Circuit Court for Prince George's County
Case No. CAE20-11776
Case No. CAL21-16242

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

Nos. 2236, 2238

September Term, 2022

9103 BASIL COURT PARTNERS LLC

v.

MONARC CONSTRUCTION, INC., ET AL.

Wells, C.J.,
Zic,
Raker, Irma. S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.
Concurring Opinion by Raker, J.

Filed: August 15, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

The parties' dispute arose out of an Agreement for Construction Services (the "Contract") to construct a four-story, 116-guestroom Homewood Suites Hotel in Largo, Maryland (the "Project"). The appellee, Monarc Construction, Inc., et al. ("Monarc") is the general contractor, and appellant, 9103 Basil Court Partners LLC ("Basil") is the owner of the property where the Project was constructed. The parties' project was delayed past the original contractually agreed-upon substantial completion date. Both parties disagreed on the cause and duration of the various delays. Monarc submitted to initiate an arbitration proceeding in accordance with the parties' contract. After a multi-day hearing before an Arbitration Panel ("Panel"), the Panel awarded in favor of Monarc. Basil filed a complaint and a petition for an order vacating, modifying and/or correcting the arbitration award in the Circuit Court for Prince George's County, which in turn affirmed the Panel's decision. Basil appealed the circuit court decision to this Court, arguing that the Panel's award should be vacated, modified, and/or corrected.

We hold, and explain below, that the Panel's award shall not be vacated, modified, or corrected.

QUESTIONS PRESENTED

Appellant presents seven questions for our review, which we have recast and rephrased as follows:[1]

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[1] Appellant phrased the questions as follows:

I. Whether the Circuit Court erred in confirming the arbitration award.

(continued)

Whether the Arbitration Panel's award should be vacated, modified, or corrected.

II. Whether the Circuit Court erred in granting Monarc's Motion to Dismiss 9103 Basil Court's Second Amended Complaint and Petition for Order Vacating, Modifying, and/or Correcting Arbitration Award.

III. Whether the award should be vacated, modified or corrected pursuant to 9 U.S.C. § 11(b) because the Panel "awarded upon a matter not submitted to them" when they granted certain delay damages to Monarc relating to changes to the HVAC duct work at the Project that Monarc had not even requested.

IV. Whether the award should be vacated, modified or corrected pursuant to 9 U.S.C. § 10(a) to the extent it concluded that certain delays on the Project related to the plumbing design ran concurrently and, as such, the Panel denied recovery of damages to both parties, because the Panel reached a "completely irrational" finding in this regard in light of the plain language of the parties' contract.

V. Whether the award should be vacated, modified or corrected as it relates to all of Monarc's disputed claims for delays and extra work because the Panel committed a "manifest disregard of the law" when it failed to enforce the plain language of the partial lien releases that Monarc submitted to 9103 Basil Court during the course of the Project.

VI. Whether the award should be vacated, modified or corrected as it relates to all of Monarc's disputed claims for delays and extra work because the Panel committed a "manifest disregard for the law" when it improperly re-wrote the parties' Contract as it relates to providing notice of claims.

VII. Whether the Panel's award of attorneys' fees and expenses to Monarc should be vacated under § 10(a) of the FAA because the arbitrators exceeded their powers, and because such award constitutes a "manifest disregard of the law."

For the following reasons, we affirm the decision of the circuit court, confirming the final arbitration award.

BACKGROUND

The parties' Guaranteed Maximum Price for the Project was in the amount of $14,071,602.00. The Project was scheduled to begin on September 11, 2017 and reach final completion by November 19, 2018; however, actual substantial completion did not occur until June 13, 2019. The Project experienced many delays during construction. The parties disagree on both the causation and duration of the delays.

Due to the disagreement, Monarc initiated a demand for arbitration on May 11, 2020 in accordance with the Contract's arbitration agreement. Basil filed both an answer and counterclaim against Monarc on September 11, 2020. The arbitration hearings occurred over multiple days in July 2021 in Prince George's County, Maryland before the Panel following the American Arbitration Association's Construction Rules. The parties submitted "close to 100 claims to be resolved by the" Panel, but the Panel surmised that "in the main," this is "a delay case." The Panel explicitly noted "[t]he parties' inexperience with hotel construction" as a main contributor to the delays and ensuing claims.

The Panel issued a Partial Award on November 16, 2021 and a Final Award on February 19, 2022. The Final Award incorporated all aspects of the Partial Award and added the resolution of the attorneys' fees issue which was not resolved in the Partial Award. The Panel awarded Monarc $1,638,399.98 and awarded Basil $208,637.24, so the net award favored Monarc in the amount of $1,429,762.74. The Panel also awarded

Monarc attorneys' fees in the amount of $313,638.60 and other expenses in the amount of $447.48. Thus, the final total amount awarded to Monarc was $1,743,848.82.

Basil filed a complaint and a petition for an order vacating, modifying and/or correcting the arbitration award, as well as a request for a hearing, in the circuit court on April 20, 2020. Shortly thereafter, Basil filed an amended complaint and petition, and then a second-amended complaint and petition.

Monarc filed a motion to dismiss Basil's second-amended complaint and petition. The circuit court judge issued an order granting Monarc's motion to dismiss Basil's second-amended complaint and petition, and the judge confirmed the Panel's arbitration award. Basil then filed this timely appeal.

