Circuit Court for Queen Anne's County
Case No. 17-C-14-019173

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1543

September Term, 2015

B&S INC. ET AL.

v.

TC SHOPPING CENTER, LP, ET AL.

(On Motion for Reconsideration)

Kehoe,
Nazarian,
Shaw Geter,
JJ.

Opinion by Kehoe, J.

Filed: November 17, 2017

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Having substantially prevailed in a complex commercial arbitration proceeding, B&S, Inc. and B&S 1983 (collectively "B&S") filed a petition to confirm that award in the Circuit Court for Queen Anne's County. The circuit court declined to do so, corrected one portion of the award and vacated another. B&S has appealed. The appellees are TC Management Company and TC Shopping Center, LP (collectively "TC"). B&S raises three issues, which we have consolidated and reworded:

> I. Did the circuit court err in vacating the final arbitration award on the grounds that the arbitrator exceeded his authority and that the award was internally inconsistent and contradictory?
>
> II. Did the circuit court err by correcting the award of arbitration expenses to conform with the terms of the parties' arbitration agreement?

We will affirm the judgment in part and reverse it in part.

Background

Our rendition of the facts is drawn largely from the arbitrator's Interim Award, with some interpolations, modifications, and deletions by us.

The TC Shopping Center, LP (the "Partnership") owns and operates the Thompson Creek Shopping Center ("the TC Center") in Stevensville, Maryland. The Partnership is governed by a limited partnership agreement dated October 31, 1994 (the "Agreement"). The general partner of the Partnership is TC Management Company ("TC Management"). TC Management is an entity controlled by Alan J. Hyatt, its president.

There are two classes of limited partner under the Agreement: Class A Limited Partners[1] and a Class B Limited Partner. The Agreement refers to TC Management and the Class A Limited Partners collectively as the "Other Partners."

The TC Center was developed in the 1980's by Bruce Butterworth, operating as B&S, Inc. In the mid-1990's, the TC Center was in financial distress. With foreclosure looming, Butterworth and Hyatt discussed the possibility of the latter's forming an entity to purchase the TC Center.

In May 1994, Hyatt and Butterworth signed an agreement of sale, under which Hyatt would form a new partnership entity to purchase the TC Center from B&S, Inc. In addition to assuming or satisfying the existing mortgage debt on the property, the buyer agreed to pay $600,000 to B&S, Inc. In September 1994, as a result of continuing discussions between Messrs. Hyatt and Butterworth, the amount of cash payable to B&S, Inc. was decreased to $400,000, and B&S, Inc. was added to the purchasing entity as the "Class B Limited Partner."[2]

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[1] The Agreement indicates that TC Management is the attorney-in-fact for the Class A Limited Partners. Their identities are not disclosed in the record.

[2] The Class B Limited Partner now consists of B&S, Inc. and B&S 1983, Inc. B&S 1983, Inc. was an entity formed by creditors of B&S, Inc. and/or Bruce Butterworth, which acquired the rights to the Class B Limited Partner's interests. These entities' interests in this litigation are identical.

Hyatt and his group of new investors rescued the financially distraught project by injecting $1,500,000 of additional capital into the TC Center. Accordingly, the Agreement provided that they would have a right to receive distributions from the Partnership before the Class B Limited Partner would receive distributions.

To that end, the Agreement provided that the Other Partners, that is the Class A Limited Partners and TC Management, were entitled to receive a priority annual distribution of $150,000 (representing a 10% return on their investment) from the shopping center's "Net Cash Flow," a defined term in the agreement.[3] This $150,000 priority annual distribution was cumulative, so that if there was insufficient cash to pay the distribution in a given year, the unpaid portion of that distribution would carry over to following years until paid in full. The Agreement further provided that annual distributions in excess of $150,000 would be divided equally between the Other Partners, that is, TC Management and the Class A Limited Partners on the one hand, and the Class B Limited Partner, on the other.

[3] The Agreement defined "Net Cash Flow" as "Net cash for any period . . . after deducting (a) payment[s] . . . of general operating expenses and current liabilities. . .; (b) amounts set aside for . . . reserves . . .; and (c) payments of the Partnership's other obligations."

The parties contemplated that there could be one or more new buildings built by the Partnership on the TC Center property. The Agreement provided that the Other Partners were to receive a return of 14% of the amount of the construction costs for any new buildings, again as a cumulative, priority distribution.

With new management and the infusion of additional capital, the parlous condition of the TC Center improved over time. For the first several years, no distributions were made by the Partnership but, by 2012, the Other Partners had received total distributions of $3,485,659 from the on-going operations of the Partnership.[4] In contrast, the Partnership had made no distributions at all to the Class B Limited Partner. The reason for the discrepancy lay in large part in TC Management's interpretation of one of the Agreement's distribution provisions, a provision found, oddly enough, in the Agreement's definitional section.

Section 3.9a of the Agreement states (emphasis added):

> Section 3.9. Class B Limited Partner — Class B Limited Partner shall be B&S, Inc., and its successors or assigns. The Class B Limited Partner shall have no rights arising out of the Partnership except the following:
>
> a. Class B Partner shall receive a distribution equal to fifty percent (50%) of Net Cash Flow arising from the Property ["Property Net Cash Flow"] in excess of [$150,000] per year. The first [$150,000] of Net Cash Flow per year is known as the "<u>Priority Distribution</u>," which shall first be distributed to all of the [O]ther Partners[.] The Priority Distribution shall be paid cumulatively so that . . . . [there

[4] The Class B Partner also has the right to a portion of the proceeds of any sale of the shopping center but no such sale has occurred.

> will be] no distribution to Class B Partner until such time as [any] cumulative deficit . . . has been paid in full to the other Partners.
>
> Notwithstanding and in addition to the above described Priority Distribution, the other Partners shall receive that portion of Net Cash Flow arising out of all newly constructed buildings within the Property (constructed after settlement) ["New Construction Net Cash Flow"] equal to fourteen percent (14%) per annum of the actual costs of construction of such newly constructed buildings ("New Construction Distribution*").* Said New Construction Distribution shall be paid cumulatively, and no distribution shall be made to Class B Partner until such time as any cumulative deficit of such payments has been paid in full to the other Partners.

TC Management interpreted this language to mean that the Class B Partner had no right to a distribution from either the Property Net Cash Flow or the New Construction Net Cash Flow until the cumulative, priority distributions payable to the Other Partners from both the Property Net Cash Flow and the New Construction Net Cash Flow were satisfied in full. (The arbitrator and the parties refer to this as the "One Bucket Approach.")

