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COURT OF APPEALS

STATE OF NEW YORK

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AMERICAN INTERNATIONAL SPECIALTY  
LINES INSURANCE COMPANY,

Respondent,

-against-

No. 23

ALLIED CAPITAL CORP.  
AND CIENA CAPITAL LLC,

Appellants.

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20 Eagle Street  
Albany, New York  
March 17, 2020

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: First matter on this  
2 afternoon's calendar is appeal number 23, American  
3 International.

4 Counsel?

5 MR. SUTHERLAND: May it please the court. I'm  
6 Brian Sutherland for appellants. I'd like two minutes for  
7 rebuttal, please.

8 CHIEF JUDGE DIFIORE: You may have your two  
9 minutes, sir.

10 MR. SUTHERLAND: The arbitrators did not exceed  
11 their authority when they reconsidered a decision on  
12 liability that was not a final and definite determination  
13 of all issues submitted to them or made at the conclusion  
14 of arbitration proceedings. And the - - -

15 CHIEF JUDGE DIFIORE: Counsel, how would  
16 reconsideration of a liability determination before  
17 deciding damages, how would that comport with public policy  
18 that supports and is in favor of arbitration?

19 MR. SUTHERLAND: Well, reconsideration is a good  
20 thing - - -

21 CHIEF JUDGE DIFIORE: Um-hum.

22 MR. SUTHERLAND: - - - if that is the question  
23 because - - -

24 CHIEF JUDGE DIFIORE: Yes.

25 MR. SUTHERLAND: - - - it enables arbitrators to



1 fix fundamental errors. And that's what Chairman Davidson  
2 did here. He said I'm not going to stand on ceremony and  
3 perpetuate my own error.

4 CHIEF JUDGE DIFIORE: So is that your argument,  
5 part of your argument?

6 MR. SUTHERLAND: That is absolutely part of my  
7 argument, yes. Reconsideration is essential. This is the  
8 part where the justice system says to the parties, getting  
9 this right is more important than our aura of  
10 infallibility.

11 So the courts have that privilege, and they  
12 increase public confidence in justice when they do that,  
13 when they correct their own mistakes during ongoing  
14 arbitration proceedings. And we shouldn't impose on  
15 arbitrators a different restriction. The rule that they  
16 live by should not be no apologies, never look back.  
17 That's not a good credo for a system of justice, and it's  
18 not one that this court needs to impose here.

19 JUDGE RIVERA: But if they decided, originally,  
20 that it was final, and that's the terminology they use and  
21 made very clear that they were going to decide liability  
22 first, the damages would be later on, and that they were  
23 going to reach a determination on - - - on that first  
24 issue, can they really go back and say, well, we didn't  
25 really mean it was final, we've decided we were wrong and



1 so we just want to reopen it?

2 MR. SUTHERLAND: Arbitrators don't have  
3 discretion to enter awards on their own initiative, and I  
4 think that's what is at the heart of Your Honor's question.  
5 Awards are a matter of contractual consent between the  
6 parties, and that's what the court - - - this court and  
7 every other court has meant when it says that the award has  
8 to be coextensive with the submission, and the submission  
9 is the agreement between the parties to give issues to the  
10 arbitrators.

11 JUDGE RIVERA: So is the submission the original  
12 agreement to arbitrate any dispute or is it the actual  
13 submission that you make at the point in time when the  
14 arbitrator is deciding whether or not they can bifurcate  
15 liability from some other aspect of damages?

16 MR. SUTHERLAND: The submission is the written  
17 agreement to arbitrate. And I think this court's case law  
18 in Welwood makes that clear, and that's the meaning that  
19 submission has always had. And in this case - - -

20 JUDGE WILSON: So the result would be the same -  
21 - - I'm sorry, over here. The result would be the same if  
22 the parties expressly asked the arbitrators to bifurcate  
23 the issue and render a final partial decision, or no?

24 MR. SUTHERLAND: If the parties agree in writing  
25 that a decision should be final, then there is a written



1 limitation on the arbitrator's authority, and they cannot  
2 exceed clear and unambiguous written limitations on their  
3 authority, and so no, the result would not be the same.

4 JUDGE FAHEY: So essentially then you're arguing  
5 that this is simply a matter of contract and that if  
6 there's an express agreement to allow bifurcation by the  
7 arbitrators that it should be allowed. But what, if there  
8 is an - - - is - - - should there be an express agreement  
9 to clarify what constitutes final arbitration? Because it  
10 doesn't seem to have happened here. So in the absence of  
11 it happening, in the context of this contract, how are we  
12 supposed to deal with it as a contract matter?

