

No. 82311-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

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**MICHAEL BROOM, KEVIN BROOM and ANDREA BROOM,**

**Respondents,**

**v.**

**MORGAN STANLEY DW INC., and KIMBERLY ANNE  
BLINDHEIM,**

**Petitioners.**

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**SUPPLEMENTAL BRIEF OF PETITIONERS MORGAN  
STANLEY DW INC. AND KIMBERLY ANNE BLINDHEIM**

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## I. INTRODUCTION

This case presents two fundamental issues regarding the proper role of the judiciary in the arbitration process. The first issue is whether a Washington state court can properly vacate an arbitration award decided by a competent, mutually accepted panel of arbitrators after a fair hearing merely because the court concludes that there is a “legal error on the face of the award.” The second issue is whether it is *per se* legal error for arbitrators to dismiss causes of action in arbitration based on Washington statutes of limitation.

The Court of Appeals decision answering these questions in the affirmative should be reversed. The court first erred when it applied an antiquated standard of review that has been superseded by Washington’s more recent arbitration statutes. The court then compounded its error when it held that statutes of limitation are, as a matter of law, inapplicable in arbitration proceedings in Washington, thereby contravening the parties’ intent by limiting the authority of arbitrators to decide all issues submitted to them. Petitioners Morgan Stanley DW Inc. (“MS”) and Kimberly Anne Blindheim (collectively, “Defendants”) ask this Court to reverse the Court of Appeals and confirm the arbitration award in their favor.

## II. ASSIGNMENTS OF ERROR

1. The Court of Appeals erred when it held that “legal error on the face of the award” was a valid ground for a court to vacate an arbitration award under Washington law. In *Malted Mousse, Inc. v. Steinmetz* (“*Malted Mousse*”), 150 Wn.2d 518, 527, 79 P.3d 1154 (2003), this Court stated that this ground for vacatur, based upon a long-repealed statute, was supplanted by the narrow grounds for review contained in current law.
2. The Court of Appeals erred when it held that arbitrators are precluded under Washington law from applying state statutes of limitation to state law claims brought in arbitration.
3. The Court of Appeals erred when it failed to confirm the arbitration award and instead vacated it based on purported legal error.

## III. STATEMENT OF THE CASE

The facts and procedural history are undisputed. MS, a member of the National Association of Securities Dealers (“NASD”), is a broker-dealer whose financial advisors provide investment recommendations to its customers.<sup>1</sup> CP 2, 18, 220. Dick Broom held investment accounts at MS, with Blindheim as his financial advisor. He died in August of 2002. CP 24, 48. Respondents Michael, Kevin and Andrea Broom (“the

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<sup>1</sup> The NASD recently merged with the New York Stock Exchange creating the Financial Industry Regulatory Authority (“FINRA”). The arbitration claims here were filed before the merger and were administered by the NASD.

Brooms”) are his adult children. On September 22, 2005, the Brooms filed a Statement of Claim to arbitrate with the NASD. CP 18-45.

The NASD has established an alternative dispute resolution program to efficiently adjudicate disputes between its members and the public. To this end, the NASD adopted a Code of Arbitration Procedure, to which all parties to the arbitration agree to be bound. CP 510. NASD Code of Arbitration Procedure 10304 sets forth a general six-year time period for eligibility to bring claims in arbitration, but further states: “This Rule does not extend applicable statutes of limitation \* \* \*.” CP 455.

In their Statement of Claim, the Brooms asserted nine claims against Defendants, eight under Washington law and one under federal law. CP 24-30. They sought attorneys’ fees in connection with their federal and state statutory claims. CP 27, 30.<sup>2</sup> A three-member panel (“the Panel”) of arbitrators, including two experienced Washington attorneys, was appointed and accepted by the parties. CP 441-46.

Defendants moved to dismiss the claims based on state and federal statutes of limitation and other grounds. CP 47-72. In response, the Brooms conceded that their claims were subject to statutes of limitation

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<sup>2</sup>Despite later advocating that the limitation periods in state statutes do not apply in Washington arbitrations, the Brooms sought fees under the Securities Act of Washington, RCW 21.20.430(1), which provides fees to any person who “may sue either at law or in equity” and the Washington Consumer Protection Act, RCW 19.86.090, which provides fees to any person who brings a “civil action in superior court.” CP 30.

but argued that they were timely filed. CP 116-27. After substantial briefing and oral argument, the Panel ruled that all but one of the Brooms' claims were barred by applicable statutes of limitation. CP 136-52, 149-52. The Brooms moved for reconsideration, again without arguing that statutes of limitation did not apply. CP 154-59. They later filed a supplemental memorandum in which they argued for the first time that state statutes of limitation were inapplicable in Washington arbitrations. CP 161-70. Despite seeking the benefit of the attorneys' fee recovery provisions of state statutes applying only to suits or actions (*infra* note 2), the Brooms argued that statutes of limitation were inapplicable because arbitrations were not suits or actions. CP 162.

After extensive briefing, the Panel denied the Brooms' motion for reconsideration. CP 161-95, 207. The Panel thereafter issued its final arbitration award ("the Award"). CP 9-16. The Award stated that all claims were dismissed and recounted that the Panel had previously granted Defendant's motion to dismiss on all but one claim, "on the grounds that the claims were barred by applicable statutes of limitation." CP 10, 14-16.

The Brooms filed a motion to vacate the Award in superior court under Washington's Revised Uniform Arbitration Act, RCW 7.04A.010 *et seq.* ("RUAA"), alleging that their claims were "improperly dismissed \* \* \* because under clear Washington law the state's statute of

limitations do not apply to claims submitted to arbitration.” CP 1-2.

Defendants opposed vacatur and sought confirmation of the award under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, and the RUAA. CP 223.

The superior court refused to confirm the award and instead vacated it. CP 556-57. In its order, the court stated:

The Arbitration Award entered on July 12, 2006 in *Broom v. MSDW*, NASD Case No 05-05019 is hereby vacated because the NASD Arbitration Panel applied “an erroneous rule of law or mistaken application thereof.” RCW 7.04A.230. The Panel incorrectly concluded that plaintiffs’ claims were barred by the statute of limitations; however, in Washington, statutes of limitations do not bar a claimant from pursuing a claim submitted to arbitration.

CP 556 (emphasis added).<sup>3</sup> Defendants appealed.

The Washington Court of Appeals affirmed, holding “that the arbitrators committed an error of law when they dismissed the Brooms’ claims under Washington statutes of limitation.” (App-4.) The court held that, despite *Malted Mousse*, the “error of law” standard of review of arbitration awards remained good law. (App-7.) While holding that the trial court erred by applying the RUAA and not its predecessor, the Washington Arbitration Act, RCW 7.04 (*repealed*) (“WAA”), the court

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<sup>3</sup> This order was later clarified to state that Defendants’ motion to confirm was granted solely as to that portion of the Award dismissing the Brooms’ federal claim (on statute of limitation grounds) and Washington Consumer Protection Act claim (on substantive grounds). CP 588-89.

concluded that this error was harmless because there were no material differences between their grounds for vacatur. (App-5 n.2.)

The court also held that *Thorgaard Plumbing & Heating Co. v. King County* (“*Thorgaard*”), 71 Wn.2d 126, 426 P.2d 828 (1967), and *City of Auburn v. King County* (“*Auburn*”), 114 Wn.2d 447, 788 P.2d 534 (1990), required the conclusion “that Washington statutes of limitation do not bar claims in arbitration proceedings.” (App-9-10.) The court reached this determination despite recognizing that, in *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett* (“*Fire Fighters*”), 146 Wn.2d 29, 42 P.3d 1265 (2002), this Court held “that whether an arbitration is deemed a judicial ‘action’ depends on the legal context in which the question arises,” thus limiting “cases like *Thorgaard* and *Auburn* to their facts.” (App-9.)

