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Advanced Micro Devices v. Intel Corp.

by
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And therefore, as when there is a controversy in an account, the parties must by their own accord, set up for right Reason, the Reason of some Arbitrator ... to whose sentence they will both stand, or their controversy must either come to blows, or be undecided, for want of a right Reason constituted by Nature; so is it also in all debates of what kind soever.¹

Introduction

Commercial arbitration as a method of alternative dispute resolution boasts the advantages of flexibility, efficiency, and finality. Parties ostensibly bargain for these advantages when fashioning arbitration agreements. With the enactment of arbitration statutes, legislatures endorse arbitral finality by providing limited grounds for judicial review of awards. Because these statutory grounds for review are silent regarding substantive review of the arbitral award, the courts have settled in relative repose about the finality and un-reviewability of the arbitrator’s determination of the merits of a dispute. However, arbitral choice of remedy has proven to be fertile ground for attempted judicial activism. A recent example is the California Court of Appeal’s decision in Advanced Micro Devices [AMD] v. Intel Corp.,² which was subsequently reversed by the California Supreme Court.

This Note explores the question of when commercial arbitrators “exceed their powers” in fashioning relief. The inquiry begins with

* J.D., 1995; M.Ed. 1991, B.A. 1990 University of California at Los Angeles. I thank all of those who have extended constant love and support, including my parents (Richard and May), Lucas, Kelly, my grandparents (Mel and Mary Jane), Alex and Louie.

¹ THOMAS HOBBES, LEVIATHAN 33 (Oxford ed. 1909) (1651).
the basic parameters of the statutory "excess of powers" provision, and the courts' role regarding this ground of review. The next inquiry in identifying when a commercial arbitrator has exceeded remedial authority draws upon concepts from the law of remedies and guidance from labor arbitration cases. Crucial to the arbitral remedial issue is identification of the sources both granting and limiting arbitral powers and the courts' level of deference when considering the scope of arbitral authority.

Analysis of judicial decisions regarding how and to what extent arbitrators may fashion relief reveals imprecise standards that allow unprincipled interference in arbitral awards. The most popular of these formulae is the so-called "essence" test of United Steelworkers v. Enterprise Wheel & Car Corp. The use of such standards has proven contradictory and unworkable.

This Note advocates a generous view of arbitral remedial power for several reasons. First, as a creature of contract hired to determine rights under a specific agreement, the arbitrator is the parties' official "contract reader" and should enjoy flexibility in both interpreting the contract and fashioning corresponding relief. Second, the gradual acceptance of arbitral awards of punitive damages gives historical support for entrusting flexible remedial authority with the arbitrator. Not only should arbitrators have the power to award as a court would (as with punitive damages), but this remedial power should not be limited to that of a court.

This Note calls upon legislators to clarify the "excess of powers" provision for judicial review, keeping in mind: (1) the necessity of arbitral flexibility, (2) the fundamental purposes of contract remedies, and (3) the need for some judicial oversight of arbitrally fashioned remedies. This Note also advocates the statutory requirement of written, reasoned arbitral findings. However, until the Legislature takes such action, and following the California Supreme Court's decision in AMD, practitioners who wish to limit an arbitrator's remedial powers are wise to expressly set forth clear guidelines and limitations in the arbitration agreement.

Part I of this Note reviews the propounded advantages of the arbitral process, and discusses the most common illustrations of discontent prompting quests for judicial intervention. Part II outlines the statutory grounds for judicial review of arbitral awards, with particular attention to the "excess of powers" provision. Part III analyzes the scope of arbitral remedial powers as understood by the courts, and reveals the inadequacies of articulated standards. Part IV offers support for affording arbitrators remedial flexibility, and suggests guide-

3. 363 U.S. 593, 597 (1960) (holding that an arbitrator's award is valid if it draws its essence from the agreement).
lines for legislators who desire to amend the "excess of powers" provision for review, and/or require written arbitral findings. Finally, this Note includes some suggestions for practitioners who desire to use the arbitration process but wish to limit arbitral remedial authority.

I. Propounded Arbitration Advantages and Corresponding Discontent

Arbitration may be simply defined as "the resolution of disputes during the contract period by an impartial person designated by the parties for just that purpose." Courts and members of the judiciary have encouraged arbitration as a binding method of alternative dispute resolution, partly because of the "mushrooming case loads of the courts." The arbitration alternative to litigation for binding dispute resolution has proven to be a viable and popular method between commercial parties.

The propounded advantages of arbitration stem from its departure from courtroom processes. Parties in arbitration are relatively "free from the requirements and expectations familiar to judicial proceedings with respect both to the formulation of pleadings and causes of action and to historical and current legal theories as to the availability of remedies." Arbitration is frequently touted as "a speedy and relatively inexpensive means of dispute resolution." Parties in arbitration expect to have their case heard and decided in a reasonable amount of time with a minimum of fees for attorneys and arbitra-

   We must now use the inventiveness, the ingenuity and the resourcefulness that have long characterized the American business and legal community, to shape new tools. . . . Against this background I focus today on arbitration, not as the answer or cure-all for the mushrooming case loads of the courts, but as one example of "a better way to do it."
   This Note assumes arm's-length bargaining between parties for arbitration benefits, although the contrary may actually be the case. See e.g., Michael Z. Green, Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?, 5 LOY. CONSUMER L. REP. 112 (1993).
tion personnel. Furthermore, unlike judges, arbitrators may be chosen for their expertise and familiarity in a particular industry. This chosen expert engenders confidence that the award is a product of familiarity with the trade, and not of "strict legal analysis or emotion." Lastly, and what has proven most troublesome, the arbitral award is "final and binding." Parties in arbitration expect that the award "shall put the dispute to rest" and resolve it "without necessity for any contact with the court."

These advantages of arbitration are the primary benefits the parties seek in an agreement to arbitrate. When a party, discontent with the award, seeks to have it reviewed in the courts, the courts generally attempt to give effect to the original bargain of arbitral finality. Courts "long ago recognized that [their] limited role in reviewing arbitration awards is necessary to preserve the bargained-for purpose of arbitration, which is the avoidance of litigation and its concomitant costs and delays." Indeed, if courts were permitted "ex-
pansive judicial oversight,” such interference with the arbitral system would jeopardize its workability.\textsuperscript{16} As Judge Learned Hand admonished:

Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.\textsuperscript{17}

However, the popularity and widespread use of arbitration has lead to much discontent and litigation. A losing party, shocked by a seemingly unfair process, an allegedly outrageous arbitral finding of law or fact, or an unforeseeable award, will often seek a sympathetic ear in the judiciary. Some courts have listened:

the initial attractiveness of dispute resolution by arbitration has waned with the experience of now finding that arbitration often does not provide simple, inexpensive, and expeditious dispute resolution but rather “is complex, expensive and time consuming,” the “results” of which, “by private and untrained ‘judges,’” are distantly remote from the fair process procedurally followed and application of principled law found in the judicial process.\textsuperscript{18}

The discontent with arbitral remedies is illustrated in the case of \textit{Advanced Micro Devices [AMD] v. Intel Corp.}\textsuperscript{19} AMD and Intel entered into a 10-year contract for the exchange of earned information. Basically, the contract was to ensure alternate sourcing of each company’s products.\textsuperscript{20} Five years into the contract, AMD compelled arbitration seeking rights to the Intel 80386 microprocessor.\textsuperscript{21} After 355 days of hearings spanning four and one-half years, the arbitrator found that AMD did not earn rights to the Intel 80386. However, he concluded that Intel had violated the contract by “breach[ing] the implied covenant of good faith and fair dealing as well as ‘its implied covenant to negotiate reasonably to further the goals of the relationship between the parties.’”\textsuperscript{22}

\textsuperscript{16} Yarowsky, \textit{supra} note 11, at 962.
\textsuperscript{17} \textit{American Almond Prods. Co. v. Consol. Pecan Sales Co.}, 144 F.2d 448, 451 (2d Cir. 1944).
\textsuperscript{18} \textit{Ehrich}, 675 F. Supp. at 562 (quoting \textit{Stroh Container Co. v. Delphi Indus., Inc.}, 783 F.2d 743, 751 n.12 (8th Cir. 1986), \textit{cert. denied}, 476 U.S. 1141 (1986)).
\textsuperscript{19} 885 P.2d 994 (Cal. 1994).
\textsuperscript{20} \textit{Id.} at 996-97.
\textsuperscript{21} \textit{Id.} at 997.
\textsuperscript{22} \textit{Id.} at 997-98.
The parties in **AMD** had granted the arbitrator broad powers to fashion a remedy with a typical clause: "The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." The arbitrator found that, as a result of Intel's breach of the covenant of good faith and fair dealing, AMD suffered loss of profits and good will. The arbitrator further concluded that "actual damages are immeasurable; and nominal damages only are inequitable." Accordingly, the arbitrator determined that the appropriate remedy was to effectively undermine Intel's collateral legal challenges to AMD's allegedly infringing use of its reverse-engineered version of the Intel 80386, the Am386. Thus, the arbitrator awarded AMD, *inter alia*, "a permanent, nonexclusive and royalty-free license to any Intel intellectual property embodied in the Am386." Moreover, the arbitrator extended for two years all patent and copyright licensing agreements that pertained to the Am386.