In contrast, and from what we can gather from the record,[5] the Class B Partner took the position that § 3.9a required two separate bookkeeping steps on an annual basis. First, the Partnership was required to: (1) determine the Property Net Cash Flow; (2) pay the current year's $150,000 priority distribution, together with any accumulated arrearages,

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[5] At one point in the arbitration proceeding, B&S apparently took the position that it was entitled to 100% of the Property Net Cash Flow after payment of the priority distributions to TC and the Class A limited partners. As we will relate, the arbitrator found that B&S was entitled to 50%.

to the Other Partners; and (3) pay all or a portion of the remaining amount to the Class B Partner. Second, the Partnership was required to: (1) determine the New Construction Net Cash Flow; (2) pay the current year's 14% priority distribution, as well as any arrearages to the Other Partners; and (3) distribute all or a portion of the remainder to the Class B Partner through the Net Property Cash Flow distribution. (The arbitrator and the parties term this the "Two Bucket Approach.")

Whether the Partnership uses the One Bucket Approach or the Two Bucket Approach is important. Historically, there has generally been a surplus Property Net Cash Flow, even after payment of the $150,000 priority distribution, but there had never been a surplus New Construction Net Cash Flow.[6]

In addition to the disagreement over the interpretation of § 3.9a, B&S asserted that TC Management, in its capacity as general partner, had (1) failed to correctly calculate the Property Net Cash Flow and the New Construction Net Cash Flow; (2) wrongfully denied the Class B Partner access to records of the Partnership; and (3) from time to time breached various other provisions of the Agreement. In 2012, B&S invoked its

[6] As of 2012, the Other Partners had the right to receive a total of $1,199,288 for the 14% priority distribution from the New Construction Net Cash Flow but had in fact received only $459,807, leaving an accumulated arrearage of $739,481.

The New Construction Net Cash Flow derives from two buildings, referred to in the arbitrators' opinion as the "Boater's World Building" and the "In-Line Building."

contractual right to resolve these disputes through the American Association of Arbitrator's procedures for the arbitration of commercial disputes.

The arbitrator conducted an initial three day evidentiary hearing in October 2013. After the October proceedings, the arbitrator issued a decision and interim award (the "Interim Award"). In the Interim Award, and relevant to the issues before us,[7] the arbitrator concluded that the language of § 3.9a of the Agreement was ambiguous regarding the Class B Partner's right to distributions to Property Net Cash Flow and New Construction Net Cash Flow. Although the arbitrator characterized parol evidence as to the Hyatt's and Butterworth's negotiations as providing "interesting background for how the Agreement came into existence," he concluded that "the language of the Agreement governs."

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[7] The arbitrator also ruled that (1) the Class B Limited Partner had the right to access financial information regarding the shopping center's operations; (2) TC Management's handling of the Partnership's reserve accounts was both reasonable and in accord with the terms of the Agreement; (3) TC Management acted reasonably settling a dispute with a tenant referred to as "Gateway;" (4) the Partnership was incorrect when it deducted the constructions expenses for the In-Line Building from the shopping center's net cash flow; (5) the Partnership's practice of include principal and interest payments in its calculation of net cash flow was reasonable; and (6) the Class B Limited Partner presented no evidence to support its assertions that Hyatt and TC Management breached the Agreement or their respective fiduciary duties to the Partnership.

None of these aspects of the award are at issue in this appeal.

The arbitrator's interpretation of the meaning of § 3.9a lies at the heart of one of the parties' contentions. Turning to that language, the arbitrator stated (emphasis added):

> I find that the Agreement plainly provides that the New Construction Distribution due to the [O]ther Partners . . . can only occur from a second "bucket," namely the portion of Net Cash Flow arising out of all newly constructed buildings within the property (constructed after settlement).
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> . . . .
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> Under Section 3.9a., the [O]ther Partners may receive a New Construction Distribution only from the second "bucket." However, I find that the Class B Limited Partner is entitled to receive Distributions from the first "bucket," namely 50% of the Net Cash Flow arising from the Property in excess of the Priority Distributions of $150,000.00 per year, regardless of whether any New Construction Distribution is ever paid. There is an inconsistency in the Agreement, because the Agreement provides that the first "bucket" for distributions contains cash from all operations in the Property, and all operations includes cash from newly constructed buildings. <u>On the other hand, the last sentence of Section 3.9a, can be read to preclude any distributions to the Class B Limited Partner of Cash arising from newly constructed buildings until the New Construction Distributions have been paid. I resolve that inconsistency by allowing Distributions to the Class B Limited Partner from the first bucket, because that is what I think is most reasonable under the circumstances, and what I think the parties intended</u>.
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> . . . .
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> [TC] argued that the second paragraph of Section 3.9a. should be read to prohibit any Distribution to the Class B Limited Partner under the first paragraph, until all of the cumulative New Construction Distributions have been paid in full to the [O]ther Partners. I disagree. Payment of New Construction Distributions to the other Partners may only come from the limited source, which is revenue arising out of the new buildings, if, has actually occurred in the case of the In-Line Building, a newly constructed building fails to generate much revenue, then the Class B Limited Partner would never be entitled to any distribution, even if the original portion of the TC Center were generating enormous Net Cash Flow. That is not a reasonable interpretation of the parties' intentions concerning Distributions to the Class B Limited Partner. . . . <u>I find that, even if Partnership operations in the newly constructed buildings do not generate sufficient Net Cash Flow to allow payment of the cumulative New</u>

> Construction Distributions, the Class B Limited Partner is nonetheless entitled to receive its 50% share of distributable Net Cash Flow, after the cumulative Priority Distribution has been paid in full to the other Partners.
>
> I do not accept the Respondents' argument that the Agreement's definition of Net Cash Flow was included solely to determine whether the Class B Limited Partner was entitled to any Distribution. The Agreement does not so provide.