#### IV. ARGUMENT

##### A. Legal Error on the Face of the Award Is an Inappropriate Ground for Vacatur Under Washington Law.

Washington has a strong public policy encouraging parties to submit their disputes to arbitration in order to resolve them without judicial intervention. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn. 2d 885, 889, 16 P.3d 617 (2001). Arbitration is favored because it eases court congestion, provides an expeditious and final alternative to resolving disputes and is less expensive than litigation. *Boyd v. Davis*, 127 Wn. 2d 256, 262, 897 P.2d 1239 (1995).

When the Brooms filed their Statement of Claim in this case, the arbitration statute effectuating Washington’s pro-arbitration public policy was the WAA, which was enacted in 1943. RCW 7.04 (*repealed*).<sup>4</sup> Like the RUAA (which became effective on January 1, 2006), the express terms of the WAA do not permit courts to vacate an arbitration award for legal error. RCW 7.04.160 (*repealed*); RCW 7.04A.230. (App-16-17.) Rather, the WAA contains a carefully articulated (and quite limited) list of grounds upon which a court can overturn an arbitration award.

Notwithstanding these specific statutory limits on vacatur, Washington courts have at times undermined the benefits of arbitration by going beyond the statutes and second-guessing arbitration awards based upon the judicially created standard of “legal error on the face of the award,” a standard which this Court recognized “was based on a statute repealed” by the WAA. *See Malted Mousse*, 150 Wn.2d at 527, citing Justice Utter’s concurring opinion in *Boyd*, 127 Wn.2d at 267-68. However, because this statement in *Malted Mousse* was treated as *dictum* by the Court of Appeals, this Court should now definitively hold in accordance with the modern judicial trend and its statement in that case, that the WAA’s express grounds for vacatur are exclusive and that legal error on the face of the award is an inoperative relic of the past.

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<sup>4</sup> As stated above, the Court of Appeals correctly held that the WAA governs this case.

The history of arbitration in Washington supports Defendants' contention that "legal error on the face of the award" is no longer a valid statutory ground for vacatur. Prior to the adoption of modern arbitration statutes such as the FAA and the WAA, courts had long exercised authority to review and vacate arbitration awards for legal error when parties provided for the application of legal rules in their arbitration agreements. *Kleine v. Catara*, 14 F. Cas. 732, 735 (C.C.D. Mass. 1814).

In 1869, Washington's territorial legislature enacted Washington's first arbitration law, which provided that a "party against whom an award may be made, may except in writing" on the grounds that the arbitrator "committed error in fact or law." 1869 WASH. TERR. LAWS., Ch. 20, § 270. (App-13-14.) But even under this pre-modern statute which permitted legal error review, this Court held that "if the error complained of is not plain, or if the point of law is a doubtful one, \* \* \* [the arbitrators'] decision will not be interfered with on account of error in law." *School Dist. No. 5, Snohomish Cty. v. Sage* ("Sage"), 13 Wn. 352, 360, 43 P. 341 (1896).

At the time the FAA was adopted in 1925, Washington was one of several states that still permitted broad legal error review. See Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards* 505-06 (1930). Other states did not permit legal error review, instead adopting the

rule that “the award of an arbitrator cannot be set aside for mere errors of judgment, either as to the law or as to the facts.” *A.O. Andersen Trading Co. v. Brimberg*, 197 N.Y.S. 289, 290 (N.Y. Sup. Ct. 1922). In passing the FAA, Congress adopted the more restrictive approach to judicial review. *See* S. Rep. No. 68-536, at 3 (1924).

In 1943, the Washington Legislature repealed the prior arbitration statute and enacted the WAA, a “modern act” following the lead of other jurisdictions.<sup>5</sup> To that end, the Legislature deleted the provision of the earlier law permitting vacatur based on legal error, bringing Washington law in line with the FAA and other states.<sup>6</sup> The standards for vacatur in the WAA are nearly identical to the deferential and narrow FAA standards. *Compare* RCW 7.04.160 and 9 U.S.C. § 10. (App-16, 18.)

Despite the Legislature’s repeal of review for “error in fact or law,” the Court in *Northern State Constr. Co. v. Banchemo*, 63 Wn. 2d 245, 249-50, 386 P.2d 625 (1963), applied the old standard. In *Boyd*, Justice Utter, joined by three other justices, exposed this mistake stating that: “All cases adopting the ‘error of fact or law’ doctrine rely on the provisions of

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<sup>5</sup> Ian R. Macneil, *American Arbitration Law-Reformation, Nationalization, Internationalization*, 54-55 (1992).

<sup>6</sup> By repealing the prior law and enacting a new statute that no longer permitted vacatur for “error in fact or law,” the Legislature is presumed to have intended a change in legal rights. *Sutherland on Statutory Construction*, § 22.30. *See also Alexander v. Highfill*, 18 Wn. 2d 733, 742, 140 P.2d 277 (1943) (it is presumed that a change in the wording of a statute was intended to change the meaning of the law).

this repealed statute.” *Boyd*, 127 Wn.2d at 267. In *Malted Mousse*, this Court unanimously adopted this statement and further opined that “a reviewing court is limited to the statutory grounds” for vacatur. *Malted Mousse*, 150 Wn.2d at 527.

Despite these opinions and the Legislature’s enactment of the WAA and RUAA, Washington courts have at times erred by continuing to apply the “legal error” standard. In doing so, they have strayed not only from the plain language of the arbitration statutes, but also from the “legal error” standard itself as formulated in *Sage* (*infra* at p. 8) by applying it even where the legal question at issue is not plain or free from doubt.<sup>7</sup> To justify this result, Washington courts have stated that an arbitrator “exceeds” his authority whenever a legal error is made which is apparent “on the face” of the award. *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 497, 32 P.3d 289 (2001). This legal fiction should be abandoned.<sup>8</sup>

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<sup>7</sup> See, e.g., *Federated Servs. Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 4 P.3d 844 (2000) (though legal issue was “novel,” court found that arbitrators committed an error of law and vacated the award under the WAA); *Morrell v. Wedbush Morgan Securities, Inc.*, 143 Wn. App. 473, 485, 178 P.3d 387 (2008) (court held, under RUAA, that if there was a legal error “recognizable from the language of the award,” the award could be vacated).

<sup>8</sup> The Brooms will likely argue that this Court should not abandon “legal error on the face of the award” because the Legislature presumably was aware of its application by Washington courts and did not amend the statute. However, this Court has “no objection to changing a rule of law provided that \* \* \* [we] are convinced that the existing rule is incorrect and harmful and that a less harmful alternative is available.” *House v. Erwin*, 81 Wn.2d 345, 348, 501 P.2d 1221 (1972). See also *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 417-20, 150 P.3d 545 (2007) (the Court abandoned the ancient “completion and acceptance” doctrine because it was based on erroneous assumptions, had been abandoned by the vast majority of other states, and created inequitable and

As recognized by Justice Utter's concurrence, "Washington is not the only state to struggle with the newer narrow language of arbitral statutes limiting appeal from an arbitrator's award." *Boyd*, 127 Wn.2d at 268. Thus, California courts applied the "legal error on the face of the award" standard for many years and then properly abandoned it.<sup>9</sup>

This Court should do the same and bring Washington law in line with the current view that arbitration is meant to be final and not a mere prelude to litigation. This view is best articulated by *Hall Street Associates, L.L.C. v. Mattel, Inc.*, \_\_U.S.\_\_, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), in which the United States Supreme Court held that arbitration awards can be vacated under the FAA, 9 U.S.C. § 10, only for "extreme arbitral conduct," not for "just any legal error." *Id.* at 1404-05. The Court recognized "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of

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harmful results). This case is similar. Legal error was repealed as a statutory ground for vacatur in 1943 and has since been incorrectly applied, as recognized by this Court in *Malted Mousse*. Continued application of this standard creates harmful results because it destroys the benefits of arbitration.

