To Be Argued By:
BRIAN A. SUTHERLAND
Time Requested: 30 Minutes

APL-2019-00040
New York County Clerk's Index No. 656341/16

Court of Appeals

STATE OF NEW YORK

AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Petitioner-Respondent,

—against—

ALLIED CAPITAL CORPORATION and
CIENA CAPITAL LLC (f/k/a Business Loan Express LLC),

Respondents-Appellants.

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

BRIAN A. SUTHERLAND
REED SMITH LLP
599 Lexington Avenue
New York, New York 10022
Telephone: (212) 521-5400
Facsimile: (212) 521-5450

JOHN W. SCHRYBER
TODD S. KIM
(admitted *pro hac vice*)
REED SMITH LLP
1301 K Street, N.W.
Suite 1000, East Tower
Washington, DC 20005
Telephone: (202) 414-9200
Facsimile: (202) 414-9299

Attorneys for Respondents-Appellants

August 8, 2019

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Cont.)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Cont.)

Page(s)

TABLE OF AUTHORITIES
(Cont.)

Page(s)

Statutes

Rules

Other Authorities

TABLE OF AUTHORITIES
(Cont.)

Page(s)

PRELIMINARY STATEMENT

A court may not vacate an arbitration award on the ground that the arbitrators exceeded their authority unless it concludes that the arbitrators violated a clear and explicit limitation on their powers contained in statutory law or the parties' arbitration agreement. American International Specialty Lines Insurance Company (the "insurer" or "AISLIC") contends that the arbitrators exceeded their authority when they reconsidered a partial ruling, but it has not identified any statutory or contractual limitation that precluded them from doing so. Therefore, the arbitrators had authority to reconsider their partial ruling and the trial court correctly confirmed their final award.

The insurer makes no effort to show that the arbitrators' initial partial ruling on liability was correct. Instead, its extraordinary argument is that the arbitrators had no authority to reconsider a partial ruling and no choice but to render a subsequent final award that they believed was legally wrong. The argument that the law compelled the arbitrators to disregard the law is unsupported and inequitable.

Not surprisingly, the insurer's argument finds no support in the law of any jurisdiction: the insurer has not cited a single case in which a court *vacated* an award on the ground that the arbitrators improperly reconsidered a partial ruling or "partial final award." Instead, they cite cases in which courts *confirmed* a "partial award" or applied the doctrine of *functus officio* to an award that completely and finally decided *all* issues submitted. Neither scenario is relevant. The question here is whether a court may vacate an award because the arbitrators reconsidered a partial ruling.

Under controlling New York law, there is a crucial difference between a partial ruling that decides only part of the issues submitted to the arbitrators and a ruling that completely decides all issues. A ruling that completely decides *all* issues is an "award" within the meaning of the CPLR and cannot be reconsidered unless the parties expressly authorize the arbitrators to do so. Conversely, a ruling that decides only *part* of the issues submitted is *not* an "award" and *can* be reconsidered unless the parties expressly provide otherwise. In other words, an arbitrators' decision does not implicate statutory limitations on their power *unless* it is an "award," and the decision is *not* an award unless it

is a final and definite resolution of all issues submitted. Here, the partial ruling did *not* decide all issues submitted because it left the issue of damages for further proceedings. It was not an "award" under the CPLR.

The insurer nevertheless insists that the partial ruling was an "award" that the arbitrators lacked authority to reconsider. It says that the parties orally agreed at an arbitration hearing that the arbitrators could issue an irrevocable and judicially-reviewable "partial final award," but this contention is completely false, as the arbitrators found. The parties *never* agreed that the arbitrators could issue an irrevocable "partial award"—not in writing or by oral statements, conduct, or silence. Thus, nothing in New York law or the parties' agreements precluded reconsideration of the partial ruling at issue here.

Seeking to avoid New York law, the insurer now contends that the Federal Arbitration Act ("FAA") preempts New York's vacatur statute. That contention directly contradicts its representations to the courts below and is unpreserved. In any event, New York's vacatur law governs this proceeding and the insurer's last-minute effort to avoid the application of the CPLR and this Court's precedents is meritless.

If federal vacatur law applied, however, it too would compel reversal of the Appellate Division. Even assuming that the parties may irrevocably bind themselves to a partial ruling, no "partial award" could exist unless the parties actually agreed to be bound—and again, the arbitrators found that they did not. The arbitrators were in the best position, by far, to determine what the parties intended by their face-to-face oral statements and conduct. Under federal and New York law alike, the arbitrators' finding that the parties did *not* agree to an irrevocable "partial" ruling must be upheld. The arbitrators' finding was *correct*, and even if it was not, neither federal nor New York law would permit this Court to review an arbitrator's fact-finding made during an ongoing proceeding.