Upon AMD's petition, the California Superior Court confirmed the award and denied Intel's petition for correction or vacatur. The court of appeal reversed, rejecting AMD's argument that the arbitrator may determine his own scope of remedial power, free from judicial interference. Borrowing the familiar "essence" test from labor arbitration cases, the court of appeal found that the arbitration award did not have the requisite "rational nexus" to the underlying agreement. The court found that AMD should not have rights pertaining to an unearned product, nor should the contract be extended another two years through arbitration "which the parties could not have done


Of dubious significance was a further "order of reference" limiting remedies to what the arbitrator "in his discretion determine[d] to be fair and reasonable but not in excess of his jurisdiction." **AMD**, 885 P.2d at 1007. This order of reference was probably not significant because it was redundant with Rule 43, and like Rule 43, it spoke only to the parties and the arbitrator, and did not purport to bind a reviewing court.

25. *Id.* at 998 (quoting the arbitrator).
26. *Id.*
27. *Id.* at 998-99.
28. *Id.* at 999.
29. *Id.*
31. *Id.* at 77-78 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).
under the contract." 32 Hence, the appellate court reasoned that the arbitrator's "rewriting" of the agreement exceeded his powers, and the court corrected the award by striking the offending remedies. 33

A sharply divided California Supreme Court reversed the court of appeal. 34 Although the majority acknowledged that courts have the "ultimate" power to overturn "unauthorized" remedies, 35 its interpretation of the scope of arbitral authority was surprisingly broad. The majority held that "the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of the contract found, expressly or impliedly, by the arbitrator." 36 The majority identified the "critical question with regard to remedies" as "whether the remedy chosen is rationally drawn from the contract as . . . interpreted [by the arbitrator]." 37 The court explained that a reviewing court must consider the source of the remedy: if the award is based upon the agreement as interpreted by the arbitrator, it survives review; if it "derives from some extrinsic source," it must be overturned. 38 The court held that the relationship of the award to the agreement and breach need only be "rational" and that the contractual terms at issue may be either (1) expressly interpreted by the arbitrator, (2) implied by the award itself, or (3) "a plausible theory of the contract's general subject matter, framework or intent." 39 The court instructed that if parties desire to restrict an arbitrator's remedial powers, they "would be well advised to set out such limitations explicitly and unambiguously in the arbitration clause." 40

Applying the new standard of review to the instant case, the court upheld the arbitrator's award. 41 The court found that the intellectual property rights and two-year contract extension awarded to AMD were rationally related to the contract and breach as interpreted by the arbitrator. 42 The majority rejected the court of appeal's reasoning that the award violated the underlying contract by granting rights to

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32. Id. at 79.
33. Id. at 79-80. The effect of the correction was to leave AMD $1 in damages for the breach of the covenant of good faith and fair dealing. See id. at 75.
34. AMD, 885 P.2d 994, 1012 (Cal. 1994).
35. Id. at 1002.
36. Id. at 996; see id. at 1005-06.
37. Id. at 1003.
38. Id. at 1006 (citing United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 38 (1987)).
39. Id. at 1005 (citing Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184, 186 (7th Cir. 1985)).
40. Id. at 1007.
41. Id. at 1012. The court noted that there were no special limitations set upon the arbitrator's remedial power. Id. at 1007.
42. Id. at 1008-09.
an "unearned" product, and found that the remedy was rationally fashioned to enable AMD to recover from the effects of Intel's breach of the implied covenants.\textsuperscript{43} The majority endorsed the view that arbitrators enjoy greater flexibility than courts in determining remedies.\textsuperscript{44}

The dissent would have added to the majority's "rational relationship" test a "scope-of-available-remedies" test;\textsuperscript{45} i.e., the arbitrator's award must "fall within the range of remedies that a court could award for the same claim."\textsuperscript{46} The dissent also rejected application of the "essence" test from the labor arbitration realm to commercial arbitration.\textsuperscript{47} The dissent noted that it would have overturned the disputed portions of the award because it was comprised of equitable relief other than the normal contract remedy of specific performance.\textsuperscript{48}

This case presented several of the classic problems in reviewing arbitration remedies: (1) What are permissible grounds for judicial review of an arbitral award? (2) What level of deference must a court grant an arbitrator's findings and determinations? (3) When have arbitrators "exceeded their powers"? (4) When does a remedy not "draw its essence" from the parties' agreement? (5) How may courts further the policy of arbitral finality while declining to enforce impermissible arbitral remedies?

\section*{II. Statutory Grounds for Judicial Review of Arbitration Awards}

Arbitration awards, standing alone, have only the force of a contract and are not self-enforcing.\textsuperscript{49} If necessary, the recipient of a favorable arbitral determination must seek "confirmation" of the award in court; an award duly confirmed has the effect of a civil judgment.\textsuperscript{50} Similarly, a disappointed party may seek to have the award "vacated" or "corrected" by the court. The grounds for correction or

\textsuperscript{43} \textit{Id.} at 1009.
\textsuperscript{44} \textit{Id.} at 1012.
\textsuperscript{45} \textit{Id.} at 1018 n.5.
\textsuperscript{46} \textit{Id.} at 1013 (Kennard, J., dissenting).
\textsuperscript{47} \textit{Id.} at 1018.
\textsuperscript{48} \textit{Id.} at 1020.
\textsuperscript{49} \textit{E.g.,} \textit{CAL. CIv. PROC. CODE} § 1287.6 (Deering 1993); Mandel, \textit{supra} note 9, at 507.
\textsuperscript{50} \textit{E.g.,} \textit{CAL. CIv. PROC. CODE} § 1287.4 (Deering 1993). In this manner, courts become instruments to further the arbitrator's determinations. For this reason, some judges find judicial confirmation of substantially unjust awards unacceptable. \textit{See} Moncharsh v. Heily & Blase, 832 P.2d 899, 919-24 (Cal. 1992) (Kennard, J., joined by Mosk, J., concurring in part and dissenting in part) (arguing that courts should not be agents of injustice by confirmation of an award that on its face is legally erroneous and results in substantial injustice).
vacatur have been legislatively enumerated. In many jurisdictions, the grounds for judicial review are deemed exclusively statutory. The typical statutes providing review are heavily skewed towards relief for procedural defects rather than substantive unfairness: e.g., corruption, fraud, partiality, misconduct, or other undue means in procuring the award, unreasonable refusal to postpone a hearing or hear material evidence, or correction of evident miscalculation or imperfection as to form. The statutory ground most susceptible to substantive review of arbitral determinations—including the choice of remedy—is the provision permitting vacatur when the arbitrators "exceeded their powers."

A. The Parameters of "Excess of Powers"

It is well settled in California that arbitrators do not exceed their powers (or "authority") by deciding the "merits" of the dispute erroneously. Since the merits "include all the contested issues of law and fact submitted to the arbitrator for decision," courts refuse to re-


52. See Moncharsh, 832 P.2d at 905; Theodore J. St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny, 75 Mich. L. Rev. 1137, 1160 (1977) (concluding, inter alia, that "[a] court asked to review or enforce an arbitral award can relax about the merits. . . . The only conditions are procedural, not substantive—jurisdiction, authority, honesty, fairness, and basic rationality.").


Although not pertinent to the discussion of this Note, courts will also overturn awards that are illegal or contrary to public policy; these grounds have been discussed at length elsewhere. See Restatement (Second) of Contracts § 178(1) (1979) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."); St. Antoine, supra note 52, at 1155-57; Note, Judicial Review of Arbitration: The Role of Public Policy, 58 Nw. U. L. Rev. 545 (1964). See generally United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42-48 (1987) (noting that an arbitrator has exceeded his or her power when their decision contravenes public policy). Arguably, if an arbitrator makes an award in contravention of law or public policy, he exceeds his powers, thus coming within the statutory proscription. See Southern Cal. Rapid Transit Dist. v. United Transp. Union, 6 Cal. Rptr. 2d 804, 807 (Ct. App. 1992).