STANDARD OF REVIEW

Circuit Court's Review of an Arbitration Panel Decision

A circuit court's review of arbitration awards is "very narrowly limited." *Amalgamated Transit Union, Local 1300 v. Maryland Transit Administration*, 244 Md. App. 1, 12 (2019) (citation and internal quotation marks omitted). This type of review is "among the narrowest known to the law." *Id.* (citation and internal quotation marks omitted). A circuit court should give great deference to an arbitration panel's factual findings and legal applications. *Downey v. Sharp*, 428 Md. 249, 266 (2012). If the arbitrator, however, "exceeded the arbitrator's powers[,]" the reviewing court need not "give any deference to an arbitration award." *Prince George's County Police Civilian Employees A'ssn. v. Prince George's County*, 447 Md. 180, 195 (2016) (hereinafter, "*Civilian Employees*"). "[M]ere errors of law or fact would not ordinarily furnish

grounds for a court to vacate or to refuse enforcement of an arbitration award." *Baltimore County Fraternal Order Police Lodge No. 4 v. Baltimore County*, 429 Md. 533, 560 (2012) (citation and internal quotation marks omitted).

Appellate Court's Review of a Circuit Court Decision

Much like reviewing a circuit court's decision to grant or deny a motion for summary judgment, this Court reviews a circuit court's decision to confirm or vacate an arbitration award *de novo*. *Amalgamated*, 244 Md. App. at 11 (citation omitted); *Civilian Employees*, 447 Md. at 192 ("An appellate court reviews without deference a trial court's ruling on a petition to vacate an arbitration award."); *WSC/2005 LLC v. Trio Ventures Associates*, 460 Md. 244, 253 (2018) ("A circuit court's decision to grant or deny a petition to vacate or confirm an arbitration award is a conclusion of law, which we review without deference."). Accordingly, we review the circuit court's conclusions of law *de novo*, and we review any factual findings under a clearly erroneous standard. *State v. Phillip Morris, Inc.*, 225 Md. App. 214, 241-42 (2015).

Appellate Court's Review of an Arbitration Panel Decision

While this Court reviews a circuit court's decision to confirm, vacate, or modify an arbitration award *de novo*, we review an arbitration panel's award with the same deferential standard a circuit court would apply in reviewing an arbitration decision. *Amalgamated*, 244 Md. App. at 11-18. The scope of review is "very narrowly limited" and "among the narrowest known to law." *Id.* at 12 (citations and internal quotation marks omitted). "We generally defer to an arbitrator's finding of fact and her application of the law . . . even when these are erroneous." *Id.* at 12-13 (citations omitted)

(explaining the "rationale for this general rule of deference" as "twofold" because arbitration is a "favored method of dispute resolution" that should not be "constantly subjected to judicial second-guessing" and because "the parties have bargained for an arbitrator's—and not a court's—resolution of the dispute" (citations and internal quotation marks omitted)).

Accordingly, we apply a deferential review to the question of whether an arbitration panel's award should be confirmed, vacated, or modified under statute or common law. We apply a *de novo* review to the question of whether a circuit court erred in confirming an arbitration award.[2]

DISCUSSION

I. THE MARYLAND UNIFORM ARBITRATION ACT, VACATUR OF ARBITRATION DECISIONS IN MARYLAND, THE FEDERAL ARBITRATION ACT, AND VACATUR OF ARBITRATION DECISIONS UNDER FEDERAL LAW

The first issue in this case is whether Maryland or federal law should apply to our review of the arbitration award because Monarc and Basil rely on caselaw from both in

[2] The first two of Basil's questions presented (quoted above in footnote 1) ask whether the circuit court erred in confirming the arbitration award, and whether the circuit court erred in granting Monarc's motion to dismiss Basil's complaint and Basil's petition. While Basil presented these two questions for review, Basil's brief does not contain any argument or cite any caselaw regarding these two questions.

Maryland Rule 8-504(a)(6) requires a brief to contain "[a]rgument in support of the party's position on each issue." This Court has previously stated that "[a] single sentence is insufficient to satisfy [Rule 8-504(a)(6)]'s requirement." *Silver v. Greater Baltimore Medical Center, Inc*., 248 Md. App. 666, 688 n.5 (2020). Beyond the question presented, there is no argument or further discussion of either question. Accordingly, we do not discuss either issue beyond clarifying the varying levels of the standard of review.

their briefs. Both Maryland common law and the Maryland Uniform Arbitration Act ("MUAA") define grounds for vacating, modifying, or correcting an arbitration decision. Md. Code Ann., Cts. & Jud. Proc. ("CJP") §§ 3-201–3-234 (1973, 2020 Repl. Vol.). The Federal Arbitration Act ("FAA") also defines grounds for vacating, modifying, or correcting an arbitration decision. 9 U.S.C. §§ 1-16.

Basil argues that the award should be vacated or modified because: the Panel awarded upon a matter not submitted to them, the Panel was completely irrational, the Panel manifestly disregarded the law, and/or because the Panel exceeded its powers. Monarc counters that a court must give such a substantial level of deference to an arbitration award and Basil did not meet the strict standards necessary to vacate or modify the award. Even if there was error—which Monarc argues there is not—the award must still be affirmed.

A. MUAA and FAA

The FAA was enacted to apply to states in an effort to "declare[] a national policy favoring arbitration." *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 56 (1995) (citation and internal quotation marks omitted). The MUAA "'was purposefully meant to mirror the language of the FAA.'" *Access Funding, LLC v. Linton*, 482 Md. 602, 641 (2022) (quoting *Walther v. Sovereign Bank*, 386 Md. 412, 423-24 (2005)); *see also Walther*, 386 Md. at 424 ("The Maryland Arbitration Act has been called the State analogue . . . to the Federal Arbitration Act.") (citations and internal quotation marks omitted). The MUAA also "'embodies a legislative policy favoring enforcement of

executory agreements to arbitrate.'" *Access Funding*, 482 Md. at 641 (quoting *Gold Coast Mall, Inc. v. Larmar Corp.*, 298 Md. 96, 103 (1983)).