13 MR. SUTHERLAND: The contract here, and I hope  
14 I'm addressing your question, the contract here says that  
15 the parties will submit all disputes to the arbitrators and  
16 then it says the decision the arbitrators - - -

17 JUDGE FAHEY: In not applying JAMS - - - the way  
18 I read this is you're not applying JAMS, right? You've  
19 agreed with that - - -

20 MR. SUTHERLAND: Right.

21 JUDGE FAHEY: - - - the JAMS rule.

22 MR. SUTHERLAND: And this is an arbitration - - -

23 JUDGE FAHEY: And let me just get the second  
24 point out - - - and as far as I can tell, the FAA rules  
25 were not preserved; is that correct?



1 MR. SUTHERLAND: That's correct.

2 JUDGE FAHEY: That's your position anyway.

3 MR. SUTHERLAND: That's right.

4 JUDGE FAHEY: All right. So in that context  
5 then, then we go to the contract. And in New York the rule  
6 should be, pretty much everything that comes in front of us  
7 we say what does the contract expressly say. Here the  
8 contract does not expressly address this issue.

9 MR. SUTHERLAND: It does, Your Honor, because it  
10 says: "The decision of the arbitrator shall be final and  
11 binding".

12 JUDGE FAHEY: Um-hum.

13 MR. SUTHERLAND: And in Welwood, this court said  
14 language like that, "fairly imports a single award".

15 JUDGE STEIN: But can that contract be modified?

16 MR. SUTHERLAND: I'm sorry, Your Honor?

17 JUDGE STEIN: Can that contract be modified - - -

18 MR. SUTHERLAND: It can be modified - - -

19 JUDGE STEIN: - - - by the parties?

20 MR. SUTHERLAND: It can be modified by the  
21 parties.

22 JUDGE STEIN: Okay. Does it say that it can only  
23 be modified in writing?

24 MR. SUTHERLAND: It doesn't say that it can only  
25 be modified in writing.



1 JUDGE STEIN: And does our law require an  
2 agreement to arbitrate be in writing in all cases?

3 MR. SUTHERLAND: It does. CPLR 7501 says that an  
4 agreement to arbitrate must be in writing. That's also  
5 what 9 U.S.C. Section 2 says. The court has jurisdiction  
6 to arbitrate agreements that are in writing. Even if you  
7 could modify that agreement without a writing, you would at  
8 least have to have an agreement to modify it, and there is  
9 no such agreement here.

10 JUDGE STEIN: So we're talking about express  
11 agreement versus written agreement; is - - - is that the  
12 difference?

13 MR. SUTHERLAND: Our position is you have to have  
14 a written agreement, and then our second fallback position  
15 would be you at least have to have an agreement. And there  
16 was no agreement to bifurcate here, there was no agreement  
17 to create finality, there was no agreement of any kind as  
18 between - - -

19 JUDGE RIVERA: So how do you describe what  
20 occurred if it's not an agreement to bifurcate? What - - -  
21 what was it then?

22 MR. SUTHERLAND: It is not an agreement to  
23 bifurcate because what occurred was our side saying we  
24 filed this motion for summary disposition but we  
25 acknowledge that the issue of defense costs might have to



1 be heard later.

2 Now, that's a one-sided statement. A party  
3 cannot unilaterally modify the submission. And the  
4 insurance company will not be able to point to anything in  
5 the record where - - -

6 JUDGE RIVERA: Okay. So - - -

7 MR. SUTHERLAND: - - - they agreed to  
8 bifurcation.

9 JUDGE RIVERA: So if they - - -

10 JUDGE FAHEY: But wait a minute - - -

11 JUDGE RIVERA: If they then said okay, would that  
12 have been a bifurcation - - -

13 MR. SUTHERLAND: That would be - - -

14 JUDGE RIVERA: - - - or request to bifurcate that  
15 the other side has consented to?

16 MR. SUTHERLAND: It still wouldn't be in writing,  
17 but that would be a closer case. But they didn't say that.  
18 Here's what Mr. Brown - - - this is counsel for the  
19 insurance company - - - said at the hearing on  
20 reconsideration. He said: "Our understanding of the  
21 agreement was that everything in dispute would be  
22 submitted, all their different claims on paper." That's  
23 what he said. And what they had pointed to is nothing more  
24 than silence. They're saying, well, we acquiesced in the  
25 suggestion that you made which was not a request for a





1 partial final award. You will not see those words in  
2 connection with the hearing on the cross-motion for summary  
3 - - -

4 JUDGE GARCIA: But counsel, they did issue a  
5 partial final award here. I mean, that's what they called  
6 it, right? That's what they labeled it. And isn't there  
7 also a countervailing policy concern that once you have  
8 something labeled a partial final award, and let's say the  
9 parties agree - - - I know you dispute that, but let's say  
10 they orally agree here, then would we really want, as a  
11 policy matter, to encourage people involved in an  
12 arbitration to go back in and try to sway the neutral  
13 arbitrator, which is what happened here, right? It was  
14 two-one one way; it went two-one the other way. What - - -  
15 why would we want a policy that would encourage that?