55. Moncharsh, 832 P.2d at 916.
view contested issues of "law or fact." Accordingly, an arbitrator's reasoning, or allegations regarding the sufficiency of evidence, are also not subject to review under the "excess of powers" provision. In curtailing a court's powers to review arbitral determinations of law or fact, the arbitration process dramatically departs from that of review of trial court decisions.

This policy of limited judicial review is a


Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or fact. A contrary course would be a substitution of the judgment of the Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.

Id. at 349; see also United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.").

The awards of arbitrators are not subject to judicial review for errors of law or of fact. Nor should there be the control which would flow from the exercise of such power of review. Submissions are for determinations based on the ad hoc application of broad principles of justice and fairness in the particular instance. Reliance is not placed on continuity of tribunal personnel or operation. Predictability is not an objective and awards do not have, nor is it intended that they should have, the precedential value that we attach to judicial determinations.


57. Moncharsh, 832 P.2d at 916 ("It is well settled that 'arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision.'" (quoting O'Malley v. Petroleum Maintenance Co., 308 P.2d 9, 12 (Cal. 1957)); see Misco, 484 U.S. at 37-38 ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept.").

58. E.g., Moncharsh, 832 P.2d at 904.

59. Misco, 484 U.S. at 38 ("Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decision of lower courts.").

Many courts, however, have carved out an exception for the nonreviewability of legal error, and will vacate an award for "manifest disregard of the law." See, e.g., Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991).

Manifest disregard has proved to be a troubling and rather unworkable standard. Writes Oehmke, "[w]hen 'misinterpretation of law' becomes so serious and grave that it is elevated to the plateau of 'manifest disregard of law,' an award may be vacated. [It is] beyond and different from a mere error in the law, or failure of the arbitrator to understand or apply the law." THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 4:28, at 103-04 (1987 & Supp. 1993). In 1961, the Ninth Circuit understood that "manifest disregard" might be defined as "when arbitrators understand and correctly state the law, but proceed to disregard the same." San Martine Compania de Navegacion S.A. v. Saguenay Terminals, Ltd., 293 F.2d 796, 800-01 (9th Cir. 1961); see Oehmke, supra, § 4:28, at 104.

Other courts are unable to let stand an award that they find so egregiously unfair as to be "utterly irrational." E.g., Volvo N. Am. Corp. v. DePaola, 554 N.Y.S.2d 835 (App. Div.
concession to the arbitral process for making determinations based upon “principles of equity and good conscience” and awards “ex aequo et bono [according to what is just and good]”\textsuperscript{60} rather than a court’s strict legal rules.

Confounding any attempt to review an arbitrator’s determinations is the lack of a requirement to articulate findings or reasoning in the arbitrator’s awards.\textsuperscript{61} Thus, “arbitrators may render a lump sum award without disclosing their rationale for it.”\textsuperscript{62} For example, an award for “$50,000 to Party A from Party B on X date” is presumably legally sufficient for judicial enforcement.\textsuperscript{63} Although not requiring clear articulations of findings may seem to frustrate practical judicial review,\textsuperscript{64} courts recognize the impropriety of establishing such a requirement: “[t]o require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable because a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.”\textsuperscript{65} In the interests of finality and to eliminate possible

\textsuperscript{60}Moncharsh, 832 P.2d at 904 (quoting Muldrow v. Norris, 2 Cal. 74, 77 (1852)).


\textsuperscript{62}Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985).

\textsuperscript{63}See Oehmke, supra note 59, § 3:29, at 57; Moncharsh, 832 P.2d at 904 (quoting Case v. Alperson, 5 Cal. Rptr. 635, 636-37 (Ct. App. 1960) (noting that parties submitting to arbitration are “bound by an award reached by paths neither marked nor traceable and not subject to judicial review”).


problems in this regard, arbitrators are in fact advised not to explain their awards. Hence, courts resign themselves to inferring grounds for relief from the award itself, in order to deem the award "within the scope of the Arbitrator's authority."  

While courts do not review the merits of a dispute under the "excess of powers" provision, the concepts of arbitral "subject matter jurisdiction" and remedial authority do come within its purview. Thus, arbitrators exceed their authority if they decide an issue not submitted to them, fashion "impermissible" remedies, or otherwise exceed their authority "as defined in the Constitution, statutes, or judicial decisions." Although the questions of submission to arbitration and corresponding remedial power are related, it is important that the two are initially subject to separate analysis under "excess of power." Thus, a reviewing court's threshold question should be whether the arbitrator improperly determined an unsubmitted issue. A much different scenario arises when the arbitrator has decided the merits of a properly submitted dispute but has fashioned an impermissible remedy in response. In both cases, the court should vacate the entire award, or if possible, strike only its offending portions. Unfortunately, in analyzing these issues, courts and commentators have tended to "put the cart before the horse" by blending the threshold submission question into the remedial authority issue, without recognizing the lineal process of analysis. A typical analysis states,

66. E.g., Oehmke, supra note 59, § 3:29, at 57-58 ("The operating premise is: less is more!").
67. Malekzadeh, 611 A.2d at 22 (citations omitted); see also AMD, 885 P.2d 994, 1005-06 (Cal. 1994).
68. AMD, 885 P.2d at 1000.

The issue of arbitrability is not often problematic in the commercial arbitration context because of broad arbitration clauses covering "any dispute arising under" the underlying contract. E.g., Todd Shipyards, 943 F.2d at 1060; AMD, 20 Cal. Rptr. at 79.
70. See, e.g., AMD, 885 P.2d at 1002-03.
71. Moncharsh v. Heily & Blase, 832 P.2d 899, 924 (Cal. 1992) (Kennard, J., concurring in part and dissenting in part) (citing Times Mirror Co. v. Superior Court, 813 P.2d 240, 244 (Cal. 1991)); see also St. Antoine, supra note 52, at 1151 (stating that with respect to arbitral jurisdiction or authority, "[a]rbitrators are subject to the mandate of the parties not only with regard to 'subject matter' jurisdiction, but also with regard to the capacity to fashion a particular remedy.").
72. See AMD, 885 P.2d at 999-1000 (noting deference due to arbitrator's determination of arbitrability, and lack of distinction in arbitration statute between judicial review of arbitrability and remedial discretion).
73. See id. at 1000.
74. Such mistakes are understandable: "With regard to a court's authority to grant an equitable remedy, the line between 'subject matter' jurisdiction and remedial powers has
“[a]lthough arbitrators enjoy a broad grant of authority to fashion remedies . . . arbitrators are restricted to those issues submitted.”

The focus of the present discussion is solely whether an arbitral remedy exceeds an arbitrator’s powers.

Enforcement statutes clearly state that an award is set aside if the court determines that an arbitrator exceeded his or her powers. Thus, whether an arbitrator’s choice of remedy was within his or her authority is a matter for judicial determination, and not for the unchecked discretion of the arbitrator. A stipulation that “the Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable” does not vest complete power of remedial determination in the arbitrator; the rule speaks only to the arbitrators and parties within a dispute and does not, in and of itself, purport to bind the court. The courts’ own struggle regarding the scope of judicial power to review arbitral remedial authority was aptly described by a California court of appeal before the AMD decision:

[T]he law has not found a position of repose on the question of judicial review. That, in part, is attributable to misgivings about the propriety of assigning a completely unreviewable power to private persons to authorize an award that is judicially enforceable. The fundamental purpose of a written contract is to subject, insofar as feasible, the jural consequences of future events to a written standard. If the arbitrators are completely cut loose from these contractual moorings, they may impose, through judicial enforcement of the award, any remedy, however fantastic, excepting only those that are illegal per se. The policy which favors the finality of an arbitration award should not be nor need not be extended to this extreme.

B. Determining the Meaning of “Excess of Powers”

This Note now turns to the analysis of the substantive issue plaguing the courts: when has an arbitrator “exceeded” remedial powers?

undoubtedly been obscured by the fact that historically the ‘system of equity’ derived its doctrines, as well as its powers, from its mode of giving relief.” Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 404 n.5 (1971) (Harlan, J., concurring). However, to simply assert that the fashioning of appropriate relief is itself a “submitted issue” improperly collapses the analyses, and the circularity of this assertion would not further the present discussion.

75. Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979) (citing AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES, Rule 42 (now Rule 43)).
76. See, e.g., CAL. CIV. PROC. CODE §§ 1286.2, 1286.6 (Deering 1993).
77. AMD, 885 P.2d at 1002.
The question is important for courts, arbitrators, and commercial parties alike. Indeed, as one court has noted, "for a court to enforce an award that clearly is beyond the arbitrator's power denies the parties of the benefit of their bargaining just as surely as overturning an award because the court disagrees with the decision's legal or factual basis." 79

This section begins with a brief discussion of remedial purpose, and the propriety of guidance from labor arbitration cases, before explaining the basic parameters of arbitral authority.

