CONFIRMING DOMESTIC ARBITRAL AWARDS: WHAT TO DO AFTER THE DECISION

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. SOURCES OF LAW 2

A. FEDERAL ARBITRATION ACT 2
B. UNIFORM ARBITRATION ACT 3

III. ENFORCEMENT OF ARBITRATION AWARDS 4

A. CONFIRMATION PROCEDURES UNDER THE FAA 5

1. Text 5

a. Section 9. Award of arbitrators; confirmation; jurisdiction; procedure 5
b. Section 12. Notice of motions to vacate or modify; service; stay of proceedings 6

2. Commentary 6

B. CONFIRMATION PROCEDURES UNDER THE UAA 7

1. Text 7

a. Section 11. Confirmation of an Award 7
b. Section 16. Applications to Court 7
c. Section 17. Court, Jurisdiction 7
d. Section 24. Modification or Correction of Award 8

2. Commentary 8

IV. OBSTACLES TO ENFORCEMENT OF ARBITRATION AWARDS 9

A. STATUTORY GROUNDS FOR VACATING OR MODIFYING AWARDS UNDER THE FAA 9

1. Text. Section 10. Same; vacation; grounds; rehearing 9
2. Commentary 10

a. Judicial Interpretation of Section 10(a)(1) – Corruption, Fraud, or Undue Means 10
b. Judicial Interpretation of Section 10(a)(2) – Evident Partiality or Corruption 11

c. Judicial Interpretation of Section 10(a)(3) – Arbitrator Misconduct 12
d. Judicial Interpretation of Section 10(a)(4) – Exceeding Authority 13

B. STATUTORY GROUNDS FOR VACATING OR MODIFYING AWARDS UNDER THE UAA 14

1. Text

a. Section 23. Vacating an Award 14
b. Section 24. Modification or Correction of Award 15

2. Commentary 16

a. Section 12(a)(1) of the Illinois UAA 16
b. Section 12(a)(2) of the Illinois UAA 17
c. Section 12(a)(3) of the Illinois UAA 17
d. Section 12(a)(4) of the Illinois UAA 18
e. Section 12(a)(5) of the Illinois UAA 19

V. CIRCUIT SPLITS ON NON-STATUTORY BASES FOR VACATING AWARDS 19

A. MANIFEST DISREGARD OF THE LAW 20

1. Seventh Circuit 20
2. Other Circuits 21

B. VIOLATION OF PUBLIC POLICY 22

1. Eleventh Circuit 22
2. Second Circuit 23
3. Tenth Circuit 23

C. COMPLETE IRRATIONALITY 23
D. ARBITRARY AND CAPRICIOUS 23

VI. EXPANDED REVIEW OF ARBITRATION AWARDS BY CONTRACTUAL AGREEMENT 24

A. NINTH CIRCUIT 24
B. SEVENTH CIRCUIT 25
C. TENTH CIRCUIT 25
D. EIGHTH CIRCUIT 25
E. FIFTH CIRCUIT 26
F. FOURTH CIRCUIT 26

VII. Practical Strategies to Facilitate More Efficient Enforcement of Arbitration Awards 26

A. Enforcing Parties Can Seek Sanction Against Adverse Parties Where Challenges to Arbitration Awards Have No Legal Basis 26

B. Parties Seeking Enforcement Can Defer Filing of Petition to Confirm Awards 28

C. Include Substantive Terms in Arbitration Agreements Requiring Expedited Voluntary Compliance 29

VIII. Conclusion 29

I. INTRODUCTION AND SUMMARY

Over the past several decades, arbitration has gained tremendous popularity and credibility as an alternative dispute resolution process. With the adoption in 1925 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et. seq.*, and widespread state-level enactment of the Uniform Arbitration Act ("UAA"), arbitration has become increasingly popular. The growth of arbitration has enjoyed strong judicial approval in the form of court decisions, endorsed by the U.S. Supreme Court, that have upheld the enforceability of arbitration agreements and awards in a broad spectrum of cases.[1]

As the law surrounding the arbitration process has become more definite and concrete, arbitration has been used increasingly to resolve contractual disputes in a wide variety of settings including employment, healthcare, securities, insurance, and consumer contexts.[2] In recent years, critics have observed that the arbitration process itself, once attractive to disputing parties as an efficient, non-complex and inexpensive alternative to litigation, has become almost as formalistic, contentious and, most importantly, as *expensive* as litigation.[3] Even more damaging is the perception that the arbitration process is being employed as a method of delaying entry of a final, legally binding decision against parties on the "wrong side" of the law. [4]

Whether that perception is grounded in reality or not is a matter for a more in-depth descriptive study; however, it is clear that the perception alone is sufficient to undermine the general appeal of the process as an alternative avenue for dispute resolution.[5] Proponents of the continued efficacy of arbitration would be wise to address the perception. There are

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[1] *See, e.g. Prima Paint Corp. v. Flood & Conklin Mfg. Corp.,* 388 U.S. 395 (1967); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

[2] Michael J. Brady, *The Arbitration Train That Just Cannot Be Stopped*, 11-6 The Metropolitan Corporate Counsel No.6, June 2003.

[3] Harry N. Mazadoorian, *Is Arbitration More Costly Than Litigation for Corporations?*, Law.com In-House Counsel, March 12, 2007, http:// www.law.com/ jsp/ihc/ PubArticleIHC.jsp?id n=1173434607698.

[4] Lou Whiteman, *Arbitration's Fall from Grace*, Law.com In-House Counsel, July 13, 2006, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1152695125655.

[5] Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?,* 26 Pace L. Rev. 73, 73-74 (2006). This perception may have been the root underlying the introduction in 2000 by Senator Russ Feingold (D-WI) and Representative Hank Johnson (D-GA) of a bill many businesses perceived as "anti-arbitration," due to its limitation on the binding nature of contractual arbitration clauses. *See* U.S. Chamber of Commerce Press Release "Anti-Arbitration Bill Sets Dangerous Precedent, Warns U.S. Chamber of Commerce," http://www.uschamber.com/press/releases /2000/june/00-81.htm (last visited on August 9, 2007).

several potential strategies that parties interested in arbitration can adopt in order to facilitate a more efficient process. Development and proper use of such strategies may reduce delays and expense in the process and restore some of the appeal of arbitration.