16 MR. SUTHERLAND: Well, two problems with that.  
17 If these statements at a hearing can create finality, then  
18 at every confirmation - - -

19 JUDGE GARCIA: No, but what about a partial final  
20 award, can that create finality?

21 MR. SUTHERLAND: Well, the partial final award,  
22 the finality of such an award, if one can exist, if  
23 statements at the hearing can create that kind of finality,  
24 you're going to be looking at the entire record when you  
25 have a petition to confirm or to vacate.



1 JUDGE GARCIA: But I'm having trouble  
2 understanding; is your position - - - and I guess one's a  
3 fallback, but that it always has to be in writing? I think  
4 Judge Stein was getting to this, that you can't have two  
5 parties come in before an arbitrator and say we agree on  
6 the record here to bifurcate. Our contract may say  
7 something else, but we've come to an agreement, we want you  
8 to decide X issue first and issue a partial final award.  
9 Can they do that?

10 MR. SUTHERLAND: No, it has to be in writing;  
11 CPLR 7501 says so. It's really easy to put things in  
12 writing. And this court looks for clear and express  
13 limitations on the arbitrator's authority.

14 JUDGE RIVERA: Well, let me ask this. If the  
15 arbitrators say we've decided that it's best to issue a  
16 partial - - - a final, excuse me, a final partial decision,  
17 and one or both - - - in this case both - - - sides object;  
18 could the arbitrators decide to do that, given the  
19 agreement? Could they unilaterally decide that they're  
20 going to issue a final partial decision?

21 MR. SUTHERLAND: No, not - - - not given this  
22 agreement.

23 JUDGE RIVERA: Okay.

24 MR. SUTHERLAND: Arbitrators do not have  
25 discretion to issue partial final awards whenever they feel



1           like it. The award must be coextensive with the  
2           submission. The submission is the parties' written  
3           agreement to give issues to the arbitrators; that's what  
4           that phrase means.

5                        JUDGE FAHEY: Let me ask this. Is this problem a  
6           problem of nomenclature? If you had called this a decision  
7           on liability rather than a partial final award, would we be  
8           here today?

9                        MR. SUTHERLAND: Well, probably not, and we never  
10          called it a partial - - -

11                      JUDGE FAHEY: And that's why, in some ways, I  
12          think that that needs to be clarified here because I've sat  
13          in on and done a number of arbitrations, and quite often,  
14          in every automobile case that was ever arbitrated that I  
15          was ever at, in every no-fault arbitration, you decided the  
16          liability question first and so because not to waste  
17          people's time. And, as a matter of policy, you don't want  
18          to bring in your doctors or spend your money on your  
19          doctors and do those things until you resolve the liability  
20          questions. That's usually how you end up in this  
21          situation.

22                      So this seems to me more a question of  
23          nomenclature and clarity that's morphed into a very  
24          fundamental challenge to the doctrine of functus officio  
25          and the entire arbitration process. And that's why Judge



1 Stein's point is important because, if the record is  
2 express, then it really goes a long way toward solving the  
3 problems, and we have a different question in front of us.  
4 So maybe this case is reaching to solve more than it  
5 should, and maybe it - - - it should be viewed on a smaller  
6 scale rather than changing New York law on a - - - a basic  
7 level.

8 MR. SUTHERLAND: It doesn't have to do that. It  
9 can be an easy case if you just look at the question  
10 whether the parties made a clear agreement to limit  
11 judicial - - -

12 JUDGE FAHEY: In other words, you agree that it  
13 has to be express; it may not have to always be in writing;  
14 perhaps you can modify it or not, but if you agree to  
15 modifications in your contract, which would be a simple  
16 enough thing to do.

17 JUDGE STEIN: And isn't that also important - - -  
18 I wanted to get into, a little bit, the question about the  
19 - - - the relationship between finality and functus  
20 officio, because what concerns me is that if it isn't at  
21 least clear and express then the parties don't know whether  
22 they have to move to vacate or confirm, within the statute  
23 of limitations, and whether they can go to court or must go  
24 to court. And it just - - - it concerns me that any other  
25 rule - - - or that - - - that what the Appellate Division



1 has done here could make it uncertain and - - - and perhaps  
2 people could inadvertently lose rights they would otherwise  
3 have.

4 MR. SUTHERLAND: That's exact - - -

5 JUDGE STEIN: Or flood the courts because, just  
6 to be sure, they would make applications every time.

7 MR. SUTHERLAND: You're going to want your clear  
8 and express limitations on the arbitrator's authority to  
9 come from somewhere. I agree with everything Your Honor  
10 said.

11 And I want to address the question about whether  
12 the doctrine of functus officio applies here. That  
13 doctrine contemplates arbitrators examining issues after  
14 arbitration proceedings have ended, based on a concern that  
15 it'll be subject to outside influence or ex parte contact.  
16 But when arbitrators make decisions during going - - -  
17 during ongoing proceedings, that rationale simply does not  
18 apply. And on the face of this decision it says there will  
19 be more proceedings. So the idea that there was going to  
20 be ex parte contact or outside influence doesn't make sense  
21 here.

