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A DIALOGUE ON A CONTEMPORARY ISSUE

CHARLES J. COLEMAN, Editor

The previous issue of this *Journal* began what I hope will be a continuing feature—an excerpt from a contemporary article or case to provide a basis for launching a discussion with our readers. In the earlier issue we included an excerpt from a decision made by the United States Fourth Circuit Court of Appeals on the topic of sexual harassment and I asked our readers to give their views on the decision. Please send your responses no longer than three double-spaced typewritten pages to Charles J. Coleman, Editor, 19-21 Potter Street, Haddonfield, NJ 08033. Responses will be printed in our next issue.

Here I am encouraging a discussion of an article printed in last year's *Baylor Law Review.* Originally, a portion of Stephen L. Hayford's article entitled "Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come," appeared in *Baylor Law Review,* Vol. 52, Number 4, pp. 783-927 and is reprinted by permission of the publisher [1]. The BLR presented a massive study of the law that surrounds labor and commercial arbitration, by Professor Stephen Hayford from the Kelley School of Business at Indiana University [2]. My excerpt gives you a very small part of the article. I have eliminated all discussion of the development of the case law; virtually all of the references; and all of the analysis that focused on anything other than two topics: 1) whether there should be one body of law governing both of these forms of arbitration rather than the two bodies that exist today; and 2) the proper role of the courts in relation to the enforcement of arbitration awards. Hayford concluded there should be one body of law and courts should resist their tendency to "correct" arbitration awards they consider to be deficient or erroneous.

Here is my digest of the conclusions reached by the author on those points. I welcome letters from our readership evaluating the positions taken by Professor Hayford. For those who become intrigued with the topic after reading this excerpt, I strongly recommend that they read the original [1].

AN EXCERPT FROM "UNIFICATION OF THE LAW OF LABOR ARBITRATION AND COMMERCIAL ARBITRATION: AN IDEA WHOSE TIME HAS COME" [1]

Stephen L. Hayford [2]

Despite their disparate origins, a single precept lies at the core of the Supreme Court's vision of the bodies of law that govern labor and employment arbitration. *When parties agree to arbitrate future controversies, they are to be held to their bargains* [Emphasis added]. Either by statute or by Supreme Court decisions, the emerging law has supported 1) the preeminence of federal law in both arenas; 2) the enforceability of agreements to arbitrate; 3) a presumption in favor of arbitration when one of the parties contests it; and 4) a narrow scope of court review of arbitration awards.

Professor Hayford shows that the U.S. circuit courts of appeals have been willing to follow the first three of those precepts, but not the fourth. They have shown themselves quite willing to review arbitration awards in their entirety and vacate them when they think they have been wrongly decided. He deplores this tendency of the courts to second-guess the arbitrator, contending that the circuit courts of appeals have largely ignored the very narrow scope of judicial review contemplated by the unambiguous words of §10(a) of the Federal Arbitration Act (FAA), which provides the basis for commercial arbitration [3], and the many Supreme Court decisions that have fashioned the law of labor arbitration. At the heart of the *vacatur* conundrum is the judicial mindset that permits courts to negate the arbitral outcome bargained for by the parties in order to assure results the court considers to be correct and accurate.

Professor Hayford argues that two things need to happen for this problem to be solved: 1) Judges, losing parties, and their counsels have to be disabused of the belief that those disappointed with the arbitral result are entitled to a "second bite at the apple" in the courts; and 2) A "circuit breaker" device must be discovered to prevent judicial meddling in the merits of disputed awards. His blueprint for accomplishing these results consists of three elements, all of which rely on the strong pro-arbitration public policy divined by the Supreme Court in its interpretation of the Labor Management Relations Act (LMRA) and the Congress's expressed statements in the FAA.

1. The Contractual Perspective on Arbitration

The Supreme Court's view of arbitration as a simple matter of contract is the basis for the contemporary law of both commercial and labor arbitration. Under this view, the proper role of the courts is to enforce the arbitration bargain. Nowhere in the definitive Supreme Court case law pertaining to *vacatur* is there even a hint that the Court believes that the arbitration bargain embraces an implicit guarantee that the award resulting from the arbitration agreement will be correct and accurate. Proper effectuation of the Supreme Court's contractual perspective on arbitration compels judges to hold the parties to their contractual agreements to accept the arbitrator's decision in final and binding resolution of future disputes— win, lose, or draw. *No matter how averse a party or a court may be to arbitration and no matter how high the stakes, parties must be made to honor their arbitration bargains. Otherwise, the promise to arbitrate disputes to a binding resolution so diligently enforced by the Supreme Court evaporates* [Emphasis added].