Any contrary ruling would involve the courts in a fact-intensive second-guessing of what the parties impliedly meant by oral statements or conduct, and would encourage other litigants, like the insurer here, to argue that an arbitrator's reasoned award should be vacated on the ground that the other side is "trapped" by the supposed implications of oral statements at a hearing. AISLIC Br. 31. As the trial court correctly ruled, that is not the law. (A. 7) This Court should reverse the Appellate

Division's decision and reinstate the trial court's order that confirmed the final award in favor of Allied.

ARGUMENT

The Legislature provided that a court may not vacate an award unless the party seeking vacatur meets narrow statutory criteria. CPLR 7511(b). The question here is whether the arbitrators exceeded a clear and explicit statutory or contractual limit on reconsidering a partial ruling during ongoing proceedings. The insurer fails to show any such limit in the CPLR or the parties' written agreement—or even in the parties' later conduct and oral statements. And while it now turns to federal law, that argument comes too late, is mistaken, and would not help the insurer anyway. Under any applicable law, the final award issued at the end of the arbitration should be confirmed.

I. The Insurer Fails to Show That the Arbitrators Exceeded a Statutory or Contractual Limit on Their Authority

The insurer fails to show that the arbitrators "exceed[ed] a specifically enumerated limitation on [their] power" in reconsidering a partial ruling. *Matter of Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984). No statute limited their authority to reconsider a partial ruling because that ruling was not an "award" under the CPLR and this

Court's precedent. And there was no contractual limit because the written agreement provided that only the single decision issued at arbitration's end would be "final and binding." Even if the parties' later conduct and oral statements were relevant, the parties never requested or agreed that the arbitrators should issue a binding and judicially-reviewable "partial final award."

A. The Partial Ruling Was Not an "Award" under the CPLR and this Court's Precedent

Under the CPLR, only a "written agreement" confers jurisdiction on the courts of this State to enter judgment on an "award." CPLR 7501. An "award" must be a "final and definite" resolution of the "subject matter submitted"; if it is not, the court must vacate it. CPLR 7511(b)(1)(iii). Thus, an award that does not finally and definitely resolve all issues submitted is no award at all. The general rule is that the "award must be co-extensive with the submission, and that it must be a final determination of the matter submitted." *Jones v. Welwood*, 71 N.Y. 208, 212 (1877).

While *Welwood* indicates that parties may provide expressly or by implication for "partial or separate awards" in their submission—that is, their written agreement (*id.* at 213)—it expressly *disapproved* the type

of "partial final award" that the insurer contemplates: "an award in the nature of interlocutory judgment" to be followed by "further awards afterwards" relating to the same controversy (*id.* at 216). Indeed, when a party claimed that a "supplemental submission" authorized the arbitrators to make such awards, this Court rejected that claim because "no such paper was produced." *Id.* The insurer dismisses this Court's decision in *Welwood* as a "detour" (AISLIC Br. 28), but old decisions remain binding precedent. *See People v. Turner*, 5 N.Y.3d 476, 482 (2005).

Rather than rebut Allied's reading of *Welwood*, the insurer irrelevantly complains that Allied did not direct this Court's attention to a few lines in a 632-page treatise. AISLIC Br. 29. These lines do not affect the proper interpretation of *Welwood*.[1] The chapter that this Court

[1] For example, the insurer snips from context a sentence about waiving "[s]trict compliance" with "formalities" not relevant here. AISLIC Br. 29; John T. Morse, Jr., *The Law of Arbitration and Award* 264 (1872). It also argues that under the treatise, "written submissions could be orally 'extended' or 'abrogated in whole or in part.'" AISLIC Br. 29. The treatise actually says that "in Massachusetts" a written agreement may be abrogated if "an express new agreement [is] entered into orally" or if there is an inference of a new agreement that is "strong and free from all doubt." Morse 82. That principle would not aid the insurer even if Massachusetts law applied because there is no evidence of an agreement to abrogate the written agreement here, let alone strong evidence that is "free from all doubt."

quoted approvingly in *Welwood* is entitled "The Award Must Be Co-Extensive With The Submission." John T. Morse, Jr., *The Law of Arbitration and Award* 339-68 (1872). It warns that "a failure to determine any controversy submitted will render the whole award void" and that "an award not co-extensive with the submission is *not final*." *Id.* at 345, 347 (capitals omitted, emphasis added).

In *Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd.*, this Court again held that the award "must be coextensive with the submission." 43 N.Y.2d 276, 281 (1977). The insurer seeks to confine *Mobil Oil Indonesia* to "procedural" questions (AISLIC Br. 18-19), but it is not so limited. Echoing *Welwood*, this Court stated that "for the court to entertain review of intermediary arbitration decisions involving procedure *or any other interlocutory matter*, would disjoint and unduly delay the proceedings, thereby thwarting the very purpose of [arbitration]." *Id.* at 282 (emphasis added). If the Court had intended to limit its ruling to "procedural" matters, it would not have added "any other interlocutory matter" to the sentence quoted above. This Court's clear holding makes sense; whether repeated trips to court delay

arbitration does not depend on an artificial distinction between "substance" and "procedure."

In sum, the principles established by the CPLR and this Court are straightforward and controlling here:

(1) "The only authority for judicial review of arbitration awards is found in CPLR 7510 and 7511."