22 JUDGE STEIN: But - - -

23 MR. SUTHERLAND: The whole doctrine - - -

24 JUDGE STEIN: But you would agree that if - - -  
25 in your view it has to be the original written agreement or



1 at least a written agreement. What if that original  
2 written agreement to arbitrate said we want a final  
3 decision on liability and we agree that whatever that is we  
4 can move before the court to confirm or vacate and - - -  
5 and then go on to decide damages as necessary. So in that  
6 instance, functus officio would still apply to the partial  
7 award, would it not?

8 MR. SUTHERLAND: Well, you don't have to call it  
9 functus officio, but I would call it a clear limitation on  
10 the arbitrator's authority to reconsider.

11 JUDGE FAHEY: But no, it would have to apply.  
12 Unless you vitiate the doctrine, it would have to apply.  
13 How could it not, logically?

14 MR. SUTHERLAND: Well, it depends on whether you  
15 call it an award under New York law, but it's at least a  
16 clear limitation on the arbitrator's authority, whether or  
17 not it is an award. Those are two separate things. If you  
18 want to call it functus officio you could, because there's  
19 absolutely no agreement to create finality in this case.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 Counsel?

22 MS. HALLIGAN: Chief Judge DiFiore, and may it  
23 please the court. Caitlin Halligan for American  
24 International Specialty Lines Insurance.

25 I'd like to start, if I can, by addressing the



1 policy questions that Chief Judge DiFiore and Judge Garcia  
2 asked, and then turn to the question that Judge Rivera and  
3 Judge Stein asked about what is required under New York law  
4 to authorize a tribunal to enter a partial final award, and  
5 then explain why that was clearly present here, as the  
6 Appellate Division found.

7 So to start with the policy question, not only  
8 would it be wildly inefficient to say that tribunals cannot  
9 enter a partial final award, but it would leave New York  
10 completely out of step with the approach of the FAA as well  
11 as the other major arbitration forum. JAMS and the AAA, as  
12 well as the FAA, clearly allow for entry of a partial final  
13 award, and the reason for that is that, if the parties  
14 decide that that is what will best facilitate resolution of  
15 the dispute, there's no reason not to permit them to do  
16 that. So from a policy perspective, it would create  
17 tremendous, I think, upset - - -

18 JUDGE RIVERA: Well, did the parties to the  
19 arbitration agreement agree to the application of the rules  
20 from those particular bodies?

21 MS. HALLIGAN: Well, there was a dispute, Your  
22 Honor, about whether or not the JAMS was - - -

23 JUDGE RIVERA: And the arbitrator resolved that,  
24 yes?

25 MS. HALLIGAN: Yes, and we're not challenging



1 that, but what I am saying is that under those rules - - -

2 JUDGE RIVERA: But my point is that the parties  
3 could choose otherwise, right? That's the whole point.

4 MS. HALLIGAN: The parties could choose otherwise  
5 - - -

6 JUDGE RIVERA: Other than what JAMS and AAA have  
7 already set out in their rules, correct?

8 MS. HALLIGAN: The parties could opt not to have  
9 a partial final award. In fact, I think that the default  
10 would be that the award entered would be a final award at  
11 the conclusion of the proceedings. But my point is that to  
12 suggest that if you're operating under New York law you  
13 cannot enter a partial final award, that the parties cannot  
14 authorize the tribunal to do that. It would leave New York  
15 out of step. So - - -

16 JUDGE WILSON: Is it a little murky here what  
17 they did?

18 MS. HALLIGAN: I really don't think so, Your  
19 Honor, and let me explain why. I would say, first of all,  
20 that the Appellate Division looked at this issue very  
21 closely and reviewed the record very carefully, and - - -  
22 and I would urge the court to look specifically at pages  
23 993 to 94 where this is laid out.

24 So first of all, I think a little context is  
25 important here, as the Appellate Division itself found, in





1 understanding - - - and this, Judge Fahey, I think, goes to  
2 your point about the way in which these arbitrations might  
3 actually unfold which makes crystal clear that there was an  
4 agreement here.

5 So if you look at the complaint, which is at 77  
6 to 78 - - - paragraphs 77 to 78, there are two separate  
7 claims that are made. One is for coverage with respect to  
8 the settlement, which was to resolve a false claims act for  
9 tremendous fraud with the small business administration,  
10 and the second was for coverage of defense costs.

11 And as the briefing unfolded, it was clear that  
12 these were viewed as two completely discrete claims. And  
13 the partial final award confirms that. When you look at  
14 the partial final award, the structure leaves no question  
15 but that there were two separate claims. It analyzes them  
16 distinctly in separate point headings. And the court also  
17 underscores that of course the obligation to defend might  
18 be broader than the obligation to indemnify, which again  
19 makes clear that they're two separate claims.

20 So at that juncture, as the Appellate Division  
21 lays out, Allied - - -

22 JUDGE STEIN: But wasn't there some cross over  
23 there too because, with regard to both, the question was  
24 whether they constituted a loss under the policy, right?