While a state must apply the FAA if the state does not have its own arbitration policy, the Appellate Court of Maryland and the Supreme Court of the United States have held that parties can opt out of the FAA via the arbitration clause in the parties' contract. *Rourke v. Amchem Products, Inc.*, 153 Md. App. 91, 119-20 (2003), *aff'd*, 384 Md. 329 (2004); *Mastrobuono*, 514 U.S. at 57. Here, the parties' arbitration clause stated that the "parties acknowledge and agree that their respective rights and obligations under this Agreement shall be governed and determined by the arbitrator in accordance with the laws of the state of Maryland, irrespective of any state or federal laws pertaining to conflicts of law(s)," seemingly opting out of applying the FAA. In Basil's brief, however, it states that the parties agreed in a "[s]cheduling [o]rder" to apply federal law procedurally, namely, the FAA, and to apply Maryland law "substantively to the arbitration."[3] Basil did not provide a citation to the quoted scheduling order, and it is not within the record. Monarc did not respond to this assertion in its briefing. At oral argument, we asked the parties why this Court should not apply Maryland law as agreed upon in the parties' Contract. Basil pointed to the scheduling order and replied that federal law should apply because this issue involves "interstate commerce." Monarc

[3] Maryland appellate courts typically apply their own state procedural law which would mean applying the MUAA rather than the FAA. *Phillip Morris*, 225 Md. App. at 238-41 (explaining that "the Maryland Court of Appeals [now, the Supreme Court of Maryland] has repeatedly stated that 'our procedural rules are not preempted by national policy favoring arbitration[.]'").

stated that the scheduling order was consented to by both parties and that federal law should apply because parties "agreed to it" in the order. No citations were provided by the parties to the scheduling order during oral arguments.

As discussed below, regardless of whether federal law or state law applies in this case, the outcome does not change.

B. Vacatur of Arbitration Decisions

1. The MUAA and the FAA

The MUAA and the FAA both allow substantially similar, but narrow avenues to overturn an arbitration decision. The MUAA is clear that a reviewing court "shall not vacate the award or refuse to confirm the award on the ground that a court of law or equity could not or would not grant the same relief." CJP § 3-224(c). Similarly, the Federal Court of Appeals, while applying the FAA, has stated that, "[a]lthough another arbitrator might have reached a different conclusion . . . it is not for us to pass judgment on the strength of the arbitrator's chosen rationale." *Jones v. Dancel*, 792 F.3d 395, 403-04 (4th Cir. 2015). Similarly, the FAA does not permit a court "to overturn an arbitral award just because it believes, however strongly, that the arbitrators misinterpreted the applicable law." *Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 478 n.5 (4th Cir. 2012) (citation omitted). "This court 'must sustain an arbitration award even if we disagree with the arbitrator's interpretation of the underlying contract as long as the arbitrator's decision draws its essence from the contract.' . . . Therefore, 'the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract,

not whether he got its meaning right or wrong.'" *Kemper Corp. Servs., Inc. v. Computer Scis. Corp.*, 946 F.3d 817, 822 (5th Cir. 2020) (citations omitted).

The MUAA at CJP § 3-224(b)(1)-(5) states:

> (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;*
> >
> > (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 3-213 of this subtitle, as to prejudice substantially the rights of a party; or
> >
> > (5) There was no arbitration agreement as described in § 3-206 of this subtitle, the issue was not adversely determined in proceedings under § 3-208 of this subtitle, and the party did not participate in the arbitration hearing without raising the objection.

(emphasis added).

The FAA states at 9 U.S.C. § 10:

> (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 --
>
> > (1) where the award was procured by corruption, fraud, or undue means;

> (2) where there was evident partiality or corruption in the arbitrators, or either 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; or
>
> *(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.*

(emphasis added).

Basil argues that the Panel exceeded their power under 9 U.S.C. § 10(a)(4) (the mirror to Maryland's CJP § 3-224(b)(3)) and that the Panel manifestly disregarded the law and was completely irrational. In Maryland, the latter two standards fall under common law. Under federal law, the latter two standards are encompassed by 9 U.S.C. § 10(a)(4). *Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277, 1290 (9th Cir. 2009).

This Court has explained that under CJP § 3-224(b)(3), "arbitrators exceed their powers not only when the substance of their award lacks a scintilla of rationality,[] but also where the award is founded upon a mistaken assertion of jurisdiction." *Snyder v. Berliner Const. Co., Inc.*, 79 Md. App. 29, 37 (1989) (citing *Stephen L. Messersmith, Inc. v. Barclay Townhouse Assoc.*, 313 Md. 652 (1988)). Arbitrators also exceed their powers by exceeding "their jurisdiction by refusing to consider all claims that are properly before them." *Id.* at 37-38 (citing *McKinney Drilling Co. v. Mach I Ltd. Partnership*, 32 Md. App. 205, 211 (1976)).

Under federal caselaw, arbitrators exceeded their powers when the Panel "'imposed its own policy choice'" by failing to apply "'a rule of decision derived from the FAA'" or state law. *Wachovia Securities*, 671 F.3d at 482 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 663 (2010)).

"Section 10(a)(4) has been interpreted narrowly and allows vacatur of an award 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." *Kemper*, 946 F.3d at 822 (cleaned up). Basil, as the party claiming vacatur under 9 U.S.C. § 10(a)(4), "bears a heavy burden." *Id.* (citations and internal quotation marks omitted). "It is not enough to show that the arbitrator committed an error—or even a serious error." *HayDay Farms*, *Inc. v. FeeDx Holdings, Inc.*, 55 F.4th 1232, 1240 (9th Cir. 2022) (cleaned up).