The arbitrator also addressed the Class B Partner's claim that the bookkeeping practices of the Partnership were deficient in several respects. The arbitrator found some merit to these assertions but, in lieu of ordering an accounting, he permitted the Partnership "to perform the accounting computations consistent with this Award." He continued:

> Based upon my decisions herein, the Partnership must perform additional accounting work to recompute Net Cash Flow from the inception in 1994 to the present, to eliminate the deductions from Net Cash Flow of new building construction costs. The Partnership must also compute Net Cash Flow arising out of the newly constructed buildings. Although the parties provided many financial computations, Net Cash Flow arising out of newly constructed buildings has not been computed. The Partnership should have an opportunity, with the benefit of this Decision and Interim Award, to perform the accounting necessary to determine Net Cash Flows from all operations, and arising out of the newly constructed buildings.
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> I will allow the Partnership 90 days from the date of this Award to perform the accounting work and share it with B&S. . . . If the computations are completed but there remain any disputes about amounts owed to the Partners in Distributions, then upon notification from either of the parties, I will consider and award appropriate final relief.

There were indeed "disputes about amounts owed to the Partners." The arbitrator held an evidentiary hearing on May 14, 2014 and subsequently issued a decision and final award (the "Final Award") to resolve them.

For our purposes, the most important dispute between the parties pertained to how the Property Net Cash Flow should be divided between the parties after payment of the annual $150,000 priority distribution to the Other Partners. B&S asserted that it was entitled to 100% of whatever remained of the Property Net Cash Flow after payment of the Priority Distribution. In rejecting this contention, the arbitrator reiterated, and to some extent expanded upon, his analysis in the Interim Award (emphasis added):

> The second paragraph of Section 3.9a of the Agreement, while providing that New Construction Distributions are cumulative, also limits the source of their payment to Net Cash Flow arising out of newly constructed buildings. As discussed in the Interim Award, this provision created a tension between the Partnership's obligation to pay distributions of Net Cash Flow from the Partnership's normal operations, as set forth in the first paragraph of Section 3.9a, and the Partnership's ability to pay the accumulating New Construction Distributions. It appears that only if a new building was an instant, resounding financial success would there be sufficient Net Cash Flow from newly constructed buildings to pay the New Construction Distributions in full each year. Otherwise, as occurred here, the amount of the unpaid accumulated New Construction Distributions will continue to grow.
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> If the last sentence of Section 3.9a were interpreted to prevent the payment of any distribution of Net Cash Flow [that is, Property Net Cash Flow] to the Class B Limited Partner until after all cumulative New Construction Distributions have been paid, the result would be that the construction of an underperforming new building would effectively prevent the Class B Limited Partner from ever receiving any distribution, even if the rest of the TC Center were generating huge amounts of Net Cash Flow. <u>I find that the parties to this Agreement did not intend that result. Under the Agreement, Section 3.9a., the Class B Limited Partner "shall receive a distribution equal to fifty percent (50%) of Net Cash Flow arising from the Property in excess of One Hundred Fifty Thousand and No/100 Dollars ($150,000) per year." To the extent that the last sentence of Section 3.9a contradicts the quoted language, that last Section 3.9a is of no effect</u>.

> The Agreement requires that New Construction Distributions may only be paid from Net Cash Flow from newly constructed buildings, and not from any other source. It is not appropriate for the General Partner to make any payment of a New Construction Distribution in any year in an amount which exceeds the Net Cash Flow from newly constructed buildings in that year, regardless of how much unpaid New Construction Distributions have accumulated. The fact that the amount of accumulated New Construction Distributions is growing does not relieve the General Partner of its obligation to pay the Class B Limited Partner 50% of the excess Net Cash Flow under the first paragraph of Section 3.9a of the Agreement. <u>The Class B Limited Partner is entitled to receive its 50% share of the excess Net Cash Flow from operations of the entire Property (after payment to the other Partners of the Priority Distributions), even when the Net Cash Flow from newly constructed buildings is too small to allow payment of any New Construction Distribution</u>.
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> . . . .
>
> This Decision and Award should not be interpreted to preclude the General Partner from making distributions to the other Partners in excess of the Priority Distribution, provided only that the Class B Limited Partner must receive its 50% share of the Net Cash Flow in excess of $150,000.

The arbitrator also addressed the results of the accounting calculations performed by the parties' respective expert witnesses as a result of the Interim Award:

> The accounting computations of Net Cash Flow performed by the parties' respective accounting experts in this case showed that the other Partners (the Class A Limited Partners and the General Partner) received more distributions than they were entitled to receive. The experts differed on the amount of the overpayment of distributions.
>
> I find that the amount of cumulative excess distributions to the [O]ther Partners, as of December 31, 2012, was $300,852.00, according to [Class B Partner's] Tab 7, Exhibit 13, a copy of which is appended hereto. <u>The General Partner shall be enjoined from making any additional distributions to the other Partners, until the Partnership recaptures the amount of those excess distributions</u>, either by payment to the Partnership from the recipients of those excess distributions, or by the General Partner withholding the amounts which would otherwise be distributable to the other Partners after January 1, 2013.
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> . . . .

> The accounting computations by the parties' respective experts also showed that the Class B Limited Partner was entitled to receive distributions from Net Cash Flow, although they differed as to the amount due. I find that the Class B Limited Partner has proven that it is entitled to payment from the Partnership in the amount of $542,122.00 for distributions from Net Cash Flow from the Partnership operations covering the period from 1994 through December 31, 2012, as set forth on Claimant's Tab 7, Exhibit A, a copy of which is appended hereto. The General Partner shall cause the Partnership to pay $542,122.00 to the Class B Limited Partner for distributions from Net Cash Flow from Partnership operations for the period from 1994 through December 31, 2012.[8]

Finally, the administrative expenses and arbitrator's fees totaled $26,950. The arbitrator ordered that TC Management and the Partnership were responsible for 2/3 of this total and B&S 1/3. He ordered TC Management and the Partnership to pay $9,885 to B&S "representing the portion of said fees and expenses in excess of the apportioned costs previously incurred by [B&S]."

The Circuit Court Proceedings

Shortly after the Final Award was issued, B&S filed a petition to confirm the award pursuant to Courts and Judicial Proceedings Article ("CJP") § 3-227.[9] TC filed a timely

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[8] The arbitrator also ordered that future distribution calculations were to be calculated according to template proposed by the Class B Partner's expert. This ruling has not been challenged by the parties.

[9] The statute states:

> (a) A party may petition the court to confirm the award.
>
> (b) The court shall confirm the award, unless the other party has filed an application to vacate, modify, or correct the award within the time provided in §§ 3-222 and 3-223 of this subtitle.
>
> (c) If an application to vacate, modify, or correct the award has been filed, the court shall proceed as provided in §§ 3-223 and 3-224 of this subtitle.

petition to correct and vacate portions of the award or, in the alternative, to remand the matter to the arbitrator for a new hearing.

