IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL BROOM; KEVIN BROOM; and ANDREA BROOM,	)	No. 82311-1
Respondents,	)	
v.	)	En Banc
MORGAN STANLEY DW INC. and KIMBERLY ANNE BLINDHEIM	)	
Petitioners.	)	Filed July 22, 2010

C. JOHNSON, J.—This case asks us to interpret former RCW 7.04.160 (1943),[1] which lists the grounds for vacating arbitration awards arising from private arbitration proceedings. We must decide whether legal error on the face of the award is a valid basis for vacating an award. If so, then we must determine whether the arbitrators' application of state statutes of limitations, thus barring most of the respondents' claims, constitutes facial legal error. The trial court vacated the arbitration award, concluding that the application of the statutes of limitations was facially erroneous. The Court of Appeals affirmed. We affirm the Court of

[1] Repealed by Laws of 2005, ch. 433, § 50.

Appeals; the arbitral panel's application of state statutes of limitations to the respondents' claims was facially erroneous.

FACTUAL AND PROCEDURAL HISTORY

In the late 1990s and early 2000s, Dick Broom kept a retirement investment account with Paine Webber. When Broom's broker at Paine Webber retired, Kimberly Blindheim took over his accounts. Blindheim liquidated Broom's blue chip stocks and purchased high tech stocks. After these purchases, Broom's account decreased in value by 25 percent. When Blindheim moved from Paine Webber to Morgan Stanley in June 2000, Broom transferred his accounts with her.

Once at Morgan Stanley, Broom's accounts continued to decline in value until his death in 2002. Broom's children (the Brooms) were the beneficiaries of the accounts. In September 2005, the Brooms filed a notice of claim with Morgan Stanley, alleging negligence, failure to make suitable investment recommendations, violation of state and federal securities law, breach of fiduciary duty, misrepresentation and omissions, failure to supervise, breach of contract, and violation of Washington's Consumer Protection Act (CPA), chapter 19.86 RCW.

In accord with their arbitration agreement, the parties submitted their dispute to the National Association of Securities Dealers. Morgan Stanley moved to dismiss the Brooms' claims, asserting, among other things, that the claims were

barred by the applicable statutes of limitations. In May 2006, the arbitration panel ruled that all of the Brooms' claims except for the CPA claim were barred by state and federal statutes of limitations. The Brooms moved for reconsideration, and Morgan Stanley moved to dismiss the CPA claim. The panel denied the Brooms' motion and dismissed the remaining CPA claim.

The Brooms filed a complaint in superior court and moved to vacate the arbitration award. They argued that the award contained facial legal error because state statutes of limitations do not apply to arbitration. The trial court agreed and vacated the award.

The Court of Appeals affirmed, holding that facial legal error is a basis for vacating an award and that state statutes of limitations do not apply to arbitration proceedings. Morgan Stanley petitioned this court for review, which we granted. *Broom v. Morgan Stanley DW, Inc*., 165 Wn.2d 1040 (2009). The Securities Industry and Financial Markets Association, the Public Investors Arbitration Bar Association, the Associated General Contractors of Washington, and the Washington State Association for Justice Foundation filed amicus briefs.

ISSUES

(1) Is "legal error on the face of the award" a valid ground for a court to vacate an arbitration award?

(2) If so, may arbitrators apply state statutes of limitations to bar the claims

presented?

ANALYSIS

(1) *Legal Error on the Face of the Award*

Private arbitration in Washington State is governed exclusively by statute. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 893, 16 P.3d 617 (2001). When the Brooms entered into the arbitration agreement and submitted their claims for resolution, arbitration was governed by the Washington Arbitration Act (WAA), former chapter 7.04 RCW.[2] The relevant provision permitted a court to vacate an arbitration award under the following circumstances:

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

[2] The superior court incorrectly relied on the current arbitration statute, the revised uniform arbitration act (RUAA), chapter 7.04A RCW. The RUAA 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 Brooms filed their notice of claim on September 22, 2005. The court's error appears to make no difference, however, because the portions of the statutes relied upon are the same.

Former RCW 7.04.160.

Morgan Stanley focuses much of its argument on the statutory history of the WAA and the trial court's proper scope of review. But we previously addressed the scope of the trial court's review in *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995), where we approved of facial legal error as an accepted basis for vacating an arbitral award. In *Boyd*, we suggested that such error indicates that the arbitrators exceeded their powers. 127 Wn.2d at 263.

