Arbitration Awards-Assailable or Written in Stone?

By

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1. You Can Appeal a Judgment But, Practically Speaking, Can You Vacate an Arbitration Award?

As an ARIAS-US certified arbitrator and co-founder of that organization dedicated to arbitration of insurance and reinsurance disputes, I had the distinct privilege of conversing with renowned U.S. District Court Judge Shira Scheindlin at the ARIAS-US November 2018 Annual Conference. Best known for triggering e-discovery obligations by means of her seminal case, *Zubulake v. UBS Warburg LLC* 229 F.R.D. 422 (S.D.N.Y. 2004), Judge Scheindlin had recently retired from the federal bench of the Southern District of New York to herself embark on a career as an arbitrator. Judge Scheindlin shared that, in the last few years of her career, her decisions had invariably been overturned by the 2nd Circuit Court of Appeals whenever she granted a motion to vacate an arbitration award under the Federal Arbitration Act. 9 U.S.C. Title 9. She mused that there was virtually no chance of disturbing an arbitration award, no matter how compelling the reasons for vacatur.

Do Judge Scheindlin's observations still hold true, as we begin 2021? For legal practitioners in Florida and the 11th Circuit, can arbitration awards be vacated or are they written in stone?

2. The Basics of Vacatur under the Federal Arbitration Act

For purposes of this article, discussion will focus on the Federal Arbitration Act, and specifically 9 U.S.C. Section 10. It is well-settled law that any case involving interstate commerce where arbitration is at issue will be governed by the Federal Arbitration Act. *Allied-Bruce Terminex Companies, Inc. v. Dobson* 513 U.S. 265 (1993*); Deitchman v. Bear Stearns Securities Corp*. 2007 WL 592238 (S.D. Fla. December 28, 2007). Accordingly, motions to vacate are properly commenced in federal district court pursuant to 9 U.S.C. Section 10, which directs a party seeking vacatur to do so "in the United States court in and or the District wherein the award was made."[i]

The specific grounds for vacatur under 9 U.S.C. Section 10 are:

(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;

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

Motions to vacate must also be brought within ninety days of arbitration award issuance. 9 U.S.C. Section 12.

A word about arbitration mechanics. An arbitration may be conducted by a single neutral arbitrator or, often in cases that involve significant amounts in controversy, a panel of three arbitrators, with party-appointed arbitrators appointed by each of the parties and a third, always neutral arbitrator (often called the umpire) selected by means set forth in the arbitration provisions of the contract at issue. Depending on which arbitration rules the parties agree are applicable, the two party-appointed arbitrators can be neutral (provided as a default mechanism by *the American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes,* Canon IX, Section A) or, as typical in arbitrations in which the arbitrators are selected from among the ARIAS-US panelists, may have an initial predilection towards a party's position but must, upon reviewing the evidence, issue an award based on the preponderance of that evidence. This analysis considers both proceedings with a single arbitrator or with the three-person panel structure.

Having had the pleasure of working on panels with fair-minded arbitrators in the course of the more than 100 proceedings in which I have served, I know that arbitrators take their responsibility for issuing awards which comport with the requirements of due process quite seriously. I do not know a single arbitrator who is unaware of the provisions of 9 U.S.C. Section 12 as set forth above. I know also, in recent years, arbitrators' attempts to demonstrate their dedication to issuing fair arbitration awards focus on two areas within the purview of those arbitrators' control; namely, (a) showing no "evident partiality" exists, and (b) taking care that hearings are postponed, if appropriate.

3. "Evident Partiality" Alleged on the Part of the Arbitrator or Neutral Umpire

In proceedings utilizing ARIAS-US credentialed arbitrators, the early practice was to have only the neutral umpire disclose actual or putative conflicts with the parties, counsel, or other critical touchpoints in writing in response to a questionnaire, while the party-appointed arbitrators disclosed their actual or putative conflicts verbally at an organizational meeting. Due to ongoing concerns about inadvertently omitting an important disclosure, many ARIAS-US credentialed arbitrators now distribute a written set of disclosures to document the nature and extent of any contacts in order to dispel any notions of "evident partiality." As to arbitrators appointed from the American Arbitration Association's lists, it has long been the practice for all arbitrators to disclose any actual or putative conflicts in writing.

Why are those party appointed arbitrators concerned? Precisely because of the factual background of a case in which the Second Circuit overturned Judge Scheindlin's initial vacatur for "evident partiality"; namely, *Scandinavian Reinsurance Co. Limited v. St. Paul Fire and Marine Insurance Company*, 668 F. 3rd 60 (2nd Cir. 2012) *overturning, Scandinavian Reinsurance Co. Limited v. St. Paul Fire and Marine Insurance Company* 732 F. Supp. 2d 293 (S.D.N.Y. 2010)

(district court opinion hereinafter referenced as "*Scandinavian*").[ii] In the case below, vacatur was granted because one party-appointed arbitrator and the umpire failed to supplement their initial disclosures to include their overlapping service together in a newly commenced case involving similar issues and a common witness but brought by a different petitioner against Platinum Underwriters Bermuda, a successor to the reinsurance division of St. Paul Fire and Marine Insurance Company. It was undisputed that the umpire had acknowledged his belief that the arbitrators were bound by a continuing duty to disclose. Judge Scheindlin had equated the non-disclosure of the later but overlapping case to "evident partiality," concluding that the umpire's and arbitrator's non-disclosure deprived Scandinavian, as petitioner, of an opportunity to object to their service on both arbitration panels and/or adjust its arbitration strategy. *Id.* at 70 *citing Scandinavian 723* at pp. 307-308. While opining that disclosure of the fact of the concurrent service by the umpire and arbitrator would have been better practice, the Second Circuit held that vacatur was not warranted because the nature of the undisclosed relationship did not significantly tend to establish bias. *Id.* at 78.