<sup>9</sup> In *Moncharsh v. Heily & Blase*, 3 Cal. 4<sup>th</sup> 1, 13-28, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (1992), the California Supreme Court engaged in an exhaustive historical analysis of California law, tracing the application of "legal error on the face of the award" from its common-law origins. Noting the "inexplicable" resurrection of the standard in more recent cases, the court stated: "Those decisions permitting review of an award where an error of law appears on the face of the award causing substantial injustice have perpetuated a point of view that is inconsistent with the modern view of private arbitration and are therefore disapproved." *Id.* at 28. The California Supreme Court properly excised an outdated, vestigial remnant of prior arbitration law from its modern jurisprudence.

resolving disputes straightaway” and held that any other reading of the FAA “opens the door to the full-bore legal and evidentiary appeals” that can render arbitration “merely a prelude to a more cumbersome and time-consuming judicial review process.” *Id.* at 1405. *Hall Street* has spawned a national debate as to whether any extra-statutory grounds for judicial review of arbitration awards under the FAA, including manifest disregard of the law, survive.<sup>10</sup>

But even if manifest disregard survives under the FAA, “legal error on the face of the award” is a much broader, more pliable standard of review than manifest disregard. Manifest disregard is limited to those “rare instances in which ‘the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the case, and nonetheless willfully flouted the governing law by refusing to apply it.’” *Stolt-Nielson SA*, 548 F.3d at 95, quoting *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 217 (7<sup>th</sup> Cir. 2002). It involves “egregious impropriety on the part of the arbitrators.” *Stolt-Nielson*, 548 F.3d at 91-92, quoting *Duferco Int’l Steel Trading v. T. Klaveness Shipping*

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<sup>10</sup>Following *Hall Street*, some courts have held that the manifest disregard standard is abolished. See, e.g., *CitiGroup Global Mkts Inc. v. Bacon*, 562 F.3d 349 (5<sup>th</sup> Cir. 2009) (manifest disregard standard is “abandoned and rejected” in light of *Hall Street*); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1<sup>st</sup> Cir. 2008) (*Hall Street* abolished review for manifest disregard). Other courts believe that it survives. See, e.g., *Stolt-Nielson SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008).

A/S, 333 F.3d 383, 389 (2d Cir. 2003). By its very definition, it cannot be applied to vacate an arbitration award where “the law is unclear” because “misapplication of an ambiguous law does not constitute manifest disregard.” *Duferco*, 333 F.3d at 390.<sup>11</sup>

Unlike the manifest disregard standard, the “legal error on the face of the award” standard, as applied by Washington courts, does not require willful flouting of clearly enunciated law or egregious arbitral impropriety. It amounts to nothing more than that the court can glean from the face of the award that the arbitrator committed a garden-variety legal error, even regarding a doubtful legal point. *Morrell*, 143 Wn. App. at 485.

Application of such a standard discourages arbitrators from stating their legal reasoning and transforms arbitration into a mere prelude to litigation, where a disgruntled party can induce a court to second-guess the arbitrator’s legal conclusions.<sup>12</sup> Such a standard is an aberration that is inconsistent with federal law and the law of other states.<sup>13</sup>

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<sup>11</sup> As discussed later (*infra* at pp. 15-18), when the Panel issued its award, the notion that arbitrators could not apply statutes of limitation to dismiss causes of action in Washington arbitrations was, at best, highly doubtful and ambiguous, since no Washington court had directly addressed the issue.

<sup>12</sup> See *Federated Ins. Co.*, 101 Wn. App. at 124 (arbitrators can “make their award more or less susceptible to judicial review, depending on the level of detail in the statement of the award”).

<sup>13</sup> See, e.g., *Health Plan of Nev., Inc. v. Rainbow Med., L.L.C.*, 120 Nev. 689, 697, 100 P.3d 172, 178 (Nev. 2004) (“Arbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement. \* \* \* Review under excess-of-authority grounds is limited and only granted in very unusual circumstances”); *Kyocera Corp. v. Prudential-Bache T Services*, 341 F.3d 987, 997 (9<sup>th</sup>

This Court should abandon this antiquated standard of review and place Washington within the mainstream of arbitration law—where the Legislature intended it to be.<sup>14</sup>

B. The Panel Did Not Commit Legal Error by Applying State Statutes of Limitation.

Even if legal error on the face of the award is a valid standard of review, which it is not, the Court should reverse the decision to vacate the award and should instead confirm it because the Panel did not commit legal error by applying state statutes of limitation. The Court should make clear that there is no per se rule prohibiting arbitrators from applying state statutes of limitation in appropriate cases.

In vacating the arbitration award in this case, the Court of Appeals held, in essence, that arbitrators are forbidden under Washington law from applying state statutes of limitation to claims advanced in arbitration without regard to the age or staleness of those claims. By this reasoning, claims that would clearly be barred in court can be brought in arbitration. This reasoning also permits claimants in arbitration to use the law—

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Cir. 2003) (en banc) (arbitrators do not exceed their powers under the FAA when they “merely interpret or apply the governing law incorrectly”).

<sup>14</sup> The principle of limited judicial review was adopted by the drafters of the Uniform Arbitration Act (“UAA”), upon which the RUAA was modeled. The prefatory comment to the UAA states that “minimal court involvement” was an underlying principle of the revised act and that the provision governing vacatur of awards was therefore limited. Nat’l Conference of Comm’rs on Uniform State Laws, *Uniform Arbitration Act*, prefatory note (2000).

common or statutory—affirmatively to assert causes of action while denying respondents equal treatment by precluding them from fully defending against the causes of action based on the limitations period established by law.<sup>15</sup> To reach its decision, the Court of Appeals held that *Thorgaard* and *Auburn*—two cases which heretofore had never been cited for this proposition—mandate that statutes of limitation only apply in court “actions” and “suits” and not in arbitrations.

The Court of Appeals’ holding undermines the important public policy in favor of relieving parties of the burden of facing stale and untimely claims, *Douchette v. Bethell Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991), and eviscerates the reasonable expectations of parties to arbitration agreements that they could defend claims based on statutes of limitation. Indeed, nothing in the record reflects that the parties intended to forgo important legal rights by agreeing to arbitrate.

Even more importantly, the Court of Appeals’ decision rests upon a misreading of *Thorgaard* and *Auburn* as well as a failure to appreciate the significance of this Court’s decision in *Fire Fighters*. Neither *Thorgaard* nor *Auburn* holds that arbitrators may not apply statutes of limitation. In *Thorgaard*, the Court addressed a very narrow issue,

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<sup>15</sup>See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (“by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute”).

whether a private party forfeited its right to recover damages against a county when it failed to give 90-days notice pursuant to a non-claim statute (RCW 36.45.010) before commencing an arbitration against the county. According to the Court, the commencement of the arbitration was sufficient to provide the requisite notice under the non-claim statute and nothing more was required. *Thorgaard*, 71 Wn. 2d at 133.<sup>16</sup> *Thorgaard* had nothing to do with statutes of limitation or for that matter with the authority of arbitrators to apply them in Washington.

The same is true of *Auburn*, in which a city that refused to arbitrate a dispute with a county filed an action for declaratory judgment and a writ of mandamus to avoid arbitration. *Auburn*, 114 Wn.2d at 449-50. The city argued that RCW 4.16.130 restricted the county's right to pursue statutory arbitration pursuant to RCW 70.05.145, a special statutory provision pertaining only to dispute resolution of health care payments by a city. In *Auburn*, the Court simply concluded that the catch-all provision of RCW 4.16.130 did not bar a demand for this special type of arbitration. *Id.* at 451. The decision does not hold that arbitrators cannot apply statutes of limitation to bar claims prosecuted in arbitration. As with *Thorgaard*, the issue of an arbitrator's authority to apply statutes of

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<sup>16</sup> This is how the Court in *Fire Fighters* viewed *Thorgaard*, explaining that "because the parties' contract in *Thorgaard* provided for arbitration upon agreement by the parties, the county was already aware of the dispute." *Fire Fighters*, 146 Wn.2d at 40.

limitation was not before the Court in *Auburn*. Perhaps this is why no published opinion has ever cited either case for the proposition that arbitrators cannot apply state statutes of limitation to causes of action advanced in arbitration.

