

82311-1

FILED
OCT 24 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON
AM

No. 60115-6-I

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL BROOM, KEVIN BROOM and ANDREA BROOM,

Respondents,

v.

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

Petitioners.

PETITION FOR REVIEW

Michael T. Garone
WSBA No. 30113
Thomas V. Dulcich
WSBA No. 13807
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW 5th Ave., Suite 1700
Portland, OR 97204-3717

Stephanie Berntsen
WSBA No. 33072
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Ave., Suite 3010
Seattle, WA 98101-2339

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2008 OCT - 2 PM 3:57
AM

TABLE OF CONTENTS

I. IDENTITY OF PETITIONERS	1
II. CITATION TO COURT OF APPEALS DECISION	1
III. ISSUES PRESENTED FOR REVIEW	1
1. Is “legal error on the face of the award” a valid ground upon which a court may vacate an arbitration award under Washington law or, as stated by the Washington Supreme Court in <i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518, 526-27, 79 P.3d 1154 (1995) (“ <i>Malted Mousse</i> ”), has this ground for vacatur, based upon a repealed 1922 statute, been supplanted by the narrow statutory grounds for review contained in current law?	1
2. Are arbitrators precluded under Washington law from applying state statutes of limitation to state law claims brought in arbitration so that the dismissal of a claim on this ground <i>ipso facto</i> constitutes legal error?	1
IV. STATEMENT OF FACTS AND PROCEDURES	2
V. ARGUMENT FOR WHY REVIEW SHOULD BE ACCEPTED	7
1. Legal Error Is Not a Valid Ground for Vacatur of an Arbitration Award under Washington Law.	10
2. In Light of this Court’s Decisions in <i>Fire Fighters</i> and <i>McKee</i> , There is no Blanket Rule in Washington that Statutes of Limitation Cannot Be Applied by Arbitrators to Claims Brought Before Them.	15
VI. CONCLUSION.....	20

APPENDIX TABLE OF CONTENTS

	PAGE
<i>Broom et al. v. Morgan Stanley DW, Inc., et al., No. 60115-5-1 (unpublished opinion)</i>	App- 1
RCW 7.04A.230.....	App-12
RCW 7.04.160 (repealed).....	App-13
Rem. Comp. Stat. § 424 (1922) (repealed).....	App-14

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Hall Street Associates, L.L.C. v. Mattel, Inc.</i> , ___ U.S. ___, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008)	7
<i>Son Shipping v. DeFosse & Tanghe</i> , 199 F.2d 687 (2d Cir. 1952)	19

STATE CASES

<i>Barnett v. Hicks</i> , 119 Wn.2d 151, 829 P.2d 1087 (1992)	13
<i>Boyd v. Davis</i> , 127 Wn.2d 256, 897 P.2d 1239 (1995)	11-16
<i>City of Auburn v. King County</i> , 114 Wn.2d 447, 788 P.2d 534 (1990)	6, 7, 16-19
<i>Davidson v. Henson</i> , 135 Wn.2d 112, 954 P.2d 1327 (1998)	9
<i>Douchette v. Bethell Sch. District No. 403</i> , 117 Wn.2d 805, 818 P.2d 1362 (1991)	9-10
<i>Godfrey v. Hartford Cas. Ins. Co.</i> , 142 Wn.2d 885, 16 P.3d 617 (2001)	8, 9
<i>Int'l Assn. of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002)	7, 8, 15-18, 20
<i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518, 79 P.3d 1154 (1995)	1, 8, 11, 14, 15

<i>McKee v. AT&T Corporation</i> , 2008 Wash. LEXIS 816, 191 P.3d 845 (2008)	18
<i>Moncharsh v. Heily & Blase</i> , 3 Cal. 4th 1, 832 P.2d 899 (1992)	13
<i>Munsey v. Walla Walla College</i> , 80 Wn. App. 92, 906 P.2d 988 (1995)	9
<i>Northern State Constr. Co. v Banchemo</i> , 63 Wn.2d 245, 386 P.2d 625 (1963)	12
<i>Thorgaard Plumbing & Heating Co. v. King County</i> , 71 Wn.2d 126, 426 P.2d 828 (1967)	7, 8, 16-18

FEDERAL STATUTES

9 U.S.C. § 1	5
9 U.S.C. § 9	5
9 U.S.C. § 10	7

STATE STATUTES AND RULES

RCW 4.16.130	17
RCW 7.04.010	11
RCW 7.04.160	11, 14
RCW 7.04.160(4)	11
RCW 7.04.170	14
RCW 7.04A.010	5
RCW 7.04A.230	5, 11, 16
RCW 19.86.010	3