(2) "[B]efore the court may intervene or even entertain a suit seeking court intervention, there must be an 'award' *within the meaning of the statute*," *i.e.*, CPLR 7511.

(3) "The 'awards' of arbitrators which are subject to judicial *examination under the statute* … are the final determinations made *at the conclusion of the arbitration proceedings*."

Id. at 281 (emphasis added); *see also Matter of Geneva City School Dist. v. Anonymous*, 77 A.D.3d 1365 (4th Dep't 2010) ("interim award" disposing of some claims was not a "final and definite award" under CPLR 7511 because it was not made "at the conclusion of the arbitration proceedings").

Because the partial ruling at issue did not decide all disputes submitted to the arbitrators and was *not* made at the conclusion of

proceedings, it was *not* an "award" and the CPLR imposed no limit on the arbitrators' authority to reconsider it.

The insurer's response is that New York law "allows for enforcement of partial final awards where those awards 'finally and conclusively dispose of a separate and independent claim, even though it does not dispose of all of the claims that were submitted to arbitration.'" AISLIC Br. 17 (quoting *Matter of Wendt v. BondFactor Co.*, 169 A.D.3d 808, 810 (2d Dep't 2019), brackets omitted).[2] This argument directly conflicts with *Mobil Oil Indonesia* and the plain text of CPLR 7511, which the insurer ignores. And even if these authorities did not foreclose the insurer's argument (they do), any reasonable definition of an "award" must require that the parties intended to authorize a final disposition that could not be reconsidered. Here, as Allied has explained, the parties

[2] The quoted statement from *Wendt* was plainly dictum, as the court held that the award there was final because it *did* dispose of "all of [petitioner's] claims." 169 A.D.3d at 810. And the statement was plainly wrong, as it relied on trial-court decisions, which relied on federal law. *Id.* The insurer's Potemkin village of string-cites (AISLIC Br. 17, 22-24) is even more clearly inapposite and unpersuasive. In any event, those decisions could not overrule this Court's decisions, which establish that an "award" is made at the *conclusion* of arbitration proceedings, not *during* arbitration proceedings.

did not intend to preclude reconsideration of a partial ruling or authorize the arbitrators to issue a judicially-reviewable "partial final award." Allied Br. 47-54; *see infra*, at 11-18.

B. The Parties' Written Agreement Did Not Clearly and Unambiguously Preclude the Arbitrators from Reconsidering a Partial Ruling

Because it cannot show that the CPLR limited the arbitrators' authority to reconsider a partial ruling, the insurer seeks refuge in the notion that the parties *authorized* the arbitrators to issue a "partial final award" that could not be reconsidered. AISLIC Br. 3, 24, 29 n.10. It endeavors to shift the burden to Allied to prove that the parties "preclude[ed] [the arbitrators] from issuing a partial final award." AISLIC Br. 25. But this effort is misguided. The arbitrators were free to reconsider the partial ruling *unless* the parties' written agreement clearly and unambiguously *prohibited them from doing so*. *See* Allied Br. 30-31; *Matter of Silverman*, 61 N.Y.2d at 307.

The parties' written agreement to arbitrate allowed the arbitrators to bind the parties in just one way: through "the" "final and binding" "decision" issued after arbitration, which constitutes "the arbitrators' award." (A. 146, 191-92) As a matter of grammar and logic, only one

"decision" would be "final and binding"—the one the arbitrators issued at arbitration's end. The insurer's efforts to show that the parties precluded the arbitrators from reconsidering a partial ruling are unavailing.

First, the insurer contends that Allied cited no authority to support its construction of the arbitration agreements. AISLIC Br. 25. But Allied cited *this Court*'s holding that such contractual language "fairly import[s] a single award or decision embracing all the matters submitted," because it "speak[s] of *the* decision, and *the* final decision." Allied Br. 33 (quoting *Welwood*, 71 N.Y. at 214).

Second, the insurer argues for the first time that language in the 2006 policy requires application of American Arbitration Association ("AAA") Rule 47(b), which allows "partial … awards." AISLIC Br. 26. But the arbitrators ruled that this arbitration was brought under the *2008 policy* and they based their award on that policy alone. (A. 78, 96-98, 109-118) The insurer itself recognized that the 2008 policy applied and that the arbitrators based their award on that policy. (A. 27 [¶ 63]; A. 88, 49-50, 958) The 2008 policy contains no reference to the AAA rules.

Moreover, the parties did *not* submit their dispute to the AAA, and the reference to the AAA rules in the 2006 policy could not override the

parties' express agreement (in both policies) that the arbitrators would issue one "final and binding" "decision" issued after arbitration. (A. 146, 191-92) The AAA rules provide that "[t]he parties, by written agreement, may vary the procedures set forth in these rules" (AAA Rule 1(a)), and the written agreements require a single final and binding decision. If there is any ambiguity as to what the parties agreed (including because they offered two separate arbitration agreements), that ambiguity must be construed in favor of upholding the arbitrators' interpretation of their mandate. Allied Br. 31, 33.