(1) General Principles from the Law of Remedies

Although review of a dispute's merits is an issue distinct from review of the corresponding remedy, the remedy is nevertheless the "means of carrying into effect the substantive right." 80 Because "the remedy should reflect the right or the policy behind that right as precisely as possible," 81 the reviewing court must delve into the merits of the case far enough to ascertain those substantive rights the arbitrator may have arguably determined. A remedy is then selected, appropriately measured, and ideally should not "go far beyond the plaintiff's bargained for right." 82 Thus, a court reviewing an arbitration award might be asked to determine: (1) the substantive rights properly submitted to and decided by the arbitrator, such as breach of contract; (2) whether the selected remedy arguably reflects that right, e.g., money damages; and (3) the arguable propriety of the measure of the remedy, such as the monetary amount awarded.

An important corollary to the above principles serves as guidance to reviewing courts: the one fashioning the remedy is, ideally, intimately familiar with the substantive law and policies affecting the underlying right. 83 Hence, arbitrators chosen for their expertise and familiarity in a particular field may be trusted, to a certain extent, to fashion appropriate relief. 84 Discontent parties who convince courts that the right and remedy did not correlate may have clouded the issues by focusing attention on the "defective" remedy, rather than the right as determined by the arbitrator. 85

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80. DAN B. DOBBS, LAW OF REMEDIES § 1.7, at 22 (1993).
81. Id. § 1.7, at 23. But see AMD, 885 P.2d at 1006 (noting that an arbitrator's remedy need not correspond exactly to a party's rights had the contract been performed).
82. DOBBS, supra note 80, § 1.7, at 23.
83. Id.
84. See AMD, 885 P.2d at 1001 (noting that the parties have "a contractual expectation of a [remedial] decision according to the arbitrators' best judgment").
85. See id. § 1.7, at 24-26.
(2) The Propriety of Guidance from Labor Arbitration Cases

In examining the commercial arbitrator's remedial authority, it is instructive, although not dispositive, to look to labor arbitration cases and their determinations. Numerous courts reviewing commercial arbitration awards have looked to labor arbitration for guidance. It is important, however, to acknowledge some of the significant differences between labor and commercial arbitration. First, commercial arbitration is an efficient substitute for litigation while labor arbitration is an alternative to "industrial strife," such as strikes. Labor arbitration may be viewed as "only part of a larger collective bargaining process" or "system of industrial self-government," while commercial arbitration is a "one shot deal" for resolving a particular dispute. Accordingly, labor arbitrators' decisions must take into account that the parties' relationship must "function smoothly in the future" while commercial arbitrators tend only to resolve past disputes. Finally, unlike commercial arbitration, labor arbitration may not strive to interpret the parties' agreement as much as it serves "as an organic extension, a fulfillment, a flowering of the seed it planted."

Despite the above differences, courts, such as the majority in AMD, and commentators borrow some remedial analysis from labor cases for application to the commercial arbitration context. One fer-

86. E.g., AMD, 885 P.2d at 1003-04 (borrowing test from United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)); see also Richard P. Hackett, Note, Punitive Damages in Arbitration: the Search for a Workable Rule, 63 CORNELL L. REV. 272, 291 (1978) (noting that federal courts, confronted with commercial cases, have been willing to take lessons from labor law).


89. AMD, 885 P.2d at 1004 (Noting that commercial as well as labor disputes may involve extended, complex dealings).

90. Collyer, supra note 88, at 395; accord Raytheon Co. v. Automated Business Sys., Inc., 882 F.2d 6, 10-11 (1st Cir. 1989) (finding labor cases limiting punitive damages remedies to express contractual authorization inapplicable to commercial cases). But see AMD, 885 P.2d at 1004 (noting that commercial as well as labor disputes may involve extended, complex dealings).

91. Mandel, supra note 9, at 510 n.23. For this reason, punitive damages in labor arbitration cases are often disallowed unless expressly provided for by the parties.

92. St. Antoine, supra note 52, at 1139; see United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 38 (1987); AMD, 885 P.2d at 1005-06.

93. 885 P.2d at 1003-05.
tile source of labor arbitration policy often cited is known as the Steelworkers Trilogy.\(^{94}\)

(3) Sources and Limits of Arbitral Authority

The question of the scope of an arbitrator's general powers, and more specifically, the arbitrator's remedial powers, is rooted in the sources from which the powers stem, and the limits placed upon them. On a broad scale, arbitral powers are limited by federal and state constitutions; awards deemed violative of these constitutions are accordingly invalid. Further, arbitrators are prohibited from issuing awards that are violative of public policy, or are illegal (as distinct from being based upon erroneous application of law).\(^ {95}\) While these limitations bring an attendant body of concerns, the most complex determination of the scope of arbitral remedial power requires interpretation of the particular parties' agreement.\(^ {96}\)

The agreements between the parties in arbitration both grant arbitral authority—including remedial power—and limit it.\(^ {97}\) The agreements granting authority are (1) the arbitration agreement, which may be found within the underlying contract from which the dispute arose; (2) the written submission to the arbitrators of the disputed issues; and (3) arbitration rules.\(^ {98}\) The arbitrator's powers are derived from, and must be found, in the context of these sources.\(^ {99}\) A leading arbitration authority states:

[The]he arbitrator is empowered to decide[ ] all issues (whether question [of] fact or law) presented, and fairly remedy the problem—unless otherwise restricted from doing so, in any specific way, by the language of the arbitration agreement. This basis requires that the


\(^{95}\) See AMD, 885 P.2d at 1010.

\(^{96}\) See Yarowsky, \textit{supra} note 11, at 958 ("Lack of power may flow from external limitations imposed by law, or internal ones embodied in the contractual agreement.").

\(^{97}\) See Moncharsh v. Heily & Blase, 832 P.2d 899, 902 (Cal. 1992) (quoting Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 673 P.2d 251 (Cal. 1983)); accord Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979) ("Arbitration is contractual and arbitrators derive their authority from the scope of the contractual agreement.") (citing \textit{Enterprise Wheel}, 363 U.S. at 597); Kaden, \textit{supra} note 4, at 275 ("[T]he parties have an institutional stake in finality because the arbitrator is their creation; he functions by their consent and at their sufferance, and his powers and roles can and should be molded by them to suit their own purposes.").

\(^{98}\) See AMD, 885 P.2d at 996.

Typically, commercial parties incorporate the American Arbitration Association’s Commercial Arbitration Rule 43 (“Rule 43”) in their arbitration agreement. The pertinent section of Rule 43 reads, “[t]he Arbitrator may grant any remedy or relief that the Arbitrator deems just and equitable and within the scope of the agreement of the parties.” Some courts have found that this rule distinguishes commercial from labor arbitration with its broad grant of remedial power. The qualification incorporated in Rule 43, “within the scope of the agreement of the parties,” conforms to the notion that the parties’ underlying contract serves to limit arbitral remedial power.

In the interest of arbitral finality, courts are admonished to generously view the scope of an arbitrator’s authority. In the labor context, the United States Supreme Court stated in one of the Steelworkers Trilogy cases:

[An arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.]

There is no shortage of judicial proclamations respecting this deference to the arbitrator’s determination of the scope of his or her authority. This judicial concession is necessary both to allow

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102. See Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1062-63 (9th Cir. 1991) (finding that although punitive damages may not be awarded in labor arbitration cases unless a contract expressly provides, Rule 43 permits awarding of punitive damages in the commercial arbitration context).
104. See United Paperworkers Int’l Union v. Misco, 484 U.S. 29, 38 (1987) (“Where it is contemplated that the arbitrator will determine remedies for [the] contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined.”); Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir. 1990) (“The standard of review is thus a very deferential one. This Court must sustain arbitration awards even if it does not agree with the arbitrators’ interpretation of the contract”), cert. denied, 501 U.S. 1206 (1991); Willoughby Roofing v. Kajima Int’l, Inc., 776 F.2d 269, 270 (11th Cir. 1985) (recognizing a court’s obligation “to resolve all doubt in favor of the arbitrator’s authority to award a particular remedy”) (emphasis added), aff’d 598 F. Supp. 353 (N.D. Ala. 1984); AMD, 885 P.2d at 1003-04; Laura v. Soriano, 4 Cal. Rptr. 328, 331 (Ct. App. 1960), quoted in Luster v. Collins, 19 Cal. Rptr. 2d 215, 218-19 (Ct. App. 1993) (“[E]very reasonable intendment must be indulged in favor of the award.”).
flexibility in arbitral dispute resolution and to give effect to the policy of arbitral finality. Thus, courts resolve any doubts in favor of an arbitrator's remedial authority. This position is also encouraged by the fact that arbitrators need not articulate explanations for awards. Without details surrounding the award before them, courts find difficulty in determining "the parameters" of the award. Without requisite findings, it seems sound doctrine that a remedy be upheld "if a legally correct explanation of [it] is conceivable." However, absolute deference to arbitrators is not appropriate. After

105. Two examples from the Sixth Circuit are instructive:

It is implicit in the Agreement and in accord with the interest of both parties that the arbitrator view the Agreement in the realistic light of the history which brought it about. In conclusion, then, the arbitrator's award here was perhaps unusual and even bizarre, but it was related to arguably proper compensatory damages and thus found its essence in the terms of the Agreement. . . . [W]here conduct of one party is arguably subject to arbitration, we will defer to the arbitrator's authority to fashion a unique remedy, where the remedy does not appear to have been expressly barred by the collective bargaining agreement, and where the remedy is at least arguably supported by equitable considerations which arise from the essence of the collective bargaining Agreement itself and the history of its development as seen by the proofs before the arbitrator.