Our holding in *Boyd* was no outlier. We have repeatedly articulated a rule that explicitly includes facial errors of law as grounds for vacation. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998); *Boyd*, 127 Wn.2d at 263; *N. State Constr. Co. v. Banchero*, 63 Wn.2d 245, 249-50, 386 P.2d 625 (1963). The *Boyd* majority embraced the existing rule, whereby facial legal error constitutes an instance in which arbitrators "exceeded their powers," thus permitting vacation of the award. The *Boyd* concurrence correctly observed that this rule was originally adopted as an interpretation of Washington's 1925 arbitration act, which did include legal error as an explicit ground for vacation. *Boyd*, 127 Wn.2d at 266 (Utter, J., concurring). The concurrence reasoned that we have improperly continued to apply this rule, ignoring the change in its statutory underpinnings. However, it is the *Boyd*

majority that continues to guide us. Even after the enactment of the WAA, we have consistently approved of the *Boyd* rule, embracing facial legal error as a ground for vacation.

Morgan Stanley argues that we implicitly overruled *Boyd* when we approved of the *Boyd* concurrence in *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 527, 79 P.3d 1154 (2003). However, as the Brooms point out, that reference to *Boyd* set no precedent. In *Malted Mousse*, we analyzed the standard of review governing mandatory arbitration. As part of that analysis, we contrasted the standards governing review of mandatory arbitration with those governing review of private arbitration. It was in this context that we referenced the *Boyd* concurrence, observing that the legal error standard for vacating a private arbitration award originated in a now-repealed statute. That reference played no part in our holding—that grounds for vacating a private arbitration award do not apply to a mandatory arbitration award. Our holding in *Malted Mousse* thus provides no guidance in interpreting the grounds for vacating a private arbitration award.

Moreover, nothing in our *Malted Mousse* analysis can be read to overrule our previous cases. We have previously disapproved of overruling binding precedent sub silentio. *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). Thus, Morgan Stanley's argument that *Malted Mousse* implicitly overruled our prior cases

and abandoned the facial legal error ground is unpersuasive.

Importantly, the legislature has not seen fit to clarify the statutory grounds for vacating an arbitral award. We have observed that "'[t]he Legislature is presumed to be aware of judicial interpretation of its enactments,' and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *Riehl v. Foodmaker*, *Inc*., 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)). After the *Boyd* court's characterization of facial legal error as an instance of arbitrators exceeding their powers, the legislature's failure to provide further clarification suggests its approval of that characterization.

Morgan Stanley argues, in essence, that we should overturn years of precedent approving of facial legal error as a ground for overturning arbitral awards. We have held that "'[t]he doctrine of stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned."'" *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (quoting *Riehl*, 152 Wn.2d at 147 (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970))). Morgan Stanley and two amici, the Associated General Contractors and the Securities Industry and Financial Markets Association, argue that the facial

legal error standard is harmful because it undermines the purposes of arbitration: finality and efficiency. But these arguments characterize the legal error standard as much broader than it is.

In fact, the facial legal error standard is a very narrow ground for vacating an arbitral award. When judicial review is limited to the face of the award, the purposes of arbitration are furthered while obvious legal error is avoided. But courts may not search the arbitral proceedings for *any* legal error; courts do not look to the merits of the case, and they do not reexamine evidence. Despite arguments to the contrary, the facial legal error standard does not permit courts to conduct a trial de novo when reviewing an arbitration award. *Boyd*, 127 Wn.2d at 262. Through the years, our courts have applied the facial legal error standard carefully, vacating an award based on such error in only four instances, one of which was the case below.[3] Thus, given the narrowness of the facial legal error standard and the care with which it is applied, we see no harm in its continued application.

Washington is not the only state to provide for this type of review of arbitral awards. Other jurisdictions have also adopted a narrow facial legal error ground for

[3] *Broom v. Morgan Stanley DW, Inc.*, noted at 146 Wn. App. 1043, 2008 WL 4053440 (2008); *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 32 P.3d 289 (2001); *Federated Servs. Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 4 P.3d 844 (2000); *Lindon Commodities, Inc. v. Bambino Bean Co.,* 57 Wn. App. 813, 790 P.2d 228 (1990). This list does not include cases in which arbitration awards vacated by the trial court were later reinstated by the Court of Appeals.

vacating arbitration awards. *See Anthony v. Kaplan*, 324 Ark. 52, 918 S.W.2d 174, 178 (1996); *First Group Health Corp. v. Ruddick*, 393 Ill. App. 3d 40, 911 N.E.2d 1201, 1213 (2009); *Parr Constr. Co. v. Pomer*, 217 Md. 539, 144 A.2d 69, 72 (1956); *Washington v. Washington*, 283 Mich. App. 667, 770 N.W.2d 908, 912 (2009); *Tiberghein v. B.R. Jones Roofing Co.*, 151 N.H. 391, 856 A.2d 21, 24 (2004); *State Office of Employee Relations v. Commc'n Workers of Am.*, 154 N.J. 98, 711 A.2d 300, 307 (1998); *Welty v. Brady*, 123 P.3d 920, 924 (Wyo. 2005).