To the extent that either *Thorgaard* or *Auburn* could be read, as the Court of Appeals did, to support a *per se* rule that Washington statutes governing “actions” can never be applied to arbitrations, *Fire Fighters* makes clear that this is wrong. In *Fire Fighters*, this Court clarified *Thorgaard*, holding that the term “action” can and does at times include arbitrations. *Fire Fighters*, 146 Wn.2d at 39-41. The Court stated: “[N]othing in the ‘plain language’ of ‘action’ prevents us from interpreting it to include arbitration proceedings.” *Id.* at 41. The Court limited *Thorgaard* to the non-claim statute at issue, refusing to “import the definition of ‘action’ from *Thorgaard*” to the wage collection statute before it. *Id.* at 39.

Accordingly, *Fire Fighters* negates the premise upon which *Thorgaard* and *Auburn* appear to rest: that arbitrations cannot be “actions” under Washington law.<sup>17</sup> Without this premise, *Thorgaard* and *Auburn*,

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<sup>17</sup> The Court of Appeals appears to confuse the issue of whether an entire arbitration proceeding may go forward in the face of a defense to arbitrability based on statutes of limitation with the issue of whether arbitrators possess authority to apply statutes of limitation to specific causes of action brought in arbitration. Thus, the Court of Appeals relied upon the *Thorgaard* court’s citation of *Son Shipping v. DeFosse & Tanghe*, 199

although not expressly overruled, have no persuasive force beyond their specific facts. In their place, *Fire Fighters* substitutes a case-by-case analysis of whether, for purposes of a particular statute, an arbitration proceeding may be deemed an action.

The Panel in this case engaged in such an independent analysis in the face of thorough briefing by the parties regarding the meaning and effect of *Thorgaard*, *Auburn*, and *Fire Fighters* and concluded that Washington law did not prohibit applying statutes of limitation to claims in arbitration. CP 161-95.<sup>18</sup> This conclusion was not legally erroneous. In fact, this Court has recognized that arbitrators often apply statutes of limitation. *See McKee v. AT&T Corp.*, 164 Wn.2d 372, 395, 191 P.3d 845 (2008) (the Court, while addressing numerous legal issues regarding arbitration, stated that “appropriate statutes of limitation” apply in arbitration and that arbitrators have the authority to apply them).<sup>19</sup>

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F.2d 687 (2<sup>d</sup> Cir. 1952), as support for its holding that arbitrators are without authority to apply statutes of limitation. (App-8.) But in *Son Shipping*, the court merely held that a party cannot preempt an arbitration by filing an action in court for a declaratory judgment that the arbitration is untimely based on statute of limitations.

<sup>18</sup> To the extent that the legal effect of these cases was “doubtful” or “not plain,” the Panel’s Award should not have been vacated even if the repealed “error of law” standard arguably applied. *Sage*, 13 Wn. at 360.

<sup>19</sup> *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 103 P.3d 773 (2004), is also instructive. In that case, this Court held that an arbitration contract’s “limitations provision will prevail over general statutes of limitation” unless the contractual provision is substantively unconscionable, i.e., it fails to provide plaintiff with a reasonable time to assert his or her claims. *Id.* at 356. The Court found that the limitation provision in the agreement was unconscionable because it was much less favorable than the federal and state limitations that would otherwise apply. *Id.* at 355-57. The Court severed the offending provision and enforced the agreement. *Id.* at 359-60. The clear implication of

But the Panel had another sound basis to support its conclusion that statutes of limitation barred some or all of the Brooms' claims: the parties' agreement to arbitrate. It is undisputed that the parties agreed to arbitrate according to the NASD rules. NASD Rule 10304 states:

(a) No dispute, claim, or controversy shall be eligible for submission under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. The panel will resolve any questions regarding the eligibility of a claim under this Rule.

(c) This Rule shall not extend applicable statutes of limitation. \* \* \*  
\* (Emphasis added.)

Defendants argued to the Panel, as they did in the trial court, that NASD Rule 10304 meant that federal and state statutes of limitation were "applicable." CP 178-81; 518-20. After initially conceding this point, the Brooms belatedly disputed this interpretation, claiming that Washington law made the statutes inapplicable. CP 192-95. Yet it was within the Panel's authority to decide this issue regarding the Rule's interpretation and the Panel apparently did so in Defendants' favor, because it applied the statutes. The Court of Appeals erroneously substituted its own interpretation of NASD Rule 10304 for the Panel's interpretation, ruling

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this holding is that the applicable federal and state statutes of limitation would apply in place of the severed limitation provision. *See also Morrell*, 143 Wn. App. at 478, 489 (court confirmed arbitration award which included dismissal of certain claims on statutes of limitation grounds); *Allen v. RBC Dain Rauscher*, 2007 WL 130119 (W.D. Wash. 2006) (court refused to vacate arbitration award dismissing claims on statutes of limitation grounds).

that subsection (c) was “simply a warning that the six-year limit for arbitrations does not extend ‘applicable statutes of limitation’ in court actions.” (App-11.)<sup>20</sup> However, this was not a question properly before the court. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002), the Supreme Court held, in connection with the same NASD Rule, that “the applicability of the NASD time limit rule is a matter presumptively for the arbitrator” and is not an issue for the courts.

The arbitrators in this case engaged in an analysis of the statutes and claims at issue and, as contemplated by *Fire Fighters*, determined that eight of the nine claims were properly subject to a defense based upon an applicable statutes of limitation within the meaning of the NASD Code of Arbitration. The interpretation that the parties bargained for, that of the arbitrators, should govern, not the interpretation of the court.

## V. CONCLUSION

This Court should reverse the Court of Appeals decision to vacate the arbitration award and should instead confirm the award in its entirety.

Respectfully submitted this 15th day of June, 2009.

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<sup>20</sup> The Court based its holding that Rule 10304(c) was meant to address court actions on an article in a journal published by a group of lawyers representing investors written in response to the trial court’s decision in this case. See App-11 n.7. This article was not available to the Panel and represents a highly partisan interpretation of the NASD Code.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL BROOM, KEVIN BROOM  
and ANDREA BROOM,

Respondents,

v.

MORGAN STANLEY DW INC., and  
KIMBERLY ANNE BLINDHEIM,

Appellants.

No. 60115-6-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: September 2, 2008

APPELWICK, J. — In this action for alleged mismanagement of an investment account, an arbitration panel dismissed virtually all claims against the investment firm and its agent as untimely under state statutes of limitation. The superior court vacated the award, ruling that statutes of limitation in this state do not bar the pursuit of claims in arbitration. Because the superior court correctly interpreted Washington law, and because the rules governing the parties' arbitration proceeding did not allow the arbitrators to apply statutes of limitation that were not applicable to those proceedings, we affirm.

Facts

In September 2005, Michael, Kevin, and Andrea Broom (Brooms) gave notice of a claim for arbitration under their late father's brokerage agreement with Morgan Stanley DW, Incorporated, and Kimberly Anne Blindheim (MS). Alleging that MS mismanaged their father's investment account, the Brooms asserted various causes of action including negligence, breach of contract, breach of fiduciary duties, misrepresentation, failure to supervise, violation of the Washington Securities Act, and violation of the Consumer Protection Act. Because MS was then a member of National Association of Securities Dealers (NASD), the Brooms filed their notice of claim with NASD's alternative dispute resolution program.

MS answered the notice and asserted various defenses, including statutes of limitation and laches. MS then moved to dismiss the notice of claim based on "the applicable statutes of limitations ... and for other legal deficiencies." Citing the NASD Code of Arbitration Procedure and the NASD Arbitrator's Training Manual, they argued that the arbitrators had authority to dismiss any claims barred by state statutes of limitation.

