

COLLECTING ATTORNEY FEES IN ARBITRATION

By Paul J. Dubow

Your client has retained you to prosecute or defend a contractual claim. Because the contract contains an arbitration clause, the case will be arbitrated. The contract contains a clause which clearly awards attorney fees to the prevailing party. You believe that there is a decent chance that your client will prevail and so you are also confident that your client will be able to recover its attorney fees. Indeed, the prospect of recovering attorney fees may color the stance that you take in any settlement negotiations in which you engage prior to the hearing.

Not so fast. There are at least three impediments to the recovery of attorney fees under a contract which contains an arbitration clause. First, there is the doctrine of *functus officio*. Second, you may run into an arbitrator who, for one reason or another, chooses not to award attorney fees to the prevailing party and, given the limited ability to appeal from an arbitrator's award, there may be no recourse from this apparent error. Third, notwithstanding the existence of the arbitration clause, part of the litigation process may occur in court, e.g., motions to compel arbitration or for a temporary restraining order or to confirm or vacate an award, and there may be a risk of not recovering that portion of attorney fees devoted to these court proceedings, particularly if the party who prevails in the pre-arbitration court proceeding does not prevail in the arbitration.

The doctrine of *functus officio* stems from the fact that an arbitration has a finite life. Once the arbitrator renders a final decision, the arbitrator ceases to have jurisdiction over the dispute. The policy underlying this rule is an "unwillingness to permit one who is not a judicial officer ... to reexamine a final decision which he has already rendered, because of the potential evil of outside communication and

unilateral influence, which might affect a new conclusion". *LaVale Plaza, Inc. v R.S. Noonan, Inc.*, 378 F. 2d 569, 572 (3d Cir. 1967).

Functus officio may cause a prevailing party to lose its right to attorney fees if the motion for attorney fees is filed after the arbitrator renders the decision. Since the arbitrator has rendered a final decision, he or she is *functus officio* and powerless to rule on the motion. This situation can be easily avoided, however. At the close of the hearing, the parties (or the arbitrator) can suggest that the amount of attorney fees expended be included in the post trial briefs so that when the arbitrator renders the final decision, that decision will include the amount of attorney fees awarded to the prevailing party. An alternate approach is a stipulation that the record will be kept open after the award on the merits is rendered, at which time the prevailing party will submit its bill for attorney fees. One advantage of the latter procedure is that the losing party will then have an opportunity to challenge the amount of fees requested. But it is most important that there is a specific recorded statement that the record will be left open because Code Civ. Proc. 1283.8 provides that an award must be rendered within the time fixed by the arbitration agreement. Most arbitration agreements provide that the arbitration be conducted pursuant to the rules of a particular arbitration provider, and these rules usually require that the award be rendered within a particular period of time after the record closes.

The doctrine of *functus officio* may also impact the ability to recover costs under Code of Civ.Proc. 998, which provides a method for a party to make a settlement offer to its adversary and recover post-offer costs if the outcome of the litigation is worse for the adversary than it would have been if the offer were accepted. In 1997, this statute was amended to include arbitrations. However, a trier of fact cannot be made aware of a Section 998 offer until after the case concludes, a time when the arbitrator would be *functus officio*. And so if the *functus officio* doctrine were applied, it would be impossible for an arbitrator to make an award pursuant to this statute. One way to avoid this problem is to ask the arbitrator at the close of testimony to hold the record open after rendering the decision. But this may be