We hold that facial legal error falls within former RCW 7.04.160(4) as one instance in which arbitrators exceed their powers and that it is a valid ground to vacate an arbitration award.

(2) *Statutes of Limitations*

The parties in this case executed an arbitration agreement in which they agreed that the arbitration proceedings would be governed by the National Association of Securities Dealers Code of Arbitration Procedure (NASD Code). However, the parties did not explicitly state in their agreement that claims would be subject to Washington State statutes of limitations. We must thus determine whether, in the absence of such an indication, the arbitrators correctly applied state statutes of limitations to bar the Brooms' claims.

Morgan Stanley argues that, even if facial legal error is a valid ground for

vacating an arbitral award, no such error existed here because the arbitration panel properly applied state statutes of limitations to dismiss the Brooms' claims. Morgan Stanley premises its argument on two separate issues: First, it argues that the NASD Code permits arbitration panels to apply state statutes of limitations. Second, it asserts that, under our previous cases, arbitral proceedings are "actions" within the purpose of Washington's statutes of limitations. We interpret these issues as being interrelated and discuss them in kind.

Morgan Stanley argues that the NASD Code permits arbitrators to make their own determinations regarding the applicability of state statutes of limitations. As part of their arbitration agreement, the parties agreed that their arbitration would be governed by the NASD Code. Section 10304 of that code, in place at the time of the parties' arbitration, provided as follows:

> (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.
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> (b) Dismissal of a claim under this Rule does not prohibit a party from pursuing the claim in court. By requesting dismissal of a claim under this Rule, the requesting party agrees that if the panel dismisses a claim under the Rule, the party that filed the dismissed claim may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.
>
> (c) *This Rule shall not extend applicable statutes of limitations*; nor shall the six-year time limit on the submission of claims apply to any claim that is directed to arbitration by a court of competent jurisdiction

upon request of a member or associated person.

NASD Code, section 10304 (2005) (emphasis added). Morgan Stanley argues that, under this rule, the authority to determine applicability of a particular statute of limitations lies with the arbitrators, not with the courts. The Court of Appeals disagreed, reasoning that this section cannot be read to authorize arbitrators to apply state statutes of limitations. *Broom v. Morgan Stanley DW, Inc.*, noted at 146 Wn. App. 1043, 2008 WL 4053440, at *5. We agree with Morgan Stanley that section 10304 should be interpreted by arbitrators, but we do not find that this conclusion permitted the arbitrators to apply state statutes of limitations in this case.

The parties and various amici submit conflicting evidence as to the correct interpretation of the NASD rule in effect at the time of the arbitration. Citing a proposed rule adopted into the current NASD Code, the Public Investors Arbitration Bar Association (PIABA) supplies evidence that the rule refers only to the statutes of limitations for filing claims in court. In addition, PIABA provides examples suggesting that this is the common understanding of the rule among industry insiders experienced in NASD arbitration. However, Morgan Stanley submitted contradictory evidence showing that NASD arbitrator training guides, in effect at the time of the arbitration, direct arbitrators to apply state and federal statutes of limitations to parties' claims. We do not pass judgment on this evidence, however,

as the task of interpreting section 10304 falls to arbitrators, not to this court. NASD Code, section 10324; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).

The correct interpretation of NASD section 10304 is not dispositive here, however. We determine independently whether our state statutes of limitations may apply to arbitral proceedings. The Brooms argue, and the Court of Appeals agreed, that our prior cases preclude arbitration proceedings from qualifying as "actions" for the purpose of applying state statutes of limitations. The Brooms rely primarily on two cases for the proposition that state statutes of limitations never apply to arbitrations. In 1967, we held that arbitration proceedings were not subject to the statute requiring a notice of claim to be filed with a municipality prior to instituting an action against it. *Thorgaard Plumbing & Heating Co. v. County of King*, 71 Wn.2d 126, 130, 132, 426 P.2d 828 (1967). In reaching this conclusion, we distinguished between judicial and arbitral proceedings and reasoned that the term "action" in the claim-filing statute could not refer to arbitrations. The Brooms argue that under *Thorgaard*, state statutes of limitations do not apply to arbitral proceedings.

