

## VACATUR PROVISIONS OF THE RUAA

The vacatur provisions of the RUAA, or any other arbitration statute for that matter, serve a dual purpose: the first is to set forth the grounds for and the manner by which an arbitral award can be set aside; and, second, to ensure that these grounds are not so numerous or far-reaching as to negate the objective of arbitration, which is to reach a final determination of the merits of the dispute. Under Sec. 23 of the RUAA, the court may vacate the award upon motion by a party if any of the following circumstances exist:

- i. the award was procured by corruption, fraud or other undue means;
- ii. there was evident partiality by an arbitrator appointed as a neutral arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.
- iii. refusal of an arbitrator to postpone the hearing upon showing of sufficient cause; refusal to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Sec. 15 (the arbitration process), so as to prejudice substantially the rights of a party to an arbitration proceeding;
- iv. the arbitrator exceeded his powers
- v. there was no agreement to arbitrate, unless the person participated in the proceeding without raising an objection not later than the beginning of the arbitration hearing; or
- vi. the arbitration was conducted without proper notice of an initiation of an arbitration as required in sec. 9 so as to prejudice substantially the rights of a party to an arbitration proceeding.

The first four grounds merely reiterated the four statutory grounds for vacatur under the Uniform Arbitration Act (UAA), which in turn were based upon the four grounds for vacatur under the Federal Arbitration Act (FAA). The last two grounds are new

### Corruption, fraud or other undue means

In order to have an arbitral award on the ground of corruption, fraud, or other undue means, the burden of proof upon the moving party is one of clear and convincing evidence, and not merely a preponderance of the evidence. (*La Farge Conseils et Etudes, S.A. v. Kaiser Cement and Gypsum*, 791 F2d 1334, 1339 (9<sup>th</sup> Circuit, 1986); *Foster v. Turley*, 808 F2d 38, 42 (10<sup>th</sup> Circuit, 1986). Corruption, fraud or other undue means may be presumed in the event of an ex parte contact involving disputed issues between an arbitrator and a party (*Rosenthal-Collins Group v. Reiff*, 748 N.E.2d 229 (Ill. Ct. App. 2001).

### Evident partiality, corruption or misconduct

According to the commentaries to the RUAA, the reason "evident partiality" is a ground for vacatur only for a neutral arbitrator is because non-neutral arbitrators, unless

otherwise agreed, serve as representatives of the parties appointing them. As such, these non-neutral, party-appointed arbitrators are not expected to be impartial in the same sense as neutral arbitrators. (Macneil Treatise Sec. 28.4). However, corruption and misconduct are grounds to vacate an award by both neutral arbitrators and non-neutral arbitrators appointed by the parties. In the case of evident partiality or corruption, no prejudice to the aggrieved party needs to be shown in order to have the award vacated. In the case of arbitrator misconduct, however, proof of prejudice is required.

In regard to the grounds of evident partiality, the standard is that the arbitrator must be neutral and avoid the appearance of bias. Consequently, motions to vacate on this ground are frequently based on the arbitrator's failure to disclose conflicts of interest and other information that could give the appearance of bias. To prevail on a claim of bias, the moving party must be able to demonstrate that the arbitrator had an interest in the subject matter of the arbitration or a pre-existing business or social relationship with one of the parties or counsel, which would color the arbitrator's judgment.

With regard to arbitrator misconduct, the standard under Sec. 23 (a) (3) is whether the arbitrator's determination prejudiced a party's right to a fair hearing. Thus, where the arbitrator refused to allow a party to cross-examine the other party's expert (*Pacilli v. Philips Appel if Walden, Inc.* 1991 WL 193507), or where the arbitrator refused to allow a party to completely present his proof on the merits of his grievance (*Teamsters, et al. v. ED Clapp Corp*, 551 Supp. 570), the award was properly vacated.

#### Refusal to postpone the hearing

This involves fundamental issues of fairness and due process. Examples of awards vacated under this ground are: where an arbitrator denied a request for adjournment when the requesting party argued that he could not continue because his wife had cancer (*Hoteles Condado Beach v. Union de Tronquistas*, 763 F2d 34 [1<sup>st</sup> Cir. 1985]); and where the arbitrator refused to postpone the hearing despite proof that the notice of hearing was sent by one party to the other party's former counsel, and that the second party had asked for a defermnet so that he could engage another lawyer (*Wedhish Morgan Sec. Inc. v. Brandman*, 597 NYS 2d 39 [1993]).

#### Exceeding Powers

Since arbitration is a creature of contract, the arbitrator can only rule upon those issues that are properly submitted to him by the parties for resolution. The standard for granting a motion to vacate under this paragraph is whether a party's rights were prejudiced by an arbitrator who, in making the award, exceeded his or her powers or so imperfectly executed them that a final and definite award on the subject matter was not made (*Blumenthal v. Merrill Lynch, et al.*, 910 F2d 1049 [1990]).

### No agreement to arbitrate

According to the commentaries on the RUAA, the purpose of Section 23(a)(5) is to establish that if there is no valid arbitration agreement, then the award can be vacated; however, the right to challenge an award on this ground is conditioned upon the party who contests the validity of an arbitration agreement raising this objection no later than the beginning of the arbitration hearing under Section 15(c) if the party participates in the arbitration proceeding.