25 MS. HALLIGAN: Well, that's correct, Your Honor,



1 but - - - but for completely different reasons. So the  
2 question of whether or not the settlement with the FCA was  
3 a loss turned on who paid it and the way in which that  
4 payment was structured.

5 JUDGE STEIN: But as I read the record, they  
6 weren't arguing about presenting proof about one or the  
7 other of those things separately. They were argue - - -  
8 what they were arguing about was whether if - - - if the -  
9 - - if the costs were covered, there might - - - there  
10 might need to be a separate hearing about what those costs  
11 were.

12 MS. HALLIGAN: I think there's no question that,  
13 at the time at which the tribunal entered the partial final  
14 award, of course as - - - as I think it was Judge Fahey  
15 here, or perhaps it was Judge Garcia, noted, the panel knew  
16 exactly what it was doing because it called it a partial  
17 final award, so it labeled it that - - -

18 JUDGE STEIN: But that would have no meaning if  
19 the parties had never discussed it at all, right?

20 MS. HALLIGAN: I think it's certainly probative.  
21 It confirms - - - it confirms what the understanding was.  
22 But at that point, just to - - - to try to be responsive to  
23 Your Honor's question, at that point the question of  
24 whether or not the grounds that Allied had proffered for  
25 coverage of the settlement, that was completely resolved;



1           there was nothing more to be done with respect to that  
2           question.  And so with respect to the question of  
3           settlement itself, there was nothing more to be done, and  
4           so that's why what Allied says in its brief in opposition  
5           is that, as you say, the quantum of attorneys' fees need  
6           not be decided but can be subject to a separate hearing.  
7           And then at the oral argument itself, again, the attorney  
8           for Allied says defense costs would be a topic for a  
9           separate proceeding like an inquest.  And so that's - - -

10                   JUDGE RIVERA:  What if we understand what the  
11           arbitrator has done is - - - the arbitration panel is  
12           having decided perhaps two things.  One, that the parties  
13           had agreed that the panel could decide all procedural  
14           questions and that whether or not to reconsider is a  
15           procedural question, and so they've made that decision.  So  
16           my first question is can we revisit that.  The second one  
17           is, what if the panel decides that, regardless what they  
18           have labeled their decision on liability, the parties never  
19           consented to a partial final award.  Can we revisit that if  
20           that is their finding?

21                   MS. HALLIGAN:  I'll tell you why I believe you  
22           cannot, Your Honor.  That's exactly where functus officio  
23           attaches, right?

24                   JUDGE RIVERA:  Um-hum.

25                   MS. HALLIGAN:  So I think, in this respect, it's



1 no different than if it had been a final award, not a  
2 partial award, right?

3 JUDGE RIVERA: Okay.

4 MS. HALLIGAN: At the time at which an award is  
5 entered that is final, whether it is in whole or in part,  
6 that is when the doctrine of functus officio attaches. If  
7 that weren't the case, then any time a tribunal issues - -  
8 -

9 JUDGE RIVERA: So your position is the court can  
10 always revisit whether or not it was final - - -

11 MS. HALLIGAN: The court - - -

12 JUDGE RIVERA: - - - regardless of whether or not  
13 the arbitrator is making a decision based - - - the  
14 arbitrators are making a decision based on their  
15 understanding of the agreement and the - - - and the way  
16 they've interpreted the representations by the parties  
17 before them.

18 MS. HALLIGAN: I'm not sure if I'm understanding  
19 Your - - - Your Honor's question, so let me try to respond,  
20 but - - -

21 JUDGE RIVERA: Well, in some way, I'm following  
22 up on Judge Wilson's point about whether or not it's a  
23 little murky what everybody's really saying and agreeing  
24 to, and if that is the case and the arbitrators decide,  
25 well, we've decided that we don't think that you all - - -



1 MS. HALLIGAN: Right.

2 JUDGE RIVERA: - - - consented to a final award,  
3 so the fact that we may have set a partial final award is -  
4 - - is irrelevant. And - - - and you've authorized us to  
5 reconsider our decisions - - -

6 MS. HALLIGAN: Yes.

7 JUDGE RIVERA: - - - and so we do that in this  
8 case.

9 MS. HALLIGAN: Okay. So two responses to that -  
10 - -

11 JUDGE RIVERA: Yes.

12 MS. HALLIGAN: - - - if I can, Your Honor.

13 JUDGE RIVERA: Yes.

14 MS. HALLIGAN: First of all, for the reasons I've  
15 just - - - just laid out, and I think we underscore these  
16 in our briefs, but really the Appellate Division, now that  
17 there was agreement between the parties, in our view, that  
18 the panel was authorized to enter a partial final award,  
19 and that makes sense, given the structure of the  
20 proceedings, and that's why the panel labeled it as such.