[The] mandate clearly is that in interpreting . . . [an] agreement and in fashioning a remedy in accordance with that agreement, an arbitrator is given broad latitude and discretion. His remedy need not be specifically authorized by the agreement. And, so long as his remedy represents a fair solution to the dispute, the remedy awarded should be affirmed. Reviewing courts should be extremely reluctant to substitute their interpretation of the agreement for that of the arbitrator. . . . [H]is awards should be upheld so long as he does not disregard or modify plain and unambiguous provisions of . . . [the] agreement.


107. *Misco*, 484 U.S. at 38 ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.").

The task of judicial review in cases such as this is never an easy one for a trial or appellate court. The facts of this case graphically illustrates the fine line between formulating remedies appropriate for a particular breach and imposing one's own brand of industrial justice. We recognize also that it does not ease the task of a trial judge for an appellate court to reach a contrary conclusion with the observation that each decision must necessarily be based upon application of relevant law to the unique facts before the court. If there is a principle therefore to be drawn in our reversal here, it is our conclusion following *Misco* that in close cases such as this, the decision of the arbitrator must be accorded controlling respect.

Local 120, 892 F.2d at 1289.

108. See supra notes 61-67 and accompanying text.


110. Hackett, supra note 86, at 297.
all, "[t]he Constitution vests the judicial power of the United States in the federal courts, not in arbitrators." 111

III. The Scope of Arbitral Remedial Authority

Having thus established that arbitrators are limited by the parties' agreements, and that courts are in general highly deferential toward arbitral remedial decisions, the next question is how and to what extent an arbitrator is permitted to fashion relief. Most commercial arbitration agreements contain expansive clauses covering any dispute arising out of the contract or related transaction. 112 Once the arbitrator determines the substantive rights of the parties arising from the contract, and within the context of the dispute, the arbitrator must then fashion corresponding relief. 113 When determining a party's contractual rights, the arbitrator typically has "broad" authority "concerning the composition, meaning, and scope of that agreement." 114 Since this contract interpretation would seem to fall within the "merits" of a dispute, this acknowledgment of authority is not too surprising. However, the exact scope of the "broad" power in relation to remedies has varied with the facts of each case, and has been determined by inconsistent standards.

Common verbal incantations explaining arbitral remedial powers include: the arbitrator may not make an award that contradicts the express language of the agreement; 115 an award is impermissible if "the arbitrators' interpretation or application of a contract is completely outside its scope"; 116 "[t]he arbitrator may not ignore the plain language of the contract[,] but [assuming that the parties] authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." 117 As may be expected, exactly when the arbitrator crosses the line from merely "misreading" the contract to "ignoring" its plain language is somewhat of a mystery. Even more creative is the notion that "a decision exceeds the arbitrator's powers only if it is so utterly irrational that it amounts to an arbitrary remak-

112. See, e.g., Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991); AMD, 885 P.2d 994, 997 (Cal. 1994).
113. See supra notes 61-67 and accompanying text.
114. Todd Shipyards, 943 F.2d at 1060.
Does this standard mean that an arbitrator may "remake" the contract as long as it is not "arbitrarily" done? One court has attempted to give some meaning to the "arbitrary remaking" standard: when "the arbitrators' reading and application of the contract is clearly within the range of ambiguity, i.e., within the ordinary bounds of semantic permissibility, there can be no tenable claim that the contract has been arbitrarily remade." Last, some courts have looked to the "foreseeability" of the remedy to determine its permissibility: "When a collective bargaining agreement neither mentions a specific remedy nor contains language from which that remedy can be 'fairly implied,' a court must consider 'whether it is at all plausible to suppose that the remedy devised was within the contemplation of the parties and hence implicitly authorized by the agreement.'

The above formulae have either derived from, or have now been subsumed within the seminal standard of review for arbitrators' awards: the "essence" test of United Steelworkers v. Enterprise Wheel & Car Corp. In an oft-quoted passage, the Court wrote:

"[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

118. Southern Cal. Rapid Transit Dist. v. United Transp. Union, 6 Cal. Rptr. 2d 804, 807 (Ct. App. 1992) (citing Posner v. Grunwald-Marx, Inc., 363 P.2d 313 (Cal. 1961); see also Summit Indus. Equip., Inc. v. Koll/Wells Bay Area, 230 Cal. Rptr. 565, 571 (Ct. App. 1986)); accord Blue Cross, 23 Cal. Rptr. 2d at 362 (when "the arbitrators are considered to have 'rewritten' the agreement of the parties"); Pacific Gas & Elec. Co. [PG&E] v. Superior Court, 19 Cal. Rptr. 2d 295, 306 (Ct. App. 1993) (authorizing judicial intervention where the arbitrator's "application or construction of the contract presents such an egregious mistake that it amounts to an arbitrary remaking of the contract between the parties"). The AMD majority concluded that the "arbitrary remaking" test for judicial review of arbitral remedial power was "incomplete." AMD, 885 P.2d 994, 1003 (Cal. 1994) (rejecting as well the "completely irrational" test).

119. PG&E, 19 Cal. Rptr. 2d at 307-08.


121. 363 U.S. 593 (1960).

122. Id. at 597.
This articulation of arbitral power has at once been seized upon by courts reviewing awards, and criticized by both courts and commentators. In an insightful passage which speaks to the topic of this Note, one writer has criticized:

The judicial role is more ambiguous and difficult to define when it is claimed that an arbitrator who decided a grievance clearly within his jurisdiction exceeded his authority either in the type of remedy he ordered or in the way he construed the agreement. This is the circumstance that goes to the heart of the essence test of Enterprise Wheel. However, to say as the Court did in that case that the merits of an arbitrator's reading of a contract must be respected so long as his words show no infidelity to that contract does not really help.

Courts have grappled with the meaning of the essence test with various levels of clarity. Some extrapolate to various standards that appear to authorize troublingly substantive review, contrary to arbitral policy. By this standard, an award does not draw its essence from the agreement if it "conflicts with express terms ... imposes additional requirements ... [or] ... is without rational support ... [in] the agreement ... [or] ... is based on general considerations of fairness and equity instead of the precise terms of the agreement." Other courts throw in the essence test "for good measure" while duly acknowledging the deferential review: e.g., "though the arbitrator's decision must draw its essence from the agreement, he 'is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.'"

Whenever an arbitrator misreads a contract, it is possible to say that his award fails to draw its essence from the contract; that the ground of the award is not the contract but the arbitrator's misreading. But so long as the award is based on the arbitrator's interpretation—

123. See, e.g., Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184 (7th Cir. 1985); AMD, 885 P.2d at 1003-04; Screen Actors Guild v. A. Shane Co., 275 Cal. Rptr. 220, 223 (Ct. App. 1990).

124. See Kaden, supra note 4, at 270, 276 ("The problem with this articulation of the limits of finality is that it provides little guidance as to the appropriate standard for judicial review of arbitral awards." Further, "the lower courts have endeavored to formulate [the 'essence' test] ... with at best indifferent success. ... "What has become known as the 'essence' test of Enterprise Wheel plainly does not elaborate reasons for finality sufficient to describe either the circumstances in which the principle properly applies, or those in which enforcement of an arbitrator's award may be denied." (citations omitted)); see Ethyl Corp., 768 F.2d at 184; St. Antoine, supra note 52, at 1148.