As a short background, it is important to note that arbitration proceedings are generally governed by agreed upon procedures and time lines.[6] For example, associations of arbitrators such as the National Association of Securities Dealers ("NASD") and American Arbitration Association ("AAA") have procedures that define the evidentiary requirements of arbitration proceedings. As such, arbitration proceedings themselves take as long as arbitrators, within their procedural discretion, consider is appropriate to resolve the dispute. Not much can be done to foster increased efficiency in the arbitration process at the substantive stage without compromising the adjudicative quality of the proceedings. By contrast, the enforcement and challenge stage often results in significant delay and expense to the parties. More efficient enforcement of arbitration awards, including reduced challenges, may have the effect of greatly increasing the overall efficiency of the process.

This presentation deals with the arbitration process at the stage *after* a final, binding decision has been made by an arbitrator. As such, the study explores the legal mechanisms available to enforce or challenge a final arbitration award and the obstacles, both legal and practical, that commonly emerge in seeking enforcement or vacatur of an award. This study also considers the post-award procedures contained in both FAA and UAA. It is apparent from an examination of these provisions that the legislature, through enactment of enforcement procedures, and the judiciary through its narrow interpretation thereof, emphasize arbitration as a desirable and efficient method of alternative dispute resolution.

II. SOURCES OF LAW

The two sources of law most influential in the shaping of arbitration jurisprudence are the FAA and UAA. The UAA has been widely adopted at the state level, with thirty-five states adopting it in its entirety, and fourteen states adopting close variations.[7] As such, in considering the legal mechanisms available to enforce arbitration awards, this presentation bases its exploration on the law of the FAA and the UAA.

A. FEDERAL ARBITRATION ACT

The Federal Arbitration Act was enacted in 1925 and has been the law governing the majority of arbitration proceedings in the United State since. Section 2 of the Act states in pertinent part:

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[6] Both the FAA and UAA allow parties to enter into agreements with respect to certain arbitration procedures. If the agreement lacks specificity on a particular point, the terms of the statutes apply. 9 U.S.C. §§ 5, 9, 10; UAA §§ 3-5, 8.

[7] The National Commissioners on Uniform State Laws, *The Uniform Arbitration Act (Last Revisions Completed Year 2000*), available at Biddle Law Library, University of Pennsylvania, http:// www. law.upenn.edu/bll/archives/ulc/uarba/arb0500.htm (last revised on August 9, 2007).

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2

As such, the FAA governs all agreements to arbitrate and requires parties to conform to the terms or arbitration agreements in all matters involving maritime transaction or transactions "involving commerce."

The FAA contains comprehensive procedures for the enforcement, modification or vacatur of arbitration awards. The FAA was drafted in response to federal courts' generally anti-arbitration stance and is carefully worded to ensure maximum enforcement of awards. The Act contains few provisions that allow for vacatur or modification of an award and courts have been hesitant to recognize non-statutory bases.

By "commerce," the FAA means "interstate commerce" or maritime issues, which triggers FAA applicability. *See, e.g., Pennsylvania Eng. Corp. v. Islip Res. Recovery A*, 710 F. Supp. 456, 460 (E.D.N.Y. 1989). Cases considering the meaning of the phrase "interstate commerce" have almost universally held that very little interstate connection is necessary to create the requisite involvement with interstate commerce. *Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330 (5th Cir. 1970); *Starr Elec. Co. v. Basic Constr. Co.*, 586 F. Supp. 964 (N.C. 1982). In *Allied-Bruce Terminix Cos., Inc. v. Dobson,* the Supreme Court ruled that the term "involving commerce" signaled the full exercise of Congress' power under the Commerce Clause. 513 U.S. 265, 277 (1995). The Court also ruled that the FAA's legislative history indicates "expansive congressional intent." *Id.* at 266.

As such, the FAA will apply in a broad spectrum of cases in which there is a substantial nexus between the subject or underlying arbitration agreement and interstate commerce.

B. UNIFORM ARBITRATION ACT

The UAA is recognized as perhaps the most successful of the modern uniform acts. As of 2000, it had been adopted in its entirety by 35 states and 14 additional states

had adopted close variations.[8] The FAA preempts state law only to the extent that state law conflicts with the pro-arbitration policy Congress intended to promote through the FAA.[9]

In practice, though, the UAA seems to apply only to a narrow band of purely intrastate transactions under the leading *Allied-Bruce Terminix v. Dobson* decision,[10] and situations were parties to an arbitration have clearly expressed their intention to conduct arbitration under state rules by contractual agreement.[11] Critics have argued that the FAA's broad provisions trample on states' rights and federal courts' application of the FAA to matters within state discretion is misplaced.[12] Despite such criticisms, the current *status quo* mandates broad applicability of the FAA and application of the UAA in circumstances of purely intrastate commerce or where the parties have agreed to its application in advance.[13]

III. ENFORCEMENT OF ARBITRATION AWARDS

The procedures for judicial enforcement of arbitration awards are governed primarily by Sections 9-14 of the FAA and Sections 11, 16 and 17 of the UAA.

The procedure for post-award enforcement of arbitration awards is straightforward under each Act. Both Acts require that a party seeking enforcement file a motion for confirmation in the appropriate court. Section 13 of the FAA requires that the following documents be filed: (1) the arbitration agreement; (2) all papers dealing with the selection of arbitrators or extension of time; (3) the award itself; and (4) each notice, affidavit or other paper upon which the application to confirm is based. 9 U.S.C. §13. The UAA does not require submission of particular documents relating to the arbitration; rather, Section 16 of the Act simply requires that all applications be made consistent with local law or court rule.

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[8] *Id.*

[9] *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University*, 489 U.S. 468, 477-78 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law – that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (internal citations omitted).

[10] Edward Brunet, *Arbitration Law in America*, at 63 (Cambridge University Press, 2006).

[11] *See generally Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

[12] David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 Oregon L. Rev. 541, 541-542 (2004).

[13] *See supra* notes 10 and 11.

Section 9 the FAA requires that motions to enforce an award be made within one year after the award issues. Conversely, the UAA does not specify a time limit on when confirmation must be sought. In any case, since courts have interpreted the "interstate commerce" phrase in the FAA expansively, it is generally wise to seek enforcement within a year of the award. Once an award is entered, an entry of judgment confirming an award will have the same force and effect as a judgment entered in a court initiated litigation. *Parsons & Whittemore Alabama Machinery and Services Corp. v. Yeargin Const. Co. , Inc.*, 744 F.2d 1482, 1485 (11th Cir. 1984).

Obstacles may arise in post-award enforcement where execution against property is sought in a state outside of the state where the arbitration award was entered. As is the case with non-arbitration related judicial judgments, parties seeking enforcement may seek an order of execution from the court which directs the sheriff to seize the property of the debtor. Most states have enacted the Uniform Enforcement of Foreign Judgments Act ("UEFJA") or some variation of it.[14] The UEFJA allows judgment creditors to enforce out-of-state judgments by filing an authentic copy of the award and the confirmation order with the state court where execution is sought.