The Brooms responded that the relevant statutes of limitation had not expired because of the discovery rule, fraudulent concealment, or other considerations affecting the commencement and tolling of the limitations periods. They did not argue that the arbitrators lacked authority to consider statutes of limitation.

The arbitration panel granted the motion to dismiss "as to all claims, with the exception of [the] claim for violation of the Washington Consumer Protection Act, on the grounds that the claims were barred by applicable statutes of limitation." The CPA claim was dismissed on other grounds.

In a motion for reconsideration, the Brooms argued for the first time that the relevant statutes of limitation did not apply to arbitration proceedings because, by their own terms, they applied only to "actions" at law, not arbitrations. MS responded that there was no arbitration rule or other authority allowing reconsideration of the award, and that nothing in the Brooms' motion provided a valid ground for reconsideration in any event. MS further argued that the relevant arbitration rules allowed the arbitrators to consider any "applicable statute of limitations."

In June, 2006, the arbitration panel denied the motion for reconsideration without comment. In its final award, the panel recited that it had also denied a second motion for reconsideration of the dismissal under statutes of limitation, stating: "The Panel concluded that neither the substance of the motion nor its exhibits impacted in any way the Panel's prior decisions in this matter."

The Brooms then filed a complaint and motion to vacate the award in superior court. They argued that the arbitrators committed an error of law in applying the statutes of limitation in the arbitration proceeding.

On May 11, 2007, the superior court granted the motion to vacate and remanded for a hearing before a new arbitration panel. The court ruled that the arbitration panel had applied an "erroneous rule of law" when it "incorrectly

concluded that plaintiffs' claims were barred by the statute of limitations." The court concluded that, "in Washington, statutes of limitations do not bar a claimant from pursuing a claim submitted to arbitration."

#### Decision

The principal issue on appeal is whether the superior court erred in ruling that the arbitrators committed an error of law when they dismissed the Brooms' claims under Washington statutes of limitation. We review a ruling vacating an arbitration award on a question of law de novo. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947-48, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). For the reasons set forth below, we conclude the court did not err in vacating the arbitrators' award.

Preliminarily, MS contends the Federal Arbitration Act (FAA) controls this case and preempts any state law allowing review of the arbitration ruling for errors of law. This issue has been waived. Preemption based on choice of law is an affirmative defense that cannot be raised for the first time on appeal.<sup>1</sup> MS offers no persuasive argument to the contrary.

We also reject MS's contention that the superior court erred in reviewing the arbitrators' decision for an "error of law." According to MS, that standard is

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<sup>1</sup> Wingert v. Yellow Freight Systems, 146 Wn.2d 841, 853-54, 50 P.3d 256 (2002) (preemption cannot be raised for the first time on appeal); Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260, 1266 (9th Cir. 1996) ("In particular, a choice-of-law preemption defense is waived if not raised below: only preemption issues affecting the choice of forum and thus raising questions of the court's jurisdiction may be raised for the first time on appeal."); ("Here, the issue involves a determination as to which law applies—the Federal Arbitration Act . . . or state law provisions applicable to arbitrations. Because the parties failed to present or argue this choice-of-law question before the trial court, the preemption issue was waived.)

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not among the grounds for vacating an arbitration award listed in the Washington Arbitration Act (WAA) or the Revised Uniform Arbitration Act (RUAA).<sup>2</sup> MS concedes that Washington courts have long countenanced review of arbitration awards for such error, but maintains that those cases were implicitly overruled by Malted Mousse Inc. v. Steinmetz, 150 Wn.2d 518, 79 P.3d 1154 (2003). MS is mistaken.

In Malted Mousse, the Supreme Court addressed the proper method of reviewing a mandatory arbitration. The court distinguished private arbitrations like the one at issue here, stating:

Parties in private arbitration generally waive their right to a jury. See Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 898, 16 P.3d 617 (2001). A party dissatisfied with the arbitrator's decision may move the superior court to vacate, modify, or correct the award. RCW 7.04.150, .160, .170. A vacation, modification, or correction of an award requires a motion to the court by a party to the arbitration proceeding who can demonstrate one of the statutorily defined circumstances warranting the vacation, modification, or correction. When reviewing an arbitrator's decision, the court's review is limited to the grounds provided for in RCW 7.04.160 - .170. See Barnett [v. Hicks], 119 Wn.2d [151] at 156, [829 P.2d 1087 (1992)]. In Boyd v. Davis, 127 Wn.2d 256, 897 P.2d 1239 (1995), we recognized that every case addressing a court's ability to reverse an arbitrator's error in law was based on a statute repealed by the current arbitration act, and that a reviewing court is limited to the statutory grounds. Boyd, 127 Wn.2d at 267-68. This case, however, deals with mandatory arbitration with an appellate process discussed next.

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<sup>2</sup> The superior court incorrectly relied on the RUAA in this case. The savings clause for the Act states that "[t]his act does not affect an action or proceeding commenced or right accrued before January 1, 2006." RCW 7.04A.903. The notice of claim commencing the arbitration in this case was filed on September 22, 2005. Thus, the RUAA is inapplicable here. Nevertheless, the court's error is harmless since there are no material differences between the relevant provisions of the WAA and the RUAA.

Malted Mousse, 150 Wn.2d at 526-27 (Emphasis added). According to MS, the emphasized language effectively overrules all prior cases employing the “error of law” standard. We disagree for several reasons.

First, the Malted Mousse court’s characterization of the holding in Boyd v. Davis is inaccurate. The court states that “we” recognized the demise of the “error of law” standard in Boyd. But only the four concurring justices in Boyd took that view. After noting that statutory language allowing vacation for “an error in fact or law ” was repealed when the WAA was enacted in 1943, the concurring justices held that nothing in the WAA—including language allowing challenges to arbitration awards when “the arbitrators exceeded their powers”—authorizes review of awards for errors of law. Boyd, at 267 (quoting former Rem. Comp. Stat. § 424 (1922)). The Boyd majority, however, equated the “exceeded their powers” language with the error of law standard and reaffirmed prior case law employing that standard. See Boyd, at 263. Thus, contrary to the statement in Malted Mousse, the error of law standard was reaffirmed in Boyd.

The Malted Mousse court also overlooked the Supreme Court’s own post-Boyd decisions recognizing the majority holding in Boyd. Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) (citing Boyd for rule that “[i]n the absence of an error of law on the face of the award, the arbitrator’s award will not be vacated or modified”); Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (reading Boyd as holding that “[u]nless the face of the arbitration award shows an error of law, the award will not be modified by the

court").<sup>3</sup> Furthermore, the Supreme Court never overrules binding precedent subsilentio. State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). Neither Boyd nor Malted Mousse expressly overrules prior case law.

Finally, the statement in Malted Mousse is not binding. As the Brooms correctly point out, the controversy in Malted Mousse involved mandatory arbitration under chapter 7.06 RCW, not vacation of a private arbitration award under chapter 7.04 RCW. The court expressly recognized that the review standards for private and mandatory arbitration differ and "may not be intertwined." Malted Mousse, 150 Wn.2d at 531-32. The relevant passage in Malted Mousse is therefore nonbinding dicta.<sup>4</sup>

Accordingly, we conclude that this case is governed by the holdings in Boyd, Davidson, and Fischer, not the dicta in Malted Mousse, and that the superior court did not err in applying the error of law standard to the arbitrators' decision.

MS next contends the superior court erred in concluding that the arbitrators committed an error of law by applying statutes of limitation in the

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<sup>3</sup> Court of Appeals' decisions have also read Boyd as reaffirming the error of law standard. Expert Drywall v. Ellis-Don Constr., 86 Wn. App. 884, 888, 939 P.2d 1258 (1997) (citing Boyd for the proposition that "[e]ither an erroneous rule of law or mistaken application thereof is a ground for vacation or modification under the statute."); Federated Servs. Ins. Co. v. Estate of Norberg, 101 Wn. App. 119, 123, 4 P.3d 844 (2000) ("One of the statutory grounds for vacating an award exists when the arbitrators have 'exceeded their powers,' as demonstrated by an error of law on the face of the award."). See also Morrell v. Wedbush Morgan Securities, Inc., 143 Wn. App. 473, 485, 178 P.3d 387 (2008) (citing Davidson, *supra.*, and stating: "In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified.").