125. Kaden, supra note 4, at 297 (emphasis added).


unsound though it may be—of the contract, it draws its essence from the contract.\textsuperscript{128} One court has simply concluded that an award that has not been drawn from the essence of the agreement is illegal and therefore unenforceable.\textsuperscript{129} Finally, the majority in AMD identified the essence test as properly focusing on the source of the remedy, while fashioning its own test in terms of a rational relationship to the contract as well as to the breach.\textsuperscript{130}

While most of these standards lack principled clarity, at least the deferential standards of the essence test are more consistent with the policy of arbitral deference and finality. However, as one court has aptly noted, it might have been better had the court "not said 'draw[ ] its essence from the . . . agreement,' arresting as this formulation is . . ., but instead had made the test simply whether the arbitrator had exceeded the powers delegated to him by the parties."\textsuperscript{131} This suggestion is preferable for at least two reasons. First, it keeps the standard of review directly within the wording of the statute.\textsuperscript{132} Second, it shifts the focus away from the substantive review that courts may be tempted to conduct using the essence test.\textsuperscript{133}

\textbf{IV. The Need for Broad Arbitral Remedial Power}

Redefining the issue of arbitral remedial authority—through the essence test and its variations—and including it within the "excess of power" wording of the statute is helpful, but requires a return to the substantive issues. We are still left with a series of difficult questions. For example, if a commercial arbitrator's award is unreviewable for questions of law or fact, including contract interpretation, how may principled review for the responsive relief granted be effected? Put another way, if the arbitrator has absolute authority to determine the substantive rights of the parties, how may courts determine whether the arbitrator has exceeded his or her powers in fashioning the corresponding remedies? Indeed, how may any review of remedy be effected when inquiry into its corresponding right is confounded by the lack of an arbitral articulated-findings requirement?\textsuperscript{134} These ques-

\begin{itemize}
\item \textsuperscript{128.} Ethyl Corp., 768 F.2d at 184.
\item \textsuperscript{129.} United Steelworkers of Am. v. USX Corp., 966 F.2d 1394, 1400 (11th Cir. 1992), cert. denied, 113 S. Ct. 1386 (1993).
\item \textsuperscript{130.} AMD, 885 P.2d at 1003, 1005-06.
\item \textsuperscript{131.} Ethyl Corp., 768 F.2d at 184 (emphasis added).
\item \textsuperscript{132.} That is, instead of indirectly within the statute through the tortured path that arbitrators "exceed their powers" if their award does not "draw its essence" from the agreement.
\item \textsuperscript{133.} See Ethyl Corp., 768 F.2d at 184; St. Antoine, supra note 52, at 1148.
\item \textsuperscript{134.} See supra notes 61-67 and accompanying text.
\end{itemize}
tions support the conclusion that permitting broad arbitral remedial authority is necessary.

A. The Arbitrator as "Contract Reader"

Shifting the focus of review from the merits of the dispute to the arbitrator's granted powers is consistent with the insightful theory that the arbitrator is the designated "contract reader." Under this principle, the arbitrator is the parties' "joint alter ego" whose task is "to handle the anticipated unanticipated omissions of the initial agreement." Viewing the arbitrator as the contract reader, "the court need have no qualms about enforcing an award that appears to the court to be at odds with the parties' agreement." Thus, arbitral "misinterpretation" or 'gross mistake' . . . becomes a contradiction in terms." Taking the contract reader hypothesis one step further to the question of remedies: "an arbitrator's sole remedial function is to interpret and apply what the agreement says about remedy . . . The function of the arbitrator, as the parties' 'contract reader,' is to determine and award the remedy provided for by the agreement."

Consistent with the contract reader theory, courts have permitted arbitration awards that arguably conflict with the plain language of agreements. However, allowing these awards seems proper, especially when the question of the scope of the parties' agreement is actually submitted to the arbitrator. This submission may include whether the contract itself represents the "complete agreement of the parties." In interpreting the scope of the contract, the arbitrator is free to adhere to or reject legal rules, such as the parol evidence rule, since rules of evidence need not apply.

135. See St. Antoine, supra note 52, at 1140.
136. Id. at 1140 (dictum so in original).
137. Id. at 1141.
138. Id. at 1140.
139. Feller, supra note 87, at 130 (emphasis added). Presumably, Feller intends that emphasized phrase to mean the "agreement" as interpreted by the arbitrator, as well as express or implied remedial provisions in the agreement. See id. at 134-35. Feller does not explain, however, how a remedy for an unforeseeable breach might be "provided for by the agreement." See id.

Although the AMD majority insists that the crucial question is not the arbitrator's interpretation of the agreement, but rather whether the remedy rationally derives from the agreement, such a focus ignores the inextricable relationship built within the court's test between the remedy and the "contract as interpreted, expressly or impliedly." AMD, 885 P.2d 994, 996-1001 (Cal. 1994).
140. See Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991).
141. Indeed, the arbitrator may be wise to at least hear, then disregard if desired, all extrinsic evidence surrounding the contract, lest the award be overturned for the statutory ground of refusal to hear material evidence. Moreover, even if an arbitration agreement
sence of contrary public policy or an express provision in the arbitration agreement otherwise limiting his authority, the arbitrator of the disputes between these parties would have the power to grant relief which in the courts would be called reformation by rewriting the provisions of the lease." 142 Likewise, in AMD, the court upheld the arbitrator's award of a two-year extension of an agreement. 143

When the scope of the parties' agreement is not deemed a submitted issue, an arbitrator's award may still do well to "reflect the spirit rather than the letter of the agreement" even where the court feels that "the arbitrator's interpretation disregards the apparent, or even the plain, meaning of the words." 144 Thus, when an award is "rationally inferable from the language and purpose of the contract" the courts may do well to uphold it. 145 Cases like SCM Corp. and AMD emphasize the power of the arbitrator as contract reader and reveal the circular unworkability of the "essence of the agreement" standard. As the official contract reader of the parties, the arbitrator's choice of corresponding relief will arguably always "draw its essence" from the agreement as "read" by the arbitrator.

B. Lessons from the Arbitral Punitive Damages Struggle

To a certain extent, lessons regarding general arbitral remedial power may be gleaned from the courts' gradual acceptance of the specific arbitral remedy of punitive damages. 146 Some courts and commentators had expressed reservations in permitting arbitrators to award punitive damages. These critics typically argued that punitive awards "undermine the entire arbitral process" because parties will back away from such power, and courts will think it their duty to scrutinize it. 147 A leading opinion rejecting such arbitral power is the 4-to-3 decision in Garrity v. Lyle Stuart, Inc. 148 The Garrity majority held

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142. SCM Corp. v. Fisher Park Lane Co., 358 N.E.2d 1024, 1029 (N.Y. 1976) (citation omitted). Cf. id. at 1029-30 (Fuchsberg, J., concurring) (arguing that arbitrators do not have the power to "rewrite" the parties' agreement by way of a contract reformation remedy).

143. AMD, 885 P.2d at 1012.


146. This area has been extensively commentated elsewhere: e.g., Hackett, supra note 86; Stipanowich, supra note 9.

147. Sullivan, supra note 12, at 1127 (citing Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976)).

148. 353 N.E.2d at 794.
that punitive damages are a sanction reserved to the states. Accordingly, courts choosing to vacate punitive damages awards have alternately invoked the grounds that the relief was contrary to public policy, or that the arbitrators exceeded their powers in granting it.

The Garrity doctrine has been widely criticized, beyond the Garrity dissent, by courts and commentators. One weakness with the majority's rationale is that, although the decision purports to curtail judicial activism in reviewing the award, it instead "invites greater judicial encroachment upon the realm of the arbitrator by allowing reviewing courts to speculate about the essential character of the award." This problem is further exacerbated by the lack of a requirement of arbitral findings in the award. Similarly, new and creative grounds to review commercial arbitrator's remedies generally further invade an arbitrator's determination of the merits.