A. CONFIRMATION PROCEDURES UNDER THE FAA

1. Text

a. **Section 9. Award of arbitrators; confirmation; jurisdiction; procedure:** "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court."

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[14] Joseph Colagiovanni and Thomas Hartmann, *Enforcing Arbitration Awards,* Lectric Law Library, http://www.lectlaw.com/files/adr15.htm (last revised on Aug. 9, 2007).

b. **Section 12. Notice of motions to vacate or modify; service; stay of proceedings:** "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award."

2. Commentary

Thus, under Section 9 of the FAA, a party seeking enforcement of an arbitration award must apply for confirmation and subsequent enforcement to the court of appropriate jurisdiction within a year of the entry of the award by the arbitrator. If a party wants to vacate an award, the party must do so within three months of the entry of the award. Parties seeking to challenge awards have argued that the three-month time limit for filing challenges to awards should not be upheld where the party seeking enforcement of an arbitration award has sought enforcement outside of the three-month time limit for challenges.

In addressing these procedural challenges, courts have construed the provisions of Sections 9 and 12 narrowly. Specifically, regardless of when enforcing party files for confirmation, the challenging party has only three months to challenge an award. In *Taylor v. Nelson*, 788 F.2d 220 (4th Cir. 1986), for example, the court explained the rationale behind the short time frame:

> A confirmation proceeding under 9 U.S.C. § 9 is intended to be summary: confirmation can only be denied if an award has been corrected, vacated, or modified in accordance with the Federal Arbitration Act. Under the Act, vacation of an award is obtainable by serving a motion to vacate within three months of the rendering of the award. 9 U.S.C. § 12. Because Nelson did not move for confirmation until April10, 1985, almost seven months after the award was filed, Taylor would be prevented from seeking a vacatur of the award unless there was pending in the district court a timely-filed motion to vacate or unless a

tolling or due diligence exception operated to excuse
his failure to make a timely motion.

788 F.2d at 225.

Another procedural issue results in a split among the federal circuits. In *Apex Plumbing Supply Inc. v. U.S. Supply Co., Inc.,* 142 F.3d 188, 191 (4th Cir. 1998), the Fourth Circuit noted the split in the federal circuits concerning the venue provision of Section 9. The venue provision reads as follows: "If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made." Thus, the question is whether an action for confirmation of an arbitral award is *required* to be brought in the district where the award was issued or whether it is merely *permissible* to do so. *Id.*

As the *Apex* court notes, both the Second and Seventh Circuits read the venue language as permissive, while the Ninth Circuit interprets it as mandatory. *Id.* The *Apex* court held in accordance with the former circuits and against the Ninth Circuit's interpretation, relying heavily on the plain language of the statute and logic employed by the Seventh Circuit in *In Re VMS Securities Litigation*, 21 F.3d 139 (7th Cir. 1994). The *Apex* court gave controlling effect to the word "may" found in the statute, and agreed with the Seventh Circuit that Congress, in other statutes, had included clear mandatory venue provisions, and could have done so here if it so chose. *Id.*

B. CONFIRMATION PROCEDURES UNDER THE UAA

1. Text

a. **Section 11. Confirmation of an Award:** "Upon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13."

b. **Section 16. Applications to Court:** "Except as otherwise provided, an application to the court under this act shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action."

c. **Section 17. Court, Jurisdiction**. "The term 'court' means any court of competent jurisdiction of this State. The making of an agreement described in Section 1 providing for arbitration in this State confers

jurisdiction on the court to enforce the agreement under this Act and to enter judgment on an award thereunder.

d. Section 24. Modification or Correction of Award.

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

2. <u>Commentary</u>

The National Conference of Commissioners on Uniform State Laws published a report on the Revised Uniform Arbitration Act ("RUAA") in 2000.[15] The Conference considered the UAA as currently enacted and proposed changes to the UAA in light of recent developments.[16]

Neither the original UAA nor the RUAA specifies a time limit for making a motion to confirm the award to the court of appropriate jurisdiction. The National Conference report considered and rejected the FAA imposed time limit of one-year for confirming of awards and concluded instead that general statute of limitation in

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[15] Available at http:// www. law.upenn.edu/bll/archives/ulc/uarba/arb0500.htm.

[16] *Id.*

a state for filing and execution on a judgment should apply.[17] Further, as discussed below, a party seeking to vacate or modify an award has ninety days to make an order to a court of appropriate jurisdiction to vacate/modify the award. Parties seeking confirmation of the award need not wait for the expiry of this ninety-day period, as doing so may give an adverse party an opportunity to dissipate or otherwise dispose of assets.

IV. OBSTACLES TO ENFORCEMENT OF ARBITRATION AWARDS

While the procedure for enforcing an arbitration award is fairly simple under relevant law, frequently enforcement requires more than just filing with the court of appropriate jurisdiction. In addition to challenges based on the statutorily defined bases, challenges to enforcement can also come in the form of challenges to the underlying arbitration agreement. In other words, when procedurally permissible, parties opposing enforcement of an arbitration award can, and often do, challenge the award based on the threshold question of whether the underlying arbitration agreement is enforceable in the first place.[18]

While procedures for vacating or modifying arbitration awards are fairly rigid under both the FAA and the UAA, both Acts provide for circumstances in which awards can be altered or vacated. *See generally*, Section 10 of the FAA and Sections 23, 24 of the UAA. While the specifically enumerated bases for modification or vacation in each Act list bad-faith on the part of the arbitrator (including evident impartiality), courts have been increasingly willing to vacate or modify awards where there is unconscionability in the substantive terms of the arbitration agreement.[19]

A. STATUTORY GROUNDS FOR VACATING OR MODIFYING AWARDS UNDER THE FAA

1. Text. Section 10. Same; vacation; grounds; rehearing.

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

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[17] *Id.*

[18] *See, e.g., Green Tree Fin. Corp.-Alabama v. Randolph* , 531 U.S. 79 (2000); *Armendariz v. Foundation Health Psychcare Servs., Inc.,* 2000 WL 1201652 (Cal. Aug. 24, 2000); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp.2d 1087 (W.D. Mich. 2000); *Powertel v. Bexley*, 743 So.2d 570 (Fla. App. 1999).

[19] *Id*.

(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.

[(5) Redesignated (b)]

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.[20]

2. **Commentary.** As one can imagine, Section 10 has sparked considerable litigation, and the body of law that has developed has shown itself to be inconsistent in some circumstances among the circuits. A sampling:

a. Judicial Interpretation of Section 10(a)(1) – Corruption, Fraud, or Undue Means.

