Vacating Arbitration Awards

Study reveals real-world odds of success by grounds, subject matter and jurisdiction

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Litigators and arbitrators are well aware of the limited statutory grounds on which a court may vacate arbitration awards under the Federal Arbitration Act and companion state laws. But how often do vacatur actions succeed? And is vacatur more likely in some cases—and in some courts—than in others?

Our research revealed that courts in a small handful of states were far more receptive to vacatur actions than courts in other state or federal jurisdictions, and that most vacatures were granted on only two grounds. However, vacatur rates remained the same regardless of the identities of the arbitrating parties or the underlying subject matter of the arbitrated dispute.

The available federal statutory grounds for vacatur include: award procured by corruption, evident partiality of the arbitrator, refusal to postpone the hearing for good cause, refusal to consider material evidence and arbitrators exceeding their powers. Most jurisdictions also permit vacatur if the arbitrator’s award exhibits “manifest disregard of the law,” and some recognize other judicially created grounds—“contrary to public policy,” “irrational” and “arbitrary and capricious.”

The purpose of this article is to take a snapshot of the real-world application of these familiar standards in a recent sample of the reported case law. We have reviewed every case, state and federal, published and unpublished, reported between January 1, 2004, and October 31, 2004, in which a court decided a motion to vacate an arbitration award on any of these grounds. We found 182 cases, and because some motions urged multiple grounds for vacating the same arbitration award, those cases involved a total of 277 legal challenges.

We wanted to know which of the available grounds for vacatur are invoked most frequently, which most often succeed and fail, whether the facts of the cases could help us read additional content into the relatively general and elastic grounds for vacatur employed by the courts and whether the cases suggest any useful practice lessons for litigators and arbitrators.

After the cases were located and categorized, we tabulated them to compute the number of cases in which a party sought award vacatur on each of the available grounds, determined the number of times such challenges succeeded and failed, noted the standards fashioned by the courts to apply the somewhat Delphic grounds for vacatur set out in the statutes and the case law and charted the types of misconduct actually alleged in the cases.
We should note that three categories of cases were excluded from our research. First, we excluded cases in which an award was vacated because the arbitration clause was held unconscionable or otherwise unenforceable from its inception as a matter of contract law—for example, duress, mistake, fraud, failure to reach an agreement. Rather, we limited our search to cases in which vacatur was sought following a properly convened arbitral proceeding involving an enforceable clause.

Second, although we included employment termination and discrimination disputes in our sample, we excluded cases addressing awards issued in the labor/collective bargaining context as sui generis.

Third, we eliminated certain decisions involving statutory mandated arbitrations in insurance and public-contracting disputes where the applicable standard of review was far less deferential and not representative of outcomes under the FAA or the analogous state statutes.

These exclusions left us with a sample of 182 reported cases, state and federal, decided during the first ten months of 2004. The cases involved a wide variety of civil disputes in which a party sought vacatur of an arbitral award.

Of the 182 cases in which vacatur was sought, the motion to vacate succeeded 37 times, or 20 percent. See Figure 1.

This percentage falls substantially if the comparison is to the total number (277) of statutory or other grounds asserted as a basis for vacatur in these cases. We found that the parties successfully asserted only 40, or about 14 percent, of the 277 grounds advanced for vacatur. See Figure 2.

No subject-matter pattern

We reviewed the 37 cases in which an award was vacated for possible subject-matter patterns in order to assess whether vacatur was ordered disproportionately in cases involving employees, consumers, other individual litigants, or in any particular types of cases or industries. We found no such patterns.

Rather, the 37 cases in which the award was vacated exhibited a very wide variety of parties and subject-matter content. We did not see a statistical “tilt” toward or against vacatur in cases involving individuals as opposed to organizational parties, in any particular type of disputed subject matter, or in any particular industrial setting.

Significant differences among states

We did find significant differences in the frequency of successful vacatur applications based on the forum where
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The case was decided. Of the total universe of 182 cases we reviewed, 120 were brought in state courts, with the remainder (62) brought in the federal courts.

Of the state court cases, 31, or about 25.8 percent, resulted in vacatur. By contrast, only six of the federal cases, or about 9.7 percent, vacated the award. See Figure 3.

We also saw dramatic differences in the vacatur success rate between the different states. Of all the state court cases vacating an award, 22 cases, or 71 percent, were decided in only four states: New York (9 cases), California (6), Connecticut (4) and Massachusetts (3). Nine other states (Alabama, Louisiana, New Jersey, Ohio, Pennsylvania, South Dakota, Tennessee, Texas and Wisconsin) each had one case vacating an award. No other state had any. See Figure 4.

The figures also indicated that vacatur was attempted more often, and succeeded more often, both on an absolute and on a percentage basis, in cases brought in all of the other 47 states combined (56), and also exceeded the total number of such cases brought in the entire federal system (62). Moreover, the courts in these 64 cases vacated the award 19 times.

A litigant seeking vacatur in these three states thus had a 30 percent chance of success, as compared to a 21 percent chance of success in the other 47 states (12 awards vacated) and only a 9.7 percent chance in the federal system (six awards vacated). See Figure 5.

Most potent grounds
Our review found that the most frequently asserted and most frequently successful of all of the statutory and other grounds advanced by parties seeking vacatur was the allegation that the arbitrators had "exceeded their powers, or so imperfectly executed them that a ... final and definitive award upon the subject matter submitted was not made." This ground was asserted 101 times in our cases, and succeeded in 21, or about 20.8 percent, of them.

By comparison, the next most active category—that the arbitrators allegedly "manifestly disregarded the law"—was asserted 52 times but succeeded in only two cases, or about 4 percent of the times it was argued.