Courts have increasingly rejected the Garrity principle and confirmed arbitral awards of punitive damages. In the commercial context, a federal court astutely pointed out that arbitrators who are familiar with a given industry are "better equipped than a judge" both to pinpoint transgressions warranting punitive awards, and to determine the appropriate measure for the purposes of specific and general deterrence. Even more importantly, if an arbitrator has been presented with a fraud or other tort claim, it is "anomalous," at best, to deny the arbitral tool of corresponding punitive damages relief. In this regard, commercial arbitrators who hear cases under expansive

149. Id. at 796.
150. Sullivan, supra note 12, at 1126.
151. Garrity, 353 N.E.2d at 800 (Gabrielli, J., dissenting).
152. E.g., Raytheon Co. v. Automated Business Sys., Inc., 882 F.2d 6, 11 (1st Cir. 1989); J. Alexander Sec., Inc. v. Mendez, 21 Cal. Rptr. 2d 826 (Ct. App. 1993); Hackett, supra note 86, at 274; Stipanowich, supra note 9, at 959.
153. Garrity, 353 N.E.2d at 796.
154. Stipanowich, supra note 9, at 987.
155. See Hackett, supra note 86, at 274, 295; supra note 48 and accompanying text.
157. Willoughby Roofing, 598 F. Supp. at 360, 363. Note also that this case involved a Construction Industry Arbitration Rule similar to Rule 43 for Commercial Arbitration, allowing "any remedy or relief which is just and equitable and within the terms of the agreement of the parties." Id. at 357 (citing Rule 43) (emphasis in original).
158. Accord Willoughby Roofing, 598 F. Supp. at 362 ("To deny arbitrators the full range of remedial tools generally available under the law would be to hamstring arbitrators and to lessen the value and efficiency of arbitration as an alternative method of dispute resolution."); Stipanowich, supra note 9, at 999 ("Having thrust upon arbitrators the responsibility to adjudge unacceptable behavior in the form of fraud in the inducement, breach of fiduciary duty, and various independent torts arising out of contractual relationships, the judiciary should acknowledge arbitral remedial power commensurate with the scope of arbitrability.").
submission agreements should be allowed correspondingly broad powers to fashion appropriate remedies.

This controversy over punitive damages may be viewed as a subset of the larger tension between giving effect to broad arbitral authority and recognizing appropriate arbitral limitations. Just as the restrictive rationale in *Garrity* is inconsistent with the concept of judicial deference to broad arbitral remedy-making power, unprincipled formulations used to find arbitral “excess of powers” threaten to undermine the accepted policies of arbitral finality. With the increasing acceptance of arbitral punitive damages may come acceptance of the fashioning of “unique” remedies not explicitly derived from the express language in the contract.

C. Arbitral vs. Judicial Remedy Power

Analogies to the specific punitive damages struggle suffer from one important distinction from the present controversy over general arbitral remedial powers: with punitive damages, arbitrators are accorded remedy power equal to that of courts, whereas in *AMD*, arbitrators have remedy power arguably above and beyond that of a court. However, it is probably unnecessary and possibly harmful to suggest that the solution to the dilemma is to limit an arbitrator’s remedial power to that of a court. The Uniform Arbitration Act explicitly authorizes that “the fact that the relief was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.”

Courts and commentators generally agree with the Model Act, finding that it enhances the bargain for arbitral finality and flexibility.

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159. Stipanowich, *supra* note 9, at 970.

160. *See, e.g.*, Raytheon Co. v. Automated Business Sys., Inc., 882 F.2d 6, 10 (1st Cir. 1989) (arguing that where parties intend to resolve “all disputes” through arbitrators having the power to grant “any remedy or relief,” they accordingly allow the arbitrators to “award the same varieties and forms of damages or relief as a court would be empowered to award.”).

161. 885 P.2d 994, 1008 (Cal. 1994).


163. *E.g.*, *AMD*, 885 P.2d at 1008, 1011; Public Serv. Co. of Colo. v. International Bhd. of Elec. Workers, 902 F.2d 19, 20 (10th Cir. 1990) (“[T]he power of arbitrators concerning every body of law is broader than the power of courts concerning those same bodies of law.”); Teamsters Union Local No. 115 v. DeSoto, Inc., 725 F.2d 931, 937 (3d Cir. 1984) (“The principle of deference enunciated in [Enterprise Wheel] demands that the arbitrator be given equal, if not greater, latitude to fashion an award[,]”); Pacific Gas & Elec. Co. [PG&E] v. Superior Court, 19 Cal. Rptr. 295, 313 (Ct. App. 1993) (“We need not inquire whether we would be required to reverse the decision of a lower court which made the same decision as the arbitrators in this case.”); Rochester City Sch. District v. Rochester Teachers Ass’n, 362 N.E.2d 977, 981 (N.Y. 1977) (“In other words a court may not vacate an award because the arbitrator has exceeded the power the court would have, or would have had if the parties had chosen to litigate, rather than arbitrate the dispute. Those who
A few have disagreed, finding it unfair that a party in arbitration receive relief unobtainable in the courts.\textsuperscript{164} It is unquestionable that the principle of limiting arbitrators' remedial powers to those of a court, while appearing to be a bright line rule, invites judicial substantive review of the merits that severely cuts back the bargained-for advantages of efficiency and finality in arbitration. As expected, such a rule would also be unworkable because express findings are not required in arbitral awards.\textsuperscript{165} The AMD majority noted:

To determine whether a remedy is within the range a court could award, a reviewing court would inevitably have to interpret the contract and resolve factual and legal disputes on questions such as the nature of the breach and the extent of the cognizable injury to the nonbreaching party.\textsuperscript{166}

Such a task by the reviewing court would be repetitive and unduly substantive, and would impermissibly interfere with the arbitrator’s function of finally determining the merits of the dispute.

D. Considerations for Legislative Clarification

Ideally, legislative amendment of the presently existing statutory “excess of power” provisions will clarify both the scope of an arbitrator’s remedial powers, and the standard of review courts are to use in considering a motion to vacate an award.\textsuperscript{167} Given the courts’ struggle

\begin{itemize}
  \item have chosen arbitration as their forum should recognize that arbitration procedures and awards often differ from what may be expected in courts of law.
  \item Staklinski v. Pyramid Elec. Co., 160 N.E.2d 78, 80 (N.Y. 1959) (“Whether a court of equity could issue a specific performance decree in a case like this is beside the point.”) (citation omitted); Ruppert v. Egelhofer, 148 N.E.2d 129, 131 (N.Y. 1958) (allowing arbitration remedy of injunctive relief contrary to New York statute); Oehmke, supra note 59, § 3:32a, at 225 (Supp. 1993); St. Antoine, supra note 52, at 1141 (“I see nothing anomalous in according an arbitral award greater finality, in either a labor or commercial context, than would be accorded a trial court's construction of the selfsame contract. Such deference to finality is consistent with the parties’ bargain to save time and cost.”).
  \item See Safeway Stores v. Bakery Workers Local 111, 390 F.2d 79, 82 (5th Cir. 1968) (arguing that the award should be set aside if “no judge, or group of judges, could ever conceivably have made such a ruling”); AMD, 885 P.2d at 1012-13 (Kennard, J., dissenting); Mandel, supra note 9, at 510 (“the interjection of commercial arbitration should not allow the winning party to obtain relief which he could not have in a judicial determination of the controversy”) (emphasis and footnote omitted). At one time California seemed to agree with this position. See Levy v. Superior Court, 104 P.2d 770, 774 (Cal. 1940).
  \item See supra notes 61-67 and accompanying text.
  \item AMD, 885 P.2d at 1011.
  \item It is also important to specify the showing necessary to establish “excess of powers.” E.g., Willoughby Roofing v. Kajima Int'l, Inc., 598 F. Supp. 353, 357 (N.D. Ala. 1984) (“federal policy places a heavy burden upon those claiming that arbitrators’ awards exceed their authority” (citations omitted)), aff'd, 776 F.2d 269 (11th Cir. 1985); Malekzadeh v. Wyshock, 611 A.2d 18, 21 (Del. Ch. 1992) (“A party moving to vacate an arbitration award on the grounds that the Arbitrators exceeded their powers ... must show by strong and convincing evidence that the Arbitrator clearly exceeded his authority.”)
\end{itemize}
with these issues, it is conceivable that legislative clarification is not possible, absent some "bright-line" rule such as that suggested by the AMD dissent. Should legislators attempt to amend the enforcing statute, it is important that certain principles be adhered to in clarifying exactly when a fashioned-remedy exceeds arbitral authority.

First, flexibility in arbitral remedial power is crucial. The question of a remedy usually is not considered until after a dispute arises. Accordingly, arbitrators must be afforded liberal authority to "do justice" in creating remedies appropriate to the (perhaps unanticipated) injury. The principle of arbitral flexibility is loyal to the concept of the arbitrator as the "contract reader."

Second, review of commercial arbitration awards stemming from a contractual dispute involves consideration of the "fundamental purpose of contract remedies" such as "the protection of societally useful exchange." With this principle, an arbitral remedy is upheld if it arguably protects the contractual "exchange relationship" at issue; a seemingly erroneous award reflects a creative, though proper, resolution of the dispute. In this regard, it should also be recognized that the commercial system of exchange does contemplate some predictability of the risks in contractual relationships. Although certain breaches and injuries may not be foreseeable at the time the underlying contract is entered into, such injuries may be contemplated at the time of the breach itself.