(1) *Ninth Circuit*: The Ninth Circuit has a well-developed and detailed interpretation of the "corruption, fraud, or undue means" grounds for vacating arbitration awards. The Ninth Circuit employs a three part test for the vacation of arbitration awards pursuant to Section 10(a)(1): "[I]n order to justify vacating an award because of fraud, the party seeking vacation must show that the fraud was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence." *A.G. Edwards*

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[20] 9 U.S.C. §10.

& Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992). The court also states that the "undue means" standard is not met by mere "sloppy or overzealous lawyering." *Id*. at 1403. Instead, undue means is interpreted to connote some activity that is immoral or illegal. *Id.*

(2) *Seventh Circuit:* The Seventh Circuit has adopted the three-prong test set out by the Ninth Circuit in *A.G. Edwards & Sons, Inc. v. McCollough*. *See Gingiss International, Inc. v. Bormet*, 58 F.3d 328 (7th Cir. 1995).

(3) *Fifth Circuit:* The Fifth Circuit has interpreted the language of Section 10(a)(1) to require a "nexus between the alleged fraud and the basis for the panel's decision." *Forsythe International, S.A. v. Gibbs Oil Co. of Texas*, 196 F.2d 1017 (5th Cir. 1990).

b. Judicial Interpretation of Section 10(a)(2) – Evident Partiality or Corruption.

(1) *Supreme Court:* The United States Supreme Court, in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), addressed the issue of what constitutes "evident partiality" under Section 10(a)(2). In *Commonwealth Coatings,* the arbitrator had engaged in repeated, though sporadic, business relationships with the winning party, without disclosing said business relationships to the other party in the arbitration. *Id.* at 146. Justice Black, writing for a plurality of the court, stated that arbitrators must disclose any relationships that might "create the impression of possible bias." *Id.* at 149. Justice Black expressed the view that arbitrators should be held to at least the same standards of impartiality and disclosure as judges, and perhaps be subject to even more scrutiny, as their decisions are not subject to appellate review. *Id*. at 148-49.

Justice White's concurring opinion, joined by Justice Marshall, presented a more limited view of the "evident partiality" grounds for vacatur pursuant to Section 10(a)(2). Justice White approved of the result of the case, but disagreed that arbitrators should be held to the same standard as judges. *Id.* at 150. Instead, Justice White stated that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." *Id.*

(2) *Resulting Circuit Split:* The majority of the circuits have relied on Justice White's concurrence in *Commonwealth Coatings* and interpreted the "evident partiality" standard narrowly.

The Fifth Circuit, sitting *en banc*, recently made it clear in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F3d 278 (5th Cir. 2007), that it considered Justice White's more limited language – permitting greater leeway to arbitrators than to judges in determining partiality – to be the Supreme Court's "effective *ration decidendi*." *Id.* at 282. The *Positive Software* court goes on to state that "[t]he resulting standard is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. The 'reasonable impression of bias' standard is thus interpreted practically rather than with utmost rigor." *Id.* at 283. The court also points out that every other circuit, save the Ninth Circuit, follows a more restrictive view of "evident partiality" more closely in line with Judge White's concurrence than Justice Black's plurality. *Id.* at 282-283.

The Ninth Circuit, on the other hand, employs an exacting view of the "evident partiality" standard. In *Schmitz v. Zilveti*, the Ninth Circuit gives little weight to Justice White's concurrence, making much of the fact that Justice White states he is joining in the opinion of Justice Black but writes to make "additional remarks." 20 F.3d 1043, 1045 (9th Cir. 1994). The *Schmitz* court states a "reasonable impression of partiality" standard, and goes on to apply said standard to vacate an award where the arbitrator was not even aware of the potential conflict, holding that the arbitrator had a duty to investigate the possibility of a conflict. *Id.* at 1048-49.

c. Judicial Interpretation of Section 10(a)(3) – Arbitrator Misconduct

(1) *Significant Misbehavior:* The misconduct or misbehavior contemplated by Section 10(a)(3) of the FAA is not of the minor kind. The First Circuit, in *Hoteles Condado Beach, La Concha and Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34 (5th Cir. 1985), states that, "[v]acatur is appropriate only when the exclusion of relevant evidence

'so affects the rights of a party that it may be said that he was deprived of a fair hearing.'" *Id.* at 40 (quoting *Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3rd Cir. 1968)).

(2) *Failure to Postpone Hearing:* An arbitrator's decision not to postpone a hearing will not be overturned if any reasonable basis for it exists. *El Dorado School District No. 15 v. Continental Casualty Company*, 247 F.3d 843, 848 (8th Cir. 2001). However, an arbitrator need not elaborate on the reasoning of his decision. *Id.*

d. Judicial Interpretation of Section 10(a)(4) – Exceeding Authority

(1) *Examples:* According to recent Third Circuit law, an arbitrator may exceed his authority by ruling on an issue not properly before the arbitrator. *Metromedia Energy, Inc. v. Enserch Energy Servs., Inc.*, 409 F.3d 574, 579 (3rd Cir. 2005). The court looks not only to the arbitration agreement, but to the submissions of the parties to determine what issues the parties intended to arbitrate. *Id.* The arbitrator has the authority in the first instance to determine what issues the parties intended to arbitrate. *Id.* The court's review of the issues before the arbitrator is therefore extremely deferential. *Id.*

In the Seventh Circuit, to achieve vacation of an arbitral award under Section 10(a)(4), a movant must establish that the arbitrators "so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made." *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 650 (7th Cir. 2001). The court interpreted "mutual" and "final" to mean that the arbitrators resolved the entire dispute that was submitted to them. *Id.* The court further interpreted "definite" to mean that the award issued by the arbitrator is sufficiently clear and specific to be enforced if confirmed and entered as a judgment. *Id.*

(2) *Commentary:* Taken together, Section 10(a)(4) could be interpreted as requiring the arbitrator to resolve the full dispute, and only the dispute, that was submitted to it in a sufficiently clear and specific manner as to allow for judicial enforcement.

Note: The Ninth Circuit has suggested, in *Kyocera Corp. v. Prudential Bache Trade Services, Inc.*, that the "manifest

disregard for the law" standard that most courts consider to be a non-statutory grounds for vacatur (and which is discussed in-depth *infra*), is in fact merely a subset of the "exceeding their powers" clause of Section 10(a)(4). 341 F.3d. 987, 1002-03 (9th Cir.2003).

