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Grounds for Vacating an Arbitration Award Remain Extremely Limited

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The Eleventh Circuit Court of Appeals issued a decision last week upholding an arbitral award, despite the failure of the arbitrators to make certain pertinent disclosures. The case involves an international arbitration before the International Chamber of Commerce (ICC) stemming from the design and construction of the Panama Canal expansion, which was "severely delayed and disrupted" and over twenty months late. Following an arbitration hearing on the merits, the panel of three arbitrators ordered the contractor to pay Panama nearly a quarter billion dollars in damages. The contractor immediately sought information from the arbitrators concerning other arbitrations that they had been involved with to reveal potential sources of bias. In response, the arbitrators disclosed several other matters where they had worked with each other or with Panama's counsel. For example, two of the arbitrators had each served as a co-arbitrator (in unrelated matters) with a lawyer who represented Panama.

In light of the new disclosures, the contractor moved to disqualify the arbitrators and set aside the award. The contractor first challenged the impartiality of the arbitrators before the ICC, which agreed that some of the arbitrators failed to make a few disclosures but did not find any basis for removal and rejected the contractor's challenge. The contractor subsequently filed a motion to vacate the award in the U.S. District Court for the Southern District of Florida (where the arbitration hearings were held). The District Court refused to aside the award. The Eleventh Circuit affirmed, noting the limited circumstances where U.S. courts can vacate international arbitration awards:

If there is one bedrock rule in the law of arbitration, it is that a federal court can vacate an arbitral award only in exceptional circumstances. In accordance with this country's liberal federal policy favoring arbitration, our courts understand arbitration as a complete method of dispute resolution, not merely a prelude to a more cumbersome and time-consuming judicial review process. So, almost always, an arbitral award should represent the end, not the start, of a legal dispute.

The presumption against vacatur applies with even greater force when a federal court reviews an award rendered during an international arbitration. As the Supreme Court has explained, "[t]he goal

of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced," in recognition of the fact that the complex system of international commerce functions only if its disputes are given consistent and predictable resolutions around the world. Against this legal backdrop, U.S. courts refrain from unilaterally vacating an award, rendered under international arbitral rules, in all but the most extreme cases. It is no surprise, then, that although the losing parties to international arbitrations often raise defenses to award enforcement before our courts, those efforts rarely succeed.

The Federal Arbitration Act sets forth grounds for setting aside an arbitration award (*see* 9 U.S.C. 10) and often governs disputes arbitrated in the United States. Those include:

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

For international awards, the New York Convention, a treaty ratified by over 150 countries and incorporated into the FAA at 9 U.S.C 207 , sets forth the following grounds for vacatur:

1. the parties were under some incapacity or the arbitration agreement was invalid under the law of the country where it was made
2. the party against whom the award is invoke was not given proper notice of the proceedings or otherwise unable to present its case
3. the award deals with a dispute that is beyond the scope of the parties agreement to arbitrate
4. the composition of the tribunal or arbitral procedure was not in accordance with the parties' agreement
5. The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority
6. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
7. The recognition or enforcement of the award would be contrary to the public policy of that country.

The Eleventh Circuit analyzed the contractor's arguments under both the FAA and the New York Convention and concluded that the contractor "presented nothing that comes near the high threshold required for vacatur." While the Eleventh Circuit agreed that arbitrators should err on the side of greater, not lesser, disclosure, it refused to vacate an award "simply because the arbitrators worked with each other and with related parties elsewhere." Without more, the Eleventh Circuit was unwilling to overturn the award based on the alleged bias of the arbitrators.

This case is also a good reminder that disclosures require careful attention, and should be addressed as early in the arbitration process as possible to avoid post-award challenges. As the Court specifically noted: "both the ICC Rules and this country's arbitration law require arbitrators to disclose information liberally. Arbitrators must 'disclose to the parties any dealing that might create an impression of possible bias.' … . And the FAA allows for 'an arbitration award [to be] vacated due

to the ‘evident partiality’ of an arbitrator’ when ‘the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.’”

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