The third most frequently advanced ground, and the second most potent, was the allegation that the arbitrators had committed "misbehavior by which the rights of a party were prejudiced," a catch-all category encompassing various judge-made grounds for vacatur, other than "manifest disregard," and includes allegations that the award was "irrational," "violated public policy" or was "arbitrary and capricious." This ground was argued in 42 of the cases and succeeded in seven, or about 17 percent, of them.

Almost as successful, but much less frequently argued, was the ground that the arbitrators "refused to postpone the hearing upon sufficient cause shown." This ground was argued in only 12 cases, but succeeded twice, or about 16.7 percent of the time.

Vacatur was sought only 33 times due to "evident partiality or corruption in the arbitrators," which surprised us because this is the ground that encompasses the much-discussed topic of arbitrator disclosures, and succeeded in only four, or about 12.1 percent, of them. Those cases do, however, indicate a major divergence in approach between the courts in California compared to the rest of the nation.

Arbitrators regularly counseled to "let everything in" at arbitrator-training seminars on evidence management may be interested to learn that vacatur was sought in
only 24 cases on the ground that the arbitrator allegedly "refused to hear evidence pertinent and material to the controversy." Moreover, that argument succeeded in only three, or about 12.5 percent, of these cases.

The most anemic of the grounds reviewed in our sample was the allegation that the award "was procured by corruption, fraud or undue means." This argument was attempted in 13 cases and only succeeded in one, or 7.6 percent of them. See Figure 6.

In general, our sample confirmed once again how very difficult it is in the real world for parties to obtain vacatur of an award. Depending on whether the comparison is to the total cases or to the total grounds asserted, the odds of successfully vacating an award in our sample were either one in five or one in six.

In the cases where the arbitrators actually decided the issues submitted to them (i.e., excluding the cases where they exceeded their powers or didn't render a definite award), those odds were one in eight. See Figure 7.

When these figures are combined with the forum-related observations discussed above, the chances of successfully vacating an award in states other than New York, California or Connecticut, or in the federal system, were quite remote in our sample, particularly if the ground relied upon was something other than an argument that the arbitrators exceeded their powers.

Our review also indicated, as discussed more specifically below, that the courts in our sample saw their roles mainly as one of policing the procedural propriety of the arbitral process rather than correcting the substantive merits of the awards rendered: Did the arbitrators decide the issues entrusted to them? Did the arbitrators engage in prejudicial misconduct that tainted the fairness of the process?

Once satisfied that the arbitrators had decided the issues submitted to them by the parties, and that the process employed satisfied some acceptable standard of "due process," the courts in this sample by and large refrained from second-guessing the merits of the decisions reached by the arbitrators.

Avoiding motions to vacate

Most observers would agree that
the goal of an arbitral proceeding should be a just award rendered in a fair, efficient and final proceeding.

Vacatur litigation inevitably compromises at least some of these goals, by adding an expensive and potentially protracted judicial "second round" to the process, whether the

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motion to vacate ultimately succeeds or not. In cases where the award is vacated, the consequences to the parties can be severe, especially in cases where they may be ordered to arbitrate anew and thus will have wasted much or all of the time and expense invested in the vacated arbitral proceedings.

Looking at the world of arbitration from this pragmatic perspective, our sample identified certain types of behavior by arbitrators and trial counsel that probably should be given a wide berth, even if such conduct did not always, or even often, result in vacatur. Although not necessarily held to be misconduct in the cases reviewed in our sample, these types of conduct did appear repeatedly in our sample as behaviors that gave rise to vacatur litigation.

For arbitrators, the short list of sensitive behavior suggested by our sample of cases includes:

* exceeding the tribunal's powers by deciding issues not submitted to the arbitrators, awarding relief in favor of or against parties not bound by the arbitration agreement, granting relief outside the claims alleged or awarding types of relief (punitive damages, consequential damages, interest or attorneys' fees) that the clause or applicable law may not permit the arbitrator to award

* failing to render an award that definitely and finally decides the issues submitted to the arbitrators

* making incomplete disclosures during the arbitrator-selection process

* engaging in ex parte communications with parties or counsel

* failure to make timely investigation into the arbitrators' disclosures

* conducting ex parte communications with, and failing to obtain disclosures from, party-appointed arbitrators who later agree to serve as neutrals

* offering testimony that is contravened by other testimony by the same witnesses given in other, particularly criminal, proceedings; and, probably most importantly,

* seeking relief that the arbitrator is not empowered to grant.

We do not suggest that all such conduct will result in vacatur of the award. Seeking vacatur successfully is everywhere and on all available grounds an uphill battle.

We do suggest that these behaviors seemed to recur in the cases in our sample, and probably led to unfortunate expense and delay consequences for the parties to the arbitral process, regardless of whether the motion to vacate was ultimately granted or not.

Tips for counsel

For counsel who hope to represent a client in an arbitration in a manner that forecloses avoidable risks of becoming embroiled in vacatur litigation later, a comparable list of actions to avoid suggested by our sample of cases includes:

* last-minute amendments of claims or prayers for relief

* last-minute production of key evidence or witnesses that should have been disclosed sooner

* failure to produce relevant documents

Endnotes


2 The authors wish to acknowledge the gracious assistance of Heller Ehrman LLP and, in particular, its Seattle attorney David Spence, in conducting the initial search for and categorization of the cases. An expanded version of this article, with brief comments on some of the cases we found particularly interesting, is in the materials presented at the ABA Section of Dispute Resolution's Seventh Annual Conference in April 2005.