Note: The Fifth Circuit has stated an "essence of the contract" test to be applied under Section 10(a)(4). *American Laser Vision, P.A. v. The Laser Vision Institute, LLC*, 487 F.3d 255, 259 (5th Cir. 2007). The *ALV* court stated: "That the award does not draw its essence from the contract is a statutory ground for vacatur, derived from 9 U.S.C. § 10(a)(4), which permits vacatur when the arbitrator exceeds his powers. The test is whether the award, however arrived at, is rationally inferable from the contract. [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (internal citations omitted).

B. STATUTORY GROUNDS FOR VACATING OR MODIFYING AWARDS UNDER THE UAA

1. Text

a. Section 23. Vacating an Award.

a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the

arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

b) An application under this Section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

c) In vacating the award on grounds other than stated in clause (5) of Subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with Section 3, or if the award is vacated on grounds set forth in clauses (3), and (4) of Subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 3. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

b. Section 24. Modification or Correction of Award.

a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

2. **Commentary.** Cases interpreting these sections of the UAA vary from state to state, and it is beyond the scope of this presentation to perform a survey of each jurisdiction's treatment of these provisions. Illinois cases nonetheless serve well to illustrate common interpretations of the vacation and modification provisions of its enactment of the UAA. *See* 710 ILCS § 5/1, *et seq*.

a. Section 12(a)(1) of the Illinois UAA[21]

Section 12(a)(1) of the Illinois UAA provides for the vacation of an arbitrator's award due to corruption, fraud, or undue means. *Pillot v. Allstate Ins. Co.*, 363 N.E.2d 460, 463 (3rd Dist. 1977). Under this provision, an award may not be vacated for errors of judgment in law, mistake of fact, or errors in the amount allowed or refused in the arbitrator's award. *Id.* at 463-64. "The party challenging the arbitration award carries the burden of proving that the award is contrary to section 12(a)(1) . . . ." *Laatz v. Intergovernmental Risk Management Agency*, 784 N.E.2d 877, 879 (2nd Dist. 2003).

(1) *Corruption and Fraud*: The alleged fraud must be present on the face of the award. 363 N.E.2d at 464. Absent a showing of fraud, the court will presume that the arbitrator "considered all of the evidence, and allowed such items as were proven." *Id.*

(2) *Undue Means*: "The phrase 'undue means' in section 12(a)(1) of the Arbitration Act has been interpreted as akin to fraud and corruption; it refers to some aspect of the arbitrator's decision or decision-making process which was obtained in an unfair manner and beyond the normal processes contemplated by the act." 784 N.E.2d at 879 (internal citations omitted).

[21] Section 12 of the Illinois UAA is an equivalent, and indeed identical provision, to Section 23 of the UAA.

(a) An arbitrator's questioning on whether or not a related worker's compensation case was still open was ruled not to constitute "undue means," as it went to the legitimate issue of set-off. *Id.*

(b) *Ex-parte* communications between arbitrator and a party creates the presumption that the award was obtained through corruption, fraud, or undue means. *Rosenthal-Collins Group, LP v. Reiff*, 748 N.E.2d 229, 232 (1st Dist. 2001).

b. Section 12(a)(2) of the Illinois UAA

In order to show evident partiality on the part of an arbitrator, the party must prove there was a "direct, definite and demonstrable" interest, on the part of the arbitrator, in the outcome of the arbitration. *Freeport Construction Co. v. Star Forge, Inc.*, 378 N.E.2d 558, 562 (2nd Dist. 1978). Further, "mere allegations of prejudice cannot vitiate an award." *Christian Dior, Inc. v. Hart Schaffner & Marx*, 637 N.E.2d 546, 552 (1st Dist. 1994).

(1) While an undisclosed business relationship with a non-party to the arbitration may be enough to create an impression of possible bias, there must be some substantial nexus of interest between non-party and the arbitration in order to reasonably create such an impression. 378 N.E.2d at 562.

(2) "The size of the award is insufficient to establish evident partiality without specific allegations of bias against the arbitrators." *Edward Electric Company v. Automation, Inc.*, 593 N.E.2d 833, 841 (1st Dist. 1992).

c. Section 12(a)(3) of the Illinois UAA

Pursuant to the Illinois UAA, a court will vacate an arbitration award if the arbitrators exceeded their authority. *Shearson Lehman Bros., Inc. v. Hedrich*, 639 N.E.2d 228, 232 (1st Dist. 1994). In interpreting this provision, the court in *Shearson Lehman* stated: "A party can also complain if the arbitrators exceed their authority and do not interpret the contract, that is, if they disregard the contract and implement their own notions of what is reasonable and fair. The arbitrators' authority is limited by the unambiguous contract language. The ultimate award must be grounded on the parties' contract and arbitrators do not have the authority to ignore plain language and alter the agreement.'" *Id*. (internal citations omitted).

In *Shearson Lehman*, the court vacated an arbitration panel's award because it did not base the amount of the award on the "clear and unambiguous mathematical formulas" provided in the contract. *Id.* The court found that the arbitrators were presented with the question of whether the defendants were wrongfully discharged, not the amount of compensation they should receive in the event they were. *Id.* As such, the arbitrators exceeded their authority by going beyond this question and ruling on the amount of compensation due defendants.

d. Section 12(a)(4) of the Illinois UAA

(1) *Exclusion of Material Evidence*: A court may vacate an arbitrator's award if the arbitrator refused to hear evidence material to controversy as to prejudice substantially the rights of the party. *Canteen Corp. v. Former Foods, Inc.*, 606 N.E.2d 174, 180 (1st Dist. 1992). "Allegations that an arbitrator refused to hear material evidence need not be addressed by a court of review where the record fails to show that the arbitrators excluded any material evidence offered by the parties." *Id*.

In *Johnson v. Baumgardt*, the arbitrators failed to consider evidence on issues not specifically raised in the contract they were interpreting. 576 N.E.2d 515, 521 (2nd Dist. 1992). The court ruled that, because the evidence at issue went to the heart of the dispute between the parties, and was related to the contract, the evidence was therefore material and should have been considered. *Id.* As such, the court remanded the case to the trial court to vacate the award for failure to consider material evidence and send the case to rehearing before the arbitrators. *Id*.