When parties unequivocally agree to accept an arbitrator's award as binding, they open themselves to a palpable risk that the award may be flawed by errors of law, contract, or fact. Nothing provides a guarantee against arbitrator error. The responsibility for minimizing the risk of incorrect or inaccurate awards falls to the parties and their advocates. But this is to be accomplished through careful selection of the arbitrator, thoughtful structuring of the arbitration mechanism, and competent framing and presentation of the case-in-chief. It is not to be achieved through an attempt to escape the arbitration bargain when one is displeased with its result.

2. The Essence from the Agreement Standard

One of the cornerstones in the law of arbitration is the requirement that the award draw its essence from the agreement. In at least seven different places in the seminal *Enterprise Wheel* decision, the Supreme Court confirmed that *vacatur* is triggered under the "essence from the agreement" standard only if a reviewing court determines that the arbitrator somehow exceeded the authority that was granted in the arbitration agreement or in the submission of the issue to arbitration [4]. In *Enterprise Wheel,* the Supreme Court dismissed the idea that an incorrect arbitral interpretation of a disputed contract provision can be deemed not based on the contract, thereby failing to draw its essence from the contract [4]. It did so because, under this view, courts would be required to review the merits of every construction of the contract by the arbitrator, making meaningless the parties' bargain for a final and binding decision by the arbitrator. The Supreme Court's *vacatur*-related pronouncements provide no objective basis for inferring that it sees the essence standard as sanctioning any judicial intrusion into the merits of challenged arbitration awards, via independent judicial interpretation of disputed contract language or otherwise, even where gross error is alleged.

In recent years, decisions that have come from the circuit courts of appeals repeatedly demonstrate a desire to expand this narrow basis for *vacatur* into something that looks very much like a "big error" standard. Instead of demurring to weigh the merits of disputed awards, the circuit courts of appeals more and more are fashioning standards whereby a challenged award is deemed to draw its essence from the contract only when the reviewing court determines that the award is based on an acceptably correct interpretation of the contract.

3. Centering the Law of *Vacatur* on §10(A) of the FAA

Section 10(a) of the Federal Arbitration Act provides only these grounds for vacating an arbitration award:

1. The award was procured by corruption, fraud, or undue means;
2. Evident partiality or corruption in the arbitrators;
3. Arbitral misconduct, e.g., in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent to the controversy;
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a final, definite award did not result [3].

Professor Hayford contends that §10(a)(4) of the FAA provides the perfect device for re-channeling the *vacatur* analysis in a manner loyal both to the Supreme Court's intent regarding the "essence from the agreement" standard and its contractual view of the proper role of the judiciary in effecting the arbitration bargain. Section §10(a)(4) sanctions *vacatur* when the arbitrators exceed the powers delegated by the parties. Because arbitration is a matter of contract, the contours of the arbitrator's authority in a given case are determined by reference to the arbitration agreement—and not to the court's view of the merits of an award. Thus, if the arbitrator actually interprets the contract in dispute and decides only the issues placed before him or her, the award is immune from *vacatur* under §10(a)(4). The submission of issues to the arbitrator and the definition of the arbitrator's authority are determinative, rather than the perceived "correctness" of the decision.

Only two dimensions of the current law of *vacatur* in commercial and labor arbitration remain to be reconciled with §10(a) of the FAA and the contractual view of arbitration. These are the manifest disregard of the law criterion and public policy grounds. Professor Hayford contends that neither of these nonstatutory grounds for *vacatur* provide a license for searching labor or commercial arbitration awards in pursuit of egregious arbitral errors warranting *vacatur*. Neither do they require judicial "line drawing" of the type that invariably leads a court to evaluate the merits of disputed arbitration awards. Both of these standards can be comported with §10(a) of the FAA and the "essence from the agreement" standard of labor arbitration law.

A proper framing of the manifest disregard of the law analysis directs a reviewing court's attention, not to the degree of the arbitrator's purported error of law, but toward the manner in which the arbitrator decided the question of law at issue. *Manifest disregard of the law occurs when an arbitrator has correctly interpreted the law and then ignored it* [Emphasis added]. The reason for *vacatur* is not an erroneous decision. *Vacatur* occurs because the arbitrator, by ignoring the known law, engaged in misconduct or misbehavior prejudicing the rights of a party. Such arbitrator misconduct denies the complaining party the benefit of its arbitration bargain. Ascertaining whether it has transpired does not require a reviewing court to delve into the merits of the disputed award.