Third, the insurer illogically argues that the FAA contradicts Allied's interpretation because it contemplates a "partial award," in the singular. AISLIC Br. 27 (quoting 9 U.S.C. § 16). This argument misses the point that the parties' written agreement provides for just one final decision and does not preclude reconsidering any partial ruling. Further, as discussed below, the FAA does not apply here.

Fourth, the insurer notes that Allied used the words "partial final award" in its letter requesting reconsideration. AISLIC Br. 27. Because Allied was seeking *reconsideration* of the "partial final award" (A. 455), its use of that language (for the first time, in a reconsideration request)

obviously could not have signified any belief that the arbitrators would lack authority to reconsider the partial ruling.

Finally, the insurer notes that parties to arbitration agreements implicitly authorize those procedures necessary to give effect to the parties' agreement. AISLIC Br. 25. That principle supports Allied, not the insurer. To give effect to the parties' agreement here, the arbitrators properly determined that they had procedural authority to fix a clear and consequential error during ongoing proceedings, then issued the final and binding decision at the end of the arbitration, just as the parties had agreed. Allied Br. 29-31.

C. The Arbitrators' Finding That the Parties Did Not Agree During the Arbitration Proceedings to Preclude Reconsideration of a Partial Ruling Was Correct, Not "Totally Irrational"

Because the parties' written agreement did *not* limit the arbitrators' authority to reconsider partial rulings, vacatur of the final award could be justified here only if the arbitrators' decision to do so was "totally irrational." *Matter of Silverman*, 61 N.Y.2d at 308. The insurer counters that the parties "empowered the arbitrators to issue a partial final award" that could not be reconsidered, such that the arbitrators exceeded their authority. AISLIC Br. 29 n.10, 36. The insurer's factual

assertion that the parties consented to an irrevocable "partial final award" is false, however, as the arbitrators found. (A. 94)

The insurer's argument has two parts: (1) the parties "requested" bifurcation and (2) a request for bifurcation is the same thing as a request for an irrevocable, final, and binding partial award. AISLIC Br. 30-32. Both of these propositions are necessary to the insurer's argument, but neither is true.

First, Allied moved for summary disposition as to the *entire* dispute, not for bifurcated proceedings. (A. 740-84) It never requested "bifurcation," much less did it request an irrevocable "final award" on liability. Rather than request bifurcation, Allied agreed that Chairman Davidson's suggestion of "partial summary disposition"—*not* a final award—"made sense." (A. 399 [141:2-5]) Justice Gische understood all this. (A. 1008-09)

Moreover, *the insurer* never requested bifurcation, as Allied has explained. Allied Br. 48-49. The insurer contends that it did not need to say anything because it was "*participating*" in proceedings. AISLIC Br. 31. But the question is whether the parties have mutually and affirmatively *agreed* to give the arbitrators authority to bind them to a

partial ruling. The insurer's silence does not establish agreement about anything.

The arbitrators expressly found that "*the parties did not bifurcate the proceedings*, but … did make reciprocal motions for summary disposition on the issue of coverage." (A. 94 (emphasis added)) That factual finding—made based on events that the arbitrators witnessed—would deserve deference even if its correctness were not clear on the cold record. *Accord* AISLIC Br. 27-28 (arbitrators' findings deserve deference). The arbitrators found that certain issues were not amenable to summary disposition, but did *not* find that *the parties* requested "bifurcation" or a "final award" on liability.

Second, in any event, a request that arbitrators decide liability before damages is plainly *not* a request that they issue an irrevocable partial ruling during ongoing proceedings in the form of a "partial final award." Allied Br. 48-49. The insurer does not even respond to this argument. Nor could it. Parties can agree to "bifurcate" proceedings without agreeing that a first-step partial ruling will be an immediately confirmable and irrevocably binding "award." The insurer's argument that acquiescence in a "partial summary disposition" is tantamount to

agreeing to an irrevocable "partial final award" is illogical and would merely lay traps for the unwary.

Not only does the insurer completely ignore the distinction between (1) one-sided acquiescence in a "partial summary disposition" and (2) mutual agreement on an irrevocable and binding "award," it also ignores the distinction between arbitration and judicial procedures. Arbitrators may issue partial rulings, even if courts will review them only when eventually incorporated in the award. Parties are even free to contract for *irrevocable* partial rulings, although they did not do so here. For this reason, the insurer's argument that Allied's position "deviates" from the practice of major arbitration institutions (AISLIC Br. 19-20) is incorrect. The question here is not whether arbitrators can "bifurcate" or issue partial rulings—they can—but whether the CPLR, this Court's law, and the parties' agreement in *this* case required *judicial* vacatur because the arbitrators reconsidered a partial ruling.

