Finality, Ripeness, and *Functus Officio*: The Interlocutory Arbitral Award Conundrum

James M. Gaitis*

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*Fellow, College of Commercial Arbitrators; Fellow, Chartered Institute of Arbitrators; BA, University of Notre Dame (1976); JD, University of Iowa College of Law (1978).
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I. Introduction

In this age of commercial arbitration, the clarion call for efficient and cost-effective case management procedures in commercial arbitration has at last been heard. As a consequence, virtually every arbitration institution and most leading arbitrators now strive to implement measures designed to ensure a fundamentally fair hearing that results in an expeditious and final resolution of the parties' dispute.

One of the most effective tools for achieving efficiencies in arbitration is the arbitrator's potential power to conduct the proceeding in phases such that claims or issues that are amenable to early determination are resolved first in the hope of both simplifying and expediting the remainder of the case. Indeed, in complex commercial arbitrations—such as those common in the construction industry—involving a multiplicity of parties, claims, and issues, the practice of “bifurcating” proceedings and obtaining early resolution of certain issues has been commonplace for years. Regrettably, the efficacy of such procedural devices is becoming more and more frustrated due to the accelerating


2 The types of matters that an arbitral tribunal might consider and decide at an early stage of the proceeding, or at least prior to the issuance of the last award in the proceeding, would seem almost limitless and include stand-alone claims (such as change order disputes in construction arbitrations); jurisdictional issues relating to nonsignatories, sureties, agents, and subcontractors; arbitrability issues relating to the scope of the arbitration clause or the satisfaction of conditions precedent to arbitration; issues relating to the legal viability of certain claims or affirmative defenses; issues relating to the quantum of damages or the recoverability of certain forms of damages; and issues relating to the recoverability and quantum of attorney's fees and costs.
advent of ambiguous and contradictory judicial decisions that not only address the reviewability of interlocutory arbitral awards and decisions but also raise a peculiar mix of ancillary issues that, too, can be of great consequence to the arbitrating parties. In deciding whether and when to resolve certain issues at an early time through the issuance of interlocutory arbitral awards and decisions, advocates and arbitrators alike therefore must now consider whether the evolving law relating to finality, *functus officio*, and ripeness will further the parties’ strategic and efficiency objectives.

It may be tempting to think there is little consequence to the fact that controlling case law under the Federal Arbitration Act (“FAA”) continues to fragment on these subjects. It thus helps, as a prefatory matter, to delineate some of the important issues relevant to those topics. Without intending to be all-inclusive, the cases and other authorities discussed in this article illustrate that when federal courts apply the FAA to address questions regarding finality, ripeness, and *functus officio*, many issues, including the following, can be implicated:

1. Whether the issuance of an interlocutory arbitral award or decision triggers the statutory time limitations for seeking the vacatur or confirmation of that award or decision and, if so, precisely what those limitations are;
2. Whether the vacatur of an interlocutory arbitral award or decision would necessitate the remand of the proceeding to a new arbitration panel composed of new arbitrators and, as a consequence, substantially delay the proceeding;
3. Whether a party risks the permanent waiver of broader objections to arbitrator bias or lack of independence when a party fails to seek vacatur of an interlocutory arbitral award or decision;
4. Whether the prevailing party may seek immediate confirmation of an interlocutory arbitral award or decision either in order

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*9 U.S.C.A. §§ 1 to 16.*
to obtain immediate enforcement or for more subtle strategic reasons;

5. Whether governing institutional rules permitting the arbitrator to state that an interlocutory award or decision is final for the purposes of judicial review have any legal force and effect;

6. Whether the fact that an arbitrator has stated in an interlocutory award or decision that the award or decision is final absolutely causes the arbitrator to be without authority to subsequently reconsider the award or decision;

7. Whether an interlocutory arbitral award or decision may be final for *functus officio* purposes but not in terms of its immediate reviewability and whether such an award or decision may be reviewable even though the arbitrator is not *functus officio*;

8. Whether a particular federal circuit’s version of the law pertaining to finality and/or ripeness will be applied to non-domestic interlocutory awards and decisions issued in international arbitrations conducted in the United States; and

9. Whether a particular federal circuit’s version of the law pertaining to finality and/or ripeness will be applied to foreign interlocutory awards and decisions for which a party is seeking recognition and enforcement in United States courts.

Oddly enough, the lack of clarity regarding these issues at least partially originates in the rules of various arbitral institutions; thus, it is there that an analysis and discussion of the current state of affairs regarding the ripeness and/or finality of arbitral awards and decisions and the application of *functus officio* principles to such decisions must begin.²

II. The Failure of Institutional Rules to Fully Address the Ripeness/Finality/ *Functus Officio* Issues

Domestic and international arbitration rules commonly used in the United States 6 generally acknowledge the authority of arbitrators to implement processes designed to maximize efficien-

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²This article is a sequel of sorts to two lengthy articles by the author published in 2004 and 2005 respectively pertaining to *functus officio* and interlocutory arbitral awards. See Gaitis, *Functus Officio*, note 3; Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Final Awards in Domestic and International Arbitrations*, 16 Am. Rev. Int'l Arb. 1 (2005) [hereinafter Gaitis, *Partial Final Awards*]. As will be shown, the state of the law pertaining to the reviewability of interlocutory arbitral decisions and the doctrine of *functus officio* has evolved significantly since the publication of those articles.

⁶For the convenience of the reader, the various arbitration rules mentioned in this article are referred to herein as follows: the 2009 American Arbitration Association Commercial Rules (the “AAA Rules”); the 2009 American Arbitra-
cies in an arbitration proceeding. In so doing, however, those rules often raise as many questions as they answer. The domestic arbitration rules of the AAA and the CPR thus grant the arbitrator the authority to issue a broad variety of interim and partial awards and orders, but then fail to attempt to clearly define or differentiate those instruments in any way. The ICDR, JAMS, and ICC international arbitration rules similarly permit the issuance of varied awards and/or orders and similarly fail to explain how they might differ. Given this lack of definition, it is not surprising that there is no uniformity in the manner in which

7 See, e.g., AAA Construction Rule 23 (requiring the arbitrator to promptly conduct a preliminary management hearing generally designed to implement efficient and cost-effective procedures); CPR Rule 9 (providing for an initial prehearing conference and requiring that the proceeding be conducted in an expeditious manner); ICDR Art. 16(2) (requiring the arbitrator to “conduct the proceeding with a view to expediting the resolution of the dispute”).

8 See AAA Rule 43 (permitting the issuance of “interim, interlocutory, or partial rulings, orders, and awards” but failing to distinguish between those instruments); CPR Rule 15.1 (permitting the issuance of “final, interim, interlocutory and partial awards”). Note that the JAMS Rules differ in that they apparently do distinguish between certain types of arbitral decisions. In particular, the JAMS Rules seem to contemplate that only final awards and partial final awards will be issued after the close of the hearing and, by inference, that interim and partial awards will be issued prior to the close of the hearing. See JAMS Rules 22(h) and 24(a). The implication appears to be that an award labeled as an interim or partial award (as opposed to a partial final award) is not final. Moreover, JAMS Rule 24(k) provides that the award is deemed final 14 days after “service” of the award. But the only “awards” that are served under JAMS Rule 24(a) are final awards and partial final awards, which logically means that all other arbitral decisions are not deemed final. This conclusion is further corroborated by the fact that JAMS Rule 24(j) (applying the recognized exceptions to functus officio) applies to final awards and partial final awards only. For a further discussion of JAMS Rule 24, see notes 223–27 and accompanying text.

9 See ICDR Art. 27(7) (permitting the tribunal to issue final awards and also “interim, interlocutory or partial orders or awards”); JAMS International Rule 30.3 (permitting the issuance of a final award and also “interim, interlocutory, or partial final awards”); ICC Rules, Art. 2(v) (defining “award” to include,
arbitrators label arbitral decisions or view the differences between one type of award or decision and another.

That is not to say that institutional rules do not attempt to provide further guidance regarding the ramifications of issuing various types of awards or orders. In acknowledgement of the common law exceptions to the doctrine of functus officio, virtually all of the rules most typically used in arbitrations conducted in the United States purport to address the central question regarding whether an arbitrator may reconsider decisions reflected in arbitral awards, orders, and directives. And yet none of those rules succeed in providing a sufficiently clear and

"inter alia, an interim, partial or final award"). In contrast, the UNCITRAL Rules specifically state that "[a]ll awards . . . shall be final and binding upon the parties" and that "[t]he parties shall carry out all awards without delay." UNCITRAL Rules, Art. 34(2). Although this provision implies that the arbitral tribunal is not empowered to issue preliminary awards that are nonfinal in nature, the case law discussed in this article makes it clear that under a broad variety of circumstances, courts will not treat interlocutory awards as final. Interestingly, the UNCITRAL Rules were amended in 2010 to revise then-existing Rule 32.1, which permitted the issuance of interim, interlocutory, or partial awards. See generally Gaitis, Partial Final Awards, note 5, at 27–28 (discussing former UNCITRAL Rule 32.1). The ambiguities associated with former UNCITRAL Rule 32.1 caused one federal court of appeals to reason that the language found in the UNCITRAL Rules did not foreclose the conclusion that arbitral decisions, orders, or rulings could also be final and subject to immediate judicial review. See Publicis Communication v. True North Communications, Inc., 206 F.3d 725, 729 (7th Cir. 2000).

The generally recognized exceptions to the functus officio doctrine are meant to ensure that the ultimate award of the arbitrator is accorded its intended meaning. Thus, under the doctrine arbitrators historically were allowed to correct ministerial and clerical errors that were apparent on the face of the award—e.g., erroneous mathematical calculations or misdescriptions of names, places, and things—even though the arbitrator was functus officio. See generally La Vale Plaza, Inc. v. R. S. Noonan, Inc., 378 F.2d 569, 573, 37 A.L.R.3d 189 (3d Cir. 1967). In the past, however, courts generally held that the doctrine precluded an arbitrator from correcting mistakes by reference to extraneous facts found in the record or elsewhere. See, e.g., Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 334 (3d Cir. 1991). As will be shown in this article, recent case law developments reflect a dramatic expansion of arbitrators' ability to circumvent functus officio principles. See Part IV.F.1.

This acknowledgement of the general applicability of functus officio principles is found in those provisions of institutional rules that allow the arbitrator to alter awards that are final in nature only when it is necessary to correct or modify a clerical, mathematical, or similar error or, in some cases, to clarify an ambiguity in an award. See, e.g., AAA Construction Rule 48; JAMS Rule 24(j); ICDR Art. 35; UNCITRAL Rules, Art. 38. See also CPR Rule 15.5 (permitting clarification of an award); ICDR Art. 30 (permitting interpretations of an award). Interestingly, some institutional rules appear to consider functus officio principles to apply only to decisions on the merits of a claim. See, e.g.,
reliable answer to the question regarding precisely under what circumstances *functus officio* comes into play in the context of interlocutory arbitral awards and decisions. As will be discussed, these ambiguities have resulted in a piecemeal interpretation of institutional rules and, more importantly, the advent of a great deal of confusion in the case law.

The CPR Rules provide a useful example of other subtle issues that can arise in this regard. Rule 15.1 of the CPR Rules provides that the arbitrator may state whether an interim, interlocutory, or partial award is final “for purposes of any judicial proceedings in connection therewith,” and yet those same rules fail contemporaneously to state whether the arbitrator would become *functus officio* with respect to the issues adjudicated in such an award. In other words, it is not explicitly clear from CPR Rule 15.1 whether the arbitrator remains empowered to alter an award that is designated as final for the purposes of judicial review other than for purposes relating to the correction of so-called ministerial and mathematical errors. The existence of CPR Rule 15.1 also raises the question whether interlocutory awards or decisions that are not designated as final for the purposes of judicial enforcement (or review) in those instances in which the party to whom they are directed fails to comply therewith. The suggestion in CPR Rule 15.1 that an arbitrator may decide whether a court can intervene and force compliance with an interim measure would seem to make little sense unless the intent is to avoid potential delays caused by intervening judicial proceedings or to permit a party to refuse to comply with the arbitrator’s directives.

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12 For example, some of the rules appear to limit the application of *functus officio* principles to “awards,” thereby making it unclear whether *functus officio* can apply to orders, directives, or rulings that are intended by the arbitrator to be final. See, e.g., AAA Construction Rule 48; CPR Rule 15.5. As mentioned, because the AAA Rules and AAA Construction Rules seem to imply that *functus officio* pertains only to “the merits of any claim already decided,” they appear not to address whether the arbitrator can become *functus officio* upon deciding ancillary issues such as those relating to the arbitrability of a claim. See AAA Rule 46; AAA Construction Rule 48.

13 CPR Rule 15.1. It is even more notable that CPR Rule 14 (Interim Measures of Protection by a Special Arbitrator) contains the same provision even though interim measures are of such a nature as to usually require judicial enforcement (or review) in those instances in which the party to whom they are directed fails to comply therewith. The suggestion in CPR Rule 14 that an arbitrator may decide whether a court can intervene and force compliance with an interim measure would seem to make little sense unless the intent is to avoid potential delays caused by intervening judicial proceedings or to permit a party to refuse to comply with the arbitrator’s directives.
proceedings are always non-final under the CPR Rules. These ambiguities are compounded by the fact that CPR Rule 15.5, pertaining to corrections of awards, applies singularly to “the award” such that it is not clear whether that rule applies only to the last final award issued in the proceeding or, alternatively, to any award that is intended by the arbitrator to be final in nature. To further exacerbate the confusion, CPR Rule 15.6 seems to imply that the award is final and the arbitrator is *functus officio* upon the issuance of “the award” but then further provides that when a party seeks a correction or modification of “the award” under Rule 15, the award does not become “final” until the earlier of the expiration of the time period within which the requested change in the award must be made by the arbitrator or the date on which the change is made by the arbitrator. The CPR Rules therefore appear to suggest both that there are two forms of finality under the rules—one pertaining to the arbitrator’s authority and a second relating to finality for purposes of judicial review—and that the advent of these two forms of finality can occur at different times. Given the above, the CPR Rules raise two questions: (1) whether, as a matter of law, the arbitrator is really *functus officio* before the award becomes final and (2) whether, as a matter of law, the time period for seeking vacatur or confirmation of a CPR award commences running upon the issuance of the award; after the passage of the 15-day period within which a correction of the award may be sought; or, in the event a correction or modification is sought, at the later time described above. As will be shown, JAMS Rules 24(j) and (k) raise similar issues.

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14 See notes 223–27 and accompanying text for a further discussion of these points.

15 Some courts have clearly stated that if an interlocutory arbitral decision is not final for the purpose of immediate judicial review, then the arbitrator cannot be *functus officio* with respect to the matters decided. See notes 181–82 and accompanying text. Nonetheless, on the surface these questions might seem to be easy to answer. If the parties agree to establish different time limitations relating to the advent of finality and *functus officio*, one would normally be inclined to assume that those agreed limitations would be enforced without question. Thus, in Photopaint Technologies, LLC v. Smartlens Corp., 335 F.3d 152, 160, 3 A.L.R. Fed. 2d 743 (2d Cir. 2003), the Second Circuit summarily enforced a post-award agreement tolling the limitations period for seeking confirmation and vacatur when one of the parties seeks “corrections” or “modifications” of the award, however, different considerations arguably might apply. For example, the amount of time that will be consumed before the arbitrator decides the issues presented by the request for corrections or modifications might conceivably
These sorts of ambiguities would be trivial were it not for the understandable impulse of arbitrators to correct errors in decision making when they are perceived to exist and for the existence of case law that suggests in contradictory fashion (1) that in the view of many courts, the advent of finality and functus officio occur simultaneously; (2) that once an interlocutory award becomes final or ripe for judicial review, the statutory time limitations for seeking vacatur of the award apply;\textsuperscript{17} and (3) that even though functus officio principles are thus tied inextricably to finality and limitations issues, courts are becoming more and more inclined to avoid a strict application of functus officio. Standing together, these three trends have the potential to place arbitrating parties in the awkward position of having to decide whether to immediately seek vacatur or confirmation of the arbitral decision, often without knowing whether a particular issue has been finally determined such that it cannot be revisited by the arbitrator. Indeed, another line of cases holds that the three-month deadline for seeking vacatur of an arbitral decision under the FAA is not tolled by the filing of a motion with the arbitrator seeking a correction, modification, or clarification of an arbitral decision due to alleged ambiguities or the existence of clerical errors in computations or in the description of places and things.\textsuperscript{18} Arbitrating parties thus cannot afford to delay the filing

\textsuperscript{16}See notes 223–27 and accompanying text.