After considering written and oral submissions by the parties, the circuit court issued a thorough memorandum opinion. In summary, the court concluded:

(1) Section 3.9a of the Agreement is unambiguous and means that both the $150,000 priority distribution from the Property Net Cash Flow and the 14% priority distribution from the New Construction Cash Flow, together with any accumulated arrearages, had to be paid in full before the Class B Partner had the right to any distribution. Therefore, reasoned the circuit court, the award of $541,122 to B&S exceeded the arbitrator's authority and contradicted his conclusion that the Other Partners' rights to receive the $150,000 and 14% distributions had priority over any right of B&S to a distribution.

(2) The arbitrator had no authority to enjoin TC Management or to mandate a "recapture" provision in the final award.

(3) The court did not accept the Other Partners' contention that there was a contradiction between the arbitrator's conclusion that B&S and the Other Partners each had the right to receive $541,122 in Property Net Cash Flow and his conclusion that the Other Partners had received $300,852 in excess distributions. After commenting that the "'Kern Calculations' are complex," the court stated that:

> while the Court may agree or disagree with the Arbitrator's reasoning, the Court concludes that deference must be given to the arbitrator. The Court is remanding this matter for the reasons addressed previously [that is, the award of costs and expenses] and below [i.e., that the award $541,122 to B&S exceeded the

> arbitrator's authority and was inconsistent with his conclusion that the Other Partners had priority distribution rights].

(4) The arbitrator's allocation of the arbitration fees and expenses was in conflict with § 20.1 of the Partnership Agreement which provides that the arbitration expenses "shall be borne equally by the parties to the arbitration[.]"

The court's dispositive order read in pertinent part (underlined emphasis added):

> ORDERED, that [B&S's] petition for confirmation of arbitration award and entry of judgment for and administrative fees and expenses . . . in the amount of $9,885.00 is denied and not confirmed, and <u>that part of the award</u> is CORRECTED to reflect that the parties shall pay equally the fees and expenses of arbitration and it is
>
> ORDERED, the [B&S's] petition for confirmation of arbitration award and entry of judgment in the amount of $542,122.00 is not confirmed, <u>and that part of the Final Award</u> is VACATED and the matter is REMANDED for a rehearing before the same arbitrator[.]

Analysis

I. The Standards of Review

Appellate courts review *de novo* a circuit court's decision to grant or deny petitions to confirm, vacate, or correct an arbitrator's award. *Prince George's County Civilian Emps. Ass'n v. Prince George's County*, 447 Md. 180, 192 (2016). This brings us to the more complicated question of the standards that courts should employ to vacate or correct an award that has been issued in a proceeding brought under the Maryland Uniform

Arbitration Act, codified as Courts and Judicial Proceedings Article ("CJP") §§ 3-201–234.[10]

The first relevant statutory provision is § 3-223(b), which authorizes a court to modify or correct an award if (emphasis added):

> (1) There was an <u>evident miscalculation of figures</u> or an evident mistake in the description of any person, thing, or property referred to in the award;
> (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

If the court grants such a petition, the court "shall modify or correct the award to effect its intent[.]" CJP § 3-223(c).

Additionally, a court is required to vacate an award under certain circumstances. CJP § 3-224 provides in pertinent part:

> (b) The court shall vacate an award if:
> (1) An award was procured by corruption, fraud, or other undue means;
> (2) There was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;
> (3) The arbitrators exceeded their powers[.]

Generally, arbitrators derive their power to resolve the parties' disputes from the terms of the relevant agreement(s) as focused by the issues submitted by to parties. *MCR of America v. Greene*, 148 Md. App. 91, 111–12 (2002) (collecting authorities).

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[10] Unless otherwise noted, all statutory references are to the Act.

However, the scope of a Maryland court's review under § 3-224(b)(1) and (3) remains a bit unsettled in one regard. A little history explains why.

Prior to the enactment of the MUAA in 1965, arbitration in Maryland was governed by common law principles. *Letke Security Contractors v. United States Surety. Co.*, 191 Md. App. 462, 470 (2010). At common law, courts could set aside an arbitral award if the award "involve[d] [a] mistake so gross as to work manifest injustice," *Roberts Bros. v. Consumers' Can Co.*, 102 Md. 362, 369 (1905), or if the "arbitrator was guilty of fraud, misconduct or prejudice, had exceeded his authority, or had made a mistake in law or fact appearing on the face of the award." *Bel Pre Med. Center v. Frederick Contractors,* 21 Md. App. 307, 316 (1974) (*vacated on other grounds*, 274 Md. 307, 316 (1975).

In *O–S Corp. v. A. Kroll, Inc*., 29 Md. App. 406, 409 (1975), this Court concluded that, in addition to the specific grounds set out in CJP § 3-224(b), the MUAA authorized courts to set an award aside if it "was based upon a completely irrational interpretation of the contract." The MUAA says nothing about setting aside an award based upon a court's disagreement with the arbitrator's interpretation of an agreement. To bridge this conceptual gap, we concluded that an award based upon an utterly irrational interpretation of a contract was one that was either procured by "undue means" or that exceeded the arbitrator's power. *Id.* We have periodically used the *Kroll* standard in reviewing arbitration awards. *See Sharp v. Downey*, 197 Md. App. 123, 151 (2010), (collecting cases), *vacated*, 428 Md. 249 (2012). Additionally, we have interpreted § 3-

224(b) to authorize courts to vacate an award when it reflects "manifest disregard of the law." *See MCR of America*, 148 Md. App. at 120; *Southern Md. Hosp. Ctr. v. Edward M. Crough, Inc.*, 48 Md. App. 401, 407–08 (1981).[11]

The continuing viability of either of these grounds as a basis for vacating an award issued pursuant to the MUAA has been cast into doubt by the Court of Appeals' analysis in *Downey v. Sharp*, 428 Md. 249, 262 (2012), wherein the Court concluded that:

> [T]he grounds for vacating awards under the Act do not expressly include the two additional grounds for vacating awards utilized by the Court of Special Appeals, namely awards which were "completely irrational" and awards which demonstrated "manifest disregard of the law." Moreover, we disagree with the Court of Special Appeals that these two grounds are encompassed by the statutory grounds of an award that was "procured by . . . undue means," § 3–224(b)(1), or an award which exceeded the arbitrators' "powers," § 3–224(b)(3).