The insurer ultimately concedes, as it must, that the arbitrators' authority depended on the parties' "submission." AISLIC Br. 29 n.10 ("parties' submission … for final disposition empowered the arbitrators"). But it denies that the submission must be in writing and instead suggests

that a "submission" is nothing more than "willingly *participating*" in proceedings. AISLIC Br. 31. The insurer's construction of the term "submission"—a term of art—is contrary to the history of arbitration, the CPLR, and this Court's precedents, which require a writing. Allied Br. 9-12, 34, 41.

Even if this Court conducted *de novo* review of the arbitrators' findings (and it should not), the arbitrators correctly determined that the parties never precluded them from reconsidering a partial ruling. Accordingly, there is no reason under New York law (or federal law) to conclude that the arbitrators could not reconsider errors while arbitration proceeded.

D. Whether the Procedural Rules Governing the Arbitration Allowed Reconsideration of Partial Rulings Was a Question for the Arbitrators

In the absence of any clear statutory or contractual limitation on the power to reconsider partial rulings, whether the procedural rules governing the arbitration allowed such reconsideration was a question for the arbitrators. Indeed, the insurer's principal argument before the arbitrators and lower courts was that JAMS' procedural rules applied here to preclude reconsideration. AISLIC First Dep't Br. 11-31. Thus, it

acknowledged that reconsideration was a matter of *which* procedural rules applied. It told the arbitrators that *functus officio* was a "red herring." (A. 461)

Allied responded that nothing in the parties' agreements required application of JAMS rules or prohibited the arbitrators from reconsidering a partial ruling. Allied First Dep't Br. 17-18. In any event, Allied argued, under JAMS rules *and* New York law, the arbitrators had procedural discretion to reconsider the partial ruling. *See id.* at 24-32. Thus, the question whether the arbitrators had authority to decide whether to reconsider was squarely presented below, not "waived" as the insurer now contends (AISLIC Br. 37), and the arbitrators had that authority because the parties agreed in writing to submit "all disputes" to the arbitrator (Allied Br. 54-55).

That the insurer later objected to the arbitrators' resolution of a procedural issue makes no difference because it had already agreed, in writing, that the arbitrators could resolve all disputes. Moreover, even the insurer's objection—that JAMS rules precluded reconsideration—was a concession that the arbitrators had authority to make procedural determinations concerning reconsideration. Allied Br. 56. The insurer's

belated reference to the AAA rules in one out of two policies (AISLIC Br. 36) is just another concession that arbitrators determine applicable procedure, including whether they may reconsider partial rulings. And the arbitrators' determination here did not exceed their authority. *See Matter of Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 43-44 (1997) (broad arbitration clause submits all disputes to arbitrators).

II. Federal Law Does Not Require Vacatur of the Final Decision and Award

At every level in this proceeding, the parties and the courts have applied New York law because the insurer filed its petition to vacate in New York Supreme Court and the parties' arbitration agreements indisputably do *not* select federal law. Now desperate to escape from New York, the insurer argues for the first time here that federal law controls. That argument is waived and also meritless. And federal law would not help the insurer anyway.

A. The Insurer Waived Its New Argument That New York Law Does Not Apply Here

The insurer's argument that federal law controls directly contradicts its arguments to the courts below. The insurer repeatedly cited New York law, including CPLR 7511, and never argued that federal law displaced or preempted New York law. *See* AISLIC First Dep't Br.

29, 30; A. 12, 939. Its reply brief explicitly stated that "AISLIC seeks vacatur under C.P.L.R. § 7511(b)(iii) …." AISLIC First Dep't Reply Br. 10. The insurer also relied exclusively on New York law at oral argument before the Appellate Division.[3]

Because the insurer presented this case below on the theory that CPLR 7511 required vacatur, it may not take the opposite position in this Court that federal law controls. *See Lichtman v. Grossbard*, 73 N.Y.2d 792, 794 (1988). Even if the insurer had not affirmatively sought application of CPLR 7511, it never argued that federal law governed or preempted New York law below, and that argument is waived. *See id.*; *Bingham v. N.Y.C. Transit Auth.*, 99 N.Y.2d 355, 359 (2003).

To be sure, the parties and the Appellate Division cited federal and state law. But this only means that the parties and justices agreed that New York courts may consult the law of other jurisdictions *in determining what New York law should be*. The insurer's different argument that federal law *displaces* New York law should not be heard for the first time here.

---

[3] http://wowza.nycourts.gov/vod/vod.php?source=ad1&video=AD1_Archive_Jun05_13-58-04.mp4 (14:21:20, 14:27:30).

B. The Parties Did Not Select Federal Law

The parties' arbitration agreements do not select federal law to govern anything. Rather, the policies (which the insurer drafted) refer only to state law. (A. 146, 192) The FAA does not govern when the parties choose to litigate in New York courts under state law. *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 201-04 (1995).