21 Then the question is, suppose down the road, if I  
22 understand Your Honor, the tribunal, or at least one  
23 member, because that's all it was, it was one member, says,  
24 well, maybe we would like to revisit that. And that's  
25 where I'm saying, Your Honor, it matters not one wit

1           whether or not it's a partial final award or a final award.  
2           If this court allows arbitration tribunals to revisit final  
3           determinations, it - - -

4                       JUDGE RIVERA:   Okay.  But I don't think you're  
5           quite answering my question.

6                       MS. HALLIGAN:   Sorry, I - - -

7                       JUDGE RIVERA:   This part of my ques - - - you've  
8           answered other parts, so I thank you for that.  So my  
9           question is can the arbitrators - - - is it always the  
10          court that decides whether or not the award is final?  And  
11          that may be contradictory to what the arbitrators decide.

12                      MS. HALLIGAN:   Well, I think there are plenty of  
13          circumstances in which, you know, orders may clearly be  
14          interim or interlocutory.

15                      JUDGE RIVERA:   Um-hum.

16                      MS. HALLIGAN:   But with respect to any award that  
17          is at least colorably deemed final - - - I think here it is  
18          plainly final, period - - - at that point, if you read the  
19          - - -

20                      JUDGE RIVERA:   But I thought we don't revisit  
21          when an arbitrator has made a mistake that's even based on  
22          law.

23                      MS. HALLIGAN:   I think, Your Honor - - - yeah,  
24          well, that's correct, but here, because the arbitrator was  
25          - - - the panel was acting in excess of its authority,



1           there is clear grounds. Just to - - - to try to - - - to,  
2           you know, take - - - take one more pass at Your Honor's  
3           question to make sure that I have - - - have gotten it, I  
4           think the Appellate Division put it, I - - - I think, very  
5           helpfully.

6                         The Appellate Division says one member of the  
7           tribunal deciding that they would like to revisit it is not  
8           enough to draw into question whether it was in fact a final  
9           determination. Because, the Appellate Division explains,  
10          by that logic, an arbitration tribunal could avoid  
11          exceeding its authority when reconsidering a partial final  
12          award as long as the arbitrator stated that the parties did  
13          not bifurcate the proceedings or that the arbitration  
14          tribunal did not intend for the award to be - - -

15                        JUDGE RIVERA: But it is a majority, right? It's  
16          two of them, though, that decide - - -

17                        MS. HALLIGAN: But either way, Your - - -

18                        JUDGE RIVERA: - - - to move forward with the  
19          reconsideration. And I thought the agreement allows for a  
20          majority to make those kinds of decisions.

21                        MS. HALLIGAN: Well, Your Honor, I think - - - I  
22          think what the Appellate Division is saying is - - - is - -  
23          - one judge had flipped, right? That - - - that's what  
24          happened after - - -

25                        JUDGE RIVERA: Sure.



1 MS. HALLIGAN: But yes, at that point, there were  
2 two - - -

3 JUDGE RIVERA: On the merits, sure.

4 MS. HALLIGAN: But also one judge - - - I guess  
5 that's right, yes. One - - - one judge joined the other  
6 and said that they could reconsider. The other judge  
7 dissented as to reconsideration.

8 I see my time has run, but if I could just finish  
9 responding.

10 CHIEF JUDGE DIFIORE: Of course.

11 MS. HALLIGAN: But I think the point, Your Honor,  
12 is once it becomes final, if you allow the tribunal itself  
13 to then push reset and say, no, we didn't mean it was final  
14 in the first place, that would inject complete chaos into  
15 any principle of finality. And this goes to - - -

16 JUDGE STEIN: But doesn't that beg the question  
17 of whether it was final? I mean, that's - - -

18 MS. HALLIGAN: Well, it does - - -

19 JUDGE STEIN: That's the question is whether it  
20 was final.

21 MS. HALLIGAN: I would say that's exactly right,  
22 Your Honor. I mean, all of these - - - these arguments, I  
23 think, that my adversary has raised about it needing to be  
24 in writing, in writing in the arbitration agreement itself,  
25 those are all foreclosed by established case law. We lay





1 that out in our brief. And the case law's clear that - - -  
2 that an oral agreement is sufficient. Here you have a  
3 request in writing in a brief and an oral representation.  
4 But you're right - - -

5 JUDGE STEIN: But where is the express consent of  
6 your client on this record? Where is it?

7 MS. HALLIGAN: Your Honor, our client absolutely  
8 proceeded in full understanding that there had been a  
9 decision - - -

10 JUDGE STEIN: But for me the question is - - -

11 MS. HALLIGAN: - - - here to enter a partial  
12 final award.

13 JUDGE STEIN: - - - is that enough - - -

14 MS. HALLIGAN: Well, Your Honor - - -

15 JUDGE STEIN: - - - because - - - and I expressed  
16 the concern to your adversary.

17 MS. HALLIGAN: Yes.

18 JUDGE STEIN: My concern is that if we're going  
19 to - - - and I - - - I guess it also follows up on - - -

20 MS. HALLIGAN: Yes.

21 JUDGE STEIN: - - - Judge Wilson's question, if -  
22 - - if we're going to allow these, perhaps, somewhat  
23 ambiguous or implied agreement or whatever, to control the  
24 finality, then I think we may be creating some other  
25 problems that have to do with statute of limitations and



1 the right to go to the courts and these kinds of things.