RCW 19.86.090.....	4
RCW 21.20.010.....	2
RCW 21.20.430(1)	3
RCW 36.45.010.....	16
RCW 70.05.145	17
Rem. Comp. Stat. § 424 (1922)	13
RAP 13.4(b)(2)	8
RAP 13.4(b)(4)	8

MISCELLANEOUS

Nat'l Conference of Comm'rs on Uniform State Laws, <i>Uniform Arbitration Act</i> , prefatory note (2000)	9
--	---

I. IDENTITY OF PETITIONERS

Petitioners Morgan Stanley DW Inc. (“MS”) and Kimberly Anne Blindheim file this Petition and ask the Supreme Court to review the Court of Appeals’ decision terminating review designated in Part II below.¹

II. CITATION TO COURT OF APPEALS DECISION

Petitioners seek Supreme Court review of the unpublished decision of Division One of the Washington Court of Appeals, No. 60115-6-I, which was filed on September 2, 2008. A copy of this decision is attached in the Appendix to this Petition for Review. (App.-1 to App.-11).

III. ISSUES PRESENTED FOR REVIEW

1. Is “legal error on the face of the award” a valid ground upon which a court may vacate an arbitration award under Washington law or, as stated by the Washington Supreme Court in *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 526-27, 79 P.3d 1154 (1995) (“*Malted Mousse*”), has this ground for vacatur, based upon a repealed 1922 statute, been supplanted by the narrow statutory grounds for review contained in current law?
2. Are arbitrators precluded under Washington law from applying state statutes of limitation to state law claims brought in arbitration so that

¹Petitioner Morgan Stanley DW Inc. merged with Morgan Stanley & Co. Incorporated on April 1, 2007. During the period at issue, the accounts giving rise to this claim were held and serviced by the former Morgan Stanley DW Inc. broker-dealer entity now known as Morgan Stanley & Co. Incorporated.

the dismissal of a claim on this ground *ipso facto* constitutes legal error?

IV. STATEMENT OF FACTS AND PROCEDURES

MS, a member of the National Association of Securities Dealers (“NASD”), is a broker-dealer whose financial advisors provide investment recommendations to its customers. CP 2, 18, 220. Respondents Michael, Kevin and Andrea Broom (“the Brooms”) are the adult children of Dick Broom. In June of 2000, Dick Broom opened investment accounts at MS, with Kimberly Blindheim as financial advisor. Dick Broom died in August of 2002. CP 24, 48. 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 arising among its members and/or the public. To this end, the NASD has adopted a Code of Arbitration Procedure, to which all parties to the arbitration agree to be bound. CP 510.²

In their Statement of Claim, the Brooms asserted nine claims against MS and Blindheim, eight based on Washington law and one based on federal law. CP 24-30. Two of the seven Washington claims were based on Washington statutes: (1) violation of the Washington Securities Act, RCW 21.20.010 *et seq.*; and (2) violation of Washington’s Consumer

²The NASD recently merged with the New York Stock Exchange. The merged entity is known as the Financial Industry Regulatory Authority (“FINRA”). During the period at issue, the arbitration claims were administered by the NASD.

Protection Act, RCW 19.86.010 *et seq.* CP 24-31. The Brooms sought attorneys' fees in connection with each of their two state statutory claims and in connection with their federal claim. CP 27, 30.³

A three-member arbitration panel, comprised of three well-qualified and neutral arbitrators, two of whom were Washington attorneys, was appointed. CP 441-46. On December 16, 2005, MS and Blindheim simultaneously filed their Answer as well as a motion to dismiss the Brooms' claims based on statutes of limitation and other legal grounds. CP 47-72. In their response to the motion, the Brooms did not argue that statutes of limitation were inapplicable in arbitration. CP 112-27. Instead, they conceded that their claims in arbitration were "subject to" or "governed by" various applicable statutes of limitation. CP 117-18, 121. The Brooms argued only that they had filed their arbitration claims in a timely manner under these statutes, based on issues such as accrual, discovery and alleged fraudulent concealment. CP 113, 117-27.

