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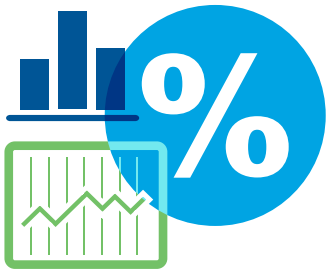

Financial Services Employment Arbitration Q&A

Motions to Vacate: Are They Worth the Trouble Anymore?

It's an understandable reaction after an unwelcome verdict: "Onward and upward. We'll be vindicated on appeal." In arbitration, of course, things are not so simple.

In considering the pros and cons of arbitration compared to litigation, one factor that's always mentioned is the limited basis for appeal of adverse awards. Whether that's a "pro" or a "con" probably depends on whether you won or lost your last case. But one thing is certain: the grounds for vacating arbitration awards have become more precarious in recent years.

Just a few months ago, Justice Elena Kagan's majority opinion in *Oxford Health Plans LLC v. Sutter* emphatically reaffirmed the limited scope of judicial review of arbitration awards. Here are a few of the Court's sound bites on the issue:

- "[C]onvincing a court of an arbitrator's error – even his grave error – is not enough."
- "The potential for those mistakes [by the arbitrator] is the price of agreeing to arbitration."
- "The arbitrator's construction holds, however good, bad, or ugly."
- "[A]n arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits."
- "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."

In light of language like that, convincing a federal court to vacate an award, even an egregiously unfair one, will be an uphill battle, to say the least. Compounding the problem is the increasing frustration of federal judges with post-arbitration petitions that simply attempt to rehash the merits of the dispute – a second bite of the apple, if you will – rather than raise legitimate grounds for vacatur. The title of a recent blog *post* by George Friedman, former Director of Arbitration for FINRA, gives a good flavor of the current state of affairs: "Federal Courts on Frivolous Motions to Vacate Arbitration Awards: 'I'm as Mad as Hell and I'm Not Going to Take this Anymore!'"

Even where a party claims that an arbitrator acted with "evident partiality or corruption," a basis for vacatur set forth explicitly in section 10(a)(2) of the FAA, the Second Circuit *recently* highlighted the limited reach of that provision, holding that there must be "abundantly clear evidence of corruption" and that a reasonable person would "*have to*" conclude that the arbitrator was biased.

So the prospects for post-arbitration review appear daunting. Yet not all hope is lost for the disappointed arbitration party. For now, "manifest disregard of the law" remains alive in a few Circuits, including the Second and, per a *decision* issued in late October, the Fourth, even though other Circuits have rejected it outright. (For a short time the Second Circuit even broadened the concept to include manifest disregard of "the law or the evidence or both," but that formulation was short-lived.) And the statutory grounds for vacatur set forth in the FAA – where the arbitrators exceeded their powers, were corrupt or showed "evident partiality," or "were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy" – remain viable, even if tightly construed.

Employers typically adopt arbitration as a dispute-resolution mechanism because they want to foster efficient and less costly resolution of employment disputes. One of the ways arbitration achieves those goals is by limiting the right of appeal, which means that all parties take the good with the bad and hope that on balance the arbitrators get it right most of the time. While post-arbitration vacatur petitions are still with us and will be for the foreseeable future, the courts seem increasingly inhospitable to such efforts. Despite the sting of a poor arbitral decision, employers should think carefully before indulging that understandable desire to ask a court to intervene.

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