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Things to Consider Before Filing a Petition to Vacate an Arbitration Award

Given the limited grounds for vacating an arbitration award and the onerous standard of review, the odds are stacked heavily against a successful vacatur action. Often times, however, a party that loses big in arbitration is willing to roll the dice. If your client is in this position, there are a number of substantive and procedural factors to consider before advising your client on how and whether to proceed.

Substantive Considerations

The obvious first step is to analyze whether one of the limited grounds for vacatur is applicable to your case. See, e.g., TEX. CIV. PRAC. & REM. CODE § 171.088(a)(1)-(4) (grounds for vacatur under the Texas Arbitration Act); 9 U.S.C. § 10(a) (grounds for vacatur under the Federal Arbitration Act). Because of the great deference courts must give to arbitration awards, these vacatur grounds are focused on the integrity of the arbitration process, not the propriety of the result. A showing of legal error is not enough, and courts will indulge every reasonable presumption to uphold an arbitrator's decision.

To gauge your chances of success for your vacatur petition, you may want to consult a recent study that reviewed every state and federal case over a ten month period in which a court decided a motion to vacate on any of the federal vacatur grounds. See Lawrence R. Mills et al., *Vacating Arbitration Awards*, Vol. 11, No. 4, DISPUTE RESOLUTION JOURNAL 23 (Summer 2005). Of the 182 cases in which vacatur was sought, the motion to vacate succeeded 37 times, or in 20% of the cases. The study also reported success rates for each statutory and common law ground for vacatur and compared success rates in state courts versus federal courts. You can also consult our Texas-specific study, which found a roughly 13% success rate in Texas cases over a 39-month period. [See Mark Trachtenberg and Christina Crozier, *The Intersection Between Arbitration and Litigation in Texas*, Advanced Civil Trial Course, State Bar of Texas, at 24 \(Fall 2007\)](#) (based on cases decided between January 1, 2003 and March 31, 2007).

Procedural Considerations

The second step is to evaluate whether procedural considerations may limit the possibility of vacatur, even if a substantive ground for vacatur is available. Some of these considerations are discussed below.

1. *Make sure that any error was preserved.*

Counsel should confirm that error was properly preserved in the arbitration proceeding. For example, a party can waive an otherwise valid objection to the partiality of the arbitrator by proceeding with arbitration despite knowledge of facts giving rise to such an objection. See *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796 (Tex. App.—Austin 2004, pet. denied). To preserve error, it is recommended that a party object both orally and in writing to the arbitrator and opposing parties. The written objection should be proffered as part of the record in the evidentiary hearing and preserved in any hearing briefs. Thomas H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 AM. JUR. TRIALS 211, at § 77 (2006).

2. Make sure you have a complete record.

A party filing a motion for vacatur bears the burden to bring forth a complete record that establishes its basis for relief. *Anzilotti v. Gene D. Liggins, Inc.*, 899 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1995, no writ). In most cases, the “record” for a vacatur action will consist of (1) the arbitration award, (2) the underlying contract between the parties, (3) the transcript of the arbitration proceedings, and (4) any written briefing or documentary evidence submitted to the arbitrators. When there is no transcript of the arbitration proceedings available, a reviewing court will presume that evidence supports the arbitration panel’s award. *Thomas v. Prudential Sec., Inc.*, 921 S.W.2d 847 (Tex. App.—Austin 1996, no writ).

3. Make sure the award is final.

An arbitral award must be final and definite before it can be reviewed by a court. To be final, the arbitration award must resolve all issues submitted to arbitration so that the rights and obligations of the parties need no further adjudication. The award must be intended by the arbitrator to be a complete determination of all issues. See Thomas H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 AM. JUR. TRIALS 211, at § 40 (2006).

4. Make sure that your vacatur petition is timely.

Under the FAA, a party challenging an award must serve its notice of a motion to vacate within three months after the award is filed or delivered. 9 U.S.C. § 12. Under the TAA, an application to vacate must be made within 90 days after the date of delivery of the award, or within 90 days after the date the party knew or should have known of corruption, fraud, or other undue means as a ground for vacating the award. TEX. CIV. PRAC & REM. CODE § 171.088(b). If, however, the opposing party files an application for confirmation and sets it for a prompt hearing, the 90-day deadline may be accelerated because a vacatur petition must be decided before or simultaneously with an application for confirmation. *Hamm v. Millennium Income Fund, L.L.C.*, 178 S.W.3d 256, 262-68 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

If your case falls short under any of these procedural considerations, it may be time to cut your losses. Courts are hesitant to interfere with arbitration awards and may use such procedural hurdles to side-step addressing the merits of your case. Moreover, a motion to vacate that is clearly groundless is sanctionable. See *Zars v. Davis*, 2006 WL 2955326, at *2-3 (Tex. App.—San Antonio 2006, no pet.); see also *B.L. Harbert, Int’l, LLC v. Hercules Steel Co.*, 441 F.3d. 905, 906 (11th Cir. 2006).

But if statutory or common law grounds support your motion to vacate and your motion is procedurally sound, the gamble to seek vacatur might just pay off.

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