difficult to accomplish because the arbitrator will want to know a reason for the request and obviously an attorney cannot reveal the existence of a Section 998 offer at that time. Failing that option, a litigator whose client has the right to collect costs pursuant to Section 998 probably has two additional options after the award is rendered. One option is to ask the arbitrator to refuse to apply the *functus officio* doctrine, either on the ground that the statute's purpose of encouraging settlement supersedes the doctrine and/or that the legislation impliedly meant that the doctrine should not be applied in such a case. The other option is for the attorney to request reimbursement for the costs when a motion to confirm the award is filed. In *Pilimai v Farmers Ins. Exchange Co.*, 39 Cal. 4th 133, 149 (2006), the prevailing party invoked Section 998 when she moved to confirm the award. The court denied the request, but on the ground that if the costs were appended to the judgment, the amount of the judgment would exceed the limits on her insurance policy. The Court of Appeal reversed and the Supreme Court affirmed that portion of the Court of Appeal decision that permitted the prevailing party to recover the costs allowed under Section 998. Although the Court did not specifically state that seeking those costs during the confirmation proceeding was permissible, it impliedly allowed this procedure because that was the method used by the prevailing party to enforce her rights under Section 998. However, there could be a problem with the confirmation approach if the losing party pays the award soon after it is rendered. Thus, the motion to confirm should be filed immediately.

What happens if the arbitrator fails to award attorney fees? If there is no request to the arbitrator to award attorney fees, then a court cannot award them when the motion to confirm is filed. *Corona v Amherst Partners*, 107 Cal App 4th 701 (2003). But if the arbitrator is asked to award attorney fees and does not do so, it may be difficult to determine the arbitrator's thought process, particularly if there is no requirement for a reasoned award. Although the arbitrator's inaction may be legal error, the California Supreme Court has held in *Moncharsh v Heily & Blasé*, 3 Cal. 4th 1 (1992) that an error of law

committed by an arbitrator cannot be reversed. Thus, it may appear at first blush that the prevailing party can do little about the arbitrator's failure to award fees.

Indeed, the California Supreme Court has twice refused to reverse an arbitrator's failure to award attorney fees notwithstanding a provision in the contract permitting the award of attorney fees to the prevailing party.

In *Moshonov v Walsh*, 22 Cal. 4th 771, 779 (2000), the Court noted that the arbitrator determined that she was not compelled to award attorney fees because the claims alleged in the arbitration proceeding were tort claims and hence were not based on the contract between the parties. Because the arbitrator expressly based her decision on an interpretation of the contractual fees clause, the Court ruled that the clause did not apply to the action at hand.

In *Moore v First Bank of San Luis Obispo*, 22 Cal. 4th 782 (2000), the Court ruled that the arbitrator did not designate who was the prevailing party and so there was no prevailing party to whom attorney fees could be awarded. Note, however, that an arbitrator's failure to identify a prevailing party should not necessarily mean that there is no prevailing party because a party "who obtains all relief requested on the only contract claim in the action must be regarded as the party prevailing on the contract for purposes of [awarding] attorney fees". *Hsu v Abbara*, 9 Cal 4th 863, 876 (1995).

But there are ways to overcome an arbitrator's failure to award fees and avoid the spectre of *Moncharsh*, although some have pitfalls. One way might be to invoke Code of Civ. Proc. 1286.6 and ask the arbitrator to correct the award. But the statute only allows for correction of an award if 1) there was an evident miscalculation of figures or evident mistake in the description of any person, thing, or property referred; 2) the arbitrators exceeded their powers and the award can be corrected without affecting the merits of the decision or 3) the award is imperfect in matter or form, not affecting the merits of the controversy. It is problematical whether a failure to award attorney fees falls within these criteria.

There is also a judge made doctrine in California that an arbitrator can *amend* an award, rather than correcting it. *A&M Construction Inc v Tri Build Development Co.*, 70 Cal. App. 4th 1470, 1476 (1999); *Century City Medical Plaza v Sperling Isaacs & Eisenberg*, 86 Cal. App. 4th 865, 880-882 (2000); *Delaney v Dahl*, 99 Cal. App. 4th 647, 657-660 (2001). There are three criteria for allowing an amendment of the award, one of which is that an issue is omitted from the award because of the arbitrator's inadvertence or mistake. The risk of course is that the arbitrator deliberately omitted awarding attorney fees because, rightly or wrongly, he or she felt that the alleged prevailing party was not entitled to them.