Similarly, a reviewing court properly applying the public policy standard for *vacatur* is not obliged to evaluate the merits of the arbitrator's analysis and decision of disputed questions of law. Rather than ascertaining the correctness of the arbitrator's resolution of the questions of law submitted for decision, the court need only look to the effect of the award on the party seeking *vacatur. If the implementation of the award would compel a violation of the subject statute, common law doctrine, or constitutional provision, or other clear and distinct public policy, vacatur is justified. Otherwise, it is not* [Emphasis added].

A Call for Unification

The promise to arbitrate made in the typical arbitration agreement is not conditioned on achievement of an acceptable arbitral result. The parties agree to accept the arbitrator's award in resolution of any future controversies, whatever the outcome. If the process is fair and the arbitrator is truly impartial, parties dismayed with the end product of their agreement to arbitrate have no legitimate expectation that the courts will intervene to ensure the award's correctness and accuracy. Otherwise, the contractual binding arbitration agreement is rendered a nullity. Section §10(a) of the FAA can stabilize and unify the law of *vacatur* in labor and commercial arbitration. Properly utilized and in conjunction with the contractual view of the arbitration process, it will discipline judicial application of the "essence from the agreement" ground for *vacatur* and terminate the dysfunctional cross-pollination between the two bodies of law. By doing so, §10(a) will become the guardian of the arbitration bargain, preventing judges from usurping the arbitral bargain when they find the award repugnant to their sense of justice. It will restore the courts to their proper role of ensuring the procedural regularity and substantive fairness of the arbitration process, leaving the merits of controversies submitted to arbitration for resolution by the arbitrators designated by the parties for that task.

This article asserts that because commercial arbitration is presently afforded the sarne degree of respect and deference granted labor arbitration for the last forty years, there is no good reason for the two bodies of law to remain separate. There is nothing inherent in labor arbitration or commercial arbitration

that makes either of them unsuited for regulation under the same, unitary statutory scheme. Nothing in the FAA precludes application of the legal principles set out in the act in the labor arbitration sphere. Unification of arbitration law would not require a rewriting of the existing law of labor arbitration. *Joinder,* furthermore, would have no effect on the pivotal role of labor arbitration in the national labor policy.

The proliferation of nonstatutory, error-based *vacatur* standards sanctioning judicial intrusion into the merits of challenged arbitration awards poses a most significant threat to the viability of both commercial and labor arbitration. These standards have the potential to vitiate the arbitration bargain by encouraging parties disappointed with the arbitral result to seek solace in the courts. The pernicious effect of the manifold nonstatutory grounds for *vacatur* now emerging from the circuit courts of appeals will crystallize only when their application leads, as it inevitably will, to the *vacatur* of substantial numbers of commercial and labor arbitration awards. When that happens there will be the moment of truth for arbitration in the United States.

When the true extent of the threat to the arbitration bargain presented by the nonstatutory grounds for *vacatur* becomes clear, the Supreme Court will be obliged to reconfigure the law of *vacatur.* Its charge will be to devise, and explicate in a manner the circuit courts of appeals cannot misinterpret, a *vacatur* paradigm that preserves the contractual integrity of the labor and commercial arbitration bargain and that also comports with the common law of labor arbitration and §10(a) of the FAA.

The template set out above by Professor Hayford for bringing the law of *vacatur* to equilibrium will both ameliorate the crisis and bring the law of both labor and commercial arbitration to complete conformity. The framework is clear, coherent, and in complete harmony with the common law of labor and commercial arbitration, the FAA, and the contractual perspective on arbitration underpinning all of the Supreme Court's arbitration opinions in the labor area. Its implementation requires only that the circuit courts of appeals overcome their instinctive concern with ensuring correct and accurate results in arbitration and focus instead on enforcing the agreement to arbitrate. If the Supreme Court fails to re-center the law of *vacatur* in a manner that ensures that result, labor arbitration will be further destabilized, and the evolution of commercial arbitration as a truly viable alternative to traditional litigation will be derailed.

ENDNOTES

1. 52 *Baylor Law Review,* 4, (2000), pp. 783-927. Reprinted with permission of the author and of the *Baylor Law Review.*
2. Professor of Business Law and Dispute Resolution, Kelley School of Business, Indiana University, Bloomington, Indiana.

3. *Federal Arbitration Act,* 9 USC §§1-14 (1925).
4. *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597-99 (1960).

Please send your comments on Professor Hayford's thoughts to:

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