After hearing oral argument, the Arbitration Panel unanimously ruled on May 1, 2006, that all of the Brooms' claims other than the Washington Consumer Protection Act claim were barred by the applicable

³The Brooms sought attorneys' fees under the Washington Securities Act, RCW 21.20.430(1), which provides statutory entitlement to such fees to any person who "may sue either at law or equity to recover the consideration paid for the security." The Brooms also sought attorneys' fees under the Washington Consumer Protection Act,

statutes of limitation. CP 149-52. The Brooms filed a motion for reconsideration and again failed to argue that statutes of limitation did not apply in arbitration. CP 154-59. They again conceded the proper application of the statutes of limitation raised by MS and Blindheim. *Id.*⁴

Six days after their motion for reconsideration was filed, the Brooms filed a supplemental memorandum in support, in which they argued for the first time that statutes of limitation do not apply in Washington arbitrations. CP 161-70. Despite their allegations in the Statement of Claim that they were entitled to an award of attorneys' fees under statutes which applied to "lawsuits" and "actions," the Brooms argued that statutes of limitation were inapplicable in Washington arbitrations because arbitrations were not "suits" or "actions." CP 162.

After deliberation, the Arbitration Panel denied the Brooms' motion for reconsideration. CP 207. On July 12, 2006, the Arbitration Panel issued its final Arbitration Award ("the Award"). CP 9-16. The Panel confirmed that all claims were dismissed and resolved in favor of MS and Blindheim. CP 14-16. The Award stated that the Panel had granted the motion to dismiss on all claims other than the Consumer

RCW 19.86.090, which provides fees to any person who brings a "civil action in superior court" to enjoin further violations or recover actual damages. CP 30.

⁴On May 23, 2006, while the Brooms' first motion for reconsideration was pending before the Arbitration Panel, MS and Blindheim filed a separate motion to dismiss the Consumer Protection Act claim for failure to state a claim. CP 11.

Protection Act claim, “on the grounds that the claims were barred by applicable statutes of limitation.” CP 10. The Award also stated that the motion to dismiss the Consumer Protection Act claim was granted. *Id.*

On October 5, 2006, the Brooms filed a Complaint and Motion to Vacate Arbitration Award (“Complaint”) with the King County Superior Court under Washington’s Revised Uniform Arbitration Act, RCW 7.04A.010 *et seq.* (“RUAA”). CP 1-4. The Brooms alleged that their claims in arbitration had been “improperly dismissed based on statutes of limitation which simply didn’t apply, because under clear Washington law the state’s statute of limitations did not apply to claims submitted in arbitration.” CP 2. In their Answer, MS and Blindheim opposed vacatur of the Award, and instead sought confirmation under both the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, and the RUAA. CP 223.⁵

On May 11, 2007, the trial court, without oral argument, granted the Brooms the relief they sought by refusing to confirm the award and instead vacating it. CP 556-57. In its order, the trial 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

⁵In a separate motion to confirm the Award, MS and Blindheim also argued that the trial court should confirm the Award under section 9 of the FAA, 9 U.S.C. § 9 and state law. CP 532.

limitations do not bar a claimant from pursuing a claim submitted to arbitration.

CP 556 (emphasis added). The trial court then remanded the case to a new arbitration panel for a hearing on the merits. *Id.*

The May 11, 2007 order was clarified on June 6, 2007 to state that MS and Blindheim's motion to confirm the Arbitrator's Award dismissing the Brooms' federal claim (on statute of limitations grounds) and the Washington Consumer Protection Act claim (on substantive grounds) was granted, but that their motion to confirm the Award regarding the remaining claims was denied. CP 588-89. MS and Blindheim timely filed a Notice of Appeal of both orders. CP 558-57.

The Washington Court of Appeals, Division One, affirmed the trial court, holding "that the arbitrators committed an error of law when they dismissed the Brooms' claims under Washington statutes of limitation." (App-4). The Court of Appeals held that, despite this Court's statement to the contrary in *Malted Mousse*, the "error of law" standard of review of arbitration awards remained good law in Washington. (App-7).

The Court of Appeals also held that this Court's decisions in *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 426 P.2d 828 (1967) ("*Thorgaard*"), and *City of Auburn v. King County*, 114 Wn.2d 447, 788 P.2d 534 (1990) ("*Auburn*"), required the conclusion

“that Washington statutes of limitation do not bar claims in arbitration proceedings.” (App-8). The Court of Appeals reached this conclusion despite its recognition that, in *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002) (“*Fire Fighters*”), 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).

