

STATE OF MICHIGAN
COURT OF APPEALS

MSX INTERNATIONAL ENGINEERING
SERVICES, INC.,

UNPUBLISHED
May 16, 2006

Plaintiff-Appellee/Cross-Appellant,

v

No. 259096
Oakland Circuit Court
LC No. 2004-056473-CK

LINDSAY FAMILY LIMITED PARTNERSHIP,

Defendant-Appellant/Cross-
Appellee.

LINDSAY FAMILY LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v

No. 259561
Oakland Circuit Court
LC No. 2004-056606-CK

MSX INTERNATIONAL ENGINEERING
SERVICES, INC.,

Defendant-Appellee.

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

These consolidated appeals arise out of a dispute between MSX International Engineering Services, Inc. (MSXI) and Lindsay Family Limited Partnership (Lindsay) following MSXI's purchase of a business known as Management Resources International, Inc. (MRI) from Lindsay. Following a final determination from contractually required arbitration of their dispute, MSXI initiated an action to vacate the award in circuit court. At the same time, Lindsay initiated an action to enforce the arbitration award. The trial court vacated the arbitration award after finding that the arbitrator failed to consider material evidence. Lindsay filed a timely appeal to this Court and MSXI timely cross-appealed. On appeal, we conclude that the arbitrator did not err when he declined to review evidence purportedly material to the controversy because the decision was within his discretion, therefore, the trial court erred when it vacated the arbitration award. We affirm in part, reverse in part, vacate in part, and remand for entry of an order affirming the arbitrator's award.

Mark Lindsay¹ founded and operated MRI until it closed in the summer of 2003. MRI offered professional training services to manufacturers and other businesses and also engaged in the development of instructional educational programs and materials. Lindsay was the sole stockholder in MRI until June 1999, when MSXI and Lindsay entered into a purchase agreement wherein MSXI purchased all MRI's outstanding stock for \$3.7 million. The purchase agreement also provided an "Earnout Opportunity" for Lindsay based on MRI's financial performance in the two fiscal years following the sale, ending March 31, 1999 ("Year One") and March 31, 2000 ("Year Two"). Basically, the purchase agreement stated that Lindsay's Earnout payment would be calculated by multiplying MRI's excess EBIT² by a certain factor.

The purchase agreement also provided that MSXI's accounting determinations would be deemed "conclusive and binding" between the parties so far as MSXI determined EBIT "in accordance with generally accepted accounting principles [(GAAP)] consistently applied" unless Lindsay objected to the determinations in writing within thirty days of MSXI's accounting staff providing it the EBIT determination. The purchase agreement also stated that if Lindsay objected, the matter was to be resolved via "the Dispute Resolution Mechanism." The purchase agreement stated:

MSXI and the [Lindsay] shall submit any dispute concerning the Earnout Opportunity or the allocation thereof to a jointly selected accounting firm (the "Settlement Firm") for resolution.

The decision of the Settlement Firm shall be final and binding on the parties and the award of the Settlement Firm (as arbitrator) may be entered in any court of competent jurisdiction.

During "Year Two" of the purchase agreement's Earnout opportunity period, MRI, MSXI, Michigan Virtual University (MVU), and the Society of Manufacturing Engineers (SME) entered into a Master Services Agreement (MSA) wherein they all agreed to "co-produce and

¹ For the sake of clarity, we refer to Mark Lindsay in this opinion as "Mark Lindsay" because Lindsay Family Limited Partnership is referred to as "Lindsay."

² Section 3.05 of the purchase agreement defines the standard accounting acronym "EBIT" (earnings before interest and taxes) as follows:

3.05 As used herein, "EBIT," for any period, shall mean the income of the Company before taxes (state, federal and local) based upon income, plus the sum of all amounts recorded and deducted in computing such income for such periods in respect of interest expense, for such period (whether paid or accrued, or a cash or non-cash expense), all determined in accordance with generally accepted accounting principles consistently applied but with [certain] adjustments

deploy an instructional computer based training program.” Essentially, they agreed to develop web-based training courses concerning quality management systems. Under the written MSA, MSXI, MVU, and SME would “[s]hare equally the ownership of the intellectual property, copyrights and other rights” to the courses, and also “[s]hare all expenses, costs and revenue equally.” Further, the written MSA stated that MSXI, MVU, and SME agreed to:

Pay for all work (budgeted costs) in equal shares that is performed prior to the date of any termination regardless of completion of project phases and/or deliverables. MRI will invoice this project as progress payments against completion of project phases and deliverables

However, prior to signing the MSA as written, MSXI expressed concerns about accounting for MRI’s earnings under GAAP. It was MSXI’s position that it had paid for MRI’s intellectual capital when it purchased the business and did not want to pay for MRI’s intellectual property a second time through the structuring of the MSA. MSXI represented that the proper scenario under GAAP would be to “collapse the two entities [MRI and MSXI]” and consider MSXI and MRI “one party to the deal, not two” for purposes of the MSA and calculate profit accordingly. MSXI explained to Mark Lindsay that it would not sign the MSA unless MRI calculated profit resulting from the MSA in the manner communicated by MSXI which they stated was in accordance with GAAP. Mark Lindsay agreed to MSXI’s demands in order to have the MSA signed. Essentially, the effect of this exchange was that MSXI’s share of MRI’s revenue under the MSA would be completely excluded. As a result, MSXI’s portion of the costs of the project would be excluded from the second year Earnout calculation and would reduce Lindsay’s Earnout opportunity under the purchase agreement. Also, MSXI would not allow Mark Lindsay to seek another equity participant to buy out MSXI’s partnership third.

MRI developed courses as provided for in task orders executed under the MSA. In February 2001 MVU and SME terminated their participation in the MSA. MRI had issued three draft course scripts by the time of the termination, and delivered and invoiced fourteen additional course scripts post-termination. MSXI booked a reserve for the total amount of the invoices representing the doubtful collection of the accounts receivable. MVU and SME had not paid their invoices by March 31, 2001, when the year two Earnout opportunity ended. When MSXI calculated MRI’s EBIT for the twelve-month period ended March 31, 2001 MSXI excluded from income the reserve account it set up for the post-termination invoices MRI issued which resulted in no Earnout payment to Lindsay. Lindsay disputed MSXI’s treatment of the receivables including the reserve.

The parties could not resolve the dispute and proceeded to dispute resolution pursuant to the purchase agreement selecting George Zuber, an accountant with Deloitte & Touche, to act as arbitrator. The role of the arbitrator was defined by an engagement letter. After holding a hearing and reviewing documentary evidence, Zuber issued an arbitration award recalculating Lindsay’s Earnout at \$3.8 million. Both MSXI and Lindsay filed suit in circuit court. Lindsay sought to confirm Zuber’s award and MSXI sought to have the trial court vacate the award. The trial court entered an opinion and order granting MSXI’s motion for summary disposition and vacating the arbitration award based on Zuber’s failure to admit material evidence and at the same time denying Lindsay’s motion for an order confirming the arbitration award. The trial court declined to vacate the award based on MSXI’s arguments that Zuber acted beyond the material terms of the parties’ arbitration agreement, acted in contravention of controlling

principles of law, and demonstrated bias or prejudice. However, the trial court did find that Zuber improperly refused to hear evidence the court considered material to the controversy, and on that basis alone, vacated the award. Following the trial court's denial of Lindsay's motion for relief from judgment, the trial court issued an order requiring the parties to once again submit the matter to arbitration before a new arbitrator to be selected by the parties. Lindsay filed a timely appeal to this Court and MSXI timely cross-appealed.

II

We review a trial court's decision to enforce an arbitration award de novo. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). If an agreement to arbitrate states that a judgment of any circuit court may be rendered on the arbitrator's award, it is a statutory arbitration. See *Beattie v Autostyle Plastics, Inc.*, 217 Mich App 572, 578; 552 NW2d 181 (1996). This is a statutory arbitration because the purchase agreement stated that "the award of the Settlement Firm (as arbitrator) may be entered in any court of competent jurisdiction."