The Supreme Court of the United States explained when arbitrators exceed their powers under 9 U.S.C. § 10(a)(4):

> Oxford invokes § 10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award where the arbitrator exceeded [her] 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 [her] contractually delegated authority—issuing an award that simply reflects [her] own notions of economic justice rather than drawing its essence from the contract—may a court overturn [her] determination. So the sole question for us is

> whether the arbitrator (even arguably) interpreted the parties' contract, not whether [she] got its meaning right or wrong.

Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013) (cleaned up).

2. Manifest Disregard and Complete Irrationality

Basil argues that the Panel manifestly disregarded the law, and that the Panel's decision was completely irrational. Monarc responds by arguing that Basil does not meet the high standard required under either vacatur ground and, therefore, there is no basis to vacate the Panel's award.

Maryland Common Law

While statutorily there are only five avenues to vacate an award, Maryland common law provides additional grounds to overturn an arbitration decision: namely, if the decision is completely irrational or if it is a manifest disregard of the law. *Downey*, 428 Md. at 263 ("Vacating an award because it is 'completely irrational' or 'manifestly in disregard of the law' is clearly different from vacating an award for one of the reasons delineated in § 3-224(b)."). The Appellate Court of Maryland has "utilized" both grounds to vacate, but the Supreme Court of Maryland has only adopted the manifest disregard of the law. *Id.* at 262-65 (determining that the Appellate Court of Maryland has previously "utilized" both grounds for vacatur but stating that the Supreme Court of Maryland "shall not in the present case reach the issue"); *WSC/2005 LLC*, 460 Md. at 260 (explaining that the common law manifest disregard of the law "has existed in Maryland for centuries" and the Legislature did not overrule the ground with the MUAA, so therefore, "an arbitration award subject to the MUAA may be vacated for manifest

disregard of the law."). "The [Appellate Court of Maryland] has taken the position that, until the [Supreme Court of Maryland] rejects the 'completely irrational' standard, 'we shall assume its continued vitality in Maryland.'" *Downey*, 428 Md. at 259 (quoting *MCR of America, Inc. v. Greene*, 148 Md. App. 91, 106 n.8 (2002)).

This Court defined manifest disregard of the law as "beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." *MCR of America*, 148 Md. App. at 120 (citation and internal quotation marks omitted). The Supreme Court of Maryland further explained what "beyond mere error" means in *WSC/2005 LLC*:

> Although this Court has applied the manifest disregard standard when reviewing an award, we have yet to explain how manifest disregard of the law differs from "mere error." *"Manifest" means "clear; obvious; or unquestionable."* BLACK'S LAW DICTIONARY 1106 (10th ed. 2014). In *Prince George's County Educators' Ass'n*, we also explained that, encompassed within the manifest disregard standard, a reviewing court will vacate an award for a "palpable mistake of law or fact." "Palpable" means "capable of being handled, touched, or felt; tangible," or "easily perceived; obvious." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1267 (4th ed. 2006). Discussing the standard as applied in federal courts, Thomas Oehmke, in his treatise on arbitration, states that, to succeed in a claim that the arbitrator acted in manifest disregard of the law, the party challenging the award must show that the award is "based on *reasoning so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling* . . . ." 4 Thomas H. Oehmke & Joan M. Brovins, *Oehmke Commercial Arbitration* § 149:2, at 149-4 (3d ed. 2017).

460 Md. at 262-63 (emphasis added) (cleaned up).

The Supreme Court of Maryland defined a completely irrational arbitration award as "inferentially opprobrious . . . causing it to be suspect in its conception." *Downey*, 428 Md. at 259 (citation and internal quotation marks omitted). In *Downey*, the Court explained "the very limited extension of the reviewing court's scope of review to include authority to vacate an award that is completely irrational." *Id.* at 258-59 (cleaned up).

Federal Law

Federal caselaw defines both complete irrationality and manifest disregard of the law, and according to the United States Court of Appeals for the Ninth Circuit, these grounds stem from the statutory ground in 9 U.S.C. § 10(a)(4) stating that a court may vacate the award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4); *see also Comedy Club, Inc.*, 553 F.3d at 1290 ("We have already determined that the manifest disregard ground for vacatur is shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4), which states that the court may vacate 'where the arbitrators exceeded their powers.' . . . The Supreme Court did not reach the question of whether the manifest disregard of the law doctrine fits within §§ 10 or 11 of the FAA.") (citations omitted).

Manifest disregard of the law "requires something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law." *HayDay Farms, Inc.*, 55 F.4th at 1240 (citations and internal quotation marks omitted). To prove manifest disregard, "the moving party must show that the arbitrator understood and correctly stated the law, but proceeded to disregard the same." *Id.* at 1241 (citations and internal quotations omitted). Factual errors by the Panel "do not

generally constitute manifest disregard of law." *Id.* (citations and internal quotation marks omitted).

"An award is completely irrational if it ignores controlling terms of the parties' contract." *Id.* (citation omitted). If the award "is a plausible interpretation of the arbitration contract," then "[a]n arbitrator does not exceed its authority." *Id.* (citations and internal quotation marks omitted). A court "decide[s] only whether the arbitrator's decision draws its essence from the contract, not the rightness or wrongness of the arbitrator's contract interpretation." *Id.* (citation and internal quotation marks omitted).

C. Modification of an Arbitration Decision

Basil makes one argument that the award should be modified because the Panel awarded upon a matter not submitted to them in violation of 9 U.S.C. § 11(b). The statute states in relevant part:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order *modifying or correcting* the award upon the application of any party to the arbitration --
>
> > (b) Where the arbitrators have *awarded upon a matter not submitted to them*, unless it is a matter not affecting the merits of the decision upon the matter submitted.