<sup>4</sup> Ironically, Malted Mousse itself recognizes the rule that "[s]tatements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." Malted Mousse, 150 Wn.2d at 531 (quoting State v. Potter, 68 Wn. App. 134, 149 n. 7, 842 P.2d 481 (1992)).

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arbitration proceedings. Two Washington Supreme Court decisions control this contention.

In Thorgaard Plumbing & Heating Co. v. King County, 71 Wn.2d 126, 426 P.2d 828 (1967), the court considered whether county nonclaim statutes, which required the filing of a claim with the county commissioners prior to any action for damages, also applied to arbitrations. Noting that the filing requirement applied only to an "action" against the County, the court held that the word "action" contemplates a prosecution in a court and, therefore, the filing requirement did not apply to arbitrations. *Id.* at 130-33. The court concluded that the nonclaim statute "is not intended to control the settlement of controversies in which a valid contract to arbitrate is in force." *Id.* at 133. Significantly, the court cited with approval a federal case holding that a federal statute of limitations was "not . . . a time bar because arbitration is not a 'suit' as that term is used in the statute. Instead, it is the performance of a contract providing for the resolution of a controversy without suit." Thorgaard, 71 Wn.2d at 131 n. 4 (citing Son Shipping Co. v. De Fosse 199 F.2d 687 (2d Cir 1952)).

After Thorgaard, the Supreme Court addressed the application of a statute of limitation to an arbitration in Auburn v. King County, 114 Wn.2d 447, 450, 788 P.2d 534 (1990). The Auburn court summarily rejected the City's argument that a catch-all statute of limitations applied to the parties' arbitration, stating: "The trial court correctly concluded that the statute of limitations by its language does not apply to arbitration. See RCW 4.16.130." Auburn, 114 Wn.2d at 450. The statute at issue stated that "[a]n action for relief not hereinbefore provided for,

shall be commenced within two years after the cause of action shall have accrued." RCW 4.16.130 (emphasis added). Given the statute's reference to an "action" and the Supreme Court's prior holding in Thorgaard that "action" applies only to suits filed in court, we read Auburn as an extension of Thorgaard's reasoning to statutes of limitation. Like the statute of limitation in Auburn, the statutes of limitation at issue here apply only to an "action." Under Thorgaard and Auburn, the superior court correctly concluded that the statutes did not apply in the arbitration proceeding.<sup>5</sup>

MS argues that Thorgaard and Auburn were undermined and/or limited by the Supreme Court's subsequent decision in International Ass'n of Fire Fighters v. City of Everett, 146 Wn.2d 29, 42 P.3d 1265 (2002). We disagree. Fire Fighters held that whether an arbitration is deemed a judicial "action" depends on the legal context in which the question arises. Id. at 40-41. While that holding does limit cases like Thorgaard and Auburn to their facts, it in no way undermines or abrogates them. In fact, the Fire Fighters court simply distinguished Thorgaard as addressing a "completely different" statutory scheme. Id. at 39. Thus, MS's assertions notwithstanding, Thorgaard and Auburn remain good law and support the superior court's conclusion that Washington statutes of

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<sup>5</sup> See RCW 4.16.005 ("Except as otherwise provided in this chapter, . . . actions can only be commenced within the periods provided in this chapter after the cause of action has accrued."); RCW 4.16.080 (limiting certain "actions" to three years); RCW 21.20.430 (limiting "actions" and stating that no person may "sue" under this section more than three years after certain events).

imitation do not bar claims in arbitration proceedings.

MS argues in the alternative that even if statutes of limitation normally apply only to court actions, they may still be applied to claims in arbitration proceedings if the parties' agreement or arbitration rules permit such application. MS contends "the parties agreed to arbitrate under the NASD [National Association of Securities Dealers] Code of Arbitration," and that the Code "expressly directs arbitrators to apply and enforce statutes of limitation."<sup>6</sup> To that end, MS argued below that NASD Code section 10304, which addresses time limits, authorized the arbitrators to apply statutes of limitation in the arbitration proceedings. In pertinent part, section 10304 states:

10304. Time Limitation Upon Submission.

(a) No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. The panel will resolve any questions regarding the eligibility of a claim under this Rule.

(c) This Rule shall not extend applicable statutes of limitations.

NASD Code of Arbitration section 10304 (2005) (emphasis added). MS contends the emphasized language authorized the arbitrators to apply Washington statutes of limitation to the claims in this case. We disagree.

Nothing in section 10304 can reasonably be read as authorizing arbitrators to apply statutes of limitation that, by their express terms, do not apply

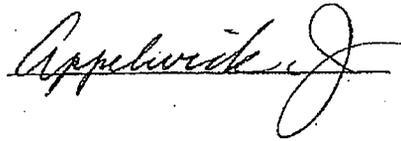
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<sup>6</sup> Because the parties' contract is not part of the record on appeal, it is unclear whether the contract expressly references the NASD, or whether the NASD and its Arbitration Code are only applicable because MS is a member of the NASD and/or the Brooms filed for arbitration with the NASD. In any event, the Brooms do not dispute that the NASD Code governed the parties' arbitration.

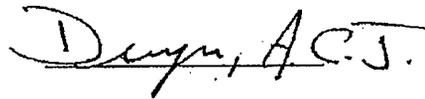
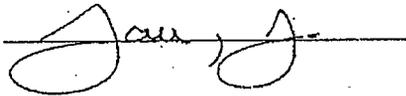
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to arbitration proceedings.<sup>7</sup> In fact, the subsequent history of the section suggests that it is simply a warning that the six-year limit for arbitrations does not extend "applicable statutes of limitation" in court actions.<sup>8</sup> But even assuming it addresses the arbitrators' authority, it does not confer authority to apply statutes of limitation that are not "applicable." A statute is "applicable" either by virtue of the substantive law applied, in this case Washington law, or the arbitration agreement: Neither basis for applying the relevant statutes of limitation is established in this case. We conclude, therefore, that section 10304 did not authorize the arbitrators to apply statutes of limitation to the claims before them, and that the superior court properly vacated their decision.

Affirmed.



WE CONCUR:



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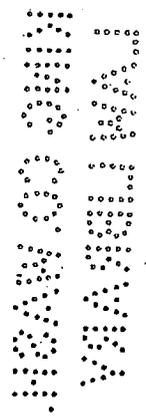
<sup>7</sup> Joseph Long, Re-Thinking the Application of Statutes of Limitations in Arbitration, 14 PIBA Bar Journal at 28 (2007) ("a simple reading of the language of [section 10304 and its successor] indicates that they do not incorporate . . . statutes of limitations into NASD arbitrations.")

<sup>8</sup> Id. at 29-31 (noting that the successor to section 10304—section 12206(c)—is titled "Effect of Rule on Time Limits for Filing Claim in Court" and that new language following the "applicable statutes of limitations" language shows that the section addresses court actions.).

STATUTES

OF THE

TERRITORY OF WASHINGTON.



AN ACT

TO REGULATE THE PRACTICE AND PROCEEDINGS IN CIVIL ACTIONS.

CHAPTER I.

OF THE FORM OF CIVIL ACTIONS AND OF THE PARTIES THEREIN.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington, That the common law of England, so far as it is not repugnant to, or inconsistent with the constitution and laws of the United States and the organic act and laws of Washington Territory, shall be the rule of decision in all the courts of this Territory.*

SEC. 2. All common law forms of action, and all distinctions between law and equity are hereby abolished, and hereafter there shall be in this Territory but one form of action to establish and enforce private rights, which shall be called a civil action.

SEC. 3. The party commencing the action shall be known as the plaintiff, and the opposite party the defendant.