### Lack of proper notice

Section 23(a)(6) is a new ground of vacatur related to improper notice as to the initiation of the arbitration proceeding under Section 9. The notice requirement in Section 9 is a minimal one intended to meet due process concerns by informing a person as to the controversy and remedy sought. The notice of initiation of the arbitration proceeding is also subject to reasonable variation by the parties' agreement

## **CONTROVERSIAL ISSUES IN REGARD TO VACATUR**

The potential controversy in regard to vacatur lies not so much in those grounds that are included in the RUAA but rather in those that were excluded by the Drafting Committee. The debate centers on the following issues, namely:

1. Whether certain non-statutory grounds for vacatur that have been enunciated by the federal courts ought to be codified in the RUAA; and
2. Whether there ought to be a clause in the RUAA specifically giving the parties the right to “opt in” to a judicial review of the award for errors of law or fact or any other grounds not prohibited by law.

### Non-statutory grounds for vacatur

In regard to the first issue, the Drafting Committee considered the advisability of including additional grounds for vacating arbitral awards. These included the grounds of “manifest disregard of the law” (which originated from the obiter dictum in the 1953 case of *Wilko v. Swan*, 346 US 427) as well as the “public policy” ground, which was first

articulated by the US Supreme Court in *WR Grace v. Local Union 759*, 461 US 757 [1983], and further clarified in the 1987 case of *United Paperworkers International Union v. Misco*, 484, US 29. Neither of these two standards is presently codified in the FAA or in any of the state arbitration acts. However, all of the federal circuit courts of appeals have embraced one or both of these standards in commercial arbitration cases. See Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 734 (1996). However, the problem was the inability of the federal courts to achieve a clear consensus as to the most appropriate analytical model for each standard. There seems to be at least two different approaches taken by the federal courts to the ground of “manifest disregard of the law”. One approach looks to the result reached in arbitration and evaluates whether it is clearly consistent or inconsistent with controlling law. Thus, a reviewing court must conclude that the arbitrator misapplied the relevant law touching upon the dispute before the arbitrator in a manner that constitutes something akin to a blatant, gross error of law that is apparent on the face of the award. However, another approach requires a reviewing court to evaluate the arbitrator's knowledge of the relevant law. Even if a reviewing court finds a clear error of law, vacatur is warranted under the "manifest disregard of the law" ground only if the court is able to conclude that the arbitrator knew the correct law but nevertheless "made a conscious decision" to ignore it in fashioning the award. See *M&C Corp. v. Erwin Behr & Co.*, 87 F.3d 844, 851 (6th Cir. 1996).

Similarly, there were different approaches in the application of the concept of “violation of public policy” as a ground to justify setting aside arbitral awards. One approach, used by the 10<sup>th</sup> Circuit in *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020,1023 (10th Cir. 1993). and by the 8<sup>th</sup> Circuit in *PaineWebber, Inc. v. Argon*, 49 F.3d 347 (8th Cir. 1995) contemplate that an award can be vacated when it "explicitly" conflicts with, violates, or is contrary to the subject public policy. Thus, the court will delve into the merits of the arbitration award in order to determine whether the arbitrator's analysis and application of the parties' contract or relevant law "violates" or "conflicts" with the subject public policy.

On the other hand, the Eleventh Circuit in *Brown v. Rauscher Pierce Refnses, Inc.*, 994 F.2d 775 (11th Cir. 1994) and the Second Circuit in *Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108 (2d Cir. 1980) considered that there was a public policy violation only when a court concludes that implementation of the arbitral result compels one of the parties to violate a well-defined and dominant public policy, a determination which does not require a reviewing court to evaluate the merits of the arbitration award but merely to determine whether confirmation of, or refusal to vacate an arbitration award, and a judicial order directing compliance with its terms, will place one or both of the parties to the award in violation of the subject public policy. If it would, the award must be vacated. If it does not, vacatur is not warranted.

As the Committee debated these issues, there were compelling arguments both for and against the inclusion of these grounds. The primary argument favoring inclusion was that it would allow the law to be stabilized by providing uniform and consistent standards to be employed by the courts. However, given the inherent difficulty of establishing a bright line standard for these two grounds, and given the possibility that the US Congress or the Supreme Court may eventually choose the definitive standard and thus preempt the RUAA, the committee decided to exclude these grounds from the draft.

### Opt-in review

The Committee faced the same predicament in regard to this issue. On one hand, by including a provision in the RUAA allowing the parties to opt in to a judicial review of the award, it would be possible to devise uniform standards for the types and extent of the review permitted, and would encourage those wary of the arbitration process to agree to have their claims submitted to arbitration. On the other hand, however, there was marked concern that putting in this clause would allow the parties a “second bite at the apple”, thus effectively negating the core objective of finality, and would encourage all parties entering into arbitration agreements to insist on these clauses, rendering the arbitration ineffective. Moreover, it was feared that the possibility of judicial review would compel arbitrators to issue lengthy, reasoned awards and would make transcription of proceedings the norm, thus jacking up further the costs of arbitration. In the end, the committee also decided not to include this ground as one of the grounds for vacatur.