9 U.S.C. § 11(b) (emphasis added).

The analogue MUAA section in relevant part states:

> (b) The court shall *modify or correct* the award if:
>
> > (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; . . .

CJP § 3-223(b)(2) (emphasis added).

II. THE ARBITRATION PANEL'S AWARD WAS NOT "COMPLETELY IRRATIONAL" OR A "MANIFEST DISREGARD" OF THE LAW.

Basil has five specific objections to the arbitration panel award. (1) Basil argues that the issue of delays regarding HVAC duct work was not properly submitted to the Panel and therefore the Panel improperly ruled on it. (2) Basil argues that the Panel was completely irrational in finding plumbing delays ran concurrently. (3) Basil also argues that the Panel committed a manifest disregard of the law in finding the partial lien release does not apply to this case, (4) in interpreting the parties' Contract relating to providing notice of claims, and (5) in awarding attorneys' fees to Monarc. Basil claims the award of attorneys' fees also constitutes the Panel improperly exceeding its powers.

A. The Arbitration Award Does Not Need To Be Modified Or Corrected Because The Issue Of HVAC Duct Work Was Submitted To The Panel.

1. Parties' Contentions

Basil argues that the Panel's award stated dates that were different than what Monarc submitted to the Panel for the issue of Basil's delayed HVAC duct work. Accordingly, Basil argues, because the Panel relied on dates different than the dates submitted to the Panel by Monarc, the Panel awarded upon a matter not submitted to them in violation of 9 U.S.C. § 11(b).[4]

[4] Basil does not cite any caselaw for this issue. Monarc cites two federal cases which speak to the broad authority the Panel has when arbitrating. Monarc states:

(continued)

Monarc argues that the matter was submitted to the Panel even though the Panel and Monarc used different dates. The "time period identified by the Panel" are the dates that are in connection to the "events [which] caus[ed] the delay." The dates used by Panel identify the date of the *events that caused the delay*. Alternatively, Monarc submitted dates to the Panel which instead identified the resulting "impact" and "effect" of the delays that the Panel identified. Because a delay-causing event occurred (as identified by the Panel), the *effect* of the delay-causing event was that the timeline of forecasted construction events had to be pushed back to account for the delay. This caused a delay in the critical path for the project.[5] Accordingly, this *effect of delay* is what Monarc identified and submitted to the Panel.

> Under the FAA, "[t]he scope of the arbitrator's jurisdiction extends to issues not only explicitly raised by the parties, but to all issues implicit within the submission agreement." *Schoenduve Corp. v. Lucent Techs., Inc*., 442 F.3d 727, 733 (9th Cir. 2006). Where broad language is used in the arbitration agreement, the arbitrator will have comparably broad authority. *See Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 (5th Cir. 1993) (noting that broad language gave the arbitrators authority "to resolve any disputed matter arising out of the joint venture").

[5] A critical path for a construction project is a constructed timeline where critical activities occur in a specific sequence. The concept is that certain construction activities need other activities to be completed before the next activity can begin. Monarc cited to a Sixth Circuit case to define the "critical path" as "the longest path in the schedule on which any delay or disruption . . . would cause a day-for-day delay to the project itself." *MACTEC, Inc. v. Bechtel Jacobs Co., LLC*, 346 Fed. Appx. 59, 62 (6th Cir. 2009) (citation and internal quotation marks omitted).

2. Analysis

The MUAA provides that a reviewing "court shall modify or correct" an arbitration award if 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." CJP § 3-223(b)(2). The FAA provides that a reviewing court "may make an order modifying or correcting" an arbitration award "[w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted." 9 U.S.C. § 11(b).

The Panel had a report submitted to them from Basil's delay expert Charles Choyce that references the delay dates identified in the Panel's award in both the body of the report, in an explanation table attached to the report, and "in Exhibit 49 to Choyce's report." Because this report was before the Panel, we find that the matter was submitted to the Panel.[6]

B. The Arbitration Panel Was Not Completely Irrational In Awarding A Non-Compensated Time Extension For Concurrent Plumbing Delays.

Regarding Maryland caselaw, as explained above, the Supreme Court of Maryland has not adopted the completely irrational standard. If the standard were to apply, it is applied sparingly, carefully, and only in instances where the award is "inferentially opprobrious . . . causing it to be suspect in its conception." *Downey*, 428 Md. at 259 (citation and internal quotation marks omitted). Federal caselaw also states that "[t]his

[6] Neither party's brief cited to the document Monarc submitted to the Panel to initiate the arbitration process.

standard is extremely narrow and is satisfied only where the arbitration decision fails to draw its essence from the agreement." *Bosack v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009) (cleaned up).

1. Parties' Contentions

Basil argues that the parties' Contract states concurrent delays cannot be compensated or granted a time extension. Thus, when the Panel awarded Monarc a 16-day non-compensable time extension for a delay Basil argues is concurrent, the Panel acted completely irrationally in their contract interpretation and application.

Monarc argues that the Panel's contract interpretation was correct because the Contract only does not allow compensation and time extensions for concurrent delays that "independently affect the critical path." Monarc argues that Basil did not put forth any evidence of independence and Basil's "own delay expert admitted on cross-examination that concurrent delays do not necessarily independently affect the critical path[.]"

2. Analysis

The parties' Contract states in relevant part:

> **8.01. <u>Compensation for Delays.</u>** Contractor's compensation for delays in its execution of Work and completion of the Project shall be governed strictly in accordance with the following:
>
> > **(c)** *Concurrent Delays.* There shall be no increase in the Guaranteed Maximum Price or extension of the Contract Time for any Owner caused delays that are concurrent with delays caused by Contractor which independently affect the critical path of the Project.

> Contractor shall manage and utilize the float in Owner's best interests.