\textsuperscript{17}See note 213 and accompanying text. See also 9 U.S.C.A. §§ 9 and 12 (respectively providing that an application to confirm an award must be filed within one year after the award is “made” and that motions to vacate an award must be “served” within three months after the award “is filed or delivered”).

\textsuperscript{18}See, e.g., Fradella v. Petricca, 183 F.3d 17, 20 (1st Cir. 1999) (holding that the filing of a request with an arbitral tribunal to correct ministerial errors in an award does not toll the three-month limitation for filing a motion to vacate under the Federal Arbitration Act [“FAA”]); Dalal v. Goldman Sachs &
of a vacatur motion pending an arbitral decision regarding whether alleged errors in an award should be corrected.

The JAMS Rules seemingly attempt to circumvent some of these issues by providing that

[t]he award is considered final, for purposes of . . . a judicial proceeding to enforce, modify or vacate the Award . . . [the latter of] fourteen (14) calendar days after service is deemed effective if no request for a correction is made, or as of the effective date of service of the corrected award.\textsuperscript{19}

In so providing, however, the JAMS Rules also assume that the parties may, by agreement (i.e., by adopting the JAMS Rules), extend the time limitation within which vacatur or confirmation of an award must be sought under the FAA.\textsuperscript{20} Just as is the case with respect to the CPR Rules, it is clear that the JAMS Rules contemplate two separate forms of finality, one pertaining to the time at which the arbitrator becomes functus officio and a second pertaining to when the award becomes subject to judicial review. As will be shown, in other contexts courts have unpredictable regard for institutional rules that purport to empower the arbitrator to determine (1) whether an interlocutory award is subject to immediate judicial review and (2) when finality occurs.

Admittedly, the JAMS and CPR Rules are intended to confront serious issues that arise due to the recognized exceptions to the functus officio doctrine. Other rules that do not take the approach reflected by the JAMS and CPR Rules—e.g., the AAA Construction Rules, which do not purport to toll the period for seeking vacatur or confirmation in the event a correction or modification

\textsuperscript{19}JAMS Rule 24(k). JAMS Rule 24(k) thus contains the same ambiguity as is found in CPR Rule 15.6: it fails to explicitly state when finality occurs in the instance in which the arbitrator denies the request that the award be modified or corrected.

\textsuperscript{20}As mentioned, some courts have taken issue with other institutional rules that purport to define when interlocutory awards become subject to judicial review. See Part IV.F.3. On the other hand, there is authority supporting the right of arbitrating parties to toll the applicable time limitations under the FAA for seeking vacatur or confirmation of an award. See, e.g., Photopaint Technologies, LLC v. Smartlens Corp., 335 F.3d 152, 160, 3 A.L.R. Fed. 2d 743 (2d Cir. 2003) (“the undisputed record establishes, as a matter of law, that [the parties] agreed to toll any applicable limitations periods imposed under the FAA”).
of an award is sought from the arbitral tribunal—are also potentially problematical. As a result, when a party formally and timely requests the arbitrator to correct or modify an award issued under the AAA Construction Rules, it arguably would be safest to assume that the time period within which to seek vacatur or confirmation of that award already is running. In that regard, it might be logical to assume that upon the issuance of a corrected or modified award, the time limitations for seeking vacatur or confirmation begin to run anew, but there is nothing reliable in the rules or the case law to suggest that will be the case.

Due to these and other ambiguities and shortcomings, institutional rules have become subject to piecemeal and contradictory interpretation by sitting arbitrators. That fact has its own implications when parties seek to confirm or vacate, or obtain recognition and enforcement of, arbitral awards and decisions through United States courts because most courts defer significantly to an arbitrator’s interpretation of the governing institutional rules. In reality, the rules are not merely ambiguous and deficient as pertains to the finality and/or ripeness of arbitral decisions and with respect to when and how *functus officio* principles apply. Instead, the rules are malleable, potentially on a case-by-case basis, and that much more unpredictable and unreliable as a result.

One might reasonably hope that better guidance on these issues would be found in the governing arbitration statute, which most often is the FAA in domestic United States arbitrations and almost always is the FAA with respect to international awards either issued in the United States or for which recognition

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21 The question of whether and to what degree the FAA governs a particular arbitration proceeding depends on a complex interplay of facts and law. In the absence of a clear, written expression by the parties stipulating to the applicability of a state arbitration statute, the FAA is likely at least to generally govern an arbitration proceeding due to its broad application to virtually any commercial transaction affecting interstate commerce. See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488, 51 Ed. Law Rep. 725 (1989). See also Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 54, 123 S. Ct. 2037, 156 L. Ed. 2d 46, 10 A.L.R. Fed. 2d 837 (2003) (rejecting the contention that in order for the FAA to apply, a particular contract must have a “substantial effect” on interstate commerce). The fact that the FAA applies to a given arbitration proceeding does not mean, however, that state courts must strictly apply every provision in the FAA. For example, the resolution of the question whether a state statute of limitations or Sections 9 and 12 of the FAA apply in a state court proceeding involving a request to vacate or confirm an arbitration award covered by the FAA requires a complex assessment of whether the pertinent
tion and enforcement is sought in United States federal courts under international arbitration treaties, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”){22} or the Inter-American Convention on International Commercial Arbitration (the “Panama Convention”).{23} Unfortunately, the FAA, too, is of little help in resolving finality, ripeness, and functus officio issues in the context of interlocutory arbitral awards and decisions.

III. The Failure of the FAA to Address Finality and Ripeness

The FAA does not directly address functus officio principles and, instead, merely acknowledges that the arbitrator has a duty to ultimately issue an award that is final in nature.{24} In contrast, the FAA generally recognizes the common law exceptions to the functus officio doctrine by permitting a reviewing court to modify or correct an award that (1) contains an evident material miscalculation or evident material mistake in the description of a person, place, or thing; (2) purports to adjudicate an issue not submitted to the arbitrator; or (3) otherwise is “imperfect in a matter of form not affecting the merits.”{25}

The FAA also does not specifically address when interlocutory arbitral awards or decisions are final or otherwise ripe for judicial review. Instead, in Section 16(a)(1)(D), which was added to the FAA by amendment in 1988,{26} the FAA mentions only in passing that an appeal may be taken from “[a]n order . . . confirming or

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{24} See 9 U.S.C.A. § 10. Section 10 thus provides that awards may be vacated when arbitrators “exceed their powers, or so imperfectly execute them that a . . . final . . . award upon the subject matter was not made.”

{25} 9 U.S.C.A. § 11. Section 11 actually permits only the court to make the aforesaid corrections and modifications, but it is nonetheless common for courts to remand the proceeding to the arbitrator with directions to make the necessary corrections or modifications. See, e.g., Mills v. James Helwig & Son, Inc., 2005 WL 1421810, *3 (N.D. Tex. 2005).

denying confirmation of an award or partial award.” 27 Section 16(a)(1)(D) no doubt came into existence due to the fact that in the early 1980s, various federal courts began to conclude that arbitral awards that were interlocutory in nature were, at least in some instances, subject to immediate confirmation and vacatur proceedings. The following discussion illustrates that while those early decisions regarding the interrelated issues of finality and functus officio were confusing and contradictory, the state of the law has fallen into a far deeper state of ambiguity over the past few years.

IV. Evolving Case Law Regarding Finality, Ripeness, and Functus Officio

A. Thirty Years of Ambiguity—1980–2008: Domestic Cases

Beginning in the early 1980s and progressing through most of the first decade of the twenty-first century, judicial decisions relating to (1) the question whether a particular interlocutory arbitral decision was final or otherwise subject to immediate judicial review and (2) the effect functus officio principles had on those issues were highly divergent. With one recent exception, 28 prior to the United States Supreme Court’s 2010 decision in Stolt-Nielsen, S.A. v. AnimalFeeds International, Corp., 29 those decisions by lower federal courts were typically based on an assessment of the “finality” of the pertinent arbitral award or decision. The pre-Stolt-Nielsen decisions by lower federal courts nonetheless were marked by varying degrees of inconsistency and confusion, depending on the nature of the matter adjudicated in the interlocutory arbitral decision and, often, on which circuit—or which court within a particular circuit—was involved. The result for arbitrating parties and arbitrators was a lack of predictability following the issuance of interlocutory arbitral decisions, which sometimes were deemed final and subject to immediate judicial review and at other times were deemed preliminary in nature such that the arbitrators were not functus officio with respect to the matters decided. In the wake of this inconsistency, federal courts generally agreed on one point: when an arbitral tribunal issued an award or decision granting interlocutory injunctive

28 See notes 77–86 and accompanying text.
relief in the form of what is now known as an “interim measure,” courts necessarily were deemed to have authority to immediately review and confirm that award or decision in order to ensure that the arbitral decision had meaning.  

In the first of no less than five significant decisions by the Second Circuit Court of Appeals during this period, Michaels v. Mariforum Shipping, S.A., 31 the court of appeals stridently held that the pertinent arbitral decision, which took the form of an “interim award” that adjudicated some but not all of the liability issues relating to the respondent’s counterclaims, was not reviewable for diverse reasons that seemed to focus on the fact that the award did not dispose of all of the issues involved in the proceeding. The court thus concluded that the award was “interlocutory” and “preliminary” even though the court did not examine whether the arbitrators actually intended that the award be final in nature.  

Just two years later, when the Federal District Court for the Southern District of New York took issue with Michaels in enforcing an interlocutory arbitral decision granting what was effectively injunctive relief, 33 the Second Circuit essentially avoided concerns regarding the viability of Michaels by affirming the district court judgment based on the conclusion that the appellant had abandoned the finality issue.  

Only four years later, the Second Circuit again was confronted with the issue of the reviewability of interlocutory arbitral deci-

30 See, e.g., Island Creek Coal Sales Co. v. City of Gainesville, Fla., 729 F.2d 1046 (6th Cir. 1984) (abrogated on other grounds by, Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co., 529 U.S. 193, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000)); Sperry Intern. Trade, Inc. v. Government of Israel, 532 F. Supp. 901, 909 (S.D. N.Y. 1982), order aff’d, 689 F.2d 301 (2d Cir. 1982); Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City, 606 F. Supp. 692, 1985 A.M.C. 2190 (S.D. N.Y. 1985) (confirming an “interim award” that required the claimant to reduce the sum stated in a Notice of Claim of Lien against the respondent’s vessels and noting that a refusal to confirm and enforce the award would “render meaningless the arbitrators’ power to grant such equitable relief”).


32 Michaels, 624 F.2d at 414.


34 Sperry Intern. Trade, Inc. v. Government of Israel, 689 F.2d 301, 304 n.3 (2d Cir. 1982).
sions in Metallgesellschaft A.G. v. M/V Capitan Constante, a case involving a “partial final award” that granted relief on a counterclaim for freight the claimant admitted was “due and owing.” In affirming the district court’s confirmation of the partial final award, the court of appeals clearly abandoned Michaels and explained that the district court properly confirmed the partial final award because the award adjudicated a claim that was “independent and separate from the remaining issues.” In establishing this “separate and independent claim” standard for the reviewability of interlocutory arbitral awards, the court of appeals suggested that prompt enforcement of final interlocutory arbitral rulings was consistent with arbitration’s objective of “quick and inexpensive resolution of contractual disputes.”

When the Second Circuit again confronted the issue regarding the finality of interlocutory arbitral awards in its 1991 decision in Kerr-McGee Refining Corp. v. M/T Triumph, the court appeared to strictly apply the Michaels standard by holding that a partial final award adjudicating both liability and actual damages was not final because other aspects of the pertinent claim relating to the recoverability of punitive damages, treble damages under the Racketeer Influenced and Corrupt Organizations Act, and costs and attorneys fees had not yet been determined. Just months later, the Second Circuit then appeared to relax the separate and independent claim standard as applied in Michaels and Kerr-McGee when it issued its decision in Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc., in which the court ruled that a “partial final award” that solely adjudicated the issue of liability (but not damages) also could be subject to immediate judicial review, at least when the parties had intended that the arbitrators decide that issue with finality and the ensuing award was so intended by the arbitrators to be final. In what

36 Metallgesellschaft A.G., 790 F.2d at 281.
37 Metallgesellschaft A.G., 790 F.2d at 282.
38 Metallgesellschaft A.G., 790 F.2d at 282.
arguably remains the seminal judicial description of the inter-
relationship between the finality of arbitral decisions and the
functus officio doctrine, the court of appeals further noted as
follows:

[T]he submission by the parties determines the scope of the arbitra-
tors' authority. Thus, if the parties agree that the panel is to make
a final decision as to part of the dispute, the arbitrators have the
authority and responsibility to do so. Second, once the arbitrators
have finally decided the submitted issues, they are, in common-law
parlance, “functus officio,” meaning that their authority over those
issues is ended. Thus, if the parties have asked the arbitrators to
make a final partial award as to a particular issue and the arbitra-
tors have done so, the arbitrators have no further authority, absent
agreement by the parties to determine that issue.\textsuperscript{43}

Issues concerning the finality of interlocutory arbitral decisions
came before the Court of Appeals for the First Circuit a decade
after Trade & Transport was decided. Specifically, in Hart Surgical, Inc. v. Ultracision, Inc.\textsuperscript{44} the First Circuit reversed a district
court determination, apparently based on several of the Second
Circuit decisions discussed above, that the district court did not
have authority to consider applications for vacatur and confirma-
tion of an interim award that had resolved liability (but not dam-
ages) issues based on an expressly agreed bifurcation of the
arbitration proceeding.\textsuperscript{45} In discussing the pertinent issues, the
court of appeals noted the “tension” found in the existing Second
Circuit decisions ‘between the desire to effectuate the parties’
intent to divide an arbitration into distinct phases, and making
sure that a losing party does not thereby forfeit an appeal by fail-
ing to object after the completion of a phase.’\textsuperscript{46} In recognition of
these competing concerns, the court of appeals established the

\textsuperscript{43}Trade & Transport, Inc., 931 F.2d at 195 (internal citations omitted)
(emphasis added). Note that unlike AAA Rule 46 and AAA Construction Rule
48(a), the court’s statement does not restrict the application of functus officio
principles to an arbitral decision affecting “the merits of a claim.”

\textsuperscript{44}Hart Surgical, Inc. v. Ultracision, Inc., 244 F.3d 231 (1st Cir. 2001).

\textsuperscript{45}Hart Surgical, Inc., 244 F.3d at 234.

\textsuperscript{46}Hart Surgical, Inc., 244 F.3d at 235 (emphasis added). This statement
was a clear reference to Kerr-McGee and thus constituted an acknowledgement
that there might be merit to the proposition that the one-year limitation under
the FAA for seeking confirmation of an award might commence running upon
the issuance of a final interlocutory arbitral decision. That issue had actually
been raised in the district court confirmation proceeding below in Kerr-McGee,
in which the losing party had alleged that the partial final award could not be
confirmed because the prevailing party had commenced the proceeding
subsequent to the one-year period within which an application for confirmation
is required to be filed under the FAA. See Kerr-McGee Refining Corp. v. M/T
rule that in accord with principles of party autonomy, an inter-
locutory arbitral award—including one labeled as an “interim
award”—adjudicating liability in a bifurcated proceeding was
subject to immediate judicial review. The court only modestly
qualified that holding by noting that “the definiteness with which
the parties have expressed an intent to bifurcate is an important
consideration.”