SEC. 4. Every action shall be prosecuted in the name of

exception and all affidavits concerning either of them when filed as herein required, shall be deemed a part of the record of the cause, and upon an appeal or review the appellate court must first ascertain therefrom the truth of the matter as far as possible, and then determine the law arising thereon. The court must allow the counsel a reasonable time to procure the verification of his statement as herein required; and all affidavits of bystanders shall be taken by the clerk of the court, who must certify thereon if he is satisfied of the fact that the bystander is respectable and disinterested.

Sec. 263. No particular form of exception shall be required. The objection shall be stated, with so much of the evidence or other matter as is necessary to explain it, but no more.

Sec. 264. The statement of the exception, when settled and allowed, shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause. No exception need be taken or allowed to any decision upon a matter of law, when the same is entered in the journal or made wholly upon matters in writing and on file in the court.

Sec. 265. When a cause has been tried by the court or by referees, and the decision or report is not made immediately after the closing of the testimony, the decision or report shall be deemed excepted to on a motion for a new trial or on appeal, without any special notice that an exception is taken thereto.

## CHAPTER XX.

### ARBITRATION AND AWARD.

Sec. 266. All persons desirous to end by arbitration any controversy, suit or quarrel, except such as respect the title to real estate, may submit their difference to the award or umpirage of any person or persons mutually selected.

Sec. 267. Said agreement to arbitrate shall be in writings, signed by the parties, and may be by bond in any sum, conditioned that the parties entering into said submission shall abide the award.

Sec. 268. The said arbitrators shall be duly sworn to try and determine the cause referred to them, and a just award make out under the hands and seals of a majority of them, agreeably to the terms of the submission. Said award, together with the written agreement to submit, shall be sealed up by the arbitrators and delivered to the party in whose favor it shall be made, who shall deliver the same, without breaking the seal, to the clerk of the district court of the district including the county wherein said arbitration is held, who shall enter the same on record in his office. A copy of the award, signed by said arbitrators, or a majority of them, shall also be delivered to the party in whose favor it is so rendered, who shall, if the matter be not settled, serve a copy of the same on the adverse party at least twenty days before the commencement of the next term of the said district court, and if no exceptions be filed against the same by or before the second day of said term, the judgment of the court shall be entered upon said award with like effect as though said award were the verdict of a jury, and execution may issue therefor and the same proceedings had as in civil actions.

Sec. 269. The arbitrators chosen under the provisions of this chapter shall each be allowed three dollars per day, to be taxed with other costs of suit; but if either party fail to appear on the day agreed upon for the arbitrators to meet, said party shall be liable for all costs accruing that day, unless his absence was unavoidable, and shall be so established to the satisfaction of said arbitrators. And any arbitrator failing to attend on the day appointed, unless delayed by sickness or unavoidable accident, shall forfeit and pay the sum of five dollars to the school fund of the county, to be recovered by action before a justice of the peace in the name of the county commissioners of the county.

Sec. 270. The party against whom an award may be made may except in writing thereto for either of the following causes:

1. That the arbitrators or umpire misbehaved themselves in the case.
2. That they committed an error in fact or law.
3. That the award was procured by corruption or other undue means.

SEC. 271. If upon exceptions filed it shall appear to the said district court that the arbitrators have committed error in fact or law, the court may refer the cause back to said arbitrators, directing the amendment of said award forthwith, returnable to the current term of said court, and on the failure so to correct said proceedings, the court shall be possessed of the case and proceed to its determination.

SEC. 272. Arbitrators, or a majority of them, shall have power:

1. To compel the attendance of witnesses duly notified by either party, and to enforce from either party the production of all such books, papers and documents as they may deem material to the cause.
2. To administer oaths or affirmations to witnesses.
3. To adjourn their meetings from day to day, or for a longer time, and also from place to place, if they think proper.
4. To decide both the law and the fact that may be involved in the cause submitted to them.

SEC. 273. The laws in force in this Territory relating to evidence and the manner of procuring the attendance of witnesses, shall govern in arbitrations.

SEC. 274. The law governing proceedings for contempt in the trial of cases before justices of the peace, so far as the same may be applicable, shall apply to proceedings before arbitrations.

SEC. 275. The costs of witnesses, and other fees in the case, shall be taxed against the losing party; said fees shall be indorsed upon the award, and when said award is affirmed as the judgment of the district court, execution shall issue therefor as for costs in civil actions.

SEC. 276. Such award when so affirmed shall be in all respects like any other judgment of the district court, and a

transcript of such judgment or execution issued thereon, recorded in the county auditor's office in the same manner as other judgments, shall be a lien upon real estate in said county.

CHAPTER XXI.

NEW TRIAL.

SEC. 277. A new trial is a re-examination of an issue in the same court after a trial and decision by a jury, court or referees.

SEC. 278. The former verdict or other decision may be vacated and a new trial granted on the motion of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which such party was prevented from having a fair trial.
2. Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions and arrived at by a resort to the determination of chance or lot; such misconduct may be proved by the affidavits of one or more of the jurors.
3. Accident or surprise which ordinary prudence could not have guarded against.
4. Newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.
5. Excessive damages appearing to have been given under the influence of passion or prejudice.
6. Error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property.

ges of the defendant at a greater sum than before, the court shall, in addition to the judgment appropriating the land, as provided in section eight, give judgment in favor of the defendant for such excess.

Sec. 12. If the defendant accept the damages paid to the clerk, he waives his right of appeal, and if he do not, such sum shall remain in the control of the court, to abide the event of the appeal, and if the defendant or unknown owner of the land do not appear and claim the same, it shall be invested for the benefit of whom it may concern, as in case of unclaimed moneys in the sale and partition of lands.

Sec. 13. Whenever the law authorizes private real property to be appropriated to public uses, the same may be entered upon, examined, surveyed and selected in the mode prescribed by the statute giving such authority, and thereafter the Territory, county or other municipal or public corporation therein, seeking and authorized to make such appropriation, may proceed in the mode in this title prescribed, to have such property appropriated and the compensation therefor determined and paid, and not otherwise; except that the compensation in the case of such Territory, county, municipal or public corporation, is paid by the deposit in court of an order duly drawn upon the treasurer thereof, for the amount of such compensation.

Passed the House of Representatives November 19, 1869.

GEORGE H. STEWARD,

*Speaker of the House of Representatives.*

Passed the Council November 17, 1869.

WILLIAM McLANE,

*President of the Council.*

Approved December 2, 1869.

ALVAN FLANDERS,

*Governor of Washington Territory.*

### AN ACT

TO REPEAL ALL POLICE TAX LAWS DISCRIMINATING AGAINST CHINESE, MONGOLIANS AND KAWAKAS.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That the acts of the following titles, to-wit:

An act to levy taxes on Kawakas, approved January 28, 1868; an act to protect free white labor against competition with Chinese Coolie labor, and to discourage the immigration of the Chinese into this Territory, passed January 23, 1864, and the several acts amendatory thereto, passed at the several sessions of 1864-5, 1865-6, 1866-7, and any laws or parts of laws which levy a police tax discriminating against persons of the Mongolian race, or natives of the Sandwich, Society or other islands of the Pacific, residing in this Territory, be and the same are hereby repealed.

Sec. 2. This act shall take effect and be in force from and after its passage.

Passed the House of Representatives November 12, 1869.

GEORGE H. STEWARD,

*Speaker of the House of Representatives.*

Passed the Council November 15, 1869.

WILLIAM McLANE,

*President of the Council.*

Approved November 25, 1869.

ALVAN FLANDERS,

*Governor of Washington Territory.*

7.04.130 Order to preserve property or secure satisfaction of award. At any time before final determination of the arbitration the court may upon application of a party to the agreement to arbitrate make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award. [1943 c 138 § 13; Rem. Supp. 1943 § 430-13.]