Morgan Stanley points out that in an even more recent case, we held that the specific legal context of the case determines whether an arbitration proceeding is an

"action" for the purpose of Washington statutes. *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 36-37, 39-40, 42 P.3d 1265 (2002). In that case, we limited *Thorgaard* to its facts and distinguished the purposes of the statutes in each case. In *Thorgaard*, we considered the purposes of the former county nonclaim statute, RCW 36.45.010—intended to put the county on notice of an impending action—and the WAA, former chapter 7.04 RCW. 71 Wn.2d at 129-30. In *Fire Fighters*, however, the labor arbitration was not governed by the WAA, and the statute at issue, RCW 49.48.030, was a remedial statute meriting liberal interpretation. 146 Wn.2d at 34, 39. Thus, our cases together teach that we should examine the purpose of the statute before us to determine whether "action" includes arbitral proceedings in a given context.

In the present case, however, relevant precedent already exists to guide us. We previously held that by its language, a catch-all statute of limitations did not apply to arbitration. *City of Auburn v. King County*, 114 Wn.2d 447, 450, 788 P.2d 534 (1990). Morgan Stanley argues that *City of Auburn* is distinguishable from the present case because that case involved a different kind of arbitration. However, our conclusion in that case rested not on the type of arbitration involved, but on the language of the statute of limitations. Importantly, the catch-all statute of limitations, RCW 4.16.130, is part of the same chapter as the general rule governing

statutes of limitations that is before us here, RCW 4.16.005. Both sections refer only to "actions" and make no mention of arbitrations. In addition, the statutory limitation specific to securities claims states that "[n]o person may *sue* under this section more than three years after" certain events. RCW 21.20.430(4)(b) (emphasis added). Thus, *City of Auburn* guides us to conclude that RCW 4.16.005 does not apply to arbitration proceedings.

Further, in the arbitration statute before us, the legislature chose its statutory language carefully to distinguish between arbitrations and judicial proceedings. In this case, as in *Thorgaard*, the parties' arbitration was governed by the WAA. Throughout the WAA, the legislature refers to arbitration variously as "arbitration," "hearing," or "proceeding," and to lawsuits as "civil actions," "actions," or "suits." Former RCW 7.04.030, .040, .070, .120, .180 (1943). The legislature maintained the distinction between the two types of proceedings in the RUAA, carefully referring to arbitrations as "arbitration proceedings" and to lawsuits as "judicial proceedings" or "civil actions." RCW 7.04A.060, .080, .210. Nowhere in either act does the legislature refer to an arbitration as an "action." Nor does either act make state statutes of limitations applicable to arbitrations. This legislatively created distinction suggests that the legislature did not intend for arbitrations governed by the WAA and the RUAA to be deemed equivalent to judicial "actions."

The legislature's carefully chosen language, as well as its apparent approval of our statutory interpretation in *City of Auburn*, suggests that we have interpreted these statutes as intended. As we noted above, "[t]he Legislature is presumed to be aware of judicial interpretation of its enactments," and so absent a legislative change, we presume that the legislature approves of our interpretation. *Friends of Snoqualmie*, 118 Wn.2d at 496-97 (citing *Glass v. Stahl Specialty Co*., 97 Wn.2d 880, 887, 652 P.2d 948 (1982)). In the absence of a clear statement to the contrary by the Washington legislature, we thus read the statutory language and our own precedent to conclude that arbitration is not an "action" subject to state statutes of limitations in these circumstances.

Although arbitrators are empowered to interpret the NASD Code, their interpretations may not violate state law. And though arbitrators have the discretion to interpret section 10304 as they see fit, that discretion is bounded by Washington's case law and statutes. Because, under our cases, state statutes of limitations may not apply to arbitrations absent the parties' agreement, the arbitrators were not authorized to apply those limits to the Brooms' claims.

This result does not subject parties to the burden of facing stale and untimely claims, as Morgan Stanley argues. If desired, parties may agree contractually to the applicability of state statutes of limitations, in which case those limits would be

applied by the arbitral panel. But here, no such agreement existed.[4] The arbitrators exceeded their powers by applying statutes of limitations inapplicable to arbitral proceedings.

CONCLUSION

We conclude that, in accordance with our previous case law, facial legal error is a valid ground for vacating an arbitration award. The arbitrators in this case erred by applying state statutes of limitations to bar the Brooms' claims. We affirm the Court of Appeals.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:

Justice Gerry L. Alexander

Justice Richard B. Sanders

Justice Debra L. Stephens

[4] The dissent asserts that the parties did agree to apply the state statutes of limitations because they agreed to apply the NASD Code and arbitrators are given the power to interpret that code, however, as we have already discussed, the power to interpret the code does not equate to a power to contravene state law. In order for state statutes of limitations to be applicable to the Brooms' claims, the parties would have had to expressly agree to such applicability in their arbitration agreement.

Justice Tom Chambers