The insurer argues that the FAA controls whenever an arbitration proceeds under two contracts choosing two different States' laws, even though it concededly lacks authority for that bizarre proposition. AISLIC Br. 14-15 & n.4. In any event, the arbitrators based their award exclusively on the 2008 policy, which selects New York law. *See supra*, at 12. The insurer cites one email in which Chairman Davidson stated that the FAA "clearly governed" (A. 798), but the arbitrators later clarified that the New York arbitration venue implied the applicability of New York procedural law and that the FAA itself did not require any particular procedural rules. (A. 90, 487 [87:11-16]) Thus, even if the arbitrators could decide which vacatur standard *this* Court applies, they correctly indicated that New York procedural law controls.

C. Federal Law Does Not Preempt New York's Vacatur Statute

The insurer's half-hearted suggestion that the FAA "could" preempt New York law is meritless. AISLIC Br. 3, 43-44. "Congress did not intend to occupy the entire field of arbitration." *Smith Barney*, 85 N.Y.2d at 203 (quotation marks omitted). Thus, if this Court reaches this waived issue, it should consider whether the federal *vacatur statute* applies in state courts. That statute authorizes *only* a "United States court" to vacate an award. 9 U.S.C. § 10(a). "To even consider the language of the statute is to doom arguments that the FAA provides the standards for judicial review of arbitration awards in state court." Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 Cardozo J. Conflict Resol. 509, 530-31 (2009); *see also* Jill I. Gross, *Over-Preemption of State Vacatur Law: State Courts and the FAA*, 3 J. American Arbitration 1, 29-33 (2004).

This dispute implicates the jurisdiction of *New York courts* to confirm or vacate arbitral decisions and the circumstances in which they should exercise that jurisdiction. This Court should decide whether and when an arbitrator's partial ruling is a judicially-reviewable "award"

within the meaning of New York law because the consequences of that decision dictate whether this State's courts have jurisdiction.

The Supreme Court's decision in *Hall Street Associates v. Mattel Inc.* confirms the point. 552 U.S. 576 (2008). *Hall* held that 9 U.S.C. § 10 furnishes the "exclusive" grounds upon which a *federal* court may vacate an arbitration award. 552 U.S. at 590. Importantly, the Court went on to say that the "FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." *Id.* Consistent with *Hall*, the highest courts of other States have recognized that federal law does not preempt their vacatur statutes.[4]

This Court routinely applies CPLR 7511 in vacatur proceedings without discussing preemption or choice of law, as one would expect of a default rule whose application requires no explanation. For example, in

[4] *See Finn v. Ballentine Partners, LLC*, 143 A.3d 859, 866-72 (**New Hampshire** 2016); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 101 (**Texas** 2011); *Raymond James Fin. Servs., Inc. v. Honea*, 55 So. 3d 1161, 1170 (**Alabama** 2010); *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1350-54 (**California** 2008).

Matter of Henneberry v. ING Capital Advisers, LLC, 10 N.Y.3d 278 (2008), a dispute involving commerce, the petitioner cited the FAA and the CPLR as grounds for vacating an arbitration award.[5] This Court held: "The parties here voluntarily agreed to arbitrate disputes arising under the employment agreement and, *as such*, our review of an arbitration award rendered pursuant to that private agreement is governed *exclusively* by CPLR 7511." 10 N.Y.3d at 283 (emphasis added); *see also Matter of Falzone v. New York Cent. Mut. Fire Ins. Co.*, 15 N.Y.3d 530, 534 (2010). Thus, CPLR 7511 governs review in New York courts, at least absent a clear agreement to the contrary.[6]

D. Even If Federal Law Applied, It Too Would Require Confirmation of the Final Decision and Award

The Supreme Court has not expressly decided whether the common-law doctrine of *functus officio* survives its decision in *Hall Street*,

---

[5] Verified Petition, 2005 WL 5837570 (Sup. Ct. N.Y. County Mar. 4, 2005).

[6] The insurer relies (Br. 13) on *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471 (2006), but the FAA standard it cites could not apply here because the parties here selected state law to govern their dispute. Moreover, the Supreme Court's subsequent decision in *Hall Street* makes clear that the FAA does *not* preempt state *vacatur* law, as reflected in decisions of this Court applying CPLR 7511 in cases involving commerce and the decisions of other States' high courts.

which holds that the federal vacatur statute (*i.e.*, *not* common law) provides the exclusive grounds for vacating an award. To vacate an award in federal court under the FAA, the insurer must show that "the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). Judicial review of arbitration awards is "tightly limited" in federal court; "perhaps it ought not be called 'review' at all." *CUNA Mut. Ins. Soc'y v. Office & Prof'l Emps. Int'l Union, Local 39*, 443 F.3d 556, 561 (7th Cir. 2006) (quotation marks omitted). A federal court may not vacate an award if the arbitrators were "even arguably" acting within their authority. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013).

"The scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission." *Local 1199, Drug, Hosp. & Health Care Employees Union v. Brooks Drug Co.*, 956 F.2d 22, 25 (2d Cir. 1992) (quotation marks omitted). Thus, arbitrators do not exceed their authority unless their decision contradicts the "clear and unambiguous" terms of the parties' written agreement. *YPF S.A. v. Apache Overseas, Inc.*, 924 F.3d 815, 819 (5th Cir. 2019). These principles compel reversal of the Appellate Division's decision.