MCR 3.602 governs judicial review and enforcement of statutory arbitration agreements. MCR 3.602(A); MCL 600.5021; *Brucker v McKinlay Transport, Inc.*, 454 Mich 8, 17-18; 557 NW2d 536 (1997). MCR 3.602(J)(1) lists the circumstances where a court may vacate an arbitration award:

- (1) On application of a party, the court shall vacate an award if:
 - (a) the award was procured by corruption, fraud, or other undue means;
 - (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
 - (c) the arbitrator exceeded his or her powers; or
 - (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Once an issue is submitted to arbitration, the uniform arbitration act and MCR 3.602 limit judicial review. *DAIE v Sanford*, 141 Mich App 820, 824-826; 369 NW2d 239 (1985). Although our Supreme Court has rejected the theory that arbitration awards are unreviewable, *DAIE v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982), it is clear that Michigan public policy favors arbitration to resolve disputes. *Rembert v Ryan's Family Steak Houses, Inc.*, 235 Mich App 118, 127-128; 596 NW2d 208 (1999). Therefore, judicial review of arbitration awards is strictly limited by statute and court rule. *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). By limiting the grounds on which an arbitration decision may be invaded, the court rules "preserve the efficiency and reliability of arbitration as an expedited, efficient, and informal means of private dispute resolution." *Gordon Sel-Way, Inc v Spence Bros, Inc.*, 438 Mich 488, 495; 475 NW2d 704 (1991).

Further, our Supreme Court has stated that “[i]t is only the kind of legal error that is evident without scrutiny of the intermediate mental indicia which remains reviewable” *Gavin, supra* at 429. In addition, an allegation that an arbitrator has exceeded his powers must be carefully evaluated so that the claim is not used as a ruse to induce the appellate court to review the merits of the arbitrator’s decision. *Gordon Sel-Way, supra* at 497. “[C]ourts may not substitute their judgment for that of the arbitrators” *Id.* And in cases where the arbitrator’s alleged error can be equally attributed to allegedly “‘unwarranted’ factfinding” and an asserted error of law, the award should be upheld because the alleged error of law cannot be shown with the requisite certainty to have been the essential basis of the arbitrator’s findings, and an arbitrator’s factual findings are not subject to appellate review. *Gavin, supra* at 429.

There are two ways a reviewing court can find that an arbitrator exceeded his powers requiring vacation of an arbitration award. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). First, because an arbitrator derives his authority from the arbitration agreement, he is bound to act within the terms of that agreement. *Id.* Thus, if an arbitrator acts beyond the material terms of the parties’ arbitration agreement, he exceeds his powers. *Id.* Second, an arbitrator also exceeds his powers if he acts in contravention of controlling principles of law. *Id.*

III

Lindsay argues that the trial court should not have set aside the arbitration award pursuant to MCR 3.602(J)(1)(d) because Zuber was within his authority to decide issues he deemed relevant to the arbitration. And, Lindsay contends that as a part of that process, Zuber had the discretion to engage in fact-finding to resolve the relevant issues and also to decide the extent of the evidence the parties could present. MSXI counters that the trial court properly vacated the arbitration award because Zuber refused to allow MSXI to present evidence relevant and material to issues he ultimately considered and decided. Further, MSXI asserts that Zuber improperly decided issues beyond his limited arbitral authority, but since Zuber decided to make determinations on those issues, he was compelled to consider testimony or other evidence submitted by both parties relating to the issues.

Although MSXI contends that Zuber’s fact-finding regarding the collectibility of disputed receivables and the quality and percent completion of the courses MRI developed pursuant to the MSA was improper, clearly, both of those factors were integral to the calculation of Lindsay’s Earnout Opportunity as defined in the purchase agreement. And, pursuant to the purchase agreement, MSXI and Lindsay were required to submit “any dispute concerning the Earnout Opportunity or the allocation thereof” to arbitration for resolution. The language of the purchase agreement was very broad, encompassing “any” conflict regarding the Earnout Opportunity. The language in the purchase agreement belies MSXI’s argument that Zuber’s inquiry was explicitly limited to whether MSXI’s method of calculating the Earnout was in accord with MSXI’s accounting policies and GAAP.

Zuber’s fact-finding was both required and proper because the phrase “any dispute concerning the Earnout Opportunity” was not limited or otherwise defined elsewhere within the parties’ contract. Since the calculation of the Year Two Earnout Opportunity was in effect the paramount issue before Zuber, he was unmistakably required to fully analyze the factors comprising the Earnout calculation. Performing a thorough computation of the Year Two

Earnout Opportunity was within Zuber's broadly defined authority under the Purchase Agreement. Zuber did just that—he determined the proper Year Two Earnout Opportunity in accordance with MSXI's accounting procedures and GAAP and in performing this accounting function, did not improperly substitute his business judgment for MSXI's. Zuber clearly set out his methodology in the arbitration award and accompanying Earnout Calculation Table. His well-documented and well-reasoned decision was based on factual findings, which are not reviewable by this Court, *Gordon Sel-Way, supra* at 497, as well as contractual interpretation, which is also reserved for the arbitrator. *Konal, supra* at 74. Further, nothing on the face of the purchase agreement contradicts Zuber's findings, therefore, he did not exceed his authority. *Gavin, supra* at 429.