The Court of Appeals declined to further address this issue because it was "not presented by the facts in this case." *Id.* at 265. As we will explain below, it isn't

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[11] "Manifest disregard of the law" can come in two forms. First, an award manifestly disregards the law when it connotes "a palpable mistake of law or fact apparent on the face of the award or a mistake so gross as to work manifest injustice[.]" *Sharp v. Downey*, 197 Md. App. at 152 (citations, ellipses and internal quotation marks omitted).

Second, an award manifestly disregards the law when its result contravenes "a public policy ascertainable by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* at 152–53. In Maryland at least, application of the latter formulation of the concept appears to be limited to cases involving collective bargaining arbitration. *See, e.g., Amalgamated Transit Union, Div. 1300 v. Mass Transit Admin.*, 305 Md. 380, 389 (1986); *International Ass'n of Firefighters, Local 1619 v. Prince George's County*, 74 Md. App. 438, at 449–50 (1988).

necessary for us to decide whether the "completely irrational" and "manifest disregard of the law" are still viable reasons to vacate an award because, regardless of which standard we apply, there is no basis for us to vacate any portion of the award other than the arbitrator's allocation of fees and expenses.

II. The Award of $542,122 to B&S

Because our review is *de novo*, we will focus on TC's arguments as to why parts of the award should be vacated or corrected. TC presents two reasons why the circuit court was correct when it vacated that part of the award requiring the Partnership to distribute $542,122 to B&S. First, TC contends that the arbitrator exceeded his powers by disregarding what it asserts is unambiguous language in § 3.9a. Second, TC asserts that the arbitrator's award is internally contradictory and should be vacated for that reason.

We agree with neither of TC's arguments. *First*, as we will explain, TCs' contention that the arbitrator exceeded his powers by disregarding relevant language in § 3.9a is based on the assumption that the language in question is unambiguous. However, the arbitrator concluded that the provision in question was ambiguous. Whether a contract provision is ambiguous is a question of law and courts generally defer to an arbitrator's legal conclusions. In deciding whether such deference is appropriate, we believe that the Supreme Court's analysis in *Oxford Health Plans LLC v. Sutter*, ___ U.S. ___, 133 S. Ct. 2064, 2067 (2013), is instructive. As we will explain, *Oxford Health Plans* suggests that a reviewing court's focus should be on whether the arbitrator "the arbitrator (even

arguably) interpreted the parties' contract," as opposed to whether the reviewing court agrees with the arbitrator's analysis. *Id.* When we apply this standard to the relevant part of the arbitrator's reasoning in the present case, we conclude that deference is appropriate.

Second, TC's argument that the award is fatally contradictory is hampered by a procedural difficulty that bars us from considering its merits. Were we to reach the merits, we would conclude that the inconsistency in the arbitrator's reasoning does not affect the $542,122 award to B&S.

(A) Section 3.9a.

TC contends that the award exceeds the arbitrator's authority because the arbitrator:

> did not merely interpret the parties' Agreement as requested;[ ] instead the Arbitrator took it upon himself to rewrite the parties' Agreement to reach a conclusion that apparently satisfied his own notions of justice and fairness, but did not reflect the plain language of the Agreement.
>
> . . . .
>
> [T]he Arbitrator in this case did not use his interpretation of the last sentence of § 3.9a to reach his desired result, because he fully understood that the plain language was contrary to that result. Arbitrator acknowledged as much in his Final Award, stating:
>
> > Under the Agreement, Section 3.9(a), the Class B Limited Partner 'shall receive a distribution equal to fifty percent (50%) of Net Cash Flow arising from the Property in excess of One Hundred Fifty Thousand and No/100 Dollars ($150,000) per year.' <u>To the extent that the last sentence of Section 3.9a contradicts the quoted language, that last sentence of Section 3.9a is of no effect."</u>

> As the above passage makes clear, the Arbitrator expressly disregarded the last sentence of § 3.9a.

(Footnote omitted; emphasis in original.)

TC points to our reasoning and holdings in *State v. Philip Morris, Inc.*, 225 Md. App. 214 (2015), as support for its contention that the arbitrator exceeded his powers by, so TC asserts, disregarding the final sentence of § 3.9a. These arguments are unpersuasive.

Philip Morris stands for three relevant principles: (1) the scope of an arbitrator's authority is defined by contract, *id.* at 243–44; (2) an arbitrator may not read an unambiguous provision out of a contract; *id.* at 245; and (3) when arbitrators do so, CJP § 3-224(b)(3) authorizes courts to vacate the award because they have exceeded their powers. *Id.* at 240. All of these propositions are unquestionably correct but none of them affects the outcome of the present case.

The arbitrator did not read the last sentence of § 3.9a out of the Agreement merely because he thought it unfair. Instead, he concluded that the last sentence of § 3.9a was ambiguous and that the construction of the last sentence proffered by TC was unfair. An arbitrator cannot disregard an unambiguous contract provision, *Philip Morris, Inc.*, 225 Md. App. at 245, but an arbitrator can certainly choose between competing interpretations of an ambiguous provision. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("'When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination

of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.'" (quoting RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979)).

Whether § 3.9a is ambiguous is a question of law. Courts in vacatur proceedings "generally defer to the arbitrator's . . . applications of law." *Downey*, 428 Md. at 266. Maryland's appellate courts have articulated the degree of deference in different ways. *See Downey*, ("[M]ere errors of law . . . [do] not ordinarily furnish grounds for a court to vacate or refuse enforcement of an arbitration award." 428 Md. at 266 (citation omitted); *Philip Morris,* 225 Md. App. at 241 (Arbitrators' "'decisions on issues of law are reviewed using a deferential standard on the far side of the spectrum away from a usual, expansive *de novo* standard.'" (quoting *Mandl v. Bailey,* 159 Md. App. 64, 92 (2004)). A recent decision by the United States Supreme Court is helpful in deciding when courts should defer to an arbitrator's legal conclusions in the context of a vacatur claim based on CJP § 3-224(b), that is, that the arbitrators exceeded their powers. [12] *Oxford Health Plans*

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[12] The MUAA is "the 'State analogue'" to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. *Holmes v. Coverall N. Am., Inc.,* 336 Md. 534, 541 (1994). As a result, when construing the MUAA, Maryland courts often look to federal decisions interpreting corresponding provisions of the FAA. *See, e.g., Cheek v. United Healthcare of Mid-Atl., Inc.*, 378 Md. 139, 150–51 (2003).