The insurer has not cited a single case in which a court concluded that arbitrators could not reconsider a "partial final award" because they were "*functus officio*." The case law is to the contrary. In *Halliburton Energy Services v. NL Industries*, for example, the district court held that "*functus officio*" did *not* preclude arbitrators from redetermining a liability issue that they had previously determined in a "Contract Award" issued after the first phase of bifurcated proceedings. 553 F. Supp. 2d 733, 772-74 & n.14 (S.D. Tex. 2008). The default rule under federal law is that something less than a "*complete* determination of all claims submitted" to the arbitrators is not a judicially-reviewable award and, for obvious reasons, an order that decides liability but not damages is *not* complete. *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980) (emphasis added).[7] And the applicability of that rule is especially clear when the purported liability and damages "phases"

[7] In *Stolt-Nielsen*, the parties executed a written agreement providing that the arbitrator "shall" issue a "partial final award," after which the arbitrator would "stay all proceedings" to permit immediate judicial review. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 88 (2d Cir. 2008). No such written agreement exists here.

involve overlapping issues. *See Halliburton Energy Servs.*, 553 F. Supp. 2d at 779, 785.

As Allied explained in its letter seeking reconsideration, the insurer's breach of its duty to defend *caused* Allied and Ciena to use the settlement funding structure that the arbitrators initially and erroneously concluded was not covered by the policy. (A. 444) If the insurer had *not* breached its duty to defend, the insurer could have funded the settlement directly, eliminating the insurer's contorted arguments that initially led the arbitrators into error (before the correction). Thus, the issue of "Loss" relating to the settlement is inextricably intertwined with, not separable from, the issue of "Loss" caused by the insurer's breach of its duty to defend.

For this reason—and putting aside the parties' written agreement and the arbitrators' express finding that the parties did *not* intend to bifurcate (A. 94)—it would be impossible to confirm a partial ruling on "liability" while remanding for further proceedings on "damages" in connection with the insurer's breach of its duty to defend. In that situation, Allied would be entitled to consequential damages flowing from *that* breach, which caused the settlement to which the insurer later

objected. The insurer may argue here that Allied is not entitled to consequential damages, but any such argument would reveal that it wants courts, and not the arbitrators, to decide the merits of the case.

Even assuming the insurer had a colorable argument that the parties empowered the arbitrators to issue a binding "partial award" on a "separate" issue (it does not), that would again be irrelevant. The question under federal law is whether the *arbitrators* had a "barely colorable" justification for their construction of the parties' agreement and claims, *Reliastar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009), not whether the *insurer* has any barely colorable arguments. The arbitrators justifiably construed the parties' written agreement, statements, conduct, and claims as allowing them to reconsider the partial ruling. (A. 94-96) Their final determination must be allowed to stand under the FAA so long as it "even arguably" construes or applies the parties' agreement. *Oxford Health Plans*, 569 U.S. at 569. "Once arbitrators have jurisdiction over a matter, any subsequent construction of the contract and of the parties' rights and obligations under it is for the arbitrators to decide." *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 899 (2d Cir. 2015).

In the federal case that is the cornerstone of both the Appellate Division's opinion and the insurer's brief, *Trade & Transport, Inc. v. Natural Petroleum Charterers Inc.*, the *arbitrators themselves* determined that they could not revisit their prior decision on liability. 931 F.2d 191, 195 (2d Cir. 1991) (when party sought to reargue liability, arbitrators issued an opinion stating it was "*functus officio*"); *see Employers' Surplus Lines Ins. Co. v. Global Reinsurance Corp.*, No. 07 Civ. 2521, 2008 WL 337317, at *5 n.9 (S.D.N.Y. Feb. 6, 2008) (distinguishing *Trade & Transport* because the "panel itself determined that it was *functus officio*"). Whether or not the arbitrators in *Trade & Transport* were correct, they had a "barely colorable" justification for declining to reconsider a prior decision. Because *Trade & Transport* merely confirms what the arbitrators decided, it is not authority for the proposition that vacatur is warranted here.

Moreover, the federal decision squarely supports Allied. The court there stated that "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." 931 F.2d at 195 (emphasis added); *see id.* ("[T]he panel had made that award final because the parties had asked it to do

so."). AISLIC omits the italicized language when it quotes this passage. AISLIC Br. 32. That language was, however, essential. The parties here, unlike those in *Trade & Transport*, never agreed that the arbitrators should make a *final* decision as to liability.

The circumstances of *Trade & Transport* were unusual. The parties needed immediate finality on a particular issue to accommodate the district court's request in a related court action, and so "the parties modified their original submission to the arbitrators in order to cause a bifurcated decision." 931 F.2d at 195. "They asked the panel to decide the issue of liability immediately, a decision that was *expressly intended* to have immediate collateral effects in the judicial proceeding." *Id.* (emphasis added).