V. ARGUMENT FOR WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review because the Court of Appeals’ decision conflicts with prior decisions of this Court and the Petition raises issues of substantial public interest. This case raises important and fundamental issues regarding the proper relationship between arbitration and the courts, which should be definitively addressed. While judicial interference with the arbitration process is improper under both federal and Washington law, the Court of Appeals’ decision encourages such interference by allowing courts to second-guess the legal decisions of arbitrators.⁶ It does so by applying grounds for judicial

⁶In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, _U.S._, 128 S.Ct. 1396, 170 L.Ed. 2d 254 (2008), the Supreme Court held that, under the FAA, 9 U.S.C. §10, arbitration awards can be vacated only for “extreme arbitral conduct” and 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 resolving disputes straightaway” and stated 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

review, “legal error on the face of the award,” which this Court recognized is an outdated relic from a Washington statute passed in the 1920’s before passage of the FAA and which does not reflect a modern appreciation of the deference accorded arbitration awards and the limited role of judicial review in the arbitration process. *Malted Mousse*, 150 Wn.2d at 527.

In addition, the Court of Appeals has worked a dramatic shift in Washington law by its blanket holding that statutes of limitation governing “actions” or “suits” cannot be applied by arbitrators to claims advanced in Washington arbitrations. In so doing, the Court of Appeals has read two Washington Supreme Court cases, *Thorgaard* and *Auburn*, out of context and contrary to this Court’s decision in *Fire Fighters* which squarely holds that statutes governing “actions” and “suits” can, in fact, apply to arbitration proceedings depending on the legal context. *See* RAP 13.4(b)(2) (a petition for review will be accepted “[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court”).

Each of the above-described issues is of substantial public interest in the State of Washington and hence should be reviewed by this Court. *See* RAP 13.4(b)(4) (review will be accepted “if the petition involves an issue of substantial public interest”). The public policy of the State of

to a more cumbersome and time-consuming judicial review process.” *Id.* at 1405. Washington law is essentially the same. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn. 2d 885, 892, 895-96, 16 P.3d 617 (2001)

Washington clearly favors arbitration and the finality of arbitration awards. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 892, 16 P.3d 617 (2001); *Davidson v. Henson*, 135 Wn.2d 112, 123, 954 P.2d 1327 (1998). See also *Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995) (“We begin our analysis by noting the strong public policy in this state favoring arbitration of disputes. Among other things, arbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation.”).

However, arbitration loses these benefits when it is not final and binding but becomes “a mere prelude” to additional expensive and time-consuming litigation and appeals. *Godfrey*, 142 Wn.2d at 892. The continued application of the antiquated “legal error” standard as a means to upset the parties’ bargain for a final and binding arbitration decision thus encourages litigation and undermines the benefits of arbitration.⁷

Similarly, the Court of Appeals’ holding that state statutes of limitation only apply to court “actions” and may not be applied in arbitration undermines the important public policy in favor of relieving parties of the burden of facing stale and untimely claims. *Douchette v.*

⁷This was recognized 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).

Bethell Sch. Dist. No. 403, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991).

The decision eviscerates the longstanding expectations of contracting parties in this state who executed contracts containing arbitration clauses fully expecting that they could defend claims arising from the contracts based on statutes of limitation.

Beyond this, the decision calls into question the application in arbitration of numerous state statutes providing substantive remedies and defenses in “actions” or “suits.” Remarkably, the Court of Appeals’ decision would permit a party to maintain in arbitration a statutory claim which authorizes a person to file a “lawsuit” or an “action” but at the same time deprives a defendant of the very limitations period specified in the same statute. While the Court of Appeals’ decision affirming the trial court is unpublished, claimants in FINRA arbitrations have already cited the trial court’s decision in this case to arbitration panels to convince arbitrators that they have no authority to apply statutes of limitation. It is feared that other arbitration claimants will attempt to cite the unpublished Court of Appeals’ decision to the same unfair end.

1. Legal Error Is Not a Valid Ground for Vacatur of an Arbitration Award under Washington Law.

Neither the RUAA, Washington’s current arbitration statute which went into effect on January 1, 2006, nor the previous arbitration statute, RCW 7.04.010 *et seq.* (“WAA”), which went into effect in 1943, contain

any express provision which authorizes a court to review an arbitration award for legal error. Even a cursory examination of the vacatur provision in the RUAA, RCW 7.04A.230, and its predecessor in the WAA , RCW 7.04.160 (repealed), reveals that “legal error” is not a legislatively approved grounds for vacating an arbitration award. (App. 12-13).⁸

The complete lack of statutory support for “legal error” review was recognized by Justice Utter in his concurring opinion in *Boyd v. Davis*, 127 Wn.2d 256, 266-70, 897 P.2d 1239 (1995), in which three other justices of the Washington Supreme Court joined, including Justice Madsen, and which was later adopted by the unanimous Supreme Court in *Malted Mousse*. To fully understand the significance of this concurring opinion and its adoption by the Court in *Malted Mousse*, it is important to carefully examine the majority opinion in *Boyd*.