IV

MSXI also asserts that Zuber refused to allow it to present evidence relevant and material to issues Zuber ultimately considered and decided, and therefore this Court should affirm the trial courts order vacating the award. Lindsay counters that Zuber's, conclusion that MSXI's proposed evidence would not be relevant was uniquely within his expertise and the engagement letter left it to Zuber's sole discretion. The specific evidence at issue is evidence relating to the quality and completion of fourteen courses MRI submitted under the MSA after it was terminated as well as evidence regarding the potential collectibility of revenue generated from those courses. The trial court reviewed this issue and found that "it was improper for the arbitrator to refuse to hear evidence material to the controversy."

MSXI sought to provide the evidence at issue to Zuber after the hearing held in Detroit. Lindsay had produced all seventeen courses to MSXI, MVE, and SME electronically upon termination of the MSA which was significantly prior to the arbitration hearing. Lindsay also brought hard copies of the courses to the arbitration hearing. An exchange took place near the close of the hearing proceedings regarding the course documents. MSXI stated that throughout the course of the hearing that there had been no testimony offered from anyone who had "reviewed or critiqued" fourteen of the seventeen courses prior to the hearing. Lindsay declared that he had provided all parties with the courses, and testimony had been offered regarding three of the courses that were reviewed and/or tested prior to the hearing. Zuber stated that he was going to rely on the testimony offered regarding the quality and completeness of the courses as a whole, and would not attempt to make any personal assessments on those matters.

He did offer, however, to identify professional consultants within his firm to independently review the courses as he was empowered to do under the engagement letter and told both parties' counsel to discuss it with their clients. MSXI's counsel stated he would discuss it with his client. Then, at the very end of testimony, Zuber stated:

I want to take the opportunity to remind each of the parties' representatives that they should notify me if they believe that there is relevant information, evidence that they haven't had a chance to get in to me.

. . . anything you believe you have not been able to get in, facts that you believe are relevant that you have not otherwise been able to get in that you believe are

essential, or if there's any way you think there has been a lack of opportunity in the process here, just let me know.

Later, MSXI's counsel sent a letter to Zuber declining his offer stating as follows:

You have suggested that someone from Deloitte & Touch review the scripts for content and percent completion. While we agree that such a review is necessary, we do not think a review and ultimately testimony from someone from within your firm would be appropriate. To preserve the integrity of the arbitration process, we believe the parties should be given the opportunity to retain experts to perform a review and submit written reports and/or testimony on those issues regarding the additional 14 scripts.

Zuber ultimately disallowed MSXI's post-hearing requests to present further factual testimony relating to the "quality" of the courses stating:

I believe that I have received a sufficient understanding regarding the relevant parties' views about the content quality of the courses, and, accordingly, I will not seek a third-party evaluation of those materials.

Just under eight months later, Zuber issued his final determination that recalculated Lindsay's Earnout at \$3.8 million instead of MSXI's calculation of zero. Zuber based his determination in part on his finding that "the quality of the course materials prepared by MRI was essentially what was contemplated under the MSA. Accordingly, as an initial matter, we believe that MRI should have recorded a receivable for 63.8 percent of the revenues provided for under the MSA." MSXI asserted in the trial court and now on appeal that pursuant to MCR 3.602(J)(1)(d), the arbitration award must be vacated because Zuber refused to hear evidence material to the controversy.

Pursuant to the plain language of the engagement letter the parties signed, Zuber had "sole discretion" to engage in any inquiry and investigation he deemed necessary to complete the arbitration process. The engagement letter stated in relevant part: "The Arbitrator will make his final and binding determination as to each item in dispute . . . in an impartial manner *based on inquiry, investigation, and other procedures as he, in his sole discretion, may deem necessary.*" As part of the arbitration process, Zuber held a two and a half day hearing wherein he questioned and heard testimony from the interested parties and their witnesses. Zuber allowed the parties to present whatever evidence they believed relevant to the issues involved in the arbitration. At the time, one of the witnesses who offered testimony was a web-course designer, Lynn Kotwicki. In its brief on appeal, MSXI argues that Zuber denied MSXI the opportunity to present evidence from Kotwicki regarding the "content, quality, and percent completion of the fourteen course scripts that were delivered after the termination of the project" This contention is inaccurate because Kotwicki was present at the hearing but she was not questioned about and did not provide testimony regarding the fourteen course scripts. Although Lindsay provided the scripts to MSXI upon termination, apparently MSXI had not provided Kotwicki—or any other person capable of making determinations about quality and completeness—with the fourteen course scripts for review prior to the hearing. But after the hearing, MSXI sought to provide additional testimony regarding these course scripts to Zuber from Kotwicki. MSXI had the opportunity to question Kotwicki about the courses, but did not.