(2) *Failure to Postpone Hearing*: A court may vacate an arbitrator's award for failure to postpone the hearing upon a showing of good cause. *Christian Dior, Inc. v. Hart Schaffner & Marx*, 637 N.E.2d 546, 551 (1st Dist. 1994). In *Christian Dior*, the defendants argued the award should be vacated because the arbitrators had refused to postpone a hearing on the basis that the hearing fell immediately after the relocation of the offices of defendant's counsel, and immediately before a scheduled jury trial. *Id.* However, the request was defendant's third request for postponement (the previous two were granted), and the postponement would have violated a clause in the arbitration agreement stating that

there must be a hearing within 60 days after selection of the arbitrators. *Id.* The court also noted that defendant was not prejudiced by the arbitrators' decision not to postpone the hearing. *Id.* Under these circumstances, the court declined to vacate the award. *Id.*

e. Section 12(a)(5) of the Illinois UAA

"Under section 12(a)(5) of the Uniform Arbitration Act, the trial court shall vacate an arbitration award if there was no arbitration agreement *and* the issue was not adversely determined in proceedings under Section 2 *and* the party did not participate in the arbitration hearing without raising the objection." *Hwang v. Tyler*, 625 N.E.2d 243, 245 (1st Dist. 1993) (emphasis in original)(internal citations omitted). In *Hwang*, the plaintiff argued that he could raise the issue of the existence of an arbitration agreement, even though the issue had previously been adversely determined in a Section 2 proceeding because he had objected at the arbitration hearing. *Id.*[22] The court rejected this argument, stating that Section 12(a)(5) made it clear that the existence of an arbitration agreement can be raised only if there was no adverse determination and there was an objection at the hearing. *Id.*

V. CIRCUIT SPLITS ON NON-STATUTORY BASES FOR VACATING AWARDS

The area of non-statutory grounds for vacation of an arbitration award is murky at best. Only one non-statutory ground is recognized by a majority of the federal circuits – "manifest disregard of the law" – and even this agreed-upon concept is subject to varying

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[22] Section 2 of the Illinois UAA states in pertinent part:

> § 2. Proceedings to compel or stay arbitration. (a) On application of a party showing an agreement described in Section 1, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.
>
> (b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. That issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

710 ILCS § 5/2.

interpretations. Additional non-statutory grounds include that the award violates public policy; that the award was arbitrary and capricious; and that the award was completely irrational.

A. MANIFEST DISREGARD OF THE LAW

1. **Seventh Circuit**. The narrowest construction of the "manifest disregard of the law" standard rests with the Seventh Circuit. The current formulation of the standard for the Seventh Circuit was articulated in *George Watts & Sons, Inc. v. Tiffany and Co*., 248 F.3d 577 (7th Cir. 2001). The *Watts & Sons* decision reconciled competing case law within the Seventh Circuit and provided some certainty as to the standard for vacating arbitral awards. A relatively detailed review of *Watts & Sons* is instructive on the issue of manifest disregard of the law, and vacation of arbitral awards under the FAA generally.

Watts & Sons begins with the statement that statutory grounds for the vacation or modification of arbitral awards may be found in 9 U.S.C. §§ 10-11, but then goes on to cite the U.S. Supreme Court's dictum in *Wilko v. Swan* that suggests an arbitrator's "manifest disregard" of legal rules is grounds for judicial intervention. *Id.* at 578 (citing *Wilko v. Swan*, 346 U.S. 427, 436-37, (1953), *overruled on other grnds, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)). The *Watts & Sons* court goes on to point out that there are often times where such a manifest disregard for the law would fall under Section 10(a)(4) and constitute a case where arbitrators "exceed their powers." *Id.* at 579. The court gives as an example a situation where an arbitration agreement calls for the application of Wisconsin law, but the arbitrator applies New York law, thus exceeding his authority under the terms of the dispute given to him. *Id.* The court then notes that such a case is not before it, so it goes on to analyze whether there is some extra-statutory principle allowing it to review an arbitrator's legal rulings. *Id.*

In so examining, the court reviews the existing Seventh Circuit case law on the manifest disregard for the law issue and finds it a jumbled mess. The *Watts & Sons* court finds one line of cases that state that "an award may be vacated when an arbitrator 'disregards' the law in the sense of treating it as an obstacle to reaching a result preferred on other grounds." *Id.* at 579-580 (internal citations omitted). The court also finds a competing line of cases that states that "arbitrators need not cite or apply rules of law outside the parties' agreement." *Id.* at 580 (internal citations omitted). Chief among the second line of cases is *Baravati v. Josephthal Lyon & Ross*. 28 F.3d 704 (7th Cir. 1994). *Baravati* concludes that the statutory list of grounds for vacating awards is exclusive, and that the *Wilko* dictum is ineffective, as *Wilko* was overruled. *Id.* at 706 (internal citations omitted).

However, the *Watts & Sons* court goes on to note that a mere year later, the Supreme Court repeated the *Wilko* dicta in *First Options of Chicago, Inc. v. Kaplan,* 514 US 938, 942 (1995). The *Watts & Sons* court also points out that in 1999 another Seventh Circuit decision issued that stated, in dicta, that manifest disregard of the law was one non-statutory basis for vacating an arbitrator's award, without even citing to *Baravati*. 248 F.3d at 580. (citing *Kovoleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999)).

The *Watts & Sons* court attempts to resolve the tension inherent in these cases by narrowly interpreting "manifest disregard of the law" to mean simply that an arbitrator may not direct the parties to violate the law. *Id.* The court goes on to state that "manifest disregard of the law" is "limited to two possibilities: an arbitral order requiring the parties to violate the law (as by employing unlicensed truck drivers), and an arbitral order that does not adhere to the legal principles specified by contract, and hence unenforceable under § 10(a)(4)." *Id.* at 581.

In so doing, the *Watts & Sons* court has effectively ruled that manifest disregard of the law is either a subset of Section 10(a)(4), and therefore not a non-statutory basis for vacatur at all, or such a limited non-statutory basis (applicable only when an arbitrator issues an order requiring a violation of the law) that it is almost a nullity.

2. **<u>Other Circuits</u>.** The law in other circuits with respect to manifest disregard of the law, while still narrow, is significantly broader than that set out by the Seventh Circuit in *Watts & Sons*. In *Babrham v. AG Edwards & Sons, Inc.*, 376 F.3d 377 (5th Cir. 2004), the Fifth Circuit restates its standard for manifest disregard of the law. *Babrham* states that manifest disregard "means more than error or misunderstanding with respect to the law. . . . The arbitrators must have appreciate[d] the existence of a clearly governing principle but decided to ignore or pay no attention to it. Furthermore, the governing law ignored by the arbitrators must be well defined, explicit, and clearly applicable." *Id.* at 381-382 (internal citations omitted). The standard employed by the Second Circuit is nearly identical. *See Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2nd Cir. 2000).