The majority in *Boyd*, faced with the contention that the arbitrator exceeded his powers under RCW 7.04.160(4), held that the trial court erred when it vacated the arbitration award after it interpreted the parties’

⁸In this case, the trial court applied the RUAA and cited RCW 7.04A.230 to support its conclusion that an arbitration award could be vacated due to an “an erroneous rule of law or mistaken application thereof.” CP 556. While the Court of Appeals held that the trial court erred by applying the RUAA and not the WAA, it held that this error was harmless because there were no material differences between the two statutes regarding grounds for vacatur. (App-5 n.2). The Court of Appeals therefore held that both statutes permitted application of “the error of law standard to the arbitrator’s decision.” (App.6.7). All of the statutes regarding judicial review of arbitration awards discussed herein are reproduced in the Appendix. (App. 12-14).

contract. *Id.* at 261-62. This holding was based on the majority's conclusion that allowing the trial court to analyze the parties' contract permitted the trial court "to conduct a trial de novo when it reviews an arbitration award." *Id.* at 262. While explaining that such broad judicial review would "heavily" dilute "arbitration's desirable qualities" of expedition and finality, the majority quoted *Northern State Constr. Co. v Banchemo*, 63 Wn. 2d 245, 249-50, 386 P.2d 625 (1963), for the proposition that "unless the award on its face shows their adoption of an erroneous rule, or mistake in applying the law, the award will not be vacated or modified." *Id.* at 262-63. The majority's conclusion that the face of the arbitration award did not exhibit any such erroneous application of law represented its only discussion of the "legal error" standard for review of arbitration awards. *Id.* at 263.

The four concurring justices agreed with "the holding of the majority that no support exists for the * * * position that the arbitrator exceeded his power within the meaning of RCW 7.04.160 and that the award can not be disturbed," but were concerned that the majority's reasoning, and its citation to *Banchemo* and older Washington cases, "may cause confusion in future cases and weaken the purposes sought to be achieved by the clear language of the Legislature." *Id.* at 266.

To avoid confusion caused by continuing reference to “the ‘legal error/face of the award’ doctrine,” Justice Utter’s concurring opinion demonstrated that the doctrine was a vestige from the 1922 arbitration act that preceded the WAA and did not accurately reflect current Washington law. *Id.* at 266-67. The 1922 act expressly provided that the arbitrator’s decision could be “excepted to” on the ground that the arbitrators “committed an error in fact or law.” Rem. Comp. Stat. § 424 (1922). (App. 14). Justice Utter stated: “All cases adopting the ‘error of fact or law’ doctrine rely on the provisions of this repealed statute.” *Id.* at 267.

In contrast, Justice Utter noted that the WAA passed in 1943 “was substantially different” and eliminated the “error in fact or law” language. Citing the Court’s holding in *Barnett v. Hicks*, 119 Wn.2d 151, 156, 829 P.2d 1087 (1992), that judicial review of an arbitration award was “strictly limited to statutory grounds,” the concurring justices in *Boyd* stated that the Court “should not resurrect the language of an old statute to give meaning to a body of law specifically rejected through repeal by the Legislature.” *Id.* at 267.⁹

⁹In reaching this conclusion, the concurring justices in *Boyd* relied on *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 28, 832 P.2d 899 (1992), in which the Supreme Court of California held that California cases which had previously recognized legal error on the face of the award as a valid ground for vacatur “have perpetuated a point of view that is inconsistent with the modern view of private arbitration and are therefore disapproved.” *Boyd*, 127 Wn.2d at 268.

The most recent Washington Supreme Court case to cite *Boyd* is the unanimous en banc decision in *Malted Mousse*. In comparing private arbitration under the WAA with mandatory court-annexed arbitration, the *Malted Mousse* Court described WAA arbitration as follows:

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*, 119 Wn.2d at 156. 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.

Id. (emphasis added).

This statement reflects the Court's unanimous adoption of the *Boyd* concurrence and its rejection of the "legal error/face of the award doctrine" in favor of limited review in strict accordance with the narrow and deferential grounds expressly set forth in Washington's arbitration statute. However, the Court of Appeals refused to follow the dictate of *Malted Mousse* based primarily on its view that the above-quoted statement was "nonbinding dicta." (App-7). However, even if that was true, the fact that all nine justices of the Washington Supreme Court, including seven of the current justices, agreed that the legal error standard for review of arbitration awards was based on a repealed statute supports the propriety of granting discretionary review in this case.