Also, at the close of the hearing, although he did not think it necessary based on testimony he had heard and documentation he had considered, in light of MSXI's demands, Zuber told the parties that if they believed further evaluation of the courses was necessary, he would have the documents independently reviewed by a consultant at his accounting firm. The engagement letter granted Zuber the "exclusive right to assign any partner, principal, director or employee of D&T to work with him" thus he was specifically empowered to ask for an independent review by a member at his firm to assist him in his review. MSXI's counsel declined Zuber's offer to consider evidence regarding the quality and completion of the fourteen courses entered via an independent professional consultant.

Despite MSXI's argument, presentation of its own expert testimony regarding the quality and completion of the fourteen courses is not the only method of offering testimony regarding those courses. It is not clear why MSXI did not prepare Kotwicki or another expert before the hearing and ask questions then regarding the fourteen scripts. In fact, Kotwicki was present and MSXI could have offered the testimony then had she been prepared. Also, MSXI could have agreed to the independent evaluation that Zuber offered, but did not, and instead demanded that Zuber hear its own expert testimony.

In light of the broad discretion granted him by the purchase agreement and the engagement letter, together with the opportunities he provided to MSXI regarding considering independent analysis evidence concerning the quality and completion of the fourteen course schedules, Zuber's decision not to allow MSXI to present its own expert testimony post-hearing was within his discretion and not in violation of MCR 3.602(J)(1)(d). To the extent MSXI challenges Zuber's factual findings supporting the award within this argument, they are not reviewable by this Court. *Gordon Sel-Way, supra* at 497. Further, again, nothing on the face of the purchase agreement contradicts Zuber's findings, therefore, he did not exceed his authority. *Gavin, supra* at 429. And, importantly, to the extent Zuber's findings are based on procedural issues—the manner in which he was willing to consider evidence—procedural issues are for the arbitrator and not for this Court to determine. *Bennett v Shearson Lehman-American Express Inc*, 168 Mich App 80, 83; 423 NW2d 911 (1987). Procedural issues are simply not judicially reviewable. *Bay County Building Authority v Spence Bros*, 140 Mich App 182, 188; 362 NW2d 739 (1984).

V

MSXI claims that Zuber exceeded his powers as arbitrator because he acted in contravention of controlling principles of law when he found that the oral modification of the written MSA was ineffective. Lindsay argues that Zuber's decision not to enforce the parties' oral modification of the purchase agreement is not based on an error of law. The MSA provides explicitly that all amendments to the contract be in writing. It states as follows:

This Agreement, together with all addenda, attachments, or Task Orders, is the sole and entire agreement respecting the subject matter hereof between the parties and shall supersede all prior negotiations, agreements and understandings, oral or written, related thereto. This Agreement may not be changed in any way except in writing, signed by all parties. This Agreement shall be binding on the parties' respective successors and assigns.

“The principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract.” *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295; 582 NW2d 776 (1998). Equitable estoppel arises where “(1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts.” *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 828; 346 NW2d 881 (1984).

Zuber evaluated MSXI’s assertions and found that Mark Lindsay was not estopped from relying on the MSA’s requirement that any amendments to the MSA be in writing. The arbitration award sets out Zuber’s findings in part as follows with internal footnotes omitted:

The MSA provides that any amendment to the MSA must be in writing and signed by all parties. Based on the testimony given in this matter and the documents provided to us, we understand that Mr. Lindsay was told by MSXI that it would not sign the MSA unless Mr. Lindsay agreed that the Earnout Calculation would exclude the one-third of the MSA’s revenue attributable to MSXI’s participation in the MSA. MSXI has asserted that Mr. Lindsay is precluded from relying on the Agreement’s requirement that any amendments must be in writing based on the doctrine of equitable estoppel. Under the facts as presented we have concluded that Mr. Lindsay is not estopped with respect to this issue for the following reasons:

- The Agreement requires that “the Parties will always act in good faith and give reasonable consideration to both the short and long term good of the Company.” Based on the testimony and other evidence provided to us, we understand that MRI spent a number of months pursuing the business opportunities provided for under the MSA. MSXI recognized the potential current and long-term revenues and wanted to participate as an Equity Participant of the MSA. In fact, after the MSA was signed, MSXI expressed both its satisfaction with the MSA and its appreciation to Mr. Lindsay for securing the MSA. Further MSXI was unwilling to relinquish its position as a one-third Equity Participant in the MSA, notwithstanding Mr. Lindsay’s willingness to seek an alternative Equity Participant. We believe the evidence demonstrates that MSXI believed, at or around the time of the signing of the MSA, that the MSA was beneficial for both the short-term and the long-term interests of the Company as a whole. Accordingly, it would appear that Mr. Lindsay may have had a basis to assert that MSXI would have been in violation of the terms of the Agreement if it had refused to sign the MSA.
- It appears that MSXI’s motivation in seeking the oral amendment before agreeing to sign the MSA was to avoid paying a portion of the money that may otherwise be due to Mr. Lindsay under the Earnout Calculation. The testimony given and the documents provided do not evidence any other significant reason why MSXI was seeking oral modification. To the contrary, the related MSXI email demonstrate MSXI’s dissatisfaction with the price paid upfront for purchase of MRI and its belief that it should not

have to pay for MRI's intellectual property a second time through the Earnout Calculation.

- The request for oral modification was made against a backdrop of (a) a last minute demand after the MSA terms had been successfully negotiated to the satisfaction of MRI and the Equity Participants, including MSXI; (b) MSXI's assertion to Mr. Lindsay that the portion of the revenues under the MSA attributable to MSXI's one-third participation would not be treated as MRI revenues under GAAP (with which we disagree, as discussed above); (c) MSXI's intent to mislead the other Equity Participants regarding the billings to MSXI for its one-third participation.

The trial court agreed with Zuber stating as follows:

Nor does the Court believe that the arbitrator acted in contravention of controlling principles of law when he refused to enforce the oral agreement regarding exclusion of Plaintiff's contributions from the earnout opportunity calculations.

It is true that an arbitrator exceeds his powers if he acts in contravention of controlling principles of law. *Dohanyos, supra* at 176. However, this Court's review is limited. "[I]t is only the kind of legal error that is evident without scrutiny of the intermediate mental indicia which remains reviewable" *Gavin, supra* at 429. From reviewing Zuber's analysis set out in the arbitration award, it is readily apparent that he considered both parties' arguments together with the facts as he found them in his role as arbitrator and came to a well-reasoned legal conclusion. The factual findings Zuber relied on in making his conclusions are not reviewable by this Court. And, we find no legal error plain on the face of the award. Therefore, Zuber did not exceed his authority by acting in contravention of controlling principles of law. *Dohanyos, supra*.

VI

Due to the resolution of the other issues on appeal, we need not reach Lindsay's argument that if there were legitimate reasons to vacate the award, the trial court should have ordered a rehearing in front of Zuber in accordance with MCR 3.602(J)(3) rather than a different arbitrator. The resolution renders this issue moot and we need not address it. *Detroit Edison Co v Michigan Public Service Commission*, 264 Mich App 462, 474; 691 NW2d 61 (2004), citing *Eller v Metro Industrial Contracting, Inc*, 261 Mich App 569, 571; 683 NW2d 242 (2004).

VII

Zuber did not exceed the scope of his authority when he evaluated the collectibility of disputed receivables and the underlying quality and percent completion of the courses and did not err when he declined to review evidence purportedly material to the controversy because it was within his discretion. Therefore, the trial court erred when it vacated the arbitration award and ordered rearbitration of the matter before a new arbitrator. Further, Zuber did not act in contravention of controlling principles of law when he refused to enforce the oral agreement regarding exclusion of MSXI's contributions from the Earnout opportunity calculations.

Affirmed in part, reversed in part, vacated in part, and remanded for entry of an order affirming the arbitration award.

/s/ Michael R. Smolenski

/s/ Donald S. Owens

/s/ Pat M. Donofrio