The decision by the First Circuit in Hart Surgical is of particu-
lar importance since it discredits the concept that there are two
types of finality—i.e., one form of finality purportedly pertaining
to functus officio and a second form of finality pertaining to when
an interlocutory arbitral decision is subject to judicial review
under the FAA. In any event, shortly after the issuance of the
Hart Surgical decision, and in a circumstance in which the par-
ties had acquiesced in the bifurcation of an arbitration proceed-
ing to allow the arbitrator to first decide liability issues concern-
ing an alleged breach of a collective bargaining agreement, the
First Circuit seemingly further relaxed the analysis set forth in
Hart Surgical by ruling that an interlocutory arbitral determina-
tion on liability could be immediately enforced by the district
court, even though the parties had only “informally agreed” upon
bifurcation.

Issues regarding the finality of interlocutory arbitral decisions
and the application of functus officio principles to such decisions
also arose in a 1999 appeal to the Eighth Circuit in Legion Insur-
ance Co. v. VCW, Inc. The court of appeals’ decision in Legion
would become noteworthy both because of the latent ambiguities
in the court’s decision and because future decisions by other
courts would be based on not only the analysis found in Legion

A.M.C. 1051 (2d Cir. 1991). In that case, the Court of Appeals for the Second
Circuit managed to avoid that issue by determining that the pertinent award
was not final.

47Hart Surgical, Inc. v. Ultracision, Inc., 244 F.3d 231, 235 (1st Cir. 2001).
48Providence Journal Co. v. Providence Newspaper Guild, 271 F.3d 16,
20–21, 168 L.R.R.M. (BNA) 2804, 144 Lab. Cas. (CCH) P 11149 (1st Cir. 2001).
As is shown by the court’s opinion, the court’s reference to an “informally agreed”
bifurcation meant nothing more than that the parties and arbitrator all
understood that the arbitrator would finally determine the liability issues prior
49Legion Ins. Co. v. VCW, Inc., 198 F.3d 718 (8th Cir. 1999).
but also the misperception that the principles articulated in *Legion* were clear.\(^{50}\)

*Legion* involved a convoluted procedural history concerning the issuance by the arbitrators of an “interim order” that required the immediate payment of certain insurance premiums and the reduction of certain sums set forth in letters of credit, but which otherwise reserved jurisdiction for a subsequent determination of other issues never described in the court’s opinion.\(^{51}\) In adjudicating a variety of issues relating to the district court’s vacatur of both the interim order and a subsequent order issued by the panel on remand, the court of appeals attempted to offer guidance regarding not only when interlocutory arbitral decisions are deemed final under the FAA but also when arbitrators become *functus officio* with respect to such decisions.

First, the court noted that the intent of the arbitrators and an indication in an interlocutory award that the award is intended to be final both are “factors in determining whether the award is final.”\(^{52}\) These observations, standing alone, of course were generally consistent with the rulings of other contemporary court of appeals decisions. In discussing awarding language reminiscent of the phraseology now permitted by CPR Rule 15.1, however, the court of appeals in *Legion* then added that the arbitrators’ intent that the interim order be final was shown by language in the order that instructed the parties to seek further relief in federal district court.\(^{53}\) In contrast, the court never expressly stated that it was also the intent of the parties that the order be final, and the court’s opinion thus did not adopt that consideration even though other federal courts of appeal had placed considerable weight on party autonomy. Instead, the court observed that the parties understood that the arbitrators intended the award to be final and that the parties thus did not assert that the district

\(^{50}\) See notes 87–90, 123 and accompanying text.


\(^{52}\) *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999).

\(^{53}\) *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999). This conclusion would suggest that when an arbitrator issues an interim award under CPR Rule 15.1 stating that the award is final for the purposes of judicial review, it should be presumed that the arbitrator also intends to be *functus officio* with regard to the issues adjudicated in the award. As logical as that presumption might seem to be, other case law granting deference to the arbitrator’s interpretation of institutional rules suggests that the opposite result might obtain when arbitrators subsequently conclude that they are not *functus officio* under the relevant circumstances. See notes 148–75 and accompanying text.
court lacked jurisdiction to review the order.\textsuperscript{54} Finally, the court of appeals affirmatively stated that an award “cannot be final if significant issues still need to be determined.”\textsuperscript{55} The meaning of this qualification to finality was sufficiently vague to leave open for other courts the question of what types of issues would and would not be “significant” in the context of finality determinations. In that regard, however, it should be noted that the court of appeals additionally emphasized that the fact that an arbitrator still needed to make “minor adjustments” to an award or order does not “create[] an important issue” and that “an order does not have to be final in all respects for the functus officio doctrine to apply.”\textsuperscript{56}

With the exception of its observation regarding the arbitrators’ statement that the interim order was final and subject to immediate judicial review, the observations by the court of appeals in \textit{Legion} thus fell somewhere vaguely within the spectrum of observations and rulings made by other federal courts of appeal. The court’s decision in \textit{Legion} nonetheless broke new ground in the sense that in linking finality to \textit{functus officio}\textsuperscript{57} the court suggested that arbitrators can never be functus officio if a significant issue remains to be determined.

As is discussed in depth later in this article, the seemingly endless disparity in the manner in which federal courts assessed the finality of interlocutory arbitral awards and decisions has significant implications that extend beyond the dual questions concerning (1) under what circumstances arbitrators become \textit{functus officio} with respect to the matters addressed in those awards and decisions and (2) whether such awards and decisions are subject to immediate review. As is often the case when splits in authority develop among the various federal circuits, however, the lack of uniformity did not provide sufficient incentive to bring harmony out of chaos. Rather, in the lead up to \textit{Stolt-Nielsen}, dif-

\begin{footnotesize}
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\item \textsuperscript{54} \textit{Legion Insurance Co. Inc.}, 198 F.3d at 720.
\item \textsuperscript{55} \textit{Legion Insurance Co. Inc.}, 198 F.3d at 720 (emphasis added).
\item \textsuperscript{56} \textit{Legion Insurance Co. Inc.}, 198 F.3d at 720.
\item \textsuperscript{57} That the court’s analysis of the finality issue is utterly dependent on its assessment of the \textit{functus officio} doctrine is further shown by the manner in which the court drafted its opinion. Section A of the opinion is entitled “Applicability of the \textit{Functus Officio} Doctrine,” and it is in that section that the court analyzed the finality issue. In Section A of its opinion, the court thus concluded that because it found that the Interim Order was final, \textit{functus officio} principles applied, in part based on the court’s observation that the arbitrator has no intention of “revisit[ing] and possibly rescind[ing] the award.” \textit{Legion Insurance Co. Inc.}, 198 F.3d at 720.
\end{enumerate}
\end{footnotesize}
ferring federal courts of appeal not only continued to take divergent courses in addressing those questions but also actually arrived at decisions that further complicated the issues in undesirable ways.

**B. Cases Involving International Arbitrations**

During the pre-*Stolt-Nielsen* era, federal courts in the United States also had occasion to consider whether interlocutory arbitral awards or decisions issued in international arbitrations conducted in the United States or other nations were subject, respectively, to immediate confirmation and vacatur proceedings or to immediate recognition and enforcement proceedings pursuant to the New York Convention or other international arbitration treaties. As pertains to interlocutory arbitral awards and decisions issued in so-called nondomestic arbitrations, the answer to that question should be simple since it is generally recognized that in such arbitrations, matters concerning the vacatur and confirmation of awards are governed by the *lex arbitri*—i.e., normally the FAA in international arbitrations conducted in the United States.\(^{58}\) Thus, in *Banco de Seguros del Estado v. Mutual Marine Offices, Inc.*,\(^{59}\) the federal district court carefully analyzed many of the cases mentioned in this article, particularly cases from the Second Circuit, before it concluded that an arbitral order that adjudicates a claim “separate” and “independent” from other remaining claims is “ripe for federal court review” under the FAA and the Panama Convention.\(^{60}\) Similarly, in *Zeiler v. Deitsch*,\(^{61}\) the Second Circuit relied on its prior decision in *Trade & Transport* when it found that certain “accounting orders” is-

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\(^{58}\) International arbitration awards that are issued within a particular nation and are governed by the New York Convention are typically referred to by the courts of that nation as "nondomestic awards" or "nondomestic international awards." In contrast, international awards issued in another nation normally are characterized as "foreign awards." Those phrases are not actually set forth in the definitional provisions of the New York Convention, but the introductory provisions of Article I of the convention clearly distinguish between the two forms of award. See New York Convention, note 22, at Art. I. For a further discussion of this topic and its many nuances, see Gaitis, Partial Final Awards, note 5, at notes 232–83 and accompanying text. See also Berg, When Is an Arbitral Award Non-Domestic Under the New York Convention of 1958?, 6 Pace L. Rev. 25 (1985).


\(^{60}\) Banco de Seguros del Estado, 230 F. Supp. 2d at 369.

\(^{61}\) Zeiler v. Deitsch, 500 F.3d 157 (2d Cir. 2007).
sued in a nondomestic international arbitration proceeding were final and enforceable.\textsuperscript{62}

Just as has occurred with notable frequency in domestic cases, cases involving international interlocutory arbitral decisions raised new issues. Thus, in \textit{Zeiler} the court of appeals offered the unique observation that the arbitral orders in question were final because they “require specific actions and do not serve as the basis for further decisions by the arbitrators.”\textsuperscript{63} The court then confused these reasonably clear observations, which seem consistent with the \textit{Trade & Transport} standard, by further explaining that the more limited standard found in \textit{Michaels} did not apply because the accounting orders in \textit{Zeiler} “are not segments of a future conclusive award, nor are they determinations required for furtherance of the arbitration.”\textsuperscript{64} Perhaps due to the accounting nature of the relief granted in the accounting orders, \textit{Zeiler} can thus arguably be read in one of two different ways—i.e., as modestly expanding the types of interlocutory arbitral decisions that might be deemed final by a reviewing court or, alternatively, as simply applying the \textit{Trade & Transport} standard to a unique circumstance.

The question whether “foreign” interlocutory arbitral awards and decisions issued in international arbitrations conducted in nations other than the United States are subject to immediate recognition and enforcement proceedings posits a significantly more complex issue since it is generally acknowledged that the sole authority of United States courts in such a situation is to apply the applicable international convention when making that determination. Perhaps predictably, pre-\textit{Stolt-Nielsen} decisions addressing that issue also reflected a divergent, and to some extent contradictory, analysis in part due to the inclination of some federal courts to apply FAA common law principles even though those principles did not apply in that circumstance. In this regard, the 2000 decision by the Seventh Circuit in \textit{Publicis Communication v. True North Communications, Inc.}\textsuperscript{65} is particularly illuminating. The interlocutory arbitral decision involved in \textit{Publicis} was characterized as a foreign arbitral order granting interim measures, but the order actually was more in the nature of a partial final award granting a portion of the final relief sought

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\item \textsuperscript{62}Zeiler, 500 F.3d at 168.
\item \textsuperscript{63}Zeiler, 500 F.3d at 168.
\item \textsuperscript{64}Zeiler, 500 F.3d at 168 n.11.
\item \textsuperscript{65}Publicis Communication v. True North Communications, Inc., 206 F.3d 725 (7th Cir. 2000).
\end{itemize}
\end{footnotesize}
by the claimant.\footnote{Specifically, the order required the respondent to deliver to the claimant certain tax records and also file them with the Internal Revenue Service and the Securities Exchange Commission. According to the court, the production of those materials was “the very issue [the claimant] wanted arbitrated.” \textit{Publicis Communication}, 206 F.3d at 727–29.} Despite the fact that the subject arbitration was being conducted in England and the arbitration law of England thus applied, the Seventh Circuit nevertheless based its analysis on admittedly inapplicable FAA cases and then concluded that it was imperative to recognize and enforce the arbitral order lest the order be “defeat[ed] due to its lack of enforcement.”\footnote{\textit{Publicis Communication}, 206 F.3d at 729. One of the stated reasons the court elected to apply FAA law was that decisions applying FAA law “may guide interpretation of the New York Convention.” \textit{Publicis Communication v. True North Communications, Inc.}, 206 F.3d 725 (7th Cir. 2000).}

Another federal court in the pre-\textit{Stolt-Nielsen} era similarly disregarded the \textit{lex arbitri} when it considered whether to recognize and confirm a foreign interlocutory arbitral award or order. In \textit{Polydefkis Corp. v. Transcontinental Fertiliser Co.},\footnote{Matter of \textit{Polydefkis Corp. v. Transcontinental Fertiliser Co.}, 1996 WL 683629 (E.D. Pa. 1996).} the Federal District Court for the Eastern District of Pennsylvania elected to apply the principles established in \textit{Metallgesellschaft} and \textit{Southern Seas Navigation Ltd. v. Petroleos Mexicanos of Mexico City}\footnote{Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City, 606 F. Supp. 692, 1985 A.M.C. 2190 (S.D. N.Y. 1985).} when it held that a foreign award, which finally decided a claim for freight due and ordered payment of the awarded sum into an escrow account, constituted the adjudication of a separate and independent claim and therefore, was subject to immediate confirmation.\footnote{Matter of \textit{Polydefkis Corp. v. Transcontinental Fertiliser Co.}, 1996 WL 683629, *3 (E.D. Pa. 1996).} While there is some logic underlying the decisions in the \textit{Publicis} and \textit{Polydefkis} due to the injunctive nature of the relief granted, it is worth noting that that same logic did not prevail in a variety of other cases in which the court, in deference to principles of comity, elected to stay recognition and enforcement proceedings pending a resolution of the pertinent issues by a national court of the seat of the arbitration.\footnote{See, e.g., \textit{Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.}, 377 F.3d 1164, 1172–73 (11th Cir. 2004); \textit{Europcar Italia, S.p.A. v. Maiellano Tours, Inc.}, 156 F.3d 310, 317–18 (2d Cir. 1998).}

Given the state of ambiguity contained within the controlling decisions of various federal courts of appeal, it is not surprising...
that during the pre-Stolt-Nielsen era federal district courts failed to maintain consistency when they addressed the issue regarding the finality of interlocutory arbitral decisions issued in either domestic or international arbitrations. That diversity of views is best illustrated by a summary description of the sequential decisions of five different federal district courts sitting in the Second Circuit. In an early 1987 case, one federal district court found that an interim award that directed the respondent to pay a debt that had been acknowledged by the respondent was subject to immediate confirmation. In a 1996 case, a second district court ruled that a partial final award was “not final for purposes of [immediate judicial review because] the arbitrators passed upon only one of two alternative damages claims.” In a 2001 case, a third federal district court concluded that an interim award that adjudicated only a portion of a damages claim and ordered immediate payment was final and subject to immediate enforcement even though other liability and damages issues relating to the same claim remained outstanding. In a 2003 case, a fourth federal district court held that an interim award finding certain “defenses are not adequate to prevent liability” was subject to immediate confirmation even though the arbitrators would remain obligated to consider those same defenses during the damages phase of the arbitration proceeding. And in a 2008 case, a fifth federal district court found that a “partial final award” was not final even though (1) the award contained language such as “Final,” “concludes,” and “conclusion” and (2) the arbitrator subsequently stated in an email that “he had intended the partial final award to be final as relates to liability.”

C. Prelude to Stolt-Nielsen—New Standards and New Access to the Courts

In the 14 months spanning the brief period from the end of

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2008 to the very beginning of 2010, two different federal courts of appeal addressed cases involving interlocutory arbitral awards and, in so doing, established new standards for determining when interlocutory arbitral awards and decisions are subject to review under the FAA. The first of those two cases—Dealer Computer Services, Inc. v. Dub Herring Ford (hereinafter Dub Herring Ford-I)—involved the review by the Sixth Circuit of a district court’s denial of a motion to vacate a “clause construction award” that had been issued under the AAA Class Arbitration Rules and had found that the parties’ arbitration agreement did not preclude the arbitrator from determining in the future that the alleged class could assert class-wide claims against the respondent. The second—Bosack v. Soward—involved a review by the Ninth Circuit of a district court judgment refusing to vacate two interim awards and an arbitral Hearing Order and, instead, simply confirming certain aspects of the Final Award entered by the arbitrators in the underlying arbitration hearing. The Bosack opinion is highly important in its own right since it identified specific criteria that must be satisfied in order for a federal district court sitting in the Ninth Circuit to conclude that an interlocutory arbitral award is final. Of the two cases, however, Dub Herring Ford-I is the most significant given the fact that the court’s decision purported to open additional pathways by which an aggrieved party might obtain immediate judicial review of an interlocutory arbitral decision even though the arbitral decision might not be deemed final under controlling law.

The introduction of the concept of “ripeness” as a potential consideration when addressing the reviewability of interlocutory arbitral awards came about in a most peculiar fashion in Dub Herring Ford-I. Despite the argument of the named class members that the clause construction award was “merely an interlocutory procedural [arbitral] ruling,” the district court below had found that the award—which was characterized under the AAA Class Arbitration Rules as a “partial final award” subject to immediate judicial review—was indeed subject to review both because that was the intent under the applicable arbitration

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77Dealer Computer Services, Inc. v. Dub Herring Ford, 547 F.3d 558 (6th Cir. 2008).
78Dealer Computer Services, Inc., 547 F.3d at 559.
76Bosack v. Soward, 586 F.3d 1096 (9th Cir. 2009).
80Bosack, 586 F.3d at 1102.
81For a discussion of other important aspects of the Dub Herring Ford-I decision, see Part IV.F.3.
rules and because other courts had already arrived at that conclusion.82 In arriving at these conclusions, however, the district court failed to address whether the arbitrators became *functus officio* with respect to the matters addressed in the award once it was issued.83 On appeal, the court of appeals also failed to fully analyze the finality and *functus officio* issues and, instead, *sua sponte* embarked on an analysis of whether the award was “ripe” for judicial review under established constitutional and federal law relating to federal court jurisdiction.84 It was only after the court engaged in its ripeness analysis that the court observed that the clause construction award “did not conclusively determine that Dealer’s claims should proceed as a class arbitration” and that the award instead “merely held that the distinct arbitration clauses . . . did not preclude class arbitration.”85

As an aside, it is worth noting that regardless of the court of appeals’ analysis, it is clear that the clause construction award had an element of finality to it—i.e., the award found that the arbitration agreement permitted class arbitration when the necessary criteria for certifying a class were shown to exist. But the mistaken analysis of the court of appeals is not what causes *Dub Herring Ford-I* to be important. What renders the case significant is that the court of appeals also concluded that under some circumstances, including circumstances not relating to interim measures or interlocutory injunctive relief, an interlocutory arbitral decision that was not final might nonetheless be subject to immediate judicial review based on a finding of ripeness. That the court of appeals also clearly articulated what it believed to be the applicable three-prong test for establishing ripeness,86 too, would come to have significance in the near future.

The 2009 decision by the Ninth Circuit in *Bosack* also intro-
duced new standards and guidelines for district courts confronted with applications to vacate or confirm interlocutory arbitral awards and decisions. Indeed, the *Bosack* case was the first of its kind for the Ninth Circuit, which noted at the beginning of its analysis that the question of “whether or not the *functus officio* doctrine may be applied to an interim award” was a question of first impression in that circuit.⁸⁷ Despite the fact that that question had never before been addressed by the Ninth Circuit, the court nevertheless made short shrift of the issue:

The Eighth Circuit has held that an interlocutory award may be deemed *final* for *functus officio* purposes if the award states it is final, and if the arbitrator intended it to be final. See, e.g., *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999). We adopt the criteria used by the Eighth Circuit, and apply them to the instant case.⁸⁸

This precedent-setting statement by the Ninth Circuit was based on the apparent assumption that the court’s description of the holding by the Eighth Circuit in *Legion* was correct even though, on its surface, it was not. In *Legion*, the Eighth Circuit did not simply hold that an interlocutory award may be deemed final for *functus officio* purposes if the award states that it is final and the arbitrator intended it to be final. Rather, the Eighth Circuit made it clear in *Legion* that *functus officio* principles did not apply “if significant issues still need to be determined.”⁹⁹ Yet it is clear from the court’s opinion in *Bosack* that the court did not intend to adopt *Legion*’s requirement of a “lack of significant outstanding issues” for finding that an interlocutory arbitral decision is final for purposes of *functus officio*. Rather, the court of appeals found the pertinent award to be final for purposes of *functus officio* even though the arbitrators actually reserved jurisdiction over “all issues” other than certain accounting issues.⁹⁰

The decision by the Ninth Circuit in *Bosack* gave rise to divergent lines of authority as between the Eighth and Ninth Circuits, one of which imposed a rather strict standard for establishing the finality of an interlocutory arbitral award and one of which created what was surely the most lax standard for establishing such finality. Taken together, the 2008 decision by the Sixth Circuit in *Dub Herring Ford-I* and the 2009 decision by the Ninth Circuit in *Bosack* thus suggested that the possibility of

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⁸⁷ *Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009).
⁸⁸ *Bosack*, 586 F.3d at 1103.
⁹⁹ *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999).
⁹⁰ *Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009).
achieving uniform standards among the various federal circuits regarding the applicability of finality and functus officio principles to interlocutory arbitral decisions was illusive at best. The Supreme Court would soon have the opportunity to rectify the ambiguities associated with those issues and would utterly fail to do so.

D. *Stolt-Nielsen*—Ripeness and a Missed Opportunity to Clarify the Law

In 2009, the Supreme Court granted certiorari in *Stolt-Nielsen*.\(^91\) In the appeal below, the Second Circuit had reversed and remanded a federal district court judgment that had vacated a partial final award finding that the parties’ arbitration agreement generally permitted class-wide arbitration.\(^92\) The partial final award, which had been labeled as a “clause construction award,”\(^93\) had been issued under AAA Class Arbitration Rule 3; in accord with that rule, the arbitral tribunal had stayed the arbitration proceeding to permit the parties to seek judicial review of the award.\(^94\) In other words, *Stolt-Nielsen* presented the Supreme Court with an opportunity to consider many of the finality and functus officio issues addressed in this article. On its own motion,\(^95\) the *Stolt-Nielsen* majority essentially ignored the finality and functus officio issues and instead applied a “ripeness” analysis in assessing the question whether it had the judicial power to review the subject partial final award. The Court’s ultimate conclusion that it had the authority to review the arbitral tribunal’s decision thus was in no way dependent on a finding that the partial final award was final in nature or that the arbitrators were functus officio as pertained to the clause construction issue.

The Supreme Court’s consideration of the ripeness issue in *Stolt-Nielsen* actually was instigated by the dissenting opinion of Justice Ginsburg, in which it was strenuously argued (1) that the clause construction award could not be considered “final” despite the existence of many of the cases discussed earlier in this article because the award was “preliminary” and “procedural,” (2) that

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\(^92\)Stolt-Nielsen, S.A., 130 S. Ct. at 1765.

\(^93\)Stolt-Nielsen, S.A., 130 S. Ct. at 1779.

\(^94\)Stolt-Nielsen, S.A., 130 S. Ct. at 1766.

\(^95\)See Stolt-Nielsen, S.A., 130 S. Ct. at 1766 n.2.
the parties could not expand the limited judicial review available under the FAA through the adoption of the AAA Class Arbitration Rule allowing the arbitrators to issue a “partial final award,” and (3) that the award was not “ripe” for judicial review because a determination of ripeness conflicted with the “firm final judgment rule prevailing in the federal court system.”

The majority in *Stolt-Nielsen* summarily dismissed Justice Ginsburg’s argument in a footnote discussion by applying a two-prong constitutional ripeness test that had been articulated in prior Court decisions and which required consideration of (1) “the fitness of the issues for judicial decision” and (2) “the hardship of withholding court consideration.” In applying those criteria, the Court concluded that the potentiality that the respondent might be forced to participate in a class arbitration proceeding that was not authorized by the parties’ arbitration agreement and thus was *ultra vires* in nature would give rise to sufficient “hardship” to cause the issues presented by the clause construction award to be “fit for . . . review at this time.”

That aspect of the majority’s opinion in *Stolt-Nielsen* in which the subjective ripeness issue was addressed is anomalous in several respects. First, the analysis arguably was premature in that it failed to first fully address whether the clause construction award was final and thus subject to immediate judicial review under the FAA for that reason. Second, the majority opinion seemingly endorsed the far broader proposition that when an arbitral tribunal incorrectly concludes it has the authority to require a party to submit to an arbitration proceeding or process not permitted by the parties’ arbitration agreement, the complaining party very possibly will be able to show that the arbitrators’ award or directive will cause that party potentially to suffer a form of “hardship” that does not materially differ from that perceived to exist by the *Stolt-Nielsen* Court. That is so because an arbitral decision that is based on an unauthorized exercise of authority over a party or specific subject matter is subject to

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96 *Stolt-Nielsen, S.A.*, 130 S. Ct. at 1778 (Ginsburg, J., dissenting).
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potential vacatur pursuant Section 10 of the FAA. Indeed, recent studies show the provisions of Section 10 of the FAA permitting the vacatur of arbitral awards when arbitrators exceed their powers—i.e., when the arbitral acts in question are ultra vires—have served as one of the primary bases for the actual vacatur of awards. Various courts have thus confirmed that one of the bases for vacating an arbitral award under Section 10 is the occurrence of ultra vires acts by the arbitrator. In the future, interlocutory arbitral decisions relating to such matters as arbitrator jurisdiction, the arbitrability of claims, and the joinder of nonsignatories and even those concerning limitations on damages recovery or liability conceivably will be deemed ripe for immediate judicial review.

During the brief passage of time since the issuance of the Supreme Court’s Stolt-Nielsen opinion in April 2010, the ripeness issue has arisen with some frequency both in the context of class arbitrations and in commercial arbitrations. The following discussion of post-Stolt-Nielsen decisions shows, however, that federal courts have not uniformly applied the Supreme Court’s ripeness test and, instead, sometimes have elected either to ignore the ripeness issue or to apply a more traditional finality and/or functus officio analysis in resolving whether a particular interlocutory arbitral decision is subject to immediate judicial review.


102 Ironically, to the extent Stolt-Nielsen permits appeals from interlocutory arbitral decisions finding that certain claims are arbitrable or that certain parties are subject to the arbitrator’s jurisdiction, that result generally is inconsistent with one of the foundational objectives of the FAA. Cf. Ermenegildo Zegna Corp. v. Zegna, 133 F.3d 177, 180 (2d Cir. 1998) (explaining that Section 16 of the FAA, which permits appeals from district court judgments confirming or denying confirmation of an award or partial award, “furthers [the FAA’s] aim of eliminating barriers to arbitration by promoting appeals from orders barring arbitration and barring appeals from orders directing arbitration”).
a result, issues relating to finality and *functus officio* have now become significantly more complicated by both the advent of ripeness considerations and the propensity of lower federal courts to continue to inject new concepts and analyses into the mix.

**E. Ripeness in the Post-Stolt-Nielsen Era**

Just months after *Stolt-Nielsen* was decided, the ripeness issue again came before the Court of Appeals for the Sixth Circuit following the issuance of a second interlocutory arbitral award by the same arbitral tribunal after the court’s remand in *Dub Herring Ford-I*. The second appeal—*Dealer Computer Services, Inc. v. Dub Herring Ford* (hereinafter *Dub Herring Ford-II*)—involved a federal district court determination that a partial final award denying class certification was not ripe for judicial review. As was the case in *Dub Herring Ford-I*, the partial final award involved in *Dub Herring Ford-II* was issued pursuant to a AAA Class Arbitration Rule that required that the arbitrators’ determination be reflected in a “partial final award.”

One might have expected the Sixth Circuit to conform its ripeness analysis to that applied by the Supreme Court in *Stolt-Nielsen*. Instead, the Sixth flatly refused to do so. In a lengthy discussion regarding both ripeness and finality, the Sixth Circuit instead articulated a variety of conclusions that not only are at odds with the Supreme Court’s decision in *Stolt-Nielsen* but also arguably establish standards in the Sixth Circuit that are significantly contrary to those likely to be found in other circuits.

First, the Sixth Circuit explicitly narrowed its prior holding in *Island Creek Coal Sales Co. v. City of Gainesville*—in which the court had ruled that an interlocutory arbitral decision was final and subject to immediate judicial review if it resolved “a separate, discrete, independent, severable issue”—by finding that in order for such an award to be subject to immediate judicial review, it cannot be “merely procedural” and, instead, must “finally and definitively” adjudicate a separate and independent claim that “affect[s] the parties’ substantive rights in their

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103 *Dealer Computer Services, Inc. v. Dub Herring Ford*, 623 F.3d 348 (6th Cir. 2010).

104 *Dealer Computer Servs., Inc.*, 623 F.3d at 350.

105 *Dealer Computer Servs., Inc.*, 623 F.3d at 350.

106 *Dealer Computer Servs., Inc.*, 623 F.3d at 357 n.4.

contractual relationship.”108 The potential implication of this finding—which might affect arbitral decisions relating to such matters as arbitrability, nonsignatories, and a broad variety of subissues that can arise in arbitration proceedings—is that arbitral tribunals are never functus officio with respect to such issues and thus may reconsider their findings on such issues even when those findings are stated in an award labeled as a partial final award.

Second, the Sixth Circuit refused to accede to the use of the two-prong ripeness test applied by the Supreme Court in Stolt-Nielsen. Instead, even though there is no mention of such an element in Stolt-Nielsen, the court of appeals insisted that the “likelihood” of harm to be suffered by the complaining party was an essential element for finding that the pertinent interlocutory arbitral award or decision was ripe.109 As a justification for this embellishment of the Stolt-Nielsen ripeness standard, the court of appeals argued (1) that the “‘likelihood’ that the identified hardship would come to pass . . . was manifestly critical to the Court’s holding” in Stolt-Nielsen110 and (2) that “it is important to recognize that the [Stolt-Nielsen] majority’s entire discussion of ripeness is confined to one footnote.”111

After acknowledging that the facts in Dub Herring Ford-I and Stolt-Nielsen were “materially indistinguishable” and that the decisions by the courts in those two cases “may be deemed in conflict,”112 the court of appeals then proceeded to apply its own three-prong ripeness test and, in so doing, to lay the predicate for the proposition that access to the federal courts for the purpose of obtaining immediate judicial review of an interlocutory arbitral award or decision might be available to the losing party but not to the prevailing party when the latter is the only party seeking review.113 This result came about because, in Dub Herring Ford-II, it was the prevailing party (i.e., the respondent) who sought judicial confirmation of the pertinent award; the claimant did not

108Dealer Computer Services, Inc. v. Dub Herring Ford, 623 F.3d 348, 352 (6th Cir. 2010).
110Dealer Computer Servs., Inc., 623 F.3d at 356.
111Dealer Computer Servs., Inc., 623 F.3d at 356.
112Dealer Computer Servs., Inc., 623 F.3d at 356.
113See also Pryor v. Overseas Admin. Servs., Ltd., 2011 WL 6329081 (N.D. Cal. 2011) (finding that the district court did not have jurisdiction to confirm a class certification award because the claimant/petitioners, as the prevailing party, faced no present hardship despite the pendency of a Texas federal district
contemporaneously seek to have the award vacated even after the respondent filed its motion to confirm. The respondent had argued to the district court that the award satisfied the Stolt-Nielsen ripeness test because the award would lack “preclusive effect” in the absence of a judicial confirmation and that as a result, the respondent would suffer “collateral hardship” in the form of substantial litigation costs and expenses that would be incurred in other cases involving the same general subject matter. The court of appeals found that such collateral hardship suffered in other cases was not cognizable and that the “disadvantages of premature review ordinarily outweigh the burden created by the additional costs of—even repetitive—litigation.”

As of the writing of this article, the Sixth Circuit is currently the only federal court of appeals to have addressed the ripeness issue in the context of interlocutory arbitral awards and decisions. On the other hand, a variety of federal district courts have addressed the issue over the past two years both in a class arbitration context and in commercial arbitrations. The following discussion demonstrates that many of those federal district court proceedings in which the losing party was seeking a judicial review of the same issues decided in the award).

114 The claimant presumably took this approach and avoided characterizing the award as final in the hope of obtaining a future reconsideration of the merits of the award by the arbitrator.

115 Dealer Computer Services, Inc. v. Dub Herring Ford, 623 F.3d 348, 358 (6th Cir. 2010).

116 Dealer Computer Services, Inc., 623 F.3d at 358. This statement, of course, is entirely at odds with the observation of the Court of Appeals for the Second Circuit in Metallgesellschaft that prompt enforcement of final interlocutory arbitral rulings is consistent with arbitration’s objective of “quick and inexpensive resolution of contractual disputes.” See note 38 and accompanying text.

117 The issue did come before the United States Court of Appeals for the Fifth Circuit in 2011, but the court did not specifically address the issue due to the voluntary dismissal of the appeal. See Louisiana Health Service Indem. Co. v. DVA Renal Healthcare, Inc., 422 Fed. Appx. 313 (5th Cir. 2011) (observing that in Stolt-Nielsen the Supreme Court allowed immediate judicial review of a “partial award . . . in certain limited circumstances”).

118 For a general discussion of judicial review of interlocutory awards issued in class arbitrations, see Blankley, Did the Arbitrator “Sneeze”?—Do Federal Courts Have Jurisdiction over “Interlocutory” Awards in Class Arbitrations?, 34 Vt. L. Rev. 493 (2010). In addition to the federal district cases discussed in this section of the article applying a ripeness test in class arbitrations and commercial arbitrations, at least one court has applied a ripeness test when considering whether to entertain an immediate review of an interlocutory arbitral decision authorizing collective arbitration under Section 216(b) of the Fair Labor Standards Act. See Smith v. Cheesecake Factory Restaurants, Inc.,
courts have struggled with the new ripeness issue despite the guidance of the Supreme Court and the Sixth Circuit.

1. Federal District Court Decisions Applying a Ripeness Analysis in Class Arbitrations

West County Motor Co. v. Talley\textsuperscript{119} involved another class arbitration clause construction award that was issued pursuant to the AAA Class Arbitration Rules. The arbitrators found that the pertinent arbitration agreement generally permitted class arbitration;\textsuperscript{120} in other words, the case involved precisely the same type of award as was at issue in Dub Herring Ford-I and Stolt-Nielsen. In support of its conclusion that the partial final clause construction award “was ripe for judicial review when it was issued,” the district court, however, cited not only Stolt-Nielsen but also the Eighth Circuit’s 1999 decision in Legion,\textsuperscript{121} which the district court described as having defined finality of the arbitrator’s award in the context of the functus officio doctrine.\textsuperscript{122} Legion, however, did not involve a ripeness analysis and, instead, solely concerned a typical finality analysis. Moreover, Legion did not address whether an interlocutory arbitral decision was subject to immediate review.\textsuperscript{123} Without further mention of finality or functus officio, the district court noted that in the absence of judicial review, the respondent “would be forced to go through class arbitration without first having the opportunity for judicial review of the arbitrator’s decision that class arbitration was permitted by the agreement in question.”\textsuperscript{124}

This highly generalized analysis, which in essence reiterates the Supreme Court’s concerns regarding the hardships associated

\textsuperscript{119}West County Motor Co. v. Talley, 2011 WL 4478826 (E.D. Mo. 2011).
\textsuperscript{120}West County Motor Co. v. Talley, 2011 WL 4478826, *3 (E.D. Mo. 2011).
\textsuperscript{121}See West County Motor Co. v. Talley, 2011 WL 4478826, *3 (E.D. Mo. 2011). (citing Legion Ins. Co. v. VCW, Inc., 198 F.3d 718 (8th Cir. 1999)).
\textsuperscript{122}West County Motor Co. v. Talley, 2011 WL 4478826, *3 (E.D. Mo. 2011).
\textsuperscript{123}See COKeM Intern., Ltd. v. Riverdeep, Inc., 2008 WL 4417323, *3 (D. Minn. 2008) (citing Legion but then concluding that the Eighth Circuit “has not recognized an exception to the finality rule” that would permit the court to review an interlocutory arbitral award).
\textsuperscript{124}West County Motor Co. v. Talley, 2011 WL 4478826, *3 (E.D. Mo. 2011).
with *ultra vires* arbitration proceedings, is of potential significance since it implies that some district courts will be disposed to entertain motions to vacate other interlocutory arbitral decisions simply on the grounds that those decisions have the effect of wrongly compelling a party to arbitrate certain claims. While those sorts of issues are considered “gateway” issues that normally are for the courts to decide, more and more arbitrators are now deciding such issues due to the broad grant of authority found in most institutional rules.\(^{125}\)

A second post-*Stolt-Nielsen* class arbitration decision by a federal district court—*Underwood v. Palms Place, LLC*—also serves to underscore how ripeness considerations heighten the potentiality for intervention by the courts when interlocutory arbitral awards and decisions are issued by arbitral tribunals. *Underwood* once again involved a clause construction award issued in a AAA class arbitration, although in this instance the arbitrator found that the parties’ arbitration agreement did not permit class arbitration.\(^{127}\) The district court summarily concluded—without attempting to apply any analyses, let alone the two- or three-prong tests respectively established in *Stolt-Nielsen* and *Dub Herring Ford-II*—that the fact that the award effectively eliminated any possibility that a class would be certified was all that was required to find that the award was ripe for judicial review and that the jurisdictional requirements of Article III of the United States Constitution were satisfied.\(^{128}\)

In contrast, in *Louisiana Health Service Indemnity Co. v. Gambro,*\(^{129}\) the Federal District Court for the Western District of Louisiana essentially ignored the ripeness issue even though that case, again, involved a clause construction award that had been labeled as a partial final award under the AAA Class Arbitration Rules. Relying in part on the fact that the arbitrators themselves had stated that they were *functus officio* with respect to the issues addressed in the award, the federal district court found that

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\(^{125}\) See Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776–78, 177 L. Ed. 2d 403, 109 Fair Empl. Prac. Cas. (BNA) 897, 93 Empl. Prac. Dec. (CCH) P 43916 (2010) (recognizing “that parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their contract covers a particular controversy” and reaffirming the Court’s prior requirement that such an agreement be “clear and unmistakable”).


the clause construction award was a final award and that the respondent in the arbitration proceeding had waived its right to seek vacatur of the award because it had failed to file its motion to vacate within the time period provided in the FAA. 130 In so ruling, the court disregarded the admonition of the Sixth Circuit that such an award was merely “procedural” and, instead, relied on a liberal reading of the Second Circuit’s decision in Trade & Transport and the Ninth Circuit’s decision in Bosack to conclude that the award was final because the arbitral tribunal intended it to be final and thus subsequently had confirmed that it was functus officio with regard to the issues decided. 131

2. Federal District Court Decisions Applying a Ripeness Analysis in Commercial arbitrations

As noted above, the application of the new ripeness standard for permitting the immediate judicial review of interlocutory arbitral decisions has been just as inconsistent in connection with commercial arbitrations. In a 2012 case—Hofer Builders, Inc. v. Capstone Building Corp. 132—involving a motion to vacate a construction arbitration panel’s denial of a summary judgment motion by which a subcontractor sought dismissal on the grounds that an “indemnity claim had not yet accrued,” the Federal District Court for the Eastern District of Louisiana stated that the Stolt-Nielsen Court “did not announce a new rule or make clear the extent to which its holding applies outside of the class arbitration context.” 133 After noting that the Fifth Circuit had previously characterized Stolt-Nielsen as allowing appeals from interlocutory arbitral decisions in “certain limited circumstances,” the court summarily concluded that the “denial of summary judgment [by the arbitrators] in which no findings were made against Hofer . . . has not caused any particular hardship” that would warrant immediate judicial review of the arbitrators’ ruling. 134

For several reasons, Hofer cannot be seen as offering much support to parties seeking to resist the application of ripeness principles to interlocutory arbitral decisions issued in commercial arbitrations. First, it is unclear why the district court would have
thought that the Supreme Court’s application of the ripeness principles emanating from Article III of the United States Constitution would apply to a class arbitration but not a commercial arbitration. Moreover, the district court failed to explain how forcing a party to participate in what might be an *ultra vires* commercial arbitration proceeding differed meaningfully from forcing a party to participate in an *ultra vires* class arbitration. Finally, the district court’s observation that the Fifth Circuit had mentioned in passing that ripeness principles only apply in “certain limited circumstances” has no significance given the fact that the Fifth Circuit surely was simply acknowledging that the Supreme Court and existing case law defined those circumstances in which ripeness may be found.

Of similar interest is the recent decision by a federal district court located in the Second Circuit. In *Pearl Seas Cruises, LLC v. Irving Shipbuilding Inc.*—a case decided under the New York Convention and apparently relating to a nondomestic international arbitration award issued in the United States—the court reasoned that the ripeness doctrine discussed in both *Stolt-Nielsen* and *Dub Herring Ford-II* does not apply to interlocutory arbitral decisions that are not final and which pertain to the substantive issues in the arbitration proceeding. The district court’s reasoning in this regard was based on the conclusion that a party does not face “imminent hardship” when the arbitral tribunal has issued a nonfinal award that might merely intimate how the tribunal will finally rule. This conclusion, in and of itself, is perfectly reasonable and is in accord with more traditional finality analyses conducted by other courts. It is nonetheless at odds with the decisions of the Supreme Court in *Stolt-Nielsen* and the Second Circuit in *Dub Herring Ford-I*, both of which are based on the premise that the ripeness doctrine becomes potentially relevant only after it has been determined that the subject interlocutory arbitral award is not final. What is most notable about the district court’s decision in *Pearl Seas*, however, is the fact that the court clearly agreed with the Sixth Circuit’s “counsel against reading [Stolt-Nielsen’s] teaching [on ripeness] more expansively than it deserves” in part because the issue was

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first raised in dissent and in part because the Supreme Court's discussion of the issue was confined to a single footnote.\textsuperscript{137}

In another case addressing the ripeness of interlocutory arbitral decisions—\textit{Draeger Safety Diagnostics, Inc. v. New Horizon Interlock, Inc.}\textsuperscript{138}—the Federal District Court for the Eastern District of Michigan considered a petition to confirm an Interim Award for Emergency Relief that ordered the respondent to return to the claimant certain records, data, and reports.\textsuperscript{139} In addressing the issue whether the court had authority to confirm the award, the court initially placed what arguably was undue emphasis on the title of the award\textsuperscript{140} and thus apparently concluded that because the award was labeled as an “interim” award rather than a “final” award, the award was not final.\textsuperscript{141} The court thus engaged in an inquiry regarding whether judicial review of the award would be premature and, as a consequence, focused on the ripeness doctrine. The district court’s analysis shows that the court concluded that the three-prong ripeness test articulated in \textit{Dub Herring Ford-II} should be applied rather than the two-prong test applied by the Supreme Court in \textit{Stolt-Nielsen}.\textsuperscript{142} After concluding that the elements of the three-prong test were satisfied, the court confirmed that aspect of the award compelling the respondent to provide the pertinent documents and data to the claimant.\textsuperscript{143}

In arriving at its ruling in \textit{Draeger}, the district court, which is located in the Seventh Circuit, clearly ignored the guidance found in the decision of the Seventh Circuit in \textit{Publicis}\textsuperscript{144} when it concluded that the pertinent award was not subject to immediate

\begin{footnotes}
\item[140] See notes 228–36 and accompanying text.
\item[144] See Publicis Communication v. True North Communications, Inc., 206 F.3d 725, 729 (7th Cir. 2000).
\end{footnotes}
judicial review under a traditional finality analysis. The irony of that conclusion is that after finding the award was not final, the court essentially made the award final by confirming the award and thereby compelling the respondent to comply with the award. This break in logic by the court illustrates one inherent risk in allowing the ripeness doctrine to supplant the more traditional application of finality principles when determining whether an interlocutory arbitral award or decision is subject to immediate judicial review. It also illustrates why the application of ripeness principles to non-final interlocutory arbitral decisions is inconsistent with prevailing law deferring to the contracting parties’ right to authorize an arbitrator to decide specified issues. By purporting to review—and confirm or vacate—nonfinal arbitral decisions, the reviewing court is displacing and usurping the arbitrator’s authority to arrive at a final decision regarding the issue in question.

F. Finality, Functus Officio, and Related Issues in the Post-Stolt-Nielsen Era

1. Functus Officio and Interlocutory Arbitral Awards

The doctrine of functus officio was originally intended to achieve the dual objectives of bringing finality to the arbitration process and ensuring that arbitral decision making was not influenced by attempts to alter an arbitrator’s conclusions through improper means. The doctrine’s original underlying premise—that arbitrators may not reconsider decisions affecting the merits—was sufficiently clear that the only real ambiguities associated with the doctrine in the past pertained to either (1) the scope of the long-established exceptions to the doctrine, which were simply intended to ensure that the ultimate award says what it was intended to say, or (2) the fact that at times, courts and arbitrators occasionally were motivated to test the limits of those...
recognized exceptions due to an understandable desire to correct perceived errors in an award that resulted in injustices.\textsuperscript{147}

Over the past two decades, the fundamental premise underlying the \textit{functus officio} doctrine has been challenged from many quarters.\textsuperscript{148} In 1995, the Seventh Circuit observed that the \textit{functus officio} doctrine “[t]oday, [is] riddled with exceptions . . . [and] is hanging on by its fingernails.”\textsuperscript{149} As a result, more recent federal court of appeals decisions reflect a dramatically heightened tendency to relax the application of \textit{functus officio} principles and to accord arbitrators significantly greater deference in determining whether they have the authority to modify arbitral awards. Two contemporary cases serve to illustrate this trend.

\textit{Eastern Seaboard Construction Co., Inc. v. Gray Construction, Inc.}\textsuperscript{150} involved an appeal from a district court decision vacating an amended arbitration award. That award had been issued in an arbitration addressing a dispute between an owner and a prime contractor who asserted the occurrence of unexpected conditions.\textsuperscript{151} The final award in the underlying arbitration proceeding had been amended by the arbitrator due to the fact that the arbitrator had failed to take into account a substantial sum that remained outstanding on the parties’ subcontract.\textsuperscript{152} The amended award then was vacated by the district court after the court concluded that the amendment was not permitted by then-applicable AAA Construction Rule 47, which essentially

\begin{footnotesize}
\begin{enumerate}
\item For a discussion of the many instances in which arbitrators have altered final awards, see Gaitis, Functus Officio, note 3.
\item For a discussion of the historic underpinnings of \textit{functus officio} and a survey of cases reflecting the doctrine’s failings, see Gaitis, Functus Officio, note 3. See also Smit, Correcting Arbitral Mistakes, 10 Am. Rev. Int’l Arb. 225, 228 (2001) (observing that arbitrators often make mistakes and arguing for the implementation of measures to mitigate problems associated with a strict application of the \textit{functus officio} doctrine).
\item Eastern Seaboard Const. Co., Inc. v. Gray Const., Inc., 553 F.3d 1 (1st Cir. 2008).
\item Eastern Seaboard Const. Co., Inc. v. Gray Const., Inc., 553 F.3d 1 (1st Cir. 2008).
\item Eastern Seaboard Const. Co., Inc. v. Gray Const., Inc., 553 F.3d 1 (1st Cir. 2008).
\end{enumerate}
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incorporated *functus officio* principles by “prohibit[ing] the substantive modifications [contained] in the amended award.”

On appeal, the First Circuit reversed and remanded the district court’s judgment with instructions to confirm the amended award. As the basis for its decision, the court of appeals noted that case law from other circuits illustrated “how limited the doctrine of functus officio has become” and then reasoned that the application of the doctrine was tempered by the fact that “[c]ourts must accord substantial deference to the decisions of arbitrators.” After acknowledging that the question whether the arbitrator exceeded his authority under AAA Construction Rule 47 was “close” and that the record before the court was “sparse,” the court explained that “seemingly complete awards may omit information or overlook contingencies.” The court then granted considerable deference to the arbitrator’s explanation of why the revisions to the award simply clarified a “latent ambiguity” in the award and thus ruled that the arbitrator did not violate AAA Construction Rule 47 or *functus officio* principles in amending the award.

The 2008 decision by the First Circuit in *Eastern Seaboard Construction* portended the further relaxation of *functus officio* principles through the grant of greater deference to the exercise

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153 Eastern Seaboard Construction Co., Inc., 553 F.3d at 3.
154 Eastern Seaboard Construction Co., Inc., 553 F.3d at 6.
156 Eastern Seaboard Construction Co., Inc., 553 F.3d at 4.
157 Eastern Seaboard Construction Co., Inc., 553 F.3d at 5.
158 Eastern Seaboard Construction Co., Inc., 553 F.3d at 6. The court’s deferential attitude toward the arbitrator is interesting for several reasons. First, the arbitrator ultimately elected to reduce the original award in the amount of $66,613.89, based primarily on a prior representation of the opposing party that the parties did not dispute that that sum was “remaining under the base contract.” Eastern Seaboard Construction Co., Inc., 553 F.3d at 2. Second, the facts indicate both that the opposing party did, in fact, assert at the hearing on the merits that the pay-when-paid clause was unenforceable and that the arbitrator did not expressly address all of that party’s arguments in the original award. Eastern Seaboard Construction Co., Inc., 553 F.3d at 3. In order to resolve the issues before it, the court of appeals thus necessarily delved into the “sparse” record and then, not finding sufficient evidence to resolve the issues, elected to rely substantially on the arbitrator’s post-award description of the pertinent facts.
of arbitral authority. The existence and ramifications of that trend became even more evident in 2010 when the United States Court of Appeals for the Second Circuit issued its opinion in *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*159 *T.Co Metals* involved an international commercial arbitration conducted in the United States under the ICDR Articles.160 Subsequent to the issuance of the final award in the proceeding, the arbitrator amended that award pursuant to ICDR Article 30(1), which permitted the arbitrator to make corrections of “clerical, typographical or computational errors” in a final award.161 But the arbitrator did not simply correct a “typographical error” or an error in computation. Instead, the arbitrator altered his final award in four different ways and for four different reasons.

First, because the arbitrator concluded he had “misread an invoice” due to the existence of “handwriting [on the invoice] obscuring the unit of measurement,” the award was amended to alter the determined price for pipe to be delivered under the parties’ contract.162 Second, the award was amended to eliminate calculations associated with a second invoice the arbitrator concluded should not have been considered.163 Third, the award was amended to adjust certain calculations pertaining to a third invoice—with regard to which the arbitrator agreed he had failed to make appropriate adjustments—even though the arbitrator was not able to precisely quantify the appropriate amount of those adjustments.164 And finally, the award was amended to make similar adjustments resulting from the arbitrator’s error in misconstruing a fourth invoice even though the arbitrator, again, was not able to precisely quantify the appropriate adjustment.165

As is suggested by the above recitation of the facts in *T.Co Metals*, the arbitrator was not able to provide a precise revised calculation supporting certain aspects of his amendment to the final award. Specifically, the arbitrator was not capable of making precise corrected calculations relating to the third and fourth

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159 *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329 (2d Cir. 2010).
160 *T.Co Metals, LLC*, 592 F.3d at 333.
161 *T.Co Metals, LLC*, 592 F.3d at 337.
162 *T.Co Metals, LLC*, 592 F.3d at 336.
164 *T.Co Metals, LLC*, 592 F.3d at 336–37.
invoice because those corrections required “unquantifiable downward adjustments.” Instead, the arbitrator simply stated in the amended award that “but for the above-identified errors” the arbitrator would have found different values for the subject pipe. The arbitrator then estimated the amount of adjustments to be made regarding the invoices. The arbitrator explained his authority to make those estimated adjustments to the final award by stating the following:

Article 30 of the ICDR International Rules does not say that errors subject to correction must be set out in [the original award’s] conclusions. It is therefore understood that an Arbitrator is empowered to change conclusions based upon clerical errors in the body of an award, even where such correction process entails an exercise of judgment beyond rote computation.

Under prevailing functus officio principles, an arbitrator may not correct errors in the interpretation of evidence. The Second Circuit in T.Co Metals nevertheless concluded that functus officio principles did not restrict the arbitrator from correcting the multiple errors he committed in rendering the final award even though (1) those errors, at least in part, arguably constituted errors in reading and interpreting the evidence and (2) the arbitrator was forced to make new subjective assessments of the evidence and “exercise [his] judgment beyond rote computation.”

In arriving at its conclusion that the arbitrator had the authority to so alter the award, the Second Circuit partially relied on an analysis similar to that employed by the First Circuit in Eastern Seaboard Construction. The court first observed that the doctrine of functus officio “is merely a default rule” that may be altered by agreement of the parties.

The author emphasizes that his analysis of T.Co Metals is in no way intended as a criticism of the acts of the arbitrator, who was identified in the court of appeals’ opinion and is widely and deservedly recognized to be one of the leading arbitrators in the United States.

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See Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 332 (3d Cir. 1991) (“The exception for mistakes apparent on the face of the award is applied to clerical mistakes or obvious errors in arithmetic computation.”).

The author emphasizes that his analysis of T.Co Metals is in no way intended as a criticism of the acts of the arbitrator, who was identified in the court of appeals’ opinion and is widely and deservedly recognized to be one of the leading arbitrators in the United States.

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166 T.Co Metals, LLC, 592 F.3d at 337.
167 T.Co Metals, LLC, 592 F.3d at 337.
168 T.Co Metals, LLC, 592 F.3d at 337 (emphasis added).
169 See Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 332 (3d Cir. 1991) (“The exception for mistakes apparent on the face of the award is applied to clerical mistakes or obvious errors in arithmetic computation.”).
170 The author emphasizes that his analysis of T.Co Metals is in no way intended as a criticism of the acts of the arbitrator, who was identified in the court of appeals’ opinion and is widely and deservedly recognized to be one of the leading arbitrators in the United States.
with some caveats. The court of appeals then built on that premise by observing that “[t]he arbitrator . . . was empowered by both parties to consider requests for revisions to be made in the arbitration award by virtue of the fact the parties agreed the arbitration would be conducted pursuant to the ICDR Articles.” That observation, of course, also was correct. The court then further explained that in interpreting ICDR Article 30(1) as permitting the pertinent corrections to the final award, the arbitrator “relied upon his interpretation of the corrective authority bestowed upon him by the ICDR Articles.” In what must be characterized as a significant embellishment of the arbitrator’s power to interpret the institutional rules applicable in any arbitration proceeding, the court then reasoned that prevailing Supreme Court decisions establish not only that the arbitrator must be accorded deference and “considerable leeway” in interpreting agreed institutional rules such as ICDR Article 30(1), but further that in the absence of extraordinary circumstances, such an interpretation is essentially free from challenge in the courts:

In other words, once we determine that the parties intended for the arbitration panel to decide a given issue, it follows that “the arbitration panel did not exceed its authority in deciding the issue—irrespective of whether it decided the issue correctly.” As our previous analysis demonstrates, the parties’ arbitration agreement empowered the arbitrator to determine for himself the scope of his reconsideration authority under ICDR Article 30(1). Therefore, even assuming that we viewed the arbitrator’s construction of Article 30(1) to be erroneous—and we reach no such conclusion

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172 As is discussed later in this article, federal courts have held that private agreements and private institutional rules are unenforceable when they purport to extend recognized limitations on federal court jurisdiction or to grant a court jurisdiction when it otherwise would not exist. Indeed, the application of ripeness considerations in Stolt-Nielsen and the Dub Herring Ford cases illustrates that a contractual agreement—effectuated through the adoption of institutional arbitration rules—purporting to define when finality occurs and when judicial review is available will not necessarily be enforced by the courts, at least to the extent that agreement purports to grant jurisdiction to a court. Thus, while parties clearly can agree to establish parameters relating to when and whether functus officio occurs, it is difficult to say how courts will react to those limitations if they purport to extend or create federal court jurisdiction.

173 T. Co Metals, LLC, 592 F.3d at 343.

As pertains to interlocutory arbitral awards and decisions, the significance of the holding of the Second Circuit in *T.Co Metals* cannot be understated. In essence, the decision portends that many such awards and decisions will be vulnerable to alterations by an arbitrator and that the reasons for altering those awards will not be subject to meaningful review by the courts. Prevailing parties thus now have an even greater motivation to seek the immediate judicial confirmation of such awards and decisions in order to ensure their finality. And yet the previously discussed cases and those yet to be mentioned in this article, indicate that at least in some jurisdictions, courts are becoming more and more reluctant to entertain such interlocutory confirmation proceedings. The conjunction of these developments—the increased deference to arbitral determinations regarding when *functus officio* occurs and courts’ reluctance to immediately review interlocutory arbitral decisions—places arbitrating parties at risk due to the consequent diminution in the reliability of phased arbitral proceedings and the finality of arbitral decisions issued in connection therewith.

A number of post-*Stolt-Nielsen* federal district court cases illustrate that issues relating to *functus officio* remain pertinent in determining the finality of interlocutory arbitral decisions. For example, when it addressed the finality of two nondomestic interlocutory awards in its post-*Stolt-Nielsen* decision in *Century Indem. Co. v. AXA Belgium*,
re-hearing of substantive issues considered in the January 2011 hearing.” In other words, the arbitrators affirmatively stated that they were, indeed, *functus officio*, at least in certain respects. As was the case in *T.Co Metals*, the district court expressed its reluctance to “second guess the Panel’s explanation of its own award,” citing another recent opinion of the Second Circuit “deferring to the American Arbitration Association’s interpretation of its own rules.”

More importantly, the court in *Century Indemnity* implied that arbitrators are always empowered to revise interlocutory arbitral decisions “as long as doing so did not create fundamental unfairness.” In support of that proposition, the court cited another recent decision by the Federal District Court for the Southern District of New York—*SH Tankers Ltd. v. Koch Shipping Inc.*—which the district court in *Century Indemnity* summarized as explaining that while “the doctrine of *functus officio* bars arbitrators from revisiting final awards subject to judicial review, the contrapositive is also true: if an arbitrator is not *functus officio* as to an interim award, then the interim award is not subject to judicial review and is therefore logically subject to revision.” It is difficult to logically integrate the court’s observation that interlocutory arbitral awards may be revised “as long as doing so did not create fundamental unfairness” with the court’s latter statement. If the arbitrator is generally free to revise interlocutory arbitral decisions, then those decisions are not final. If they are not final, the arbitrator cannot be deemed *functus officio*. And if the arbitrator cannot be deemed to be *functus officio* when the arbitrator issues an interlocutory arbitral decision, under the court’s view it would seem to follow that there can never be an immediate judicial review of that decision based on the conclusion that it is final.

*SH Tankers* also provides further insights into the differing manner in which federal courts analyze *functus officio* issues. The

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interlocutory arbitral decision in that case was actually a Ruling, delivered by email, in which the arbitral tribunal stayed the arbitration proceeding until such time as the respondent complied with a previously issued partial final award requiring the respondent to post security.¹⁸³ In concluding that the ruling was not final and not subject to immediate judicial review, the court reasoned that the tribunal could alter the ruling at any time and, more significantly, that “nonfinal procedural order[s]” were not subject to judicial review because they did not dispose of any claim.¹⁸⁴

These concepts, which the court supported with citations to other recent Second Circuit and federal district court cases holding that interim procedural orders and case management orders that do not dispose of a claim are not final and not reviewable,¹⁸⁵ certainly were supported by some existing case law. The facts in SH Tankers show, however, that the arbitral tribunal itself deemed the entire arbitration proceeding to be “at an end” due primarily to the apparent fact that the respondent was never going to comply with the interim measures ordered by the tribunal and the related fact that the tribunal had stayed the proceeding until such time as such compliance occurred.¹⁸⁶ SH Tankers thus provides some precedent supporting the concept that in some circumstances, an arbitral tribunal cannot be deemed functus officio and its last order staying the arbitration cannot be deemed a final, reviewable order, even if the arbitration proceeding is declared by the arbitrators to be concluded upon the issuance of that last order.¹⁸⁷ There thus seems to be a form of purgatory in which some arbitral rulings that are or might be final are nonetheless not immediately reviewable even though they do affect

¹⁸⁷Notably, having arrived at these conclusions, the district court added that the arbitrator’s ruling also was not subject to judicial review either under the collateral order doctrine or based on a finding of ripeness. SH Tankers Ltd. v. Koch Shipping Inc., 2012 A.M.C. 2096, 2012 WL 2357314, *5–6 (S.D. N.Y. 2012).
the merits of a claim or a party’s ability to have a claim or defense adjudicated.

A second example of such a ruling is found in another post-
Stolt-Nielsen case—Accenture LLP v. Spreng. Accenture, which
was relied upon by the federal district court in SH Tankers, was
yet another decision by the Second Circuit relating to interlocu-
tory arbitral decisions. The interlocutory decision that was
indirectly at issue in Accenture was an arbitral “order” denying
Spreng’s motion for leave to amend Spreng’s arbitration plead-
ings to include a claim for fraudulent inducement. Following
the denial of that motion, Spreng commenced a new arbitration
by filing an arbitration demand that included the claim for fraud-
ulent inducement and concurrently dismissed the initial arbitra-
tion, purportedly without prejudice. As a result, Accenture
commenced a district court action seeking an order enjoining the
second arbitration, with regard to which an arbitrator had al-
ready been appointed.

On appeal, the court of appeals reversed the district court’s
judgment, which had remanded the arbitration to the first
arbitrator and had found, among other things, that the arbitral
order denying leave to amend was an enforceable arbitral
award. The basis for the court of appeal’s decision in part was
that the arbitrator’s “order did not rule on the substance of
Spreng’s proposed amended claims” and that in the court’s view
the order “was an interim procedural ruling, not an arbitration
award.” On its face, this aspect of the court’s decision seems
sensible enough, particularly when considered in the context of
what the implications would be were such orders considered by
courts to be final and subject to immediate judicial review. What
followed in the Accenture case, however, was the further conclu-
sion that because the arbitral order denying the motion to leave
was not final, and because the court could not review and purport
to enforce a nonfinal arbitral order, “[t]he second arbitrator
remains free to determine the preclusive effect, if any, of the . . .

188 Accenture LLP v. Spreng, 647 F.3d 72, 32 I.E.R. Cas. (BNA) 385 (2d Cir.
2011).
189 Accenture LLP, 647 F.3d at 73.
190 Accenture LLP v. Spreng, 647 F.3d 72, 73, 32 I.E.R. Cas. (BNA) 385 (2d
Cir. 2011).
191 Accenture LLP, 647 F.3d at 73–74.
192 Accenture LLP, 647 F.3d at 74.
193 647 F.3d at 77.
In other words, confounded by its own self-created conundrum, the Second Circuit was forced to acknowledge that there might, indeed, be reasons for finding that the interlocutory arbitral decision was final such that it had preclusive effect even though it could not be deemed final for purposes of judicial review.

In this respect, the decision by the court of appeals in Accenture has some similarity to the decision of the Federal District Court for the Southern District of New York in SH Tankers, as awkward as both of those decisions might be. Comments made by the court of appeals in Accenture to the effect that the pertinent interlocutory arbitral decision was “procedural” in nature are also similar to those made by the Sixth Circuit in Dub Herring Ford-II with respect to the arbitrators’ partial final award denying class certification. The courts in Accenture and Dub Herring Ford-II were correct in suggesting that procedural issues are presumptively for the arbitrator to decide. As the Supreme Court noted in Stolt-Nielsen, “the FAA requires more” when the issue relates to the question of whether the parties granted the arbitrator the authority to exercise arbitral jurisdiction in a certain manner. Thus, arbitral decisions denying a party the right to assert a claim or determining which parties are proper parties to an arbitration proceeding are not merely procedural in nature. Instead, and just as was the case in Stolt-Nielsen, such decisions directly affect the substantive aspects of the proceeding, both in terms of the issues to be arbitrated and the parties that will arbitrate. Such determinations can be jurisdictional in nature and certainly can relate to the parties’ substantive rights. As a result, courts should avoid overbroad characterizations of an

194 Accenture LLP, 647 F.3d at 77 n.5.
195 Dealer Computer Services, Inc. v. Dub Herring Ford, 623 F.3d 348, 352 (6th Cir. 2010).
197 130 S. Ct. 1758, 1776 (2010) (stating that the parties cannot be “compelled” by the arbitrators to submit to a class arbitration to which they did not agree).
198 For a case arising in a different context and seemingly disagreeing with these observations, see Central West Virginia Energy, Inc. v. Bayer Cropscience LP, 645 F.3d 267, 275–76 (4th Cir. 2011) (finding that an interlocutory arbitral decision regarding the validity of a contract extension that substantively altered
arbitral decision when they are determining whether the decision is subject to immediate judicial review.

A brief mention of one final post-\textit{Stolt-Nielsen} case serves to illustrate the continuing confused state of affairs regarding the application, or the absence of the application, of \textit{functus officio} principles to interlocutory arbitral decisions. The interlocutory arbitral decision at issue in \textit{AO Techsnabexport v. Globe Nuclear Services & Supply GNSS, Ltd.}\textsuperscript{199} was a foreign partial award issued by a Swedish arbitral tribunal in which the tribunal rejected certain independent defensive grounds asserted by one of the respondents but also refrained from addressing a dispositive defense contending that the subject contract was invalid under Swedish statutory law.\textsuperscript{200} In a subsequent recognition and enforcement proceeding under the New York Convention,\textsuperscript{201} the Fourth Circuit affirmed the final award issued by the tribunal and intimated that \textit{functus officio} principles did in fact apply to the defensive issues previously determined by the tribunal.\textsuperscript{202} This conclusion is unique in the case law since it represents the first time a federal court of appeals has suggested that \textit{functus officio} principles apply in such a circumstance. The court did not opine on whether the advent of \textit{functus officio} in those circumstances would mean that such a partial award in a domestic case would be subject to immediate judicial review. Nor did the court explain why it was applying FAA case law regarding \textit{functus officio} to an arbitral award entered in Sweden and thus presumably subject to vacatur and confirmation proceedings only by the courts of Sweden.

It seems reasonable to characterize these and prior cases addressing the application of \textit{functus officio} principles as composing a confused body of case law that is trending in a direction that accords to arbitrators more and more flexibility to determine after the issuance of arbitral awards whether they are \textit{functus officio} with respect to such awards. This increased lack of predictability is ominous for a variety of reasons, all relating to the fact

\textsuperscript{201} See AO Techsnabexport v. Globe Nuclear Services and Supply GNSS, Ltd., 404 Fed. Appx. 793, 796, 797 (4th Cir. 2010).
that when the advent of *functus officio* becomes less predictable, so does the advent of finality. The potential negative ramifications of this trend are compounded by the fact that many judicial decisions, including decisions issued in the post-*Stolt-Nielsen* era, conclude that the time limitations for seeking vacatur of an interlocutory award are triggered by the fact that an arbitral tribunal has become *functus officio* upon the issuance of the award in question. When and whether *functus officio* occurs with respect to any such award is therefore of critical interest to arbitrating parties and arbitral tribunals.

2. FAA Deadlines for Seeking Vacatur and Confirmation of Awards

Section 9 of the FAA provides that an application to confirm an arbitration award must be filed within one year from the date the award is “made,” and Section 12 of the FAA provides that a motion to vacate an award must be “served upon the adverse party or his attorney within three months after the award is filed or delivered.”

The time period within which to seek vacatur of an arbitral award is particularly significant both due to its brevity and because federal courts strictly enforce that time limitation. For example, a variety of federal courts of appeal have held that a party may not file a motion to vacate as a defense to an application to confirm once the deadline for filing a vacatur motion has expired. Some federal courts similarly have held that the doctrine of equitable tolling does not apply to the time limitations set forth in the FAA for the filing of motions to vacate arbitral


204 9 U.S.C.A. § 12. The specific language of Section 12 requiring that a motion to vacate be “served” within three months of the filing or delivery of the award has been enforced rigorously by federal courts. See Webster v. A.T. Kearney, Inc., 507 F.3d 568, 572, 101 Fair Empl. Prac. Cas. (BNA) 1584, 90 Empl. Prac. Dec. (CCH) P 42990, 155 Lab. Cas. (CCH) P 60525 (7th Cir. 2007) ("service of a motion to vacate is the act that stays the three-month statute of limitations [under the FAA],” not the mere filing of a motion to vacate).

205 See, e.g., Webster, 507 F.3d at 574 (finding that a motion to vacate filed and served on April 5, 2006, was “three months and one day” after the “three-month” deadline set forth in Section 12 and thus denying the motion as untimely); Cullen v. Paine, Webber, Jackson & Curtis, Inc., 863 F.2d 851, 854 (11th Cir. 1989); Professional Administrators Ltd. v. Kopper-Glo Fuel, Inc., 819 F.2d 639, 642, 8 Employee Benefits Cas. (BNA) 1769, 125 L.R.R.M. (BNA) 3010, 106 Lab. Cas. (CCH) P 12386 (6th Cir. 1987); Florasynth, Inc. v. Pickholz, 750 F.2d 171, 175 (2d Cir. 1984).
awards, although others have suggested that equitable tolling would apply in very limited circumstances. The general lack of uniformity of decisions relating to the application of Section 12 is so pervasive that courts cannot even agree on whether the three-month time limitation under Section 12 means (1) the three calendar months following the issuance of the pertinent award, (2) 90 days, (3) conceivably less than 90 days when one of the intervening months is February, or (4) substantially less than 90 days when the applicable rules so state or the parties so agree. The body of case law that existed prior to the advent of Stolt-Nielsen is far more ambiguous with respect to the question whether the one-year period under the FAA for seeking confirmation of arbitral awards also applies to interlocutory awards and

206 See, e.g., Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986) (stating that due diligence and tolling arguments were questionable); Florasynth, 750 F.2d at 175 (“there is no common law exception to the three month limitation period”); Pennsylvania Engineering Corp. v. Islip Resource Recovery Agency, 714 F. Supp. 634 (E.D. N.Y. 1989) (holding that the doctrine of equitable tolling cannot apply to motions to vacate under the FAA).

207 See Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith, 477 F.3d 1155, 1158 (10th Cir. 2007) (ruling that under the circumstances loss of evidence did not toll the deadline but also suggesting that under some circumstances the deadline could be equitably tolled); Ford Dealer Computer Services, Inc. v. Highland Lincoln Mercury, Inc., 2008 WL 895990, *3 (E.D. Mich. 2008) (discussing reasons why “[t]he doctrine of equitable tolling may be applicable to the FAA statute of limitation” and citing supporting authorities). See also Photopaint Technologies, LLC v. Smartlens Corp., 335 F.3d 152, 160, 3 A.L.R. Fed. 2d 743 (2d Cir. 2003) (permitting the tolling of the vacatur and confirmation limitations periods when such tolling was agreed to by the parties).


209 See Board of Trustees of University of Illinois v. Organon Teknika Corp. LLC, 614 F.3d 372, 375 (7th Cir. 2010).

210 See R & Q Reinsurance Co. v. American Motorist Ins. Co., 2010 WL 4052178, *3-4 (N.D. Ill. 2010) (rejecting the argument that Section 12 provides for a 90-day limitation and, instead, applying a three-month limitation period of less than 90 days to an interlocutory arbitral award, wrongly characterized as the “Final Award,” issued in the month of February).

211 See Louisiana Health Service Indem. Co. v. Gambro A B, 756 F. Supp. 2d 760, 767 (W.D. La. 2010), appeal dismissed, 422 Fed. Appx. 313 (5th Cir. 2011) (finding that the provisions of the AAA Class Arbitration Rules providing for a 30-day stay to allow a party to seek judicial review of a clause construction award constituted an enforceable limitation on the right to seek vacatur).
decisions that are subject to immediate confirmation. Given this history relating to the judicial enforcement of Sections 9 and 12 of the FAA, it should not be surprising that during the pre-Stolt-Nielsen era, courts routinely applied the time limitations under Section 12 to motions to vacate interlocutory arbitral awards that were deemed by the court to be subject to immediate judicial review.

Issues relating to the application of the time limitations for seeking vacatur and confirmation of interlocutory awards have become even more complex in the post-Stolt-Nielsen era. The advent of the application of the ripeness doctrine to interlocutory arbitral awards has raised the question whether the time limitations under the FAA for seeking confirmation or vacatur of an interlocutory arbitral decision apply when such a decision is deemed ripe for immediate judicial review. The very issue of the application of the one-year period for seeking confirmation of a non-final award that is deemed ripe was raised by the appellant in Dub Herring Ford-II. Specifically, the appellant contended that, if the court refused to review the subject award based on the conclusion that it was not ripe for judicial review, the appellant might be foreclosed from seeking confirmation of the award at a later time. Although the Sixth Circuit understandably dispensed with this argument based on its observation that “no court could legitimately consider the one-year period to have begun running from the date of the [issuance of the] award after having denied judicial review for lack of ripeness,” the court did not state that the one-year period would not apply in the circumstance in which the award was, or could be, deemed to be ripe. Depending on the federal circuit involved, a party that is

212 See notes 41–47 and accompanying text. One reason for this ambiguity is that there is a split in opinion among the federal circuits regarding whether the one-year period for seeking confirmation of an award under Section 9 of the FAA is permissive or mandatory. See Kolowski v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 2008 WL 4372711, *2 (N.D. Ill. 2008) (discussing the split in opinion among the federal circuits regarding the permissive or mandatory nature of Section 9 of the FAA).


214 See Dealer Computer Services, Inc. v. Dub Herring Ford, 623 F.3d 348, 357 (6th Cir. 2010).

215 Dealer Computer Servs., Inc., 623 F.3d at 357.

216 Dealer Computer Servs., Inc., 623 F.3d at 358.
involved in a complex arbitration that might take more than a year to complete and who obtains a favorable ruling in an interlocutory arbitral decision thus might need to consider whether to seek an early judicial confirmation of that decision in order to avoid waiver of its right to obtain a confirmation of the award.

Other federal courts have addressed whether the three-month time limitation for seeking vacatur applies to non-final arbitral decisions that are deemed ripe and have come to disparate conclusions. In *West County Motor*\(^{217}\) the United States District Court for the Eastern District of Missouri concluded that the three-month time limitation under Section 12 does apply to nonfinal arbitral decisions that are ripe for judicial review.\(^{218}\) In contrast, in *Southern Communications Services Inc. v. Thomas*\(^{219}\) the United States District Court for the Northern District of Georgia observed that it was not “entirely clear” that *Stolt-Nielsen* subjected such awards to the three-month time limitation under Section 12.\(^{220}\) Given the lack of consistency regarding issues associated with interlocutory arbitral decisions, it seems obvious that arbitrating parties and arbitrators alike would be well served to familiarize themselves with the current state of the decisional law in the federal circuits in which the arbitration proceeding is being conducted prior to agreeing to bifurcated or phased proceedings resulting in the issuance of interlocutory arbitral decisions.

3. **Post-*Stolt-Nielsen* Cases Ignoring Institutional Rules Providing for the Reviewability of Certain Awards**

Courts generally defer to the arbitrating parties’ right to contractually agree, through a predispute arbitration agreement or an arbitration submission, to the nature of the arbitration proceeding that will govern the resolution of their disputes.\(^{221}\) As a consequence, and as is illustrated by the above discussion of


\(^{220}\) *Southern Communications Services Inc.*, 829 F. Supp. 2d at 1330. The court then entirely avoided the issue by proclaiming that because the pertinent award was issued prior to *Stolt-Nielsen*, the court “assume[d] without deciding” that the motion to vacate was timely. *Southern Communications Services Inc.*, v. Thomas, 829 F. Supp. 2d 1324 (N.D. Ga. 2011).

the Second Circuit’s decision in *T.Co Metals*, courts also tend to pay deference to most aspects of institutional arbitration rules that have been incorporated into the parties’ arbitration agreement. Many federal court decisions issued in the past few years, beginning with *Dub Herring Ford-I* and *Stolt-Nielsen*, nonetheless show that courts are far less deferential to institutional arbitration rules that purport to define when federal courts have jurisdiction to review interlocutory arbitral decisions. In *Stolt-Nielsen*, the Supreme Court thus accorded no deference to the AAA Class Arbitration Rules provisions purporting to provide that clause construction awards are final and immediately reviewable by a court. More poignantly, in *Dub Herring Ford-I* the court of appeals not only found that the pertinent clause construction award was not final or ripe, but further emphasized that, at least in some circumstances, district courts should not rely on statements in institutional rules regarding the immediate reviewability of an interlocutory award issued under those rules:

The district court’s reliance on the intent of the AAA, a private dispute resolution organization, is misplaced. While the AAA is free to permit parties to seek judicial review for the purposes of its own proceedings, Article III ripeness requirements will not necessarily be satisfied whenever the AAA allows such review . . . The AAA . . . does not have the authority to waive away Article III-based ripeness deficiencies. *Federal courts should not grant judicial review of arbitration awards simply because the organization conducting arbitration would like them to do so.*

All of the cases cited in this article involving instances in which
federal district courts have refused to grant review of clause construction awards and class certification awards based on a finding of lack of finality or ripeness essentially support the Sixth Circuit’s conclusion that a determination regarding finality should not be grounded on whether the arbitral institution believes the pertinent decision is subject to immediate judicial review. Those decisions thus further call into question the efficacy of other institutional rules, such as CPR Rule 15.1, which provides that the arbitrator may state whether an interim, interlocutory, or partial award is final “for purposes of any judicial proceedings in connection therewith.” Those same cases conceivably undermine the effectiveness of JAMS Rules 24(j) and (k), which provide both for a brief period within which to seek “computational, typographical or other similar errors in the Award” and that “[t]he award is considered final, for purposes of . . . a judicial proceeding to enforce, modify, or vacate the award” only after the later of the expiration of the time period to respond to a request for modification or “the effective date of service of a corrected Award.” As previously discussed, in so providing, JAMS Rule 24 arguably is vulnerable to potential attack because the rule clearly purports to extend the time within which a party may seek vacatur or confirmation of the award. That is so because the plain language of JAMS Rule 24(j) makes it clear that the intent of the rule is that the arbitrator is functus officio upon the issuance of the original award; it is for that reason that the award only may be altered to correct “computational, typographical or other similar errors” after that time. In a legal sense, the pertinent award normally would thus be final at the time it was issued because the arbitrator no longer has the authority to further consider the merits of the matters adjudicated in the award and, instead, can only correct clerical and ministerial errors in the award. Under existing case law it is clear that the time periods for seeking vacatur or confirmation of a final award generally commence running as soon as an award that is final in

strict the time periods within which such judicial review may be sought. See, e.g., Louisiana Health Service Indem. Co. v. Gambro A B, 756 F. Supp. 2d 760, 767 (W.D. La. 2010), appeal dismissed, 422 Fed. Appx. 313 (5th Cir. 2011) (ruling that the respondent waived its right to seek review of a clause construction award when it failed to seek that review within the 30-day period provided in the AAA Class Arbitration Rules). For an interesting discussion regarding whether parties can contractually agree to waive review of an interlocutory arbitral award deemed final by the court, see Swenson v. Bushman Inv. Properties, Ltd., 870 F. Supp. 2d 1049, 1055–1057 (D. Idaho 2012).

225 JAMS Rules 24(j) and (k).
nature is issued. The implication of JAMS Rule 24(j) thus is that a motion to seek corrections to an award based only on recognized exceptions to functus officio tolls the time limitations within which motions to vacate and confirm awards must be made. The same observation is true with respect to CPR Rule 15.6. While there remains a possibility that federal courts one day will uniformly apply equitable tolling principles in such a circumstance as is presented by JAMS Rule 24 and CPR Rule 15.6, it is unclear whether and when that might occur. After all, the line of post-Stolt-Nielsen cases discussed above reflects that federal courts are not entirely sympathetic to institutional rules that purport to declare when and if federal court jurisdiction accrues.