Even if it is shown that the arbitrators did manifestly disregard the law, this may not be enough under governing Fifth Circuit law. In *Sarofim v. Trust Company of the West*, the court articulates a two-part test, as follows: "First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld. Second, where on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators

to judge norms appropriate to the relations between parties." 440 F.3d 214 (5th Cir. 2006) (internal citations omitted).

The standard in the Tenth Circuit is "more than error or misunderstanding with respect to the law," but instead, "a willful inattentiveness to the governing law." *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001) (internal citations omitted). The Fourth Circuit's manifest disregard standard is that the arbitrator "understands and clearly states the law, but proceeds to disregard the same." *Patten v. Signator Insurance Agency, Inc.*, 441 F.3d 230, 235 (4th Cir. 2006). A similar standard is employed by the First Circuit, limiting vacation of awards to "instances where it is clear from the record that the arbitrator recognized the applicable law-and then ignored it." *Morani v. Landenberger*, 196 F.3d 9, 11 (1st Cir. 1999). The standard employed by the Eight Circuit is identical. *See Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003).

Finally, the Sixth Circuit's standard is stated slightly differently but is very similar to that of the majority of other circuits. The court's discussion in *Mitchell v. Ainbinder* is instructive:

> An arbitration panel acts with manifest disregard if (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle. Proof that the panel "disregarded" the law or refused to heed the law implicitly requires proof that the arbitrators have consciously chosen not to apply the relevant law. To make things even more difficult for petitioners, arbitrators are not required to explain their decisions. When they choose not to do so, as they have done here, it is all but impossible to determine whether they acted with manifest disregard for the law. If the court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.

214 Fed.Appx. 565, 567 (6th Cir. 2007).

B. VIOLATION OF PUBLIC POLICY

The Second, Tenth, and Eleventh Circuits all recognize an additional non-statutory grounds for the vacatur of a arbitration award – violation of public policy.

1. **Eleventh Circuit.** The Eleventh Circuit states the public policy requirement as follows: "The public policy exception to the enforcement of arbitration awards allows courts to refuse to enforce arbitration awards where

enforcement would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993).

2. **Second Circuit.** In the Second Circuit, a court may vacate an arbitrator's award "where enforcement would violate a well defined and dominant public policy." *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2nd Cir. 2000). There is little law on the subject of what constitutes such a violation of a well defined and dominant public policy, though at least one New York district court has ruled that it requires more than basic allegations of fraud and partiality. *Hakala v. Deutsche Bank AG*, 2004 WL 1057788 (S.D.N.Y. 2004).

3. **Tenth Circuit.** The standard is the same in the Tenth Circuit as in the Second Circuit. In *The Denver & Rio Grande Western R.R. Co., v. Union Pacific R.R. Co.,* 119 F.3d 847 (10th Cir. 1997), the plaintiff urged the court to vacate the arbitrator's award on the basis that it violated Kansas' well-defined and dominant public policy against allowing a party to be indemnified for its own gross negligence. However, because the arbitrator had found that the employee whose actions were grossly negligent was the employee of plaintiff, not defendant, this public policy concern was not implicated. *Id.* The court stated it could not review this factual finding of the arbitrator. *Id.* at 850.

C. Complete Irrationality

The Eight Circuit lists "complete irrationality" as a non-statutory grounds for vacating an arbitrator's award, stating: "First, an arbitrator's award can be vacated if it is completely irrational, meaning it fails to draw its essence from the agreement. An arbitrator's award draws its essence from the [parties' agreement], as long as it is derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention." *Schoch v. InfoUSA*, *Inc.*, 341 F.3d 785, 788 (8th Cir. 2003). The Ninth Circuit also recognizes irrationality as a grounds for vacatur, but seems to consider it in conjunction with manifest disregard for the law. *See GC and KB Investments Inc. v. Wilson*, 326 F.3d 1096, 1105 (9th Cir. 2003).

D. Arbitrary and Capricious

The Eleventh Circuit stands alone in recognizing the "arbitrary and capricious" nature of an award as grounds for vacatur. "An award is arbitrary and capricious only if a ground for the arbitrator's decision cannot be inferred from the facts of the case. This is, however, a very difficult standard for the party contesting the arbitration award to overcome. Indeed, the award is presumptively correct, and will be vacated only if there is no ground whatsoever for the Panel's decision. Furthermore, for an award to be vacated as arbitrary and capricious, the Panel's

award must contain more than an error of law or interpretation." *Lifecare Int'l Inc. v. CD Medical, Inc.*, 68 F.3d 429, 435 (11th Cir. 1995).

VI. EXPANDED REVIEW OF ARBITRATION AWARDS BY CONTRACTUAL AGREEMENT

An emerging issue in the area of enforcement of arbitration awards is the ability of parties to agree to expanded judicial review of awards. Parties may seek contractually to allow for a substantive review of the arbitrators' decision, and courts are currently in disagreement as to the enforceability of such agreements. The law in this area is not yet well-developed, although *certiorari* has recently been granted by the U.S. Supreme Court to resolve the issue. *See Hall Street Associates, LLC v. Mattel, Inc.*, 127 S. Ct. 2875 (May 29, 2007).

A. NINTH CIRCUIT

The most activity in the area of expanded judicial review is in the Ninth Circuit. Not only is the case awaiting decision by the Supreme Court from the Ninth Circuit, but one of the leading, on-point cases was also decided in the Ninth Circuit. In *Kyocera Corp. v. Prudential Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003), the Ninth Circuit reversed itself and declined to enforce a provision of an arbitration agreement calling for heightened judicial review. Initially, in *LaPine Tech Corp. v. Kyocera Corp.*, a divided panel of the Ninth Circuit court of appeals "held that when parties resort to the use of an arbitral tribunal[,] . . . they may leave in place the limited court review provided by §§ 10 and 11 of the FAA, or they may agree to remove that insulation and subject the result to a more searching court review of the arbitral tribunal's decision, for example a review for substantial evidence and errors of law." *Id.* at 991.

After issuing its decision, the Ninth Circuit panel remanded the case to the district court for further proceedings consistent with its opinion. *Id.* at 982. Using the heightened standard of review endorsed by the *LaPine* court, the district court affirmed the arbitrators' ruling, and a second appeal by Kyocera followed. *Id.* at 993. The Ninth Circuit, in a second panel decision, affirmed the ruling of the district court. *Id.* Kyocera then filed a request for a rehearing *en banc*, which was granted. *Id.* at 994. On rehearing, the court revisited the question of whether it may apply a different standard to its review if the parties have so agreed, and rendered its decision in the negative, stating:

> The Federal Arbitration Act, 9 U.S.C. §§ 1-16, enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard. Because the Constitution reserves to Congress the power to determine the standards by which federal courts render decisions,

> and because Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision, we hold that private parties may not contractually impose their own standard on the courts.