(emphasis in original).

The questions the parties are asking are whether concurrent delays always "independently affect the critical path," or if something more must be shown to satisfy independence, and whether the Panel's interpretation of the parties' Contract is permissible.

The Panel characterized the delay at issue here as "concurrent" but did not define whether this concurrent delay is independent or whether a concurrent delay is inherently independent.[7] We defer to the Panel's expertise and understanding of concurrent and independent delays. Because the Panel's analysis does not define this concurrent delay as independent, the award does not defy the parties' Contract. We defer to and presume that the Panel understands the parties' Contract and the concept of concurrent delays. The Panel's assumed reasoning that the concurrent delay at issue here is not an independent delay within the meaning of the parties' Contract is not so "inferentially opprobrious . . . causing it to be suspect in its conception." *Downey*, 428 Md. at 259 (citation and internal

[7] Additionally, neither party's brief defined concurrent delays or cited to caselaw regarding what constitutes a concurrent or independent delay. This Court has held that concurrent delays are delays from both contractor and subcontractor that are "intertwined." *Gladwynne Const. Co. v. Mayor and City Council of Baltimore*, 147 Md. App. 149, 194 (2002) (citations and internal quotation marks omitted); *see also* 5 Bruner & O'Connor on Construction Law § 15:68 ("'Concurrency' is easily shown where obvious multiple causes of delay affect a single critical activity."). The United States Court of Federal Claims explained that concurrent delays are generally not compensable unless the contractor can establish the delay "apart from that attributable" to the other party. *George Sollitt Const. Co. v. U.S.*, 64 Fed. Cl. 229, 241 (Fed. Cl. 2005) (citations and internal quotation makes omitted).

quotation marks omitted). Under the federal law standard for the completely irrational ground, we do not assess the "rightness or wrongness of the arbitrator's contract interpretation." *HayDay Farms, Inc.*, 55 F.4th at 1241 (citation and internal quotation marks omitted). Because the Panel's award "is a plausible interpretation of the arbitration contract," we find that the award is not completely irrational, and the Panel did "not exceed its authority." *Id.* (citation and internal quotation marks omitted). Accordingly, we do not vacate the award on this issue.

C. The Arbitration Panel Did Not Manifestly Disregard The Law In Finding That The Partial Lien Release Does Not Apply To The Current Claims.

During the course of the Project, Monarc submitted signed partial lien releases to Basil in consideration of progress payments. The waiver was titled, "Unconditional Waiver and Release Upon Progress Payment." It stated that Monarc "in consideration of progress payments . . . for labor, services, equipment, or materials furnished to [Basil] . . . does hereby unconditionally release all mechanic's liens and claims for work or materials furnished to or for the benefit of the Project . . . on or before the date of January 31, 2019 . . . together with any rights thereto that Contractor . . . has with respect to the Project[.]" Monarc agreed to "hold harmless [Basil] . . . from and against all liens and claims through [January 31, 2019]." In all capital letters, the lien stated, "this release covers a progress payment for certain services, equipment, and materials furnished to owner through the above referenced date only and does not cover any retention or items furnished after said date." (capitalization omitted).

1. Parties' Contentions

Basil argues that when Monarc signed the partial lien release, any claims held by Monarc were released. Basil points to the language of the release which stated that the lien "does hereby unconditionally release all mechanic's liens and claims for work or materials furnished to or for the benefit of the Project . . . together with any rights thereto that [Monarc], or anyone claiming through [Monarc], has with respect to the Project."

Monarc responds by arguing that the lien waiver only covers a progress payment. Monarc points to the language of the release stating that "this release covers a progress payment for certain services . . . through the above . . . date only and does not cover any . . . items furnished after said date." Monarc also argues that the Contract contextualizes the language of the lien waivers, and in fact the lien releases do not release any claims under Article 9 of the Contract because Monarc contends that Article 9 states that "[a]ny claims or disputes between the parties arising out of this Agreement not resolved by the parties shall be set aside pending completion of the Work or termination of this Agreement."

2. Analysis

In deciding this issue, the entirety of what the Panel wrote is as follows:

> The obligation to keep the property and premises of the owner[,] [Basil,] free of liens exists provided that the owner pays all undisputed amounts properly. Contract § 6.22. This contract had a history of delayed payments, such that the subcontractors became uncooperative due to late payments. The requirement of lien waivers in Section 10.01 is in the application for payment, so it is prospective, meaning that the waiver would become inoperative if the owner unduly delayed payments. Once a matter becomes a claim under

> Article 9, the lien waiver would not apply. Therefore, the Panel rejects [Basil]'s argument that Monarc's execution of lien waivers under these facts waives [Basil]'s obligation to pay.

The Panel did not adequately explain the legal analysis or conclusions regarding the effect of the lien waivers. It is not clear why the waiver would "become inoperative if the owner unduly delayed payments." The Contract did not say as much, and the Panel neither cited any support for its decision nor explained how it arrived at that conclusion. Similarly, the Panel neither cited to support nor explained why once "a matter becomes a claim under Article 9, the lien waiver would not apply." This language is not within Article 9. Article 9 reads as follows:

> Contractor shall have the burden of establishing entitlement to a Claim by submitting a written "Notice of Claim" to Owner within ten (10) calendar days of the occurrence of events underlying the Claim. If Contractor fails to provide timely notice of said events, such Claim shall be deemed waived, irrespective of whether Owner has any constructive notice of such events. Contractor shall submit all such documentation reasonably required by Owner in support of such Claim within ten (10) calendar days of its submittal of the corresponding Notice of Claim. All increases or decreases in the Guaranteed Maximum Price shall be determined in accordance with the provisions of Article 8.03 and shall be limited strictly to those amounts solely attributable to each proposed, pending, or disputed change. Contractor shall substantiate any Claim for a change in Contract Time with a critical path method delay analysis. Any Claims or disputes between the parties arising out of this Agreement not resolved by the parties shall be set aside pending completion of the Work or termination of this Agreement. Both parties expressly agree that the requirements and limitations set forth in this Article 9 shall survive completion of the Work or termination of this Agreement and shall exclusively govern the final

> determination of Contractor's damages during mediation or judicial determination of dispute between the parties.