The Court of Appeals also pointed out in its decision that both this Court and the Court of Appeals have applied the error of law standard post-*Boyd*. (App-6 and App-7, n. 3). However, if anything, these cases reflect continuing confusion regarding the standard of review of arbitration awards possibly arising from the concurring opinion in *Boyd* and potentially exacerbated by this Court's adoption of that concurring opinion in *Malted Mousse*. The case at bar therefore presents an excellent vehicle for deciding whether the concurring opinion in *Boyd* should be expressly adopted as Washington law.¹⁰

2. In Light of This Court's Decisions in *Fire Fighters and McKee*, There Is no Blanket Rule in Washington that Statutes of Limitation Cannot Be Applied by Arbitrators to Claims Brought Before Them.

A proper appreciation for the limited role of the courts in reviewing arbitration awards leads to a hands-off approach which protects the values of arbitration. *Boyd*, 127 Wn.2d at 269-70. Therefore, an award may only be vacated if fundamental notions of fairness expressly stated in the arbitration statute are violated such as when the award is procured by corruption or fraud, the arbitrator is biased, the arbitrator engages in prejudicial misconduct or when the arbitrator exceeds the

¹⁰In each of the post-*Boyd* cases cited by the Court of Appeals (App-6 and App-7 n.3) which allegedly "recognized" and "reaffirmed the error of law standard," no party apparently attacked its continued validity and there was no detailed discussion of the standard of review beyond its mere description. See, e.g., *Davidson*, 135 Wn.2d at 118 (in case that did not involve any contention of legal error on the face of the award, court merely described the standard but stressed the finality of arbitration decisions and the narrowness of judicial review in affirming the arbitration award).

authority conferred by the parties' submission. RCW 7.04A.230. Mere legal error does not come within these fundamental statutory standards.

However, even if mere legal error is a valid ground for vacatur and an arbitrator's legal conclusions can be freely second-guessed by judges, there was no such legal error present in this case. The Court of Appeals ruled that two prior decisions of this Court, *Thorgaard* and *Auburn*, set forth a blanket rule that statutes of limitation which by their language apply to "actions" or "suits" are not applicable in Washington arbitrations and that arbitrators therefore may not apply them to claims brought before them. (App. 9-11). In so ruling, the Court of Appeals erred by giving insufficient weight to this Court's decision in *Fire Fighters*, a case which calls into question the continued vitality of both *Thorgaard* and *Auburn* and which rejects the notion that a statute which applies by its express terms to "actions" simply cannot be applied in arbitrations.

The Court of Appeals ignored the fact that neither *Thorgaard* nor *Auburn* hold that arbitrators may not apply statutes of limitation. In *Thorgaard*, the county moved to dismiss a motion to confirm an arbitration award, arguing that the motion was barred because the contractor had not complied with RCW 36.45.010—a nonclaim statute that requires a party seeking damages against a county to formally present its claim within ninety days of the damage as a condition to bringing an

“action” on the claim. *Id.* at 129. The *Thorgaard* court held that the nonclaim statute did not require submission of notice of claims prior to the filing of a confirmation action under the WAA because the arbitration itself was used to provide notice and resolve such controversies prior to litigation. *Id.* at 133.¹¹ The Court did not hold that arbitrators could not apply statutes of limitation to claims advanced in arbitration.

The same is true of *Auburn*, in which the city refused to arbitrate a dispute with the county and the county responded by filing an action for declaratory judgment and a writ of mandamus. *Auburn*, 114 Wn.2d at 479. The city argued that the catch-all, two-year statute of limitations, RCW 4.16.130, restricted the County’s right to pursue an arbitration proceeding brought pursuant to a specific statute, RCW 70.05.145, a special statutory provision pertaining only to dispute resolution of health care payments by a city. 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 limitations to bar claims prosecuted in arbitration.

¹¹This is how the court in *Fire Fighters* viewed the holding in *Thorgaard* when it explained 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.

To the extent that either *Thorgaard* or *Auburn* could be read 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*, the Washington Supreme Court revisited its decision in *Thorgaard* and clarified its ruling to state that the term “action” includes arbitrations. *Fire Fighters*, 146 Wn.2d at 39-41. As the Court stated: “Thus, nothing in the ‘plain language’ of ‘action’ prevents us from interpreting it to include arbitration proceedings.” *Id.* at 41. Therefore, the Court in *Fire Fighters* properly limited the holding of *Thorgaard* to the nonclaim statute at issue and refused to “import the definition of ‘action’ from *Thorgaard*” to the wage collection statute before it. *Id.* at 39. Accordingly, there is clearly no blanket or per se rule holding that statutes of limitation applicable to “actions” or “lawsuits” cannot be applied in Washington arbitrations. A contrary holding destroys the reasonable expectations of parties that they could defend claims brought in arbitration based on statutes of limitation and also leads to the unfair result of giving one side in arbitration the full benefit of claims under Washington law, while severely limiting the opposing party’s right to avail itself of the full range of defenses arising from those same laws.