2 MS. HALLIGAN: It's a fair question, Your Honor.

3 JUDGE STEIN: And that's where, I think - - -

4 MS. HALLIGAN: Yes.

5 JUDGE STEIN: - - - we come in.

6 MS. HALLIGAN: And Your Honor, that's a fair  
7 question, and I would respond to it by saying this. Trade  
8 & Transport, in which the request for entry of a partial  
9 final award is almost really on all fours with what you  
10 have here, that case was decided nearly thirty years ago in  
11 1991. And I would submit to Your Honor that if allowing  
12 that sort of request to provide the basis - - -

13 JUDGE STEIN: But in Trade & Transport, I thought  
14 it was a lot clearer than - - - than it is here.

15 MS. HALLIGAN: There, Your Honor, it says that  
16 they're requesting an immediate determination. That's  
17 almost exactly the language that was used here.

18 JUDGE GARCIA: But counsel, in that case, Trade &  
19 Transport, didn't they also have a collateral federal  
20 proceeding that they were trying to get their decision to,  
21 at least in part, so that collateral proceeding could move  
22 forward? I thought that was a key fact in Trade &  
23 Transport.

24 MS. HALLIGAN: But I don't think, Your Honor,  
25 that the question of why the parties might want entry of a



1 final award is something that any court has ever probed.

2 JUDGE GARCIA: No, I agree, and I think that goes  
3 also - - - I think Trade & Transport, to me, sets up - - -  
4 it's not really a two-part test, but it's an intent test,  
5 right, and part of that is what do the parties agree to on  
6 the record, what have they done, what are these other  
7 factors they might be considering - - -

8 MS. HALLIGAN: Right.

9 JUDGE GARCIA: - - - that would go to their  
10 intent, such as the collateral proceeding. And then I  
11 think it's what did the panel itself understand at that  
12 time - - -

13 MS. HALLIGAN: Yes.

14 JUDGE GARCIA: - - - not later, when they called  
15 it a partial final award - - -

16 MS. HALLIGAN: Agreed.

17 JUDGE GARCIA: - - - not that they're self-  
18 declaring it final, but that was their understanding - - -

19 MS. HALLIGAN: Yes.

20 JUDGE GARCIA: - - - of what the parties  
21 intended. I think the problem I'm having with let the  
22 panel decide that again is it would really gut the  
23 doctrine, wouldn't it?

24 MS. HALLIGAN: It would, and - - - and that's my  
25 point. And to go to the question of what the parties



1 understood, and - - - and in response to - - - to both  
2 Judge Garcia and Judge Stein, Allied itself, when it came  
3 back and asked for a corrected award, asked for a corrected  
4 partial final award. So Allied itself clearly understood  
5 that there was authorization.

6 JUDGE RIVERA: But that's responding to the  
7 arbitrator's labeling.

8 JUDGE FAHEY: Judge, is it all right.

9 JUDGE RIVERA: They labeled it as such, right?

10 MS. HALLIGAN: Yeah, well, Your Honor, I think  
11 that it reflects that they understood - - - and again, the  
12 way in which the - - - the proceeding itself unfolded, I  
13 think, made very clear there were two claims at issue here,  
14 there was complete resolution on one, and the other one was  
15 going to proceed.

16 I see my time is up. If I may - - -

17 JUDGE FAHEY: Judge, is it all right if I ask a  
18 question?

19 CHIEF JUDGE DIFIORE: Yes, please.

20 JUDGE FAHEY: Would you mind? Mobil Oil - - -

21 MS. HALLIGAN: Yes, Your Honor.

22 JUDGE FAHEY: Let's go to Mobil Oil just for a  
23 second - - -

24 MS. HALLIGAN: Please, yes.

25 JUDGE FAHEY: - - - since we're near the end of



1 the discussion here. That's New York law. It's not First  
2 Circuit law. It's - - - it's not federal case law.

3 MS. HALLIGAN: Yes, it is.

4 JUDGE FAHEY: It's New York law. And it's a  
5 rather old case, but I guess my question is: why isn't the  
6 argument here solved by Mobil Oil, number one, and doesn't  
7 - - - the problems that we're having in solving this  
8 argument, aren't these exactly the kind of problems that  
9 Mobil Oil said we really - - - this is why we made this  
10 ruling, so you wouldn't have this discussion, so there  
11 wouldn't be this ambiguity?

12 MS. HALLIGAN: Well, we don't have any quarrel  
13 with Mobil Oil, Your Honor. What - - - what Mobil Oil says  
14 is that - - - that you can't have confirmation of an  
15 interlocutory judgment, which there I believe was about the  
16 rules that applied.