Courts should not be entirely stripped of their essential purpose of promoting justice when faced with an "outrageous" remedy. Private parties should not be allowed to take advantage of the courts by obtaining confirmation of an "outrageous" award, when such confirmation has the force of a judgment at law. While increasing judicial and legislative encouragement of the arbitration process is consistent with policies of arbitral flexibility and finality, unbridled support may well bring arbitral downfall. Commercial parties will feel compelled to draft extremely narrow arbitration agreements that are contrary to

168. AMD, 885 P.2d at 1012-13 (Kennard, J., dissenting).
169. See Stipanowich, supra note 9, at 1000.
171. Hackett, supra note 86, at 308.
172. See id. at 304, 308.
173. See Kaden, supra note 4, at 297-98.
175. Accord Randall, supra note 111, at 783:

Arbitration is no panacea. It cannot replace the courts, which are ultimately responsible for enforcing the laws of the land and safeguarding the unrepresented public. The arbitrator, often a non-lawyer, is merely a contract-reader. ... While the judiciary should generally defer to the merits of an arbitration award, federal courts should not abdicate their essential role of enforcing the laws of the land and representing the public.
the broad scope recommended by the American Arbitration Association.\footnote{176} Worse, parties will express their lack of confidence in the private arbitration system by not choosing it at all. Indeed, "the ongoing trend toward arbitral gigantism may well result in the fall of this jurisprudential Goliath."\footnote{177}

An adequate record of arbitral decision making process is necessary for meaningful judicial review. Therefore, this Note advocates the statutory requirement of minimal written findings by the arbitrator. This state might resemble the following:

**ADEQUATE RECORD FOR REVIEW OF AWARD**

(a) The court shall review an award [in accordance with those provisions regarding correcting, vacating, and confirming the award] only if presented with the arbitrator's written findings which must include:

1. a summary of the submitted claims or a certified copy of the claims actually submitted;
2. the arbitrator's interpretation of the disputed portions of the parties' underlying agreement;
3. the arbitrator's determination regarding the claims, including how and to what extent the underlying agreement was breached and by whom;
4. the arbitrator's determination of the nature and extent of the injury incurred due to any breach; and
5. the arbitrator's determination of appropriate relief corresponding to the found breach.

(b) If the court is not presented with the arbitrator's findings in accordance with subsection (a), the court shall remand the application to review the award back to the arbitrator.

The written findings requirement would serve several purposes. For courts attempting to review an arbitral award, the written determinations will avoid judicial second-guessing of contractual interpretation and breach. Arguably, because of the lack of an express findings requirement, the *AMD* majority felt compelled to formulate a broad holding encompassing implied contract interpretations and

\footnote{176. See Sullivan, *supra* note 12, at 1113. Narrowly or explicitly drafted arbitration agreements are often recommended by practitioners. See Oehmke, *supra* note 59, § 4:28, at 101; Roth et al., *supra* note 23, § 4:12, at 8-9.}

\footnote{177. Sullivan, *supra* note 12, at 1113.}

However, such drafting provides questionable protection: one court has held that arbitrators do not exceed the scope of their authority by awarding relief other than that requested; this court found that Rule 43 operated to give the requested relief only the effect of "proposals" and "not exclusive alternatives." Malekzadeh v. Wyshock, 611 A.2d 18, 22 (Del. Ch. 1992) (citing Robert M. Rodman, *Commercial Arbitration* § 21.3 (1984)). Another court upheld an award of punitive damages despite the fact that one party asserted that it "[d]id not consent to the submission of punitive damages issues" to arbitration in a memorandum response to the demand for arbitration. Raytheon Co. v. Automated Business Sys., Inc., 882 F.2d 6, 7 (1st Cir. 1989) (alteration in original).}
implied breach-of-contract determinations.¹⁷⁸ This standard of review seems equivalent to no review at all, and the one circumstance permitting the vacatur or correction of an award, i.e., when "the reviewing court is compelled to infer the award was based on an extrinsic source,"¹⁷⁹ seems beyond reach when courts must resolve all doubts in favor of upholding the award.¹⁸⁰ Yet incredibly, if the arbitrator in *AMD* had not set forth in writing his understanding of the contract and the breach of implied covenants, it would have been difficult to rationalize, post hoc, how the award of intellectual property rights was not based on an extrinsic source. Moreover, those intellectual property rights were for a product that was not within the terms of the contract, and was in fact the subject of pending federal litigation.¹⁸¹

With the statutory findings requirement, the reviewing court need not imply the arbitrator’s interpretation of the contract or findings of breach. Instead, the court’s only task will be to determine if the remedy is rationally related to the express findings. Because the arbitrator in *AMD* provided reasoned findings, this requirement probably would not have changed the *AMD* outcome. However, a written findings requirement might have served to considerably narrow *AMD*’s broad holding. The proposed provision should not open the door to a substantive review of the dispute’s merits with issues such as contract interpretation and breach, but is meant only to aid the court in reviewing an arbitral remedy by requiring a minimum record. The requirement should not unduly burden the arbitrator, who is simply asked to record those decision-making steps presumably already taken.

A written findings requirement would also contribute to the perception of basic fairness in the proceedings. Whether they win or lose, parties who entrust their disputes to arbitration are more likely to feel adequately heard and to perceive that their disagreements were fairly determined when presented with a reasoned award at the end of the proceedings. The absence of a reasoned award will unduly contribute to the dissatisfaction of the losing party, and possibly introduce the nagging suspicion that the winning party somehow received some windfall. Although some arbitrators might have to spend more time and effort to comply with the requirement, there is nothing wrong with requiring an arbitrator to commit the determinations in writing, especially when legislatures and courts sanction their decisions. Hopefully, the combination of a reasoned award that satisfies the parties and a policy of broad deference to arbitrator’s decisions will serve to reduce rather than increase petitions for review of awards in court.

¹⁷⁸. *See supra* note 36 and accompanying text.
¹⁸⁰. *Id.* at 1009.
¹⁸¹. *See id.* at 1008-10.
E. A Word to Practitioners

Given the uncertainty in the courts regarding review of arbitral remedies and the expansive view of arbitral authority set forth in cases such as AMD, parties who wish to place certain limits on an arbitrator's remedial power should expressly set forth those limitations in the arbitration agreement or submission. Inter alia: require the arbitrator to articulate specific findings; limit the arbitrator's remedial power to that of a court's; set forth certain exclusive relief, limiting relief to money damages only, or to "no more than $X," or, no punitive damages; or, specify a heightened standard of judicial review. Express limitations set upon an arbitrator's remedial powers should be carefully fashioned. A court that is unable to comply with the provision, because of an incomplete or ambiguous record, for example, may have to remand the case to the arbitrator for clarification, thus further defeating the arbitral bargain of efficiency. Finally, parties should think carefully before agreeing to arbitration because the process may not be appropriate for their relationship. For example, in AMD, the parties each spent more than $100 million in legal costs, while their arbitration dragged on for over four and one-half years. By the time it was over, the technology over which the parties were arguing had become obsolete.

Conclusion

The arbitral advantages of efficiency, flexibility, and finality have long attracted commercial parties and legal practitioners. Legislative response to the increasingly overcrowded judicial system has encouraged arbitral determinations by limiting statutory grounds of review. By reviewing general concepts from the law of remedies, drawing upon the discipline of labor arbitration, and examining the sources of an arbitrator's powers, the parameters of arbitral authority may be discerned. Courts have been unable to resist invoking various verbal formulae first to review, then to reject arbitrators' awards that were perceived to grant remedies outside the scope of their authority. Many of these articulated standards, such as the "essence of the agreement," are vague and authorize untoward judicial activism in the realm of the arbitrator.

Arbitrators, as "contract readers," should be afforded the same substantial flexibility in fashioning relief as they are in determining

182. The AMD majority apparently found crucial the parties' lack of intent to limit the arbitrator's remedial power. Id. at 1007, 1011.
substantive rights. While this lesson may be gleaned somewhat from the historical struggle over the acceptance of arbitral awards of punitive damages, arbitral remedial power should extend beyond that of a court. Review of a challenged remedy must draw upon recognized principles of arbitral authority: while arbitral flexibility to “do justice” is crucial, the choice of remedy must arguably protect the contractual exchange at issue. Finally, courts must have some principled grounds on an adequate record to pass upon the arbitrator’s choice of remedy. If “outrageous” awards are summarily enforced, commercial parties will not choose the arbitration process, thus frustrating legislative encouragement of this method of alternative dispute resolution.