And, in fact, this Court has recognized that arbitrators often do apply statutes of limitation. In *McKee v. AT&T Corporation*, 2008 Wash.

LEXIS 816, 191 P.3d 845 (2008), the Court, while addressing numerous legal issues regarding arbitration, stated:

“Similarly, arbitrations can (and often should) be conducted openly and without secrecy, apply appropriate statutes of limitation, award damages (both compensatory and punitive), and award attorney fees. Limiting consumers’ rights to open hearings, shortening statutes of limitation, limiting damages, and awarding attorney fees have absolutely nothing to do with resolving a dispute by arbitration.”

Id. at *23-24 (emphasis added).

In conclusion, the Court further stated:

“Arbitrators supervise class actions, conduct open hearings, apply appropriate statutes of limitation, and award compensatory and punitive damages, as well as attorney fees, where appropriate.”

Id. at *34-35 (emphasis added).

These statements are in firm opposition to the Court of Appeals’ decision in this case which holds that statutes of limitation simply are not applicable in arbitration and may not be applied by arbitrators. This Court should grant review in this case to make clear that arbitrators are the judges of both the facts and the law and have the authority to apply statutes of limitation to claims brought in the arbitral forum.¹²

¹²In its opinion, the Court of Appeals confused the issue of whether an 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 claims brought in arbitration. Thus, the Court of Appeals relied upon the *Thorgaard* court’s citation of *Son Shipping v. DeFosse & Tanghe*, 199 F.2d 687 (2^d Cir. 1952), as support for its holding that arbitrators are without authority to apply statutes of limitations. (App-8). But in *Son Shipping*, the court merely held that a statute of limitations could not be used as a defense to going forward in arbitration. Like *Thorgaard* and *Auburn*, the court did not hold that arbitrators cannot apply statutes of limitation to claims brought in arbitration. Indeed, *Auburn* also involved a parties’ effort to persuade a court to order an arbitration not to proceed based on the parties’ argument

VI. CONCLUSION

For the above stated reasons, this Court should grant review to insure adherence to its decision in *Fire Fighters*, to make clear that arbitrators are not devoid of authority to apply statutes of limitation to state claims advanced in Washington arbitrations and to clarify once and for all whether the “legal error/face of the award” doctrine is or is not good law.

Respectfully submitted this 2nd day of October, 2008.

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*

that the arbitration was time-barred. Cases from other states cited by the Brooms below do not alter the conclusion that the arbitrators herein properly decided that Washington’s statutes of limitation were “applicable” within the meaning of the parties’ agreement to arbitrate under NASD rules. *See* Resp. Br., p: 43 n.31. A unifying principle in many of these cases is not that statutes of limitation cannot be applied in arbitration, it is that the arbitrator decides whether specific statutes of limitation apply to claims in arbitration and not courts. *See* Reply Brief of Appellants, p. 24, n 16.

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.¹ 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

¹ 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.).

not among the grounds for vacating an arbitration award listed in the Washington Arbitration Act (WAA) or the Revised Uniform Arbitration Act (RUAA).² 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.

² 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").³ Furthermore, the Supreme Court never overrules binding precedent subsilientio. State v. Studd, 137 Wn.2nd 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.⁴

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

³ 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.").

⁴ 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)).

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.⁵

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

⁵ 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."⁶ 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.

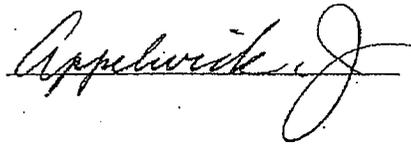
NASD Code of Arbitration section 10304 (2005) (emphasis added). MS contends the emphasized language authorized the arbitrators to apply Washington statutes of limitation to the claims in this case. We disagree.

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

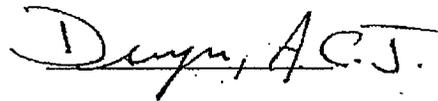
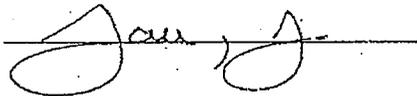
⁶ Because the parties' contract is not part of the record on appeal, it is unclear whether the contract expressly references the NASD, or whether the NASD and its Arbitration Code are only applicable because MS is a member of the NASD and/or the Brooms filed for arbitration with the NASD. In any event,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

to arbitration proceedings.⁷ 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.⁸ 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:



⁷ 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.")