Perhaps the best way to overturn an arbitrator's failure to award attorney fees is to take the path laid out in *DiMarco v Cheney*, 31 Cal. App. 4th 1809 (1995). In that case, the arbitration contract provided that "the prevailing party *shall* be entitled to reasonable attorney's fees and costs". (Emphasis supplied.) Nevertheless, the arbitrator denied the prevailing party's request for attorney fees. The trial court vacated that portion of the award and ruled that the prevailing party was entitled to attorney fees. The losing party appealed, arguing that the trial court was bound by the arbitrator's decision even if it were an error of law under the rule set forth in *Moncharsh*. The Court of Appeal rejected that argument, holding that the arbitrator was compelled by the terms of the agreement to award reasonable attorney fees and had exceeded his powers by not doing so. The California Supreme Court, in issuing its decision in *Moshonov*, expressly distinguished *Di Marco*, holding that the arbitrator in *Moshonov* had the discretion to determine whether the underlying claim was in tort or contract while the arbitrator in *DiMarco* had no such discretion.

Can an arbitrator award attorney fees to a party who prevailed in a court proceeding that preceded the arbitration, i.e., where the court granted the party's motion to compel arbitration or issued a temporary restraining order? The answer is yes. But why ask the arbitrator to award the fees? For example, the party who prevailed on the motion to compel arbitration or was successful in obtaining an injunction may lose on the merits in the arbitration. There is absolutely no chance that the arbitrator

would award attorney fees to such party. Indeed, there is a possibility that the arbitrator might award the party who prevailed on the merits *all* of its attorney fees, including those expended in its unsuccessful efforts in court.

The better course of action is to ask the court to award the fees after the court proceeding is concluded and *before* the arbitration proceeding commences. The argument against this is that there is no prevailing party at that stage of the proceedings. But courts that have awarded attorney fees in these instances have held that the prior proceedings in court were distinct actions and that there was a prevailing party therein. See *Acosta v Kerrigan*, 150 Cal. App. 4th 1124 (2007); *Otay River Constructors v San Diego Expressway*, 158 Cal. App. 4th 796 (2008); and *Turner v Schultz*, 175 Cal. App. 4th 974 (2009). In those cases, the courts were assisted by clauses in the underlying contracts that contemplated court proceedings necessary to enforce the contracts and so the courts in essence were enforcing the parties' intent. There is, however, a split in the Courts of Appeal on this issue. See *Lachkar v Lachkar*, 182 Cal. App. 3d 641 (1982) and *Green v Mt. Diablo Hospital District*, 207 Cal. App. 3d 63 (1989). Nevertheless, *Acosta*, *Otay River*, and *Turner* appear to contain the better reasoning and, of course, there is no harm in asking for the fees.

There are some occasions, however, where the arbitration agreement may prevent a party who prevailed in pre-arbitration litigation from obtaining attorney fees before the arbitration occurs. In *Kalai v Gray*, 109 Cal. App. 4th 768 (2003), a defendant who obtained a summary judgment in Superior Court on the ground that the plaintiff failed to arbitrate was found not to be entitled to attorney fees where the contract provided for the recovery of attorney fees by the "prevailing party to the arbitration". Thus, the party seeking the attorney fees could not recover those fees until he actually prevailed in the arbitration.

There are instances where the contract requires that all disputes be resolved by arbitration but the attorney fee clause calls for recovery of attorney fees by the prevailing party that were expended in the

“suit” or “litigation”. Nevertheless, the prevailing party in the arbitration can recover attorney fees expended in the arbitration. *Taranov v Brokstein*, 135 Cal. App. 3d 662 (1982); *Tate v Saratoga Savings & Loan Association*, 216 Cal. App. 3d 843 (1989); and *Harris v Sandro*, 96 Cal. App 4th 1310 (2002). The rationale of these decisions is that since it was the parties’ intent to arbitrate their disputes, the only way to carry out the parties’ further intent to award attorney fees to the prevailing party is to include the term “arbitration” within the terms “suit” and “litigation”.

In conclusion, a provision in an arbitration contract allowing the prevailing party to recover attorney fees will not automatically assure that a party who prevails will obtain those fees. The party’s attorney needs to develop a strategy to assure that those fees will be recovered.

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