Even if the lien waivers do not apply to Article 9 claims, the Panel did not explain how Basil's claims fall within the ambit of Article 9.

While we may describe the five-sentence explanation as a non-sequitur, it does not rise to the level of a manifest disregard of the law. In Maryland, a manifest disregard is "clear; obvious; or unquestionable" and is a "palpable mistake" that is "capable of being handled, touched, or felt; tangible," or "easily perceived; obvious" so much so that "no judge, or group of judges, could ever conceivably have made such a ruling." *WSC/2005*, 460 Md. at 262-63 (cleaned up). Federal caselaw explains a manifest disregard of the law as "requir[ing] something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law." *HayDay Farms, Inc.*, 55 F.4th at 1240 (citations and internal quotation marks omitted). To prove manifest disregard, "the moving party must show that the arbitrator understood and correctly stated the law, but proceeded to disregard the same." *Id.* at 1241 (citations and internal quotation marks omitted).

Here, Basil did not demonstrate that the Panel understood and disregarded the law. The Panel referred to the parties' Contract, considered the parties' arguments, and engaged in reasoning to decide the issue. Lack of clarity in a Panel's award, as we have here, is not a manifest disregard of the law under either the Maryland or federal standard. Accordingly, we do not vacate the award on this issue.

D. The Arbitration Panel Did Not Manifestly Disregard The Law In Interpreting The Parties' Contract Regarding Providing Notice of Claims.

1. Parties' Contentions

Basil argues that Monarc's claims against Basil are untimely in contravention of Article 10 of the parties' Contract which states that a Notice of Claim must be given within 10 calendar days of the event and all documentation must be submitted 10 days thereafter. Basil argues that the Panel's determination that it "is reasonable to allow claims filed under one year of the date on which they arose or were fully documented" because the parties' conduct in practice did not follow the Contract requirements is a manifest disregard of the law. Basil cites Maryland cases and argues that "[w]ell-established Maryland law [] expressly forbids such re-writing of contracts[.]"

Monarc argues that the Panel's arbitration award is not a manifest disregard of the law because the Panel "explicitly" addressed and "describe[d] the conduct of the parties upon which the Panel relied in making its decision," and therefore reasonably found that the parties' conduct modified the contractual obligations, which is permitted by Maryland law. Furthermore, Monarc argues that Basil did not provide controlling law or contest the factual determinations on which the Panel relied.

2. Analysis

"The terms of a written contract [] may be modified or waived by the subsequent conduct of the parties." *Mercantile-Safe Deposit and Trust Co. v. Delp and Chapel Concrete and Const. Co*., 44 Md. App. 34, 41 (1979) (citations omitted). "[T]he determination of whether the conduct of the parties subsequent to the execution of a

written contract constitutes a modification is ordinarily a question left to the fact-finder." *Berringer v. Steele*, 133 Md. App. 442, 504 (2000) (citation omitted). Accordingly, Maryland law is clear that parties can modify a contract based on their subsequent conduct.

Here, the Panel explained how the parties "did not follow" the "procedure" outlined in the Contract "in most cases." The Panel found that Basil would consider claims "months after a dispute arose." While the Panel stated that Basil's consideration occurred "months after a dispute arose," the Panel also acknowledged Basil's consideration may not have been "months after the full documentation was available to Monarc." The Panel did not explain why a time frame of one year was chosen.

Similar to the analysis in section II.C.2, even with this uncertainty, we cannot hold that the Panel's analysis rose to the level of a manifest disregard for the law. As explained above, mere error is not enough to vacate an arbitration decision under Maryland common law or under federal caselaw interpreting the FAA. Maryland law allows parties to modify contracts based on their actions. *Mercantile-Safe Deposit*, 44 Md. at 41. Here, the Panel referred to the parties' Contract requirements, characterized the parties' conduct, and conducted an analysis based on the legal concept of parties' conduct subsequently modifying a contract. Accordingly, we do not vacate the arbitration award on this ground because the Panel engaged in a reasoned analysis, and therefore, did not manifestly disregard the law.

E. The Panel Neither Exceeded Their Powers Nor Manifestly Disregarded The Law In Awarding Attorneys' Fees to Monarc.

1. Parties' Contentions

With regard to attorneys' fees, Basil cites both Maryland caselaw and the MUAA. Basil argues that the Panel exceeded their powers and manifestly disregarded the law in awarding Monarc attorneys' fees and expenses, totaling $313,638.60. Basil states that "Maryland law governs Monarc's request for attorneys' fees" and that the parties should follow the MUAA for this issue. With respect to attorneys' fees, the MUAA states, "Unless the arbitration agreement provides otherwise, the award may not include counsel fees." CJP § 3-221(b). Basil points to Contract Article 16.03 which is "entirely silent" as to expenses and attorneys' fees and, therefore, Basil argues that the parties' arbitration agreement does not "provide[] otherwise" as required by CJP § 3-221(b). Relying on *MCR of America, Inc. v. Greene*, 148 Md. App. 91 (2002), Basil argues that it "is of no import" that the Contract incorporated the American Arbitration Association's Construction Industry Mediation Procedures (the "AAA Rules"), and AAA Rule 48(d)(ii) provides that an arbitration award "may include . . . an award of attorneys' fees if all parties have requested such an award[.]"[8] Basil construes *MCR of America* to hold that an incorporation of the AAA Rules into a parties' arbitration agreement is not enough to satisfy the requirement of "provide[] otherwise" under CJP § 3-221(b).