7.04.140 Form of award—Copies to parties. The award shall be in writing and signed by the arbitrators or by a majority of them. The arbitrators shall promptly upon its rendition deliver a true copy of the award to each of the parties or their attorneys. [1943 c 138 § 14; Rem. Supp. 1943 § 430-14.]

7.04.150 Confirmation of award by court. At any time within one year after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is beyond the jurisdiction of the court, or is vacated, modified, or corrected, as provided in RCW 7.04.160 and 7.04.170. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof. The validity of an award, otherwise valid, shall not be affected by the fact that no motion is made to confirm it. [1982 c 122 § 2; 1943 c 138 § 15; Rem. Supp. 1943 § 430-15.]

7.04.160 Vacation of award—Rehearing. In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:

(1) Where the award was procured by corruption, fraud or other undue means.

(2) Where there was evident partiality or corruption in the arbitrators or any of them.

(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.

(5) If there was no valid submission or arbitration agreement and the proceeding was instituted without either serving a notice of intention to arbitrate, as provided in RCW 7.04.060, or without serving a motion to compel arbitration, as provided in RCW 7.04.040(1).

An award shall not be vacated upon any of the grounds set forth under subdivisions (1) to (4), inclusive, unless the court is satisfied that substantial rights of the parties were prejudiced thereby.

Where an award is vacated, the court may, in its discretion, direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the agreement for the selection of the original arbitrators and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order. [1943 c 138 § 16; Rem. Supp. 1943 § 430-16.]

[Title 7 RCW—page 4]

7.04.170 Modification or correction of award by court. In any of the following cases, the court shall, after notice and hearing, make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

(2) Where the arbitrators have awarded upon a matter not submitted to them.

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy. The order must modify and correct the award, as to effect the intent thereof. [1943 c 138 § 17; Rem. Supp. 1943 § 430-17.]

7.04.175 Modification or correction of award by arbitrators. On application of a party or, if an application to the court is pending under RCW 7.04.150, 7.04.160, or 7.04.170, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in RCW 7.04.170 (1) and (3). The application shall be made, in writing, within ten days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating that objections, if any, must be served within ten days from the notice. The arbitrators shall rule on the application within twenty days after such application is made. Any award so modified or corrected is subject to the provisions of RCW 7.04.150, 7.04.160, and 7.04.170 and is to be considered the award in the case for purposes of this chapter, said award being effective on the date the corrections or modifications are made. If corrections or modifications are denied, then the award shall be effective as of the date the award was originally made. [1985 c 265 § 2.]

7.04.180 Notice of motion to vacate, modify, or correct award—Stay. Notice of a motion to vacate, modify or correct an award shall be served upon the adverse party, or his attorney, within three months after a copy of the award is delivered to the party or his attorney. Such motion shall be made in the manner prescribed by law for the service of notice of a motion in an action. For the purposes of the motion any judge who might make an order to stay the proceedings, in an action brought in the same court, may make an order to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. [1943 c 138 § 18; Rem. Supp. 1943 § 430-18.]

7.04.190 Judgment—Costs. Upon the granting of an award, confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith. Costs of the application and of the proceeding subsequent thereto, not exceeding twenty-five dollars and disbursements, may be awarded by the court in its discretion. [1943 c 138 § 19; Rem. Supp. 1943 § 430-19.]

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RCWs > Title 7 > Chapter 7.04A > Section 7.04A.230

[7.04A.220](#) << [7.04A.230](#) >> [7.04A.240](#)

### RCW 7.04A.230 Vacating award.

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

(a) The award was procured by corruption, fraud, or other undue means;

(b) There was:

(i) Evident partiality by an arbitrator appointed as a neutral;

(ii) Corruption by an arbitrator; or

(iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW [7.04A.150](#), so as to prejudice substantially the rights of a party to the arbitration proceeding;

(d) An arbitrator exceeded the arbitrator's powers;

(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW [7.04A.150](#)(3) not later than the commencement of the arbitration hearing; or

(f) The arbitration was conducted without proper notice of the initiation of an arbitration as required by RCW [7.04A.090](#) so as to prejudice substantially the rights of a party to the arbitration proceeding.

(2) A motion under this section must be filed within ninety days after the movant receives notice of award in a record under RCW [7.04A.190](#) or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW [7.04A.200](#), unless the motion is predicated upon the ground that the award was procured by corruption, fraud, or other undue means, in which case it must be filed within ninety days after such a ground is known or by the exercise of reasonable care should have been known by the movant.

(3) In vacating an award on a ground other than that set forth in subsection (1)(e) of this section, the court may order a rehearing before a new arbitrator. If the award is vacated on a ground stated in subsection (c), (d), or (f) of this section, the court may order a rehearing before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as provided in RCW [7.04A.190](#)(2) for an award.

(4) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

[2005 c 433 § 23.]

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## 9 USCS § 10

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\*\*\* CURRENT THROUGH PL 111-25, APPROVED 06/02/2009 \*\*\*

TITLE 9. ARBITRATION  
 CHAPTER 1. GENERAL PROVISIONS

**[Go to the United States Code Service Archive Directory](#)**

9 USCS § 10

**[NITA Commentary:](#)**

[Review expert commentary from The National Institute for Trial Advocacy preceding 9 USCS § 1.](#)

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

**[History:](#)**

(July 30, 1947, ch 392, § 1, [61 Stat. 672](#); Nov. 15, 1990, P.L. 101-552, § 5, [104 Stat. 2745](#); Aug. 26, 1992, P.L. 102-354, § 5(b)(4), [106 Stat. 946](#); May 7, 2002, P.L. 107-169, § 1, [116 Stat. 132](#).)

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> [14 Moore's Federal Practice \(Matthew Bender 3d ed.\), ch 81, Applicability of the Rules in General; Removed Actions § 81.08.](#)

> [17 Moore's Federal Practice \(Matthew Bender 3d ed.\), ch 110, Determination of Proper Venue § 110.48.](#)

> [19 Moore's Federal Practice \(Matthew Bender 3d ed.\), ch 203, Interlocutory Orders § 203.12.](#)

Forms:

> [10 Bender's Federal Practice Forms, Form 56:107, Federal Rules of Civil Procedure.](#)

Intellectual Property:

> [8 Chisum on Patents \(Matthew Bender\), ch 21, Jurisdiction and Procedure in Patent Litigation § 21.01.](#)

> [2 Trademark Protection and Practice \(Matthew Bender\), ch 7A, Trademark Law and the Internet § 7A.06.](#)

> [3 Milgrim on Licensing \(Matthew Bender\), ch 28, General Contract Clauses §§ 28.09, 28.16, 28.17.](#)

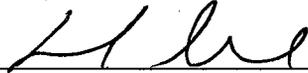
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of June, 2009, I caused to be served by deposit in the United States Mail, postage prepaid, the foregoing **SUPPLEMENTAL BRIEF OF PETITIONERS MORGAN STANLEY DW INC. AND KIMBERLY ANNE BLINDHEIM** of Morgan Stanley DW Inc. and Kimberly Anne Blindheim on the following:

<p>Michael T. Schein Kevin P. Sullivan Sullivan &amp; Thoreson 701 5<sup>th</sup> Ave., Suite 4600 Seattle, WA 98104-7068</p> <p>Of attorneys for Respondents</p>	<p>David Paltzik, Esq. Greenberg Traurig, P.A. 2375 E. Camelback Road, Suite 700 Phoenix, AZ 85016</p> <p>Bradford D. Kaufman, Esq. Jason M. Fedo, Esq. Greenberg Traurig, P.A. 777 S. Flagler Drive, Suite 300 East West Palm Beach, FL 33401</p> <p>Of Attorneys for Amicus The Securities Industry and Financial Markets Association's</p>
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SCHWABE, WILLIAMSON & WYATT, P.C.

By:   
Michael T. Garone, WSBA #30113  
Thomas V. Dulcich, WSBA #13807  
Stephanie P. Berntsen, WSBA #33072

*Attorneys for Petitioners, Morgan Stanley DW Inc. and Kimberly Anne Blindheim*