Arbitration is a “creature of contract.” A party cannot be compelled to arbitrate, absent agreement, and parties generally may determine the scope and method for the arbitration proceedings to which they consent.

Thus, if parties were to agree that arbitration will be conducted on an expedited basis, with a decision to be rendered by a date certain, one might expect that failure to deliver an arbitration award within the specified time frame could mean that consent to arbitration has lapsed, and any arbitration award rendered thereafter would be void.

Despite some earlier views, the weight of modern authority is that untimeliness of an award is typically not fatal to enforceability of an award.1

As a result, drafters of arbitration agreements, and arbitration practitioners, must take special care in the drafting of the arbitration agreement to ensure that their intent to obtain a timely award is implemented.

Interpreting Organization’s Rules

• Power of Arbitration Organization to Interpret Its Own Rules. The Commercial Arbitration Rules of the American Arbitration Association (AAA) provide one example of provisions regarding the timeliness of arbitration awards. AAA Rule 41 provides: “The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or if oral hearings have been waived, from the date of the AAA’s transmittal of the final statements and proofs to the arbitrator.” Even this relatively straightforward provision leaves open questions regarding what constitutes a timely award. Thus, for example, in Koch Oil, S.A. v. Transocean Gulf Oil Co.,4 the U.S. Court of Appeals for the Second Circuit held that even though an award was received by the parties more than 30 days after the close of hearings, the AAA had the authority to interpret its own rules and could reject a challenge to the timeliness of the award, based on the fact that the award was signed (but not issued) within the 30-day deadline.5

Prejudice Showing Required

In the more recent case of I Appel Corp. v. Katz,6 the U.S. District Court for the Southern District of New York ruled that “[a] district court has discretion to enforce a late award if no objection to the delay has been made prior to the rendering of the late award or if the losing party fails to demonstrate prejudice or actual harm caused by the delay.”7 To “demonstrate prejudice,” moreover, a petitioner must “do more than show it lost the arbitration or otherwise fared poorly under the terms of the late award.”

The petitioner in Appel attempted to construct a “prejudice” argument from the fact that the arbitrators had apparently adopted (but not issued) an initial (timely) arbitration award and then later modified the decision resulting in an (untimely) award. The District Court flatly rejected this argument. Citing Koch Oil, the court explained that the AAA could (interpreting its own rules) properly determine that the initial award was not “final.” Further, the court noted, it was “far from clear” what the award would have looked like had it been issued at the earlier date, since the reason that the initial award was not timely issued was because the complaining petitioner’s party-appointed arbitrator had not been available to give input.9

Failure to Object

The Second Circuit has long disfavored “post-award technical objections by a losing party as a means of avoiding an adverse arbitration decision.”10 In a recent case, the U.S. District Court for Connecticut held that, despite a set of state regulations requiring issuance of arbitration awards on a specific timetable, there was no basis to set aside an arbitration award where “plaintiff has made no showing that it objected to the delay prior to the issuance of the award.”11 Indeed, under some arbitral systems (such as the AAA Commercial Rules), failure to object may constitute a waiver, even if the objection might otherwise be entirely appropriate.12 Where failure to object is combined with a lack of prejudice (or even a showing that the petitioner contributed to the delay), moreover, the untimeliness complaint is almost certainly doomed to fail.13

Time of the Essence’ Requirement

Yet another basis for upholding enforcement of an untimely award appears in the recent decision in Hasbro, Inc. v. Catalyst USA, Inc.14 There, the U.S. Court of Appeals for the Seventh Circuit (applying Wisconsin law), noted that untimely performance of a contractual obligation should not result in the “harsh penalty of forfeiture” unless the parties agree that “time is of the essence.” Such a “time of the essence” element must be expressly stated in the arbitration agreement if an award is to be considered unenforceable for delay in rendering an award. Moreover, since neither the arbitration agreement nor the applicable AAA rules contained such a requirement, “the arbitrators did not exceed their authority by issuing an untimely award.”15 The Hasbro court suggested, however, that time could be made “of the essence” by “reasonable notice” to the arbitrators, and to all parties, so that all could consider the arbitration award or present a claim of violation of a mandatory, binding deadline for issuance of an arbitration award. One can imagine a case, for example, where parties have included specific, mandatory language in their arbitration agreement, requiring an award by a date certain, where the time for the award has passed, where at least one party has properly stated an objection, and where some form of prejudice from delay can be shown.16 What then?

The classic view (perhaps greatly influenced by early historical antipathy to arbitration) is that any such award is a nullity, as it exceeds the power of the arbitrators. But what are the
The solution to this quandary may lie in earlier intervention by courts, in appropriate circumstances where an arbitration tribunal's failure to render a timely award may result in prejudice. In the context of administrative agencies, courts have determined that they may have jurisdiction, even before an agency renders a decision, to direct the agency to decide the case. The theoretical basis for intervention appears in the ultimate obligation of the courts to review agency decisions, when rendered. Thus, “[b]ecause the statutory obligation of a court to afford a party a prompt hearing may be overridden by an agency that fails to resolve disputes, a [court] may resolve claims of unreasonable delay in order to protect its future jurisdiction.”

Similarly, a court could conceivably exercise jurisdiction to review the “decision” in a delayed arbitration proceeding, where the “decision” consists of the arbitration tribunal’s nondecision. The court might then remand the matter to the arbitration tribunal, for issuance of a “final and definite” award.

An early decision, in Brandon v. Hines, illustrates how this system could work. The court there held (in the context of court-approved arbitration):

If the arbitrators request additional time to render their award, the parties have a good-faith duty to grant a reasonable extension. Each party’s consent, moreover, is presumed unless the party promptly makes known to the court his objection and the grounds therefor. The court then can determine whether the requested extension is reasonable and how much more time, if any, the arbitrators may have to render their award.

Thus, as in Brandon, where no request was made for court intervention to compel decision and the delay was relatively modest and understandable, the award could be upheld. In egregious cases, however, where an immediate award is essential and where the arbitration tribunal’s delay is not well-founded, prompting from a court may be entirely appropriate.

1. See United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 569-70 (1960) (Brennan, J., concurring) (“Strike arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to a reluctant party to the arbitration table, whether the parties have agreed to such a particular dispute?”) see general by Steven C. Bennett, “Arbitration: Essential Concepts” 9 (ALM Publishing, 2002) (discussing “contractual nature” of arbitration). 3. For a review of early cases holding that, whenever the parties agree to an award, the authority of the arbitrators to make an award terminates with the expiration of such time, see Allan E. Kopol, “Construction and Effect of Contractual or Statutory Provisions Fixing Time Within Which Arbitration Award Must Be Made,” 56 ALR 3d 815, 83 (1974). 23. The “functus officio” doctrine is explained in greater detail elsewhere.

As in 'Brandon,' where no request was made for court intervention and the delay was modest and understandable, the award could be upheld. In egregious cases, however, prompting from a court may be entirely appropriate.

5. See id. at 534 (citing AAA Rule 53, which grants AAA power to grant an extension where 'a party, with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.'); see also McMahon v. RMS Electronics, Inc., 695 F. Supp. 1557, 1559 (S.D.N.Y. 1988) (fact that counsel did not respond to AAA’s request for extension within the time period established by the limit on extension constitutes waiver of the deadline notwithstanding subsequent objection letter).