Id. The court went on to state that parties are free contractually to modify the arbitration process and rules thereof, but once the arbitration process is complete and the matter reaches the federal courts, private parties have no power to set the standard of review. *Id.* at 1000. Instead, the courts must follow the narrow standard of review set by Congress, and any attempt by parties to contractually alter the standard is legally unenforceable. *Id.*

B. SEVENTH CIRCUIT

The Seventh Circuit is in agreement with the conclusion of the Ninth Circuit in *Kyocera Corp. v. Prudential Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003). In *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, Judge Posner states that: "Federal courts do not review the soundness of arbitration awards. An agreement to submit a dispute over the interpretation of a labor or other contract to arbitration is a contractual commitment to abide by the arbitrator's interpretation. If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract. Unless the award was procured by fraud, or the arbitrator had a serious conflict of interest – circumstances that invalidate the contractual commitment to abide by the arbitrator's result – his interpretation of the contract binds the court asked to enforce the award or to set it aside." 935 F.2d 1501, 1504-05 (7th Cir. 1991).

C. TENTH CIRCUIT

The Tenth Circuit has also weighed in against enforcement of contracts for expanded judicial review, ruling succinctly that: "[P]arties may not contract for expanded judicial review of arbitration awards." *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001).

D. EIGHTH CIRCUIT

The Eighth Circuit has left the possibility of heightened review open, but has so far declined to exercise such review, stating in *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997-98 (8th Cir. 1998), that it is unclear that parties have any say in how the courts will review an arbitration award, but that if the parties wished to do so their intent must be "clearly and unmistakably expressed." *See also Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8th Cir. 2003) (finding that parties contract did not show clear and unmistakable intent to contract for heightened review).

E. Fifth Circuit

The Fifth Circuit, on the other hand, has come down squarely on the other side of the divide. In *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995), the court states that: "In this case, however, the parties contractually agreed to permit expanded review of the arbitration award by the federal courts. Specifically, their contract details that '[t]he arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal.' Such a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract and the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties." *Id.* at 996.

F. Fourth Circuit

The Fourth Circuit, citing *Gateway*, agreed, and also enforces arbitration agreements that call for an expanded role for the court in reviewing the award. *Syncor Int'l Corp. v. McClelland*, 120 F.3d 262 (4th Cir. 1997).

VII. Practical Strategies to Facilitate More Efficient Enforcement of Arbitration Awards

Arbitration awards, without judicial confirmation, are not legal judgments. In order to make an arbitration award binding and legally enforceable, the party seeking enforcement must file an application with a court of appropriate jurisdiction. Confirmation proceeding are envisioned as rubber-stamp procedures both in the FAA and UAA, but often wind up time-consuming and expensive ventures where challenges – meritorious or not – exist.

In addition to the delays inherent in the judicial process, the most significant delays in enforcement of arbitration awards come from substantive and procedural challenges to the award and the arbitrator's authority to rule on the issues presented in the arbitration. Meritorious challenges to an improper award, made in good faith by the losing party to an arbitration, are to be encouraged and can have the effect of strengthening the public's confidence in the arbitration process. However, frivolous challenges (such as an attempt to challenge an award after the statutory period to do so has indisputably lapsed) introduce unnecessary delay into a process designed to operate in a speedy manner. Below are some strategies to deter non-meritorious challenges and ensure that meritorious challenges will be promptly brought before the court for decision.

A. Enforcing Parties Can Seek Sanction Against Adverse Parties Where Challenges to Arbitration Awards Have No Legal Basis

The growing prevalence of tactics designed to delay the enforcement of arbitration awards has the potential to undermine the appeal of arbitration as an alternative to litigation. The trend has grown enough to merit serious attention from courts. At least two federal courts have taken exception to tactics designed to delay enforcement

of arbitration awards and ruled strongly against parties challenging awards where there is no substantive or procedural basis for challenge.

The Eleventh and Seventh Circuit Courts have both affirmed Rule 11 sanctions imposed against parties challenging arbitration awards without legal basis. Prior to imposing sanctions, the Eleventh Circuit court issued a warning to parties challenging arbitration awards:

> [M]ost importantly, when Harbert took its arbitration loss into the district court and then pursued this appeal, it did not have the benefit of the notice and warning this opinion provides. The notice it provides, hopefully to even the least astute reader, is that this Court is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards. The warning this opinion provides is that in order to further the purposes of the FAA and to protect arbitration as a remedy, we are ready, willing, and able to consider imposing sanctions in appropriate cases. While Harbert and its counsel did not have the benefit of this notice and warning, those who pursue similar litigation positions in the future will.

B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 915 (11th Cir.2006).

The Seventh Circuit has already imposed sanctions in similar situations. In *CUNA Mut. Ins. Society v. Office & Professional Employees Int'l Union*, 443 F.3d 556 (7th Cir. 2006), the court affirmed Rule 11 sanctions imposed on parties raising meritless challenges to arbitration awards, quoting from an opinion written by Judge Posner over twenty years earlier:

> A company dissatisfied with the decisions of labor arbitrators need not include an arbitration clause in its collective bargaining contracts, but having agreed to include such a clause it will not be permitted to nullify the advantages to the union by spinning out the arbitral process unconscionably through the filing of meritless suits and appeals. For such conduct the law authorizes sanctions that this court will not hesitate to impose. Mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation have made it imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts. . . . Lawyers practicing in the Seventh Circuit, take heed!

443 F.3d at 561 (citing *Dreis & Krump Mfg. Co. v. Int'l Assoc. Machinists Dist. 8*, 802 F.2d 247, 255-56 (7th Cir.1986)).

Similarly, a California Court of Appeals awarded sanctions in *Evans v. Centerstone Development Co.*, 134 Cal.App.4th 151 (2005), where parties seeking to challenge an arbitration award had no legal basis, stating:

> Courts have repeatedly instructed litigants that challenges to the arbitrator's rulings on discovery, admission of evidence, reasoning, and conduct of the proceedings do not lie. Plaintiffs' crude attempt to characterize their claims so they would fall within acceptable bases for an appeal is an artifice we condemn. Further, most of plaintiffs' claims are patently disingenuous.

Id. at 167.

As courts attempt to effectuate the pro-arbitration provisions of the FAA and UAA, they appear increasingly willing to impose sanctions where it is clear that arbitration challenges are little more than thinly-veiled attempts at delaying confirmation of an otherwise appropriate award.

B. PARTIES SEEKING ENFORCEