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# The New York Court of Appeals overturns the Appellate Division's ruling regarding *functus officio*



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A unanimous New York Court of Appeals (New York's highest court) decision in [Am. Int'l Specialty Lines Ins. Co. v Allied Capital Corp.](#) (AISLIC) delved into *functus officio*, a doctrine that this court had not closely examined in almost 130 years ([Flannery v Sahagian](#)). In this re-examination of *functus officio*, the court overturned the Appellate Division First Department's ruling in this case (see [Blog post, Is it really final? American International Specialty Lines Insurance Company v Allied Capital Corp.](#)).

AISLIC was an *arbitration* before a three-arbitrator tribunal, in which each side had *selected a party arbitrator* and the two arbitrators selected the chair. The parties had both moved for summary disposition on the question of liability. The tribunal issued a partial final award (PFA 1) in favor of the claimant insurer by a two to one vote, leaving for subsequent determination the question of the quantum of defense *costs* to be awarded after a separate *evidentiary* hearing. However, before the evidentiary hearing on defense costs took place, the insured (Allied) moved the tribunal to reconsider its ruling on liability. The tribunal, again by a two to one vote (with the chair switching positions) reversed its prior ruling and this time found for the insured (PFA 2). Following PFA 2, an evidentiary hearing on defense costs occurred and the tribunal issued a final award.

The insurer brought a set aside proceeding in the Supreme Court (court of first instance) challenging PFA 2 based on *functus officio*. The insurer argued that PFA 1, even though a partial final award, dispensed with the issue of liability and was not subject to reconsideration. The lower court judge denied the application, upholding the validity of PFA 2. The Appellate Division reversed, in a four to one vote, finding that PFA 1, even though a partial final award, was entitled to *functus officio* protection.

The Court of Appeals reversed, upholding the power of the tribunal to reconsider PFA 1 and reinstating PFA 2. In fact, the court stated, right at the beginning of its ruling, that:

“... inasmuch as the record is devoid of any evidence that the parties to the arbitration mutually agreed to the issuance of a partial decision that would have the effect of a final award, we hold that the arbitration tribunal acted within the bounds of its broad authority by reconsidering [PFA 1]”.

Therefore, it is clear that it was the vacuum in the record as to the parties' consent to a partial final award that negated the applicability of the *functus officio* doctrine to PFA 1. Because this was an *ad hoc arbitration* with no set of rules, as the Court of Appeals noted, the court examined the record to determine if the parties had stipulated to be bound by a partial final award, and found they had not. There was nothing in New York's *lex arbitri* that would make a partial award final absent party consent.

The opinion explains that:

“... under the common law rule, arbitrators relinquish all powers over the parties to the arbitration upon issuance of a final award and therefore are precluded from modifying or reconsidering that award.”

The court held that because PFA-1 did not resolve the entire case, it was not final. The court held, however, that:

“... partial determinations may be treated as final awards where the parties expressly agree both that certain issues submitted to the arbitrators should be decided in separate partial awards and that such awards be considered final.”

The lack of rules was critical to the result. Under the *Commercial Rules* the *American Arbitration Association (AAA)*, for example, tribunals are “not empowered to redetermine the merits of any claim already decided” (R-50). If AAA rules applied, therefore, R-50 would have precluded the tribunal's issuance of PFA 2. (In this case the parties considered, and rejected, adopting the *JAMS Comprehensive Arbitration Rules and Procedures*, which has a similar provision (Rule 24(j)).

The lack of rules in this case severely constrains the AISLIC ruling from being cited as precedent in other cases because the court makes clear that this opinion is limited to the facts before it and some rules (either *institutional* or *UNCITRAL*) generally apply in most arbitrations. Second, the tribunal's failure to obtain a clear and precise consensus from both sides, on the record, regarding the scope of the first partial award before its issuance triggered the domino effect resulting in this Court of Appeals ruling. A simple stipulation on the record as to the intent of the parties would have prevented this long litigation and subsequent appeals. As the court opined (and lamented):

“... [T]here was no discussion [in AISLIC] regarding whether any such ‘partial summary disposition’ would be a ‘final’ award deciding some, but not all, of the issues submitted to the tribunal.”

Going forward, arbitrators and counsel should take note that best practices dictate that if there is going to be the issuance of a partial final award, which occurs frequently in arbitration, absent rules clearly addressing the matter, there certainly should be a clear and unmistakable agreement on the record as to the intended scope and finality of the partial award.