By contrast, the insurer does not suggest *any* reason why the parties here would have needed a ruling on liability to be immediately confirmable and irrevocably binding. Tellingly, the insurer did *not* petition to confirm the "partial final award" until *after* the arbitrators corrected it. Before the trial court could act on that petition, the arbitrators issued their final award, prompting the insurer to file an

amended petition. (A. 979-80) Thus, the insurer's extra trips to the courthouse served no purpose and accomplished nothing.

III. The Insurer's Position Is Hostile to Arbitration, Justice, and Sound Public Policy

Allied's position promotes freedom to contract, efficiency, and justice in arbitration. Parties should be free to conduct arbitration in phases without automatically binding themselves to a series of interlocutory "partial awards." If parties do wish to bind themselves to incorrect partial rulings, they should say so in writing to set clear limits on arbitrators' authority and prevent fact-intensive litigation about purported submission-by-participation like the insurer advocates here. Otherwise, justice and ordinary arbitration principles provide that arbitrators are not bound by partial rulings during ongoing proceedings when they believe the partial ruling is contrary to law.

Remarkably, the insurer argues that arbitration policy would be served by a default rule in which incorrect partial rulings made during arbitration proceedings, and not at their conclusion, become final, irrevocable, and judicially-reviewable *even when the arbitrators explicitly found that the parties did not intend that result*. Make no mistake, the insurer is asking for *de novo* judicial review of the arbitrators' *finding of*

fact. It is hard to imagine a position that calls for more judicial interference with arbitration than the insurer's position here. The Appellate Division's ruling was entirely unprecedented for good reason.

If courts could conduct *de novo* review of arbitrators' fact-finding based on a mishmash of adversarial briefs, oral statements, and silence, the outcome would be delay, confusion, gamesmanship, exploitation of unsophisticated litigants, and waste. Allied Br. 43-47, 50-54. Such *de novo* review would involve courts in fact-intensive determinations about whether parties impliedly consented to an irrevocable, reviewable, partial award and incentivize litigants like the insurer to file petitions and appeals seeking vacatur. To avoid all this, the law requires the parties to put their agreement to be bound in writing—or at a minimum to agree *clearly* that a partial ruling is final and binding.

The default rule that arbitrators may revisit partial rulings made during arbitration proceedings has stood the test of time because it makes sense. Parties usually will prefer waiting until the arbitration ends before asking the court to enter judgment on an "award." It is sensible to ask parties who have an unusual need to bind themselves to a partial ruling to request one clearly, rather than "trapping" those who

never meant to agree at all. They can do so in writing before arbitration or during it, as the need arises.

Unable to come up with anything better, the insurer claims a systemic interest in limiting reconsideration requests. But its view that a party will "continue trying for reconsideration until the issuance of a final award" (AISLIC Br. 3, 42) flouts common experience and common sense. To avoid alienating the decision-maker in arbitration or litigation, rational parties do not sacrifice time, money, and goodwill on a reconsideration request without a compelling reason. Arbitrators are capable of handling requests to reconsider partial rulings efficiently and wisely. The insurer's suggestion that arbitrators cannot be trusted to manage reconsideration requests is more of the same hostility to arbitration upon which *functus officio* is premised. Allied Br. 10.

When tribunals *do* grant reconsideration, moreover, it is for good reason. This case proves the point. The arbitrators fixed a fundamental error that would have allowed the insurer to keep more than $10 million it should have paid under the insurance policy it sold to Allied. Allied Br. 21 n.1. The insurer does not explain how the "partial final award" could have been correct; rather, it seeks to make the error uncorrectable.

Because of the public and private interests in proper application of the law, however, the usual rule is that decision-makers can reconsider partial or interlocutory rulings. *See Liss v. Trans Auto Sys., Inc.*, 68 N.Y.2d 15, 20 (1986) ("every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action"). That is the usual rule because the interests of law and justice should not be outweighed by the unfounded fear that, unless eliminated, reconsideration mechanisms will be abused by parties acting against reason and self-interest.

To encourage parties to arbitrate their disputes in accordance with New York law, this Court should hold that arbitrators may reconsider a partial ruling that does not decide all disputes between the parties unless the parties have clearly provided otherwise in their written agreement.

CONCLUSION

This Court should reverse the judgment of the Appellate Division, First Department.

Dated: August 8, 2019

Respectfully submitted,

Brian A. Sutherland
REED SMITH LLP
599 Lexington Avenue
New York, NY 10022
Tel: (212) 521-5400
bsutherland@reedsmith.com

Counsel for Respondents-Appellants

John W. Schryber
Todd S. Kim
(*admitted pro hac vice*)
REED SMITH LLP
1301 K Street, N.W.
Suite 1000, East Tower
Washington, DC 20005
Tel: (202) 414-9200
jschryber@reedsmith.com
tskim@reedsmith.com

Word Count Certification

I, Brian Sutherland, hereby certify pursuant to Rule 500.13 that the total word count for all printed text in the body of the brief is 6,995 words.

/s/ Brian A. Sutherland