The unwillingness of many federal courts to defer to institutional rules that purport to define when jurisdiction accrues to review an award thus is at odds with the cases discussed in this article reflecting a strong judicial deference to an arbitrator’s interpretation of institutional rules relating to the scope of an arbitrator’s authority to alter an award. Although there may well be a legitimate basis for distinguishing between the granting of deference to arbitrators’ interpretation of some institutional rules and refraining from granting deference to other institutional rules that purport to state when an award is final for purposes of judicial review, that distinction serves to create significant risks for arbitrating parties.

V. Other Risks and Incongruities Relating to Interlocutory Arbitral Awards and Decisions in the Post-Stolt-Nielsen Era

A. The Relevance of the Manner in Which the Arbitral Decision Is Labeled

The pre-Stolt-Nielsen decisional law relating to the immediate reviewability of interlocutory arbitral awards and decisions illustrated that it could not be assumed that the manner in which the arbitral decision was labeled would determine how the decision would be treated by a reviewing court. Various cases thus showed that, at least under some circumstances, courts were willing to treat some interlocutory decisions as being final, even

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226 See notes 203–13 and accompanying text.
227 See notes 13–15 and accompanying text.
228 See M & C Corp. v. Erwin Behr GmbH & Co., 289 Fed. Appx. 927, 933 (6th Cir. 2008) (observing that “when determining whether an arbitrator’s action is an award, courts should ‘go beyond a document’s heading and delve into
though the decision bore such diverse captions as “order,”229 “interim order,”230 “prehearing conference order,”231 “interim award,”232 “partial award,”233 “directive,”234 and “accounting order”235 or even concerning an arbitrator’s determination of the proper locale for the arbitration proceeding.236 Nonetheless, the labeling of an interlocutory decision as “final” made it far more likely that the decision would be treated as final and subject to immediate judicial review. Indeed, as has been discussed, at least one federal circuit has required such a written expression of finality in the pertinent instrument in order for the decision to be deemed final.237

Leading federal circuit court of appeals decisions such as Bosack and Legion that emphasize the relevance of expressions of intent by the arbitrator and/or the parties regarding finality will no doubt continue to influence courts reviewing interlocutory arbitral decisions for the purpose of determining whether they are final and subject to immediate judicial review. Largely due to the sudden application of ripeness considerations to that issue, however, it also is clear that the labels given to interlocutory arbitral decisions by arbitrators and even arbitral institutions often will be

deemed irrelevant. This development will lead to undesirable ambiguities, confusion, and risk for both arbitrating parties and arbitrators because parties and arbitrators are likely, on a case-by-case basis, to draw their own conclusions regarding whether an interlocutory arbitral decision is final and whether, as a consequence, *functus officio* principles apply such that the prevailing party may rely on the ruling as having fully resolved the issues presented. Under circumstances such as these, when the ultimate confirmation or vacatur of an interlocutory arbitral decision is of importance to them, arbitrating parties should err on the side of caution and promptly seek judicial review of such decisions when there is a possibility that the decisions might be construed as final or ripe by a court.  

Arbitrating parties and arbitrators at times also would be well served to take other reasonable actions for the purpose of maximizing the likelihood that a court ultimately will acknowledge the finality of, or lack of finality in, the arbitral decision. For example, parties might consider developing a transcribed record on the topic of finality or entering into appropriate stipulations. Conversely, advocates no doubt will seek to identify strategies that will preserve for their clients future opportunities to challenge the finality of such decisions should they fail to prevail on the issues addressed by the arbitrators. And, as has been shown, arbitrators themselves will sometimes be motivated to ignore their own labels suggesting the finality of an arbitral decision when those arbitrators subsequently realize that they desire to correct, alter, or otherwise amend that decision. As between the arbitrating parties and the arbitrators, each thus should be wary of alterations in others’ perspectives regarding whether such labels accurately portray the intent and meaning of the interlocutory decision, particularly as relates to finality.

### B. Arbitrator Disqualification and the Appointment of New Arbitrators Following the Vacatur of Interlocutory Arbitral Awards and Decisions

It has long been generally acknowledged that the FAA does not provide a basis for courts to purport to disqualify arbitrators for bias or other misconduct prior to the issuance of an arbitral

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238. "A party who is uncertain about the finality or appealability of an arbitra-
tion award should err on the side of compliance with the FAA § 12, which is not
onerous." Olson v. Wexford Clearing Services Corp., 397 F.3d 488, 492 (7th Cir.
2005).
award.\footnote{See, e.g., Gulf Guar. Life Ins. Co. v. Connecticut General Life Ins. Co., 304 F.3d 476, 490 (5th Cir. 2002) ("[E]ven where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award. . . . Thus, the FAA appears not to endorse court power to remove an arbitrator for any reason prior to issuance of an arbitral award."); Aviall, Inc. v. Ryder System, Inc., 110 F.3d 892, 895, 21 Employee Benefits Cas. (BNA) 1094 (2d Cir. 1997) ("Although the FAA provides that a court can vacate an award where there is evident partiality or corruption in the arbitrators, . . . it does not provide for pre-award removal of an arbitrator.").} Once a court determines that an interlocutory arbitral award or decision is final or otherwise ripe for judicial review, however, it logically follows that courts must be willing to consider issues related to the question whether the subject decision might have been influenced by arbitrator bias. These topics were previously addressed in some detail a number of years ago in the prequel to this article and need not be fully revisited here.\footnote{For a discussion of the case law through 2005 on the topic of the disqualification of arbitrators following the issuance of final interlocutory arbitral awards and decisions, see Gaitis, Partial Final Awards, note 3, at 92–97.}

It is sufficient to note that through 2005 the case law was contradictory regarding whether arbitrators could be disqualified under such circumstances during the pendency of the arbitration hearing.\footnote{Compare Certain Underwriters at Lloyd’s London v. Argonaut Ins. Co., 264 F. Supp. 2d 926 (N.D. Cal. 2003) (vacating an award based on a finding that the arbitrators exceeded their authority by issuing an “arbitrary” interim award and yet concluding that it was prohibited from disqualifying a biased or partial arbitrator during the pendency of the arbitration), with Bull HN Information Systems, Inc. v. Hutson, 229 F.3d 321 (1st Cir. 2000) (reversing a magistrate’s order vacating a partial final award and concluding that “there is no basis for the matter to be remanded to a different arbitrator” because there was “no showing of bias or prejudice that would warrant remanding the case to a new arbitrator”.

\footnote{Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007).} \footnote{Applied Industrial Materials Corp., 492 F.3d at 135.}} In Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.,\footnote{Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007).} a 2007 New York Convention case regarding an appeal from a federal district court judgment vacating a nondomestic partial final award on the grounds of arbitrator partiality, the Second Circuit apparently found no reason to bother discussing the issue. In the pertinent arbitration proceeding, the parties had agreed “to bifurcate the arbitration proceedings into liability and damages phases”;\footnote{Applied Industrial Materials Corp., 492 F.3d at 135.} given that fact, the parties and the court presumably knew that the Second
Circuit had already held that a partial final award could immediately be reviewed under those circumstances. The court of appeals thus embarked on an analysis of the partiality issue without first inquiring into its own jurisdiction and then simply affirmed the district court’s vacatur based on the determination that the arbitrator was evidently partial under governing FAA law.\textsuperscript{244} It is more than clear from the court’s comments regarding the arbitrator’s acts and omissions that there was no possibility that a court would countenance continuing service by the arbitrator in the case.

In the post-\textit{Stolt-Nielsen} era there should be little doubt that when an interlocutory arbitral award is subject to immediate review, courts will, at times, vacate those awards due to arbitrator bias or misconduct. In fact, the clause construction award at issue in \textit{Stolt-Nielsen} was vacated by the Supreme Court not only based on a finding that the arbitrators had exceeded their authority in analyzing the question whether the parties’ arbitration agreement permitted class arbitration but also because the Court found that the arbitrators’ conduct in this regard was tantamount to a manifest disregard of the law.\textsuperscript{245}

The prospect that courts will consider allegations of arbitrator bias and misconduct when reviewing interlocutory arbitral decisions has a number of significant implications beyond the fact that those grounds can serve as a basis for vacating such a decision. For example, the trend in the decisional law is to require parties to raise arbitrator bias issues as soon as they arise.\textsuperscript{246} If, at some time prior to the issuance of an interlocutory arbitral de-

\textsuperscript{244}Applied Industrial Materials Corp., 492 F.3d at 139.

\textsuperscript{245}130 S. Ct. 1758, 1768 n.3. The issue of whether to remand the arbitration proceeding to the original arbitrators or a new panel of arbitrators apparently was not expressly analyzed in \textit{Stolt-Nielsen}, perhaps in part because the Court’s opinion made it clear that the arbitrators would not be required to reconsider the issues that came before the Court. The Court thus stated, “Because we conclude there can be only one possible outcome on the facts before us, we see no reason to direct a rehearing by the arbitrators.” \textit{Stolt-Nielsen}, 130 S.Ct. at 1770. The Court therefore simply reversed the decision of the court of appeals and remanded the case for proceedings consistent with the Court’s opinion. \textit{Stolt-Nielsen}, 130 S.Ct. at 1777.

\textsuperscript{246}See, e.g., Fidelity Federal Bank, FSB v. Durga Ma Corp., 386 F.3d 1306, 1313 (9th Cir. 2004) (waiver occurs when an arbitrating party has constructive knowledge that the arbitrator has a potential conflict of interest but fails to object prior to the issuance of an award); JCI Communications, Inc. v. International Brth. of Elec. Workers, Local 103, 324 F.3d 42, 52, 172 L.R.R.M. (BNA) 2095, 148 Lab. Cas. (CCH) P 10180 (1st Cir. 2003) (party waived objection when it “was put on notice of the risk [but] chose not to inquire into the backgrounds of [the arbitrators] before or during the hearing”); Kiernan v. Piper
cision, a party has challenged an arbitrator based on alleged conflicts of interest and an arbitral institution has denied that challenge, the challenging party will probably need to raise that issue again at the time the party seeks vacatur of the interlocutory decision or risk waiving its right to seek removal of the arbitrator on those grounds.247

Post-Stolt-Nielsen authorities show that there are no definitive principles regarding precisely when arbitrations should be remanded to the same arbitrator as opposed to a new arbitrator. In its 2010 decision in Kashner Davidson Securities Corp. v. Mscisz,248 the First Circuit held that, in an instance in which an arbitral award is vacated based on “manifest disregard of the law,”249 the question whether to remand an arbitration proceeding to the original arbitrators or to a new panel lies within the

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247 Most institutional rules, such as the AAA Rules, provide a process whereby the institution itself will resolve challenges to the continuing service of an arbitrator based on allegations of partiality. See AAA Construction Rule 20(b); JAMS Rule 15(i). The fact that the institution will resolve such challenges does not mean, however, that the issue will not subsequently be considered by a reviewing court upon the filing of a motion to vacate based on the same grounds relating to arbitrator partiality. See NGC Network Asia, LLC v. PAC Pacific Group Intern., Inc., 2012 WL 377995, *3 (S.D. N.Y. 2012), aff'd, 2013 WL 490935 (2d Cir. 2013) (observing that the law of the Federal District Court for the Southern District of New York and of the Second Circuit is that “the parties are bound by the AAA’s determination [of a challenge against an arbitrator based on alleged partiality]” but then nonetheless deciding the issue on its own by applying federal case law under the FAA).

248 Kashner Davidson Securities Corp. v. Mscisz, 601 F.3d 19 (1st Cir. 2010).

sound discretion of the district court. Whereas in an earlier case—*Montes v. Shearson Lehman Bros.*—the Eleventh Circuit ordered the district court to refer the matter to a new arbitration panel under similar circumstances. When an arbitrator is found to be biased in favor of or against a party, a remand of the arbitration proceeding to a new arbitrator is the only logical choice.

These nuances present problems for arbitrating parties. In some instances, a party aggrieved by an interlocutory arbitral award that is potentially subject to immediate review might not desire to raise issues of arbitrator bias at that time even though the party believes such bias might exist. For example, the claim that has been resolved, for instance, a relatively minor change order claim in a construction arbitration, might not be of such value as to cause that party to be willing to incur the risk of

(2006). For detailed discussions of the historical origins of the doctrine of manifest disregard of the law and its interrelationship with the FAA's provisions permitting the vacatur of arbitral awards when arbitrators act "in excess of their authority," see Gaitis, Clearing the Air on "Manifest Disregard" and Choice of Law in Commercial Arbitration: A Reconciliation of Wilko, Hall Street, and Stolt-Nielsen, 22 Am. Rev. Int'l Arb. 23 (2011); Gaitis, Unraveling the Mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy, 7 Pepp. Disp. Resol. J. 1 (2007). Because the origins of the manifest disregard doctrine are historically and conceptually intertwined with the concept of vacating awards for acts in excess of arbitrator authority, the potential remains that in future cases interlocutory arbitral decisions will be deemed final or otherwise ripe for review based on the possibility that the arbitrator has acted in manifest disregard of the law. As was previously mentioned, the Supreme Court in *Stolt-Nielsen* in part justified its conclusion that the pertinent interlocutory arbitral award was ripe for review by observing that if the manifest disregard doctrine did, indeed, survive, the arbitrators certainly violated it in that case. See note 245 and accompanying text.

250 Kashner Davidson Sec., 601 F.3d 19 at 25.
251 *Montes v. Shearson Lehman Bros.*, Inc., 128 F.3d 1456, 4 Wage & Hour Cas. 2d (BNA) 385, 134 Lab. Cas. (CCH) P 33638 (11th Cir. 1997).
252 *Montes*, 128 F.3d at 1464.
alienating the arbitrator by pressing allegations of bias, at least
at that time. Considerations such as these thus can be relevant
at the time a party considers whether to agree to bifurcated
proceedings that will result in the issuance of an interlocutory
arbitral award.

VI. Conclusion

It is difficult to define the universe of interlocutory arbitral de-
cisions that could be affected by the case law and trends discussed
in this article. Interlocutory arbitral awards and decisions relat-
ing to arbitrator jurisdiction, venue, the scope of the parties’
arbitration agreement and the arbitrability of claims, and the
joinder of nonsignatories and even interlocutory decisions
concerning limitations on damages recovery or liability conceiv-
ably could be, and at times will be, at risk of being subject to im-
mediate judicial review upon their issuance. As a result, issues
such as the potential waiver of the right to seek vacatur and
confirmation, the inevitability of delay, the lack of finality, and
the composition of the arbitral tribunal all are bound to arise
from time to time at an intermediate stage of the arbitration
proceeding.

Ambiguities, of course, are the progenitor of risk for the unwary
and strategic opportunity for the well informed. Arbitrating par-
ties and advocates representing parties in arbitration would thus
be well served to investigate the state of the law in the jurisdi-
cctions in which they are likely to either seek or be confronted by
motions to vacate and confirm interlocutory arbitral awards and
decisions. Knowledge of the state of the law in relevant jurisdi-
cctions furthermore will aid arbitrating parties, advocates, and
arbitrators in arriving at informed decisions regarding whether
and when to bifurcate arbitral proceedings or address issues on a
phased basis. Otherwise, all of those players should bravely brace
themselves for the unforeseen delays and vagaries that can at-
tend the types of judicial intervention discussed in this article.
Finally, it should be emphasized that issues regarding the final-
ity and ripeness of interlocutory arbitral decisions, and the ap-
application of *functus officio* principles to those decisions, are not
uniquely confined to federal court confirmation and vacatur
proceedings. Those issues arise also in state court proceedings
with frequency and are resolved with the same lack of
uniformity.254 If the past is indeed prologue for the future, further
confusion and ambiguity on these subjects should be expected as
the case law continues to develop in the coming years.

Paso 2010) (ruling that the finality of an interlocutory arbitral award issued in
an arbitration covered by the FAA is determined by the application of substantive FAA law and holding that two interlocutory arbitral awards were final and that the aggrieved party waived its right to seek vacatur of those awards by failing to file a motion to vacate within the time period set forth in the FAA), with Collins v. Tex Mall, L.P., 297 S.W.3d 409, 419 (Tex. App. Fort Worth 2009) (applying the Texas General Arbitration Act to an arbitration clearly governed by the FAA and concluding that a partial final award that “does not dispose of all of the claims submitted to arbitration” is not subject to immediate judicial review).