17 JUDGE FAHEY: Um-hum.

18 MS. HALLIGAN: We're not seeking to do that here.  
19 We're not seeking to say there was some interim procedural  
20 order that applied. So our position is fully consistent  
21 with Mobil Oil. It doesn't in any way preclude that when  
22 there is a separate claim - - - and you know, we lay out  
23 extensive case law at pages 17 - - -

24 JUDGE FAHEY: Well, there's a whole discussion  
25 you have about this being a separate claim. I don't accept



1 that. Liability and damages aren't two separate claims;  
2 those are two parts of a claim. So - - -

3 MS. HALLIGAN: Understood, Your Honor - - -

4 JUDGE FAHEY: So I would - - -

5 MS. HALLIGAN: - - - but I'm talking about - - -

6 JUDGE FAHEY: Let me finish.

7 MS. HALLIGAN: Sorry.

8 JUDGE FAHEY: I would disagree with that, that  
9 characterization, because that's not what we're talking  
10 about here. There isn't a separate claim.

11 And the characterization of Mobil Oil, the way I  
12 read it is the PFA is - - - PFAs cannot be final. They  
13 cause enormous delays in proceedings and create a situation  
14 where you have interlocutory judgments on arbitration  
15 proceedings. That's - - - that's the way I read it.

16 MS. HALLIGAN: If I may respond to that, Your  
17 Honor?

18 JUDGE FAHEY: Sure, yeah, go ahead, please.

19 MS. HALLIGAN: So what I would say is the entry  
20 of partial final awards is permitted clearly under the FAA,  
21 permitted under the AAA rules, permitted under the JAMS  
22 rules. I don't think there's any sense that that has led  
23 to untoward litigation, to parties rushing to court. And -  
24 - - and so - - - I also think that the law has been clear.  
25 The cases that we cite, including in the Appellate



1 Divisions, as well as the federal court, a number of them  
2 have been on the books for a long time. So it seems to me  
3 that, if there was a risk, that that would occur that that  
4 would have materialized a long time ago, and that this  
5 would put New York out of step with those other  
6 jurisdictions.

7 I realize I am way over time. If I may just say,  
8 on another note, I do wish the court luck in the coming  
9 months, weeks.

10 CHIEF JUDGE DIFIORE: Thank you, Ms. Halligan.  
11 Counsel?

12 MR. SUTHERLAND: So nothing from the insurance  
13 company; they're not able to point to a single place in the  
14 record where they agreed to create finality.

15 JUDGE GARCIA: Counsel, what would happen in this  
16 case if JAMS rules applied? What would the result be?

17 MR. SUTHERLAND: The institutional rules aren't  
18 implicated here. That might be a different case.

19 JUDGE GARCIA: No, no, no, but I know, and I  
20 accept that issue isn't here. I'm just asking,  
21 hypothetically, if the JAMS rules applied here, what would  
22 be the result? Same facts, everything the same, but you  
23 had agreed the JAMS rules would apply.

24 MR. SUTHERLAND: I think we would still win  
25 because the policy itself says the arbitrator should issue



1 a single decision; it says "the decision of the  
2 arbitrator".

3 JUDGE GARCIA: So the JAMS rules would be  
4 overruled by - - -

5 MR. SUTHERLAND: Yes.

6 JUDGE GARCIA: - - - the policy?

7 MR. SUTHERLAND: Then there would be an  
8 inconsistency as between the policy and the JAMS rules.  
9 And if there's an ambiguity - - - and on their best day,  
10 and I think the record's clear that there was no agreement,  
11 but on their best day the record was murky or ambiguous,  
12 and in those situations you uphold the award.

13 Notice what we're doing here; it's a de novo  
14 review of the entire record to see if there's some way we  
15 could bend over backwards to have a vacatur. But that's  
16 not what you're supposed to do. If the arbitrators had a  
17 colorable justification for their construction of the  
18 parties' agreement or not, then you uphold the award. And  
19 the arbitrators had a colorable justification for  
20 construing what the parties here did as - - - as lacking an  
21 agreement. They said clearly, at page 94 of the record,  
22 there is no agreement to bifurcate here. That's true even  
23 on a de novo review, but that's not what arbitration review  
24 is all about.

25 And then finally, I want to clear - - - clarify





1 one factual issue. There was nothing decided at the  
2 hearing on the cross motions for summary disposition. And  
3 I think that's a little different from what my colleague  
4 was saying. Liability was not decided at the hearing on  
5 the cross motions for summary disposition. That's clear at  
6 page 413 of the record, where Chairman Davidson says we  
7 don't know what we're going to do right now, I'm still a  
8 little confused. So it's just not the case that the  
9 parties agreed to bifurcate or anything like that.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. SUTHERLAND: Thank you.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of American International Specialty Lines Insurance Company v. Allied Capital Corp., No. 23, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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