CJP § 3-224(b) corresponds to 9 U.S.C. § 10(a) of the Federal Arbitration Act (FAA), which states in pertinent part (emphasis added):

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

LLC v. Sutter, ___ U.S. ___, 133 S. Ct. 2064, 2067 (2013). This case involved a challenge to an arbitrator's legal conclusion that the arbitration agreement in question permitted class arbitration proceedings. *Id.* at 2066.

Writing for the majority of the Court, Justice Kagan explained:

> Here, Oxford invokes § 10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award "where the arbitrator[ ] exceeded [his] powers." A party seeking relief under that provision bears a heavy burden. It is not enough to show that the arbitrator committed an error—or even a serious error. Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits. Only if the arbitrator acts outside the scope of his contractually delegated authority—issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract—may a court overturn his determination. So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.

133 S. Ct. at 2068 (Emphasis added; ellipses, quotation marks, footnote, citations and some internal bracketing deleted.). *See also Police Civilian Empl. Ass'n v. Prince George's County,* 447 Md. 180, 194 (2016) ("[T]he issue of whether an arbitrator exceeded the arbitrator's authority is not the same thing as the issue of whether the arbitration award was rational or legally correct.").

. . . .

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

Returning to the case before us, TC asserts that the arbitrator substituted his own notions of economic justice for terms of the parties' agreement by stating in the Final Award that "[t]o the extent that the last sentence of Section 3.9a contradicts the quoted language, that last sentence of Section 3.9a is of no effect." We believe that TC takes that statement out of context[13] and, in any event, its argument would be persuasive only if § 3.9a is unambiguous as to the Class B Limited Partner's right to distributions.

Contractual language is ambiguous "if, when read by a reasonably prudent person, it is susceptible of more than one meaning." *Calomiris v. Woods*, 353 Md. 425, 436 (1999).[14]

[13] In both the Interim and the Final Award, the arbitrator made it clear that he did not agree with TC's interpretation of § 3.9a's distribution provisions.

[14] For the reader's convenience, we set out the pertinent parts of § 3.9a:

> The Class B Limited Partner shall have no rights arising out of the Partnership except the following:
>
> a. Class B Partner shall receive a distribution equal to fifty percent (50%) of Net Cash Flow arising from the Property. . . . The first One Hundred Fifty Thousand and No/100 Dollars ($150,000) of Net Cash Flow per year is known as the "Priority Distribution," which shall first be distributed to all of the other Partners of the Partnership. The Priority Distribution shall be paid cumulatively so that . . . . [there will be] <u>no distribution to Class B Partner until such time as [any] cumulative deficit . . . has been paid in full to the other Partners.</u>
>
> Notwithstanding and in addition to the above described Priority Distribution, the other Partners shall receive that portion of the [New Construction Net Cash Flow] equal to fourteen percent (14%) per annum of the actual costs of construction of such newly constructed buildings ("New Construction Distribution*")*. <u>Said New Construction Distribution shall be paid cumulatively,</u>

The first paragraph of § 3.9a states that (1) the Other Partners are entitled to an annual $150,000 priority distribution from the Property Net Cash Flow; (2) as long as there are no arrearages in the payments of the priority distributions, the Other Partners and the Class B Partner are each entitled to 50% of the remaining Property Net Cash Flow; but that (3) no distributions will be made to the Class B Partner until all arrearages in the annual $150,000 priority distributions have been paid. The second paragraph of § 3.9a provides that (1) "[n]otwithstanding and in addition to" the $150,000 priority distribution, the Other Partners have a right to receive another priority distribution (equal to 14% of the cost of construction) from the New Construction Net Cash Flow; and (2) "no distribution" will be made to the Class B Partner until any arrearage of the New Construction Distribution is satisfied. The issue confronting the arbitrator was whether the second restriction on distributions referred to Property Net Cash Flow (TC's position) or only to New Construction Net Cash Flow (B&S's position).

The arbitrator interpreted this language to mean that that the Class B Limited Partner:

> is entitled to receive Distributions from the first "bucket," namely 50% of the Net Cash Flow arising from the Property in excess of the Priority Distributions of $150,000.00 per year, regardless of whether any New Construction Distribution is ever paid. There is an inconsistency in the Agreement, because the Agreement provides that the first "bucket" for distributions contains cash from all operations in the Property, and all operations includes cash from newly constructed buildings. On the other hand, the last sentence of Section 3.9a, can be read to

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> <u>and no distribution shall be made to Class B Partner until such time as any cumulative deficit of such payments has been paid in full to the other Partners.</u>

> preclude any distributions to the Class B Limited Partner of Cash arising from newly constructed buildings until the New Construction Distributions have been paid. I resolve that inconsistency by allowing Distributions to the Class B Limited Partner from the first bucket, because that is what I think is most reasonable under the circumstances, and what I think the parties intended.

This a reasonable, albeit not an ineluctable, interpretation of the contract language. Whether we review the arbitrator's decision from "the far side of the spectrum away from . . . *de novo* [review]," *Philip Morris,* 225 Md. App. at 241, or treat it was a "mere" legal error, *Downey*, 428 Md. at 266, the result is the same. The arbitrator's conclusion that the distribution provisions of § 3.9a are ambiguous falls comfortably within the category of arbitral decision-making to which courts should defer.[15]

In *Oxford Health Plans,* the Supreme Court discussed an argument very similar to the one presented by TC, namely, that the arbitrator had "badly misunderstood" a critical provision of the parties' contract. The Court stated:

> We reject this argument because, and only because, it is not properly addressed to a court. Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was "arguably construing" the contract—which this one was—a court may not correct his mistakes under [9 U.S.C.] § 10(a)(4). The potential for those mistakes is the price of agreeing to arbitration. As we have held before, we hold again: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is

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[15] For the same reasons, we conclude that the award was based neither upon a completely irrational interpretation of the Agreement nor a manifest disregard of the law.

> different from his." The arbitrator's construction holds, however good, bad, or ugly.
>
> In sum, Oxford chose arbitration, and it must now live with that choice.

133 S. Ct. at 2070–71 (internal citations omitted).

Returning to the present case, it is clear to us that the arbitrator's conclusion as to ambiguity was based upon his interpretation of the relevant language in the Agreement. Thus, even assuming that the arbitrator's conclusion was a "grave error," we nonetheless defer to the arbitral ruling. This is because TC, as well as B&S, "bargained for the arbitrator's"—and not a court's—"construction of their agreement." *Oxford Health Plans,* 133 S. Ct. at 2068.