In the 11th Circuit, no cases refute the *Scandinavian* rationale. One can deduce that only the most extreme of undisclosed conflicts would suffice to allow arbitration awards' vacatur for an arbitrator's "evident partiality." The best-known case outlining those extreme circumstances emanates from the 9th Circuit; namely, *Monster Energy Company v. City Beverages, LLC* 940 F.3d 1130 (9th Cir. 2019). The arbitration was conducted under the auspices of JAMS, an arbitration society. The arbitrator issued a written disclosure statement indicating that (1) he "practiced in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS"; and that (2) he had arbitrated a separate dispute between Monster Energy Company ("Monster") and a distributor, resulting in an award against Monster. The statement omitted that the arbitrator had a substantial ownership interest in JAMS and JAMS had administered 97 decisions for Monster and the past five years. *Id*. at 1136.

Where the arbitration award was in favor of Monster, these facts were sufficient to prompt the 9th Circuit's reversal of the district court's denial of vacatur. The 9thCircuit relied on the U.S. Supreme Court's holding in *Commonwealth Coatings. Corp. v. Continental Cas. Co.,* 393 U.S. 145, 149 (1968) that vacatur for "evident partiality" is supported where the arbitrator fails to "disclose to the parties any dealing that might create an impression of possible bias." But in providing its rationale, the 9th Circuit stressed the significance of the undisclosed interest in JAMS and JAMS' relationship with *Monster,* as opposed to any long past, attenuated or insubstantial connections between Monster and the arbitrator.

4. But What About Due Process? Failure to Continue the Final Hearing

Arbitration panels may well continue a final hearing upon the first request of counsel, but given busy arbitration schedules, are reluctant to grant repeated requests if counsel have not worked diligently to move to final hearing. Under most factual scenarios, courts in the 11th Circuit and elsewhere are reluctant to disturb an arbitration panel's discretion. But, in a recent Florida DCA decision, a court applied the Federal Arbitration Act and determined that the arbitration panel's decision to proceed to a hearing despite Efron's second request for continuance was in error. *Efron v. UBS Financial Services of Puerto Rico* 300 So. 3d 733 (Fla. 3rd DCA 2020) (applying Federal Arbitration Act). In another case proving the extreme circumstances can support

vacatur, the respondent's attorney withdrew eleven days before the final hearing. Efron then failed to appear at the hearing. The arbitration panel defaulted him and heard evidence concerning damages. The court vacated the arbitration award, reasoning that the ability to obtain legal representation was intimately connected to the integrity of the arbitral process.

5. Are There Any Other Likely Grounds in the 11th Circuit for Vacatur under the Federal Arbitration Act?

No discussion of grounds for vacatur would be complete without making clear that the 11th Circuit, like the 5th, 7th, and 8th Circuits, no longer entertain "manifest disregard for the law" on the part of the arbitrators as grounds for vacating an arbitration award. *Visiting Nurse Ass'n of Florida, Inc. v Jupiter Medical Center, Inc*. 154 So. 3d 115 (Fla. 2014) *citing with approval Hall Street Associates, LLC v. Mattel, Inc.,* 552 U.S. 576 (2008). No judicial or contractual gloss can add to the specified grounds for vacatur under 9 U.S.C. Section 10.

6. Conclusion

Given it is so difficult to vacate an arbitration award, should you, as corporate counsel, recommend taking arbitration clauses out of contracts you prepare? As a seasoned arbitrator, I argue arbitration's advantages outweigh any difficulty you may encounter in vacating an unfavorable arbitration decision. Where extreme circumstances exist, vacatur can be granted. But, most importantly, arbitration provides an efficient process by which your company's dispute is reviewed by individuals who have significant background in the industry in which your company operates. If arbitrators and umpires are selected with all appropriate care, corporate counsel can maximize the potential to secure just the right arbitration award before any review.

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[i] While the Florida Arbitration Code is set forth in Chapter 682 of the Florida statutes, by its terms, this Code pertains only to arbitration awards made on or after July 1, 2013, unless the parties otherwise agree. Fla. Stat. Section 682.013. Furthermore, since judging what constitutes "interstate commerce" for determining arbitration questions is a low threshold, it is likely that, usually, motions for vacatur will be addressed to a U.S. district court rather than a Florida state court. However, Florida state courts, where appropriate, do apply the Federal Arbitration Act. *see, e.g. Efron v. UBS Financial Services of Puerto Rico* 300 So. 3d 733 (3rdDCA 2020). Further, the Florida Arbitration Code for post-2013 contracts can apply where not inconsistent with the Federal Arbitration Act. *See Visiting Nurse Ass'n of Florida, Inc. v Jupiter Medical Center, Inc*. 154 So. 3d 115 (Fla. 2014). Interestingly, the Florida Arbitration Code includes a section on vacatur which provides grounds very similar to those set forth in the Federal Arbitration Act. *See* Fla. Statutes Section 682.13. These grounds include, in relevant part: (b) (1) Evident partiality by an arbitrator appointed as a neutral arbitrator; (2) Corruption by an arbitrator; and (3) Misconduct of an arbitrator prejudicing the rights of a party to the arbitration proceeding.

[ii] In full disclosure, the author served as General Counsel from 1996-88 of St. Paul Re, Inc., a division of St. Paul Fire and Marine Insurance Company. This service took place well before the subject arbitration took place in 2009, and the author had no role whatsoever in that arbitration proceeding.