[8] Importantly, both parties and the Panel refer to the AAA Rules, but a copy of the AAA Rules is not within the record. As both parties and the Panel presumably agree to the language of the relevant AAA Rule R-48(d)(ii), we accept the parties' construction of the rule as stipulated.

In the alternative, Basil argues that even if CJP § 3-221(b) does allow an incorporation of AAA Rules to satisfy its requirement of "provide[] otherwise," Basil "did not request an award of attorney[s'] fees" as required under AAA Rule 48(d)(ii) because Basil merely sought to recover "indemnity damages."

Monarc argues that there is no basis to modify, vacate, or correct the attorneys' fee award with respect to this issue because the parties agreed in the Contract via an incorporation of AAA Rule 48(d)(ii) that the Panel can award attorneys' fees in the event that both parties requested them, and here, Monarc argues that both parties requested attorneys' fees. Monarc also relies on *MCR of America* but construes the case differently than Basil. Monarc argues that *MCR of America* does allow incorporated AAA Rules to be a basis for awarding attorneys' fees**.** The reason the parties in *MCR of America* were not awarded attorneys' fees, Monarc argues, was because their contract agreement incorporated a different AAA rule that did not provide for attorneys' fees. Monarc endorses the Panel's conclusion that Basil did in fact request attorneys' fees.

2. Analysis

Regarding whether a reference in the parties' Contract to an incorporation of the AAA Rules is enough to satisfy MUAA's requirement that attorneys' fees are not recoverable unless a statute or contract provision provides otherwise, the Panel in this case did exactly as *MCR of America* instructs.

In *MCR of America*, the parties' contract stated that the "dispute shall be submitted to arbitration under the rules of the American Arbitration Association." *MCR of*

America, 148 Md. App. at 98. Accordingly, this Court found that the contract's language did in fact incorporate the AAA Rules:

> The National Rules for Arbitration Disputes ("AAA Rules") were incorporated by the parties into their agreement. AAA Rule 34(e) states that an "arbitrator shall have the authority to provide for the reimbursement of representative fees, in whole or in part, as part of the remedy, in accordance with applicable law." The "applicable law" here, however, is the Arbitration Act, and as pointed out, that act disfavors the recovery of counsel fees "[u]nless the arbitration agreement provides otherwise." CJP § 3-221(b).

MCR of America, 148 Md. App. at 108. This Court in *MCR of America* analyzed what the "applicable law" was in the case and held that the law the parties agreed to apply in arbitration did not provide an avenue for an arbitration panel to award attorneys' fees. *Id.*

Here, the Panel first properly acknowledged that CJP § 3-221(b) does not allow recovery of attorneys' fees unless "the arbitration agreement provides otherwise." The Panel cited to four Maryland cases explaining CJP § 3-221(b) of the MUAA. The Panel then cited to Article 16.03 of the parties' Contract that incorporates the AAA Rules relating to the "Construction Industry Arbitration Procedures." The Panel looked to AAA Rule 48(d)(ii) which, according to the Panel, provides:

> The award of the arbitrator may include: . . . an award of attorneys' fees if all parties have requested such an award *or* it is authorized by law *or* their arbitration agreement.

(emphasis added).

The Panel stated that according to AAA Rule 48(d)(ii), the Panel's "ability to make such an award is delineated to three sources: the parties' express requests, the governing law of the State of Maryland[,] and the Contract, which incorporates the

[AAA] Rules." The Panel found that "both parties requested an award [of attorneys' fees]."[9] The Panel explained that when Basil requested "Other Relief Sought" in its Answering Statement and Counterclaim, and checked the box for "Attorneys[']s Fees," Basil "was seeking attorneys' fees on any final award of damages that *included* legal fees incurred in defending mechanic's lien cases." (emphasis in original). The Panel cited *MCR of America* and explained that the "Contract in this case is not silent on the subject of attorneys' fees because Article 16.03 incorporates the [AAA] Rules as a source of authority, and [AAA] Rule 48(d)ii expressly authorizes an arbitral award if both parties request it."

We, therefore, accept the Panel's reading of *MCR of America* because that case stated that a contract's reference to the AAA Rules does in fact incorporate the AAA Rules into an agreement. Here, because the relevant AAA Rule allows an arbitrator to award attorneys' fees if both parties requested it, and both parties did request it, then the Panel neither manifestly disregarded the law nor exceeded its powers under either Maryland or federal law. Accordingly, we affirm the Panel's attorneys' fees award in this matter.

[9] While neither party nor the Panel provides a citation to the record to support the finding that Monarc requested attorneys' fees, we defer to the Panel's factual findings and acknowledge that neither party contests it.

CONCLUSION

We conclude that the Panel's award shall not be vacated or modified.

Accordingly, the Panel's arbitration award is affirmed.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

Circuit Court for Prince George's County
Case No. CAE20-11776
Case No. CAL21-16242

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

Nos. 2236, 2238

September Term, 2022

9103 BASIL COURT PARTNERS LLC

v.

MONARC CONSTRUCTION, INC., ET AL.

Wells, C.J.,
Zic,
Raker, Irma. S.
(Senior Judge, Specially Assigned),

JJ.

Concurring Opinion by Raker, J.

Filed: August 15, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Raker J., Concurring.

I join the opinion of the majority. I write separately to note that I join in the discussion of the so-called "common law basis" of complete irrationality only insofar as we assume *arguendo* that such an exception applies in Maryland, and this opinion should not be construed as accepting its application.