⁸ 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.)

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.]

Inside the Legislature

- * [Find Your Legislator](#)
- * [Visiting the Legislature](#)
- * [Agendas, Schedules and Calendars](#)
- * [Bill Information](#)
- * [Laws and Agency Rules](#)
- * [Legislative Committees](#)
- * [Legislative Agencies](#)
- * [Legislative Information Center](#)
- * [E-mail Notifications \(Listserv\)](#)
- * [Students' Page](#)
- * [History of the State Legislature](#)

Outside the Legislature

- * [Congress - the Other Washington](#)
- * [TV Washington](#)
- * [Washington Courts](#)
- * [OFM Fiscal Note Website](#)



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.]

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 order, confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith. Costs of the application and of the proceedings 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.]

[Title 7 RCW—page 4]

(2004)

after file t

of ar sion

appl copy

an at

has t to al actic actio Rem

final judg ment § 431

MA

Sectic

7.06.C 7.06.C

7.06.C 7.06.C 7.06.C 7.06.C 7.06.C 7.06.C

7.06.9 7.06.9

Rules

of m tion coun less, judg rize i [200: § 1.]

P 2.32.1

C Short

Cou nanc appe:

(2004

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. [Cf. L. '60, p. 324, § 4; L. '69, p. 65, § 269; Cd. '81, § 267; 2 H. C., § 427.]

§ 424. Exceptions to Award.

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.

[L. '60, p. 324, § 5; Cd. '81, § 268; 2 H. C., § 428.]

Cited in 5 Wash. 207—211; 13 Wash. 355, 356; 70 Wash. 349.

Objections and Exceptions: See Remington's Digest, Arb. & Aw., § 13; McDonald v. Lewis, 18 Wash. 300, 51 Pac. 337; Dickie Mfg. Co. v. Sound Construction & Eng. Co., 92 Wash. 316, 159 Pac. 129.

Impeachment of award for mistake of fact not involving exercise of judgment. Ann. Cas. 1918C, 974, 1001.

Influencing or attempting to influence decision as ground for avoidance of

award by arbitrators. 8 A. L. R. 1082.

Restriction of number of witnesses or refusal to receive material testimony as ground for setting aside an award of arbitrators. 3 Ann. Cas. 510.

Inadequacy of award as compared with actual loss as ground for setting it aside. Ann. Cas. 1913E, 1048.

Preparation of award by attorney for party as ground for setting it aside. Ann. Cas. 1912C, 1007.

§ 425. Proceedings of Court on Such Exceptions.

If upon exceptions filed it shall appear to the said superior 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 said court, and on the failure so to correct said proceedings, the court shall be possessed of the case and proceed to its determination. [Cf. L. '60, p. 325, § 6; Cd. '81, § 269; L. '91, p. 105, § 2; 2 H. C., 429.]

Cited in 5 Wash. 207—211; 13 Wash. 355, 356; 92 Wash. 320, 321.

Failure to Arbitrate: See Remington's Digest, Arb. & Aw., § 6; Tacoma R. & Motor Co. v. Cummings, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507.

Confirmation by Court: See Remington's Digest, Arb. & Aw., § 14; Tacoma R. & Motor Co. v. Cummings, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507; Suksdorf v. Suksdorf, 93 Wash. 687, 161 Pac. 465.

Recommittal to Arbitrators by Court: See Remington's Digest, Arb. & Aw., § 15; School District No. 5 v. Sage, 13 Wash. 352, 43 Pac. 341; Tacoma R. & Motor Co. v. Cummings, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507.

Under this section the courts cannot review on the merits the decision of arbitrators except to refer it back for corrections of errors appearing on the face of the award: School Dist. No. 5 v. Sage, 13 Wash. 352, 43 Pac. 341.

§ 426. Powers of Arbitrators.

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;

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2008, I caused to be served by hand delivery the foregoing PETITION FOR REVIEW of Morgan Stanley DW Inc. and Kimberly Anne Blindheim on the following by hand-delivering the same to him at the office listed below:

Michael T. Schein
Kevin P. Sullivan
Sullivan & Thoreson
701 5th Ave., Suite 4600
Seattle, WA 98104-7068

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*

FILED
COURT OF APPEALS OF
STATE OF WASHINGTON
2008 OCT -2 PM 3:58