(B) The Spreadsheets

The arbitrator attached spreadsheets (referred to as "Kern A" through "Kern D" [16]) to the final award to explain certain aspects of his analysis. TC asserts that there is an inconsistency between two of the spreadsheets that undercuts the arbitrator's reasoning as to his conclusion that the Class B Partner is entitled to a distribution of $542,122.

Specifically, TC suggests that there is a discrepancy in the methodology used in the "Kern B" spreadsheet, which is a calculation of excess distributions to the Class A

[16] Mr. or Ms. Kern (first name unknown) was an expert witness who testified for B&S in the arbitration proceeding.

Limited Partner, and the "Kern A" spreadsheet, which is a calculation of what would have been payable to the Class B Limited Partner if TC Management had correctly interpreted the distribution provisions of § 3.9a.[17]

Kern B indicates that the Class A Partners had received $300,852 in excess distributions, and that those calculations were based, in part, upon the assumption that B&S was entitled to 100% of any Property Net Cash Flow in excess of the priority distribution of $150,000 per year. As TC points out in its brief, "[t]his argument was firmly rejected by the Arbitrator in the Final Award."

On the other hand, the calculations in Kern A presume that the Other Partners and B&S each have a right to 50% of the Property Net Cash Flow distributions after the $150,000 annual priority distribution is made to the Other Partners. This calculation is certainly consistent with the arbitrator's reasoning.

From these premises, TC asserts that the portion of the Final Award ordering payment of $542,122 to B&S must be vacated because:

> By accepting and incorporating the Kern Calculations, which exclude the 50% of "Cumulative Net Cash Flow" in excess of the Priority Distribution to which Class A is entitled, while nonetheless specifically rejecting the argument that Class A is not entitled to its share of profits above its Priority Distribution, the Award is patently inconsistent and contradictory, and, as a result, the monetary awards are miscalculated.

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[17] Kern A also contains adjustments for other accounting problems identified by the arbitrator and addressed in the Final Award that are not at issue in this appeal. *See* notes 7 and 8, *supra*.

In support of its position, TC directs us to *Downey v. Sharp* and *Snyder v. Berliner Construction*, 79 Md. App. 29, 39 (1989). In both of these cases, the appellate court remanded the action to the arbitrator for clarification of the award.

At issue in *Downey* was whether a lot owned by Downey was subject to an access easement for the benefit of Sharp. The parcels were originally owned by the same grantor; in the deed to Sharp's predecessor-in-title, the grantor also conveyed what purported to be an easement across its retained land providing access from a public road to the Sharp lot, which was otherwise landlocked. The problem was that the easement, as described, did not extend to either the public road or the Sharp lot. Subsequent efforts to clarify the land records only muddled the situation further. 428 Md. at 253–56. The dispute was eventually submitted to arbitration and the arbitrator first concluded that there was no record easement to the Sharp lot and, second, that Sharp did not have an easement of necessity because "'he does not need one.'" *Id.* at 256.

Relying on CJP § 3–225(a),[18] the Court stated (emphasis added):

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[18] CJP § 3-255 states in pertinent part (emphasis added):

> (a) *New arbitrators.* — If any award is vacated on grounds other than those stated in § 3–224(b)(5) of this subtitle, <u>the court may order a rehearing before new arbitrators</u> selected by the parties as provided by the agreement, or by the court in absence of an agreement as provided in § 3–211 of this subtitle.
>
> (b) *Same arbitrators.* — If the award is vacated on grounds set forth in § 3–224(b)(3) and (4) of this subtitle, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with § 3–211 of this subtitle.

> Although this Court has not previously dealt with § 3–225, courts elsewhere have held that § 3–225(a) or a similar statute authorizes a court to vacate an award and order a rehearing before arbitrators when the award is contradictory, uncertain, or requires clarification.
>
> . . . .
>
> Section 3–225(a), by its language, is not limited to awards which are vacated for the reasons set forth in § 3–224(b). Moreover, when a court orders a rehearing before an arbitrator pursuant to § 3–225(a), because an award is contradictory, the court is not substituting its view of the law or the facts for that of the arbitrator. Rather, the decision of the arbitrator after rehearing will be the final award, subject to the very limited judicial review applicable to arbitration awards generally.

Id. at 268–69.

Downey is not particularly helpful to TC. In that case, the Court of Appeals remanded the case pursuant to CJP § 3-225(a). Although the grounds for a remand under § 3-225(a) are broader than the grounds for vacating an award under CJP § 3-224(b), *Downey,* 428 Md. at 269, the sole remedy offered by § 3-225(a) is a remand to a new arbitrator. We decline to read the Court's opinion in *Downey* as standing for the proposition that a court can remand a matter to the same arbitrator even if there are no grounds to vacate an award pursuant to CJP § 3-224(b). Moreover, there is another problem with TC's argument.

In the present case, the circuit court remanded the case to the same arbitrator because the arbitrator exceeded his powers "and the contradictions indicated in the Interim and Final Awards[.]" These "contradictions" did not include the discrepancy between the calculations on the Kern A and Kern B spreadsheets because the circuit court explicitly

refused to vacate the award on those grounds.[19] At this juncture, TC is asking us to grant it a remedy that the circuit court denied it. However, TC did not file a cross-appeal and, subject to rather narrow exceptions that aren't applicable in this case, a party that does not file an appeal (or cross-appeal as the case may be) is precluded from challenging the trial court's judgment. *See Cottman v. State*, 395 Md. 729, 738 n.6 (2006); *Joseph H. Munson Co. v. Secretary of State,* 294 Md. 160, 168 (1982). We turn to *Snyder.*

In that case, the arbitrator's award stated that Berliner's claim was meritorious but denied it anyway without explanation. We held that the award had to be vacated because it was contradictory. 79 Md. App. at 39. Unlike *Snyder,* the case before us does not involve an arbitral award that states, in effect, that "you should win, but you don't." Rather, the arbitrator granted one form of relief—that B&S is entitled to $542,122 from the Partnership for distributions that should have been made to B&S but weren't—and another—that the Partnership must recapture $300,852 in excess distributions to the Other Partners before additional distributions are made to them. There is no inconsistency between the arbitrator's reasoning and the $542,122 award; the computational problem

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[19] The circuit court's opinion makes it clear that the court viewed the award of $542,122 as contradictory to the arbitrator's conclusion that the Other Partners had priority distribution rights. As we have explained, the arbitrator's conclusion that the priority distributions provisions of the Agreement are ambiguous was a reasonable one, albeit one upon which reasonable minds might differ.

lies with the $300,852 recapture provision. But the circuit court refused to vacate the recapture provision and TC did not file a cross-appeal.

If the issue were properly before us—and it isn't—we would see no reason to vacate the parts of the award that are internally consistent. [20]

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[20] Finally, TC asserts that the arbitrator had no authority to enjoin TC Management or to mandate a "recapture" provision in the final award. This argument is not persuasive.

First, as explained in the main text, it is not preserved for review because TC did not file a cross-appeal. Looking beyond preservation, the arbitration clause in the Agreement states that arbitrations will be conducted "in accordance with Commercial Rules of the American Arbitration Association [as] then in effect[.]"Although the relevant AAA rules—Commercial Arbitration Rules and Mediation Procedures: Including Procedures for Large, Complex Commercial Disputes (2013)—aren't in the record, they are available through the AAA's website. *Commercial Arbitration Rules and Mediation Procedures: Including Procedures for Large, Complex Commercial Disputes*, AMERICAN ARBITRATION ASSOCIATION (2013), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased. We take judicial notice of them. *See* Md. Rule 5-201(b).

AAA Rule R-47(a) states:

> The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

The recapture provision, which operates to restrict the Partnership from making distributions to the Other Partners until the Partnership makes good on its obligations to B&S, is the sort of "just and equitable" relief appropriate to safeguard B&S's rights under the Agreement.

TC cites *Bullock v. Bregman,* 46 Md. 270, 278–80 (1877) but the decision is inapposite. The relevant fatal flaw in the arbitration panel's award in *Bullock* was that it was based in part upon substantive grounds that lay outside the scope of the parties' submission. *Id.* at 278. In contrast, the recapture provision in the Final Award is a remedy.

III. The Allocation of Arbitration Fees and Expenses

The Agreement explicitly provides that the parties will share equally arbitration fees and expenses. In the Final Award, the arbitrator ordered the TC Management and the Partnership to pay two-thirds of those costs and awarded the Class B Partner $9,855, "representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by [B&S]." The arbitrator exceeded his authority in making this award because an arbitrator does not have the authority to change the terms of the parties' contract. *Cf. McR of Am. v. Greene*, 148 Md. App. 91, 111-112 (2002) (An arbitrator erred in requiring a party to pay a portion of opposing party's attorney's fees when underlying agreement did not provide for attorney's fee awards.). The circuit court appropriately corrected this discrete portion of the award.

Recapitulation

We conclude that there is not a basis to vacate that part of the Final Award stating that the Class B Partner, that is B&S and B&S 1983, is due $542,122 from the Partnership. Whether the circuit court erred by failing to vacate the recapture provision is not before us because TC did not file a cross-appeal. As we explained in Part III of this

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Bullock was decided long before the MUAA was enacted. TC points to no authority for the proposition that a statement of claim in AAA arbitration proceeding must spell out each and every possible remedy that the arbitrator might find appropriate. It isn't necessary for us to pursue the matter further. *See Konover v. WHE*, 142 Md. App. 476, 494 (2002).

opinion, the circuit court appropriately corrected that portion of the final award that awarded $9,855 to B&S and B&S 1983 for arbitration costs and expenses.

Upon remand, the circuit court should enter a judgment that (1) corrects the award in a manner consistent with this opinion, and (2) confirms the corrected award.

The Motion for Reconsideration

TC has filed a motion for reconsideration based on several grounds. One of TC's contentions has some merit but doesn't change the outcome of the appeal. The others are unpersuasive.

First, TC argues that the panel's analysis "is based on an incorrect factual premise that the Class B Partner is entitled to more than one distribution[.]" TC is incorrect in its reading of the award and this panel's opinion. The arbitrator made it clear in the award that he concluded that § 3.9a's distribution provisions were ambiguous. Whether contract language is ambiguous is a legal, as opposed to a factual, question and the panel was cognizant of this distinction in preparing the opinion.

Second, TC contends the panel, in effect, substituted its reasoning for that of the arbitrator regarding the arbitrator's critical conclusion that § 3.9a was ambiguous. TC has a point, although it doesn't get it very far.

In the context of a vacatur action, the judicial focus should not be on whether the court agrees with the arbitrator's reasoning as to a legal issue—in this case, whether § 3.9a is ambiguous. Instead, the court's task is to- decide whether it must defer to the arbitrator's legal conclusion. Courts must afford some deference to an arbitrator's legal conclusions, even though courts have articulated the degree of deference in different ways. *Compare Oxford Health Plans LLC v. Sutter*, ___ U.S. ___, 133 S. Ct. 2064, 2068 (2013), *with Downey v. Sharp,* 428 Md. 249, 266 (2012), *and State v. Philip Morris, Inc.*, 225 Md. App. 214, 241 (2015).

Assuming, for purposes of analysis, that the arbitrator's legal reasoning was faulty, any suppositional error was not so extreme as to warrant vacating the award. We have revised the pertinent analysis in Part II of the opinion accordingly.

Third, TC argues that we "overlooked [its] arguments regarding the contradictory and miscalculated amount of 'excess distributions' that the Arbitrator ordered to be 'recaptured,' which has a significant consequence for the parties going forward." This is not correct. TC's arguments on this issue were not preserved for appellate review because TC failed to file a cross-appeal. Our analysis on this issue is set out in the opinion and does not require further elaboration.

Fourth, TC contends that, as a result of the award and this panel's opinion, "the parties have no clear understanding of how to operate under the Agreement as it relates to accounting and making distributions going forward." Our opinion does not purport to

address how future distributions should be calculated. TC does not explain what specific accounting problems are posed by the award and we are not inclined to speculate. Moreover, if TC viewed the award as problematic in this regard, it could have, and should have, raised the issue to the arbitrator or the circuit court. But TC did not do so until now. And now is too late for TC to present an entirely new argument for the first time.

Fifth, TC states that the court's opinion "will likely lead to additional arbitration proceedings filed by individual partners who were not parties to the arbitration proceedings. . . ." Without commenting upon the claim- and issue- preclusive effects of a final judgment in this case, the time for joining other parties has long ago expired. To permit TC to raise the lack of necessary parties after it has fully litigated its case would be unfair to B&S and wasteful of judicial resources. *See Caretti v. Colonnade Limited Partnership,* 104 Md. App. 131, 142 (1995).

THE JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY IS REVERSED IN PART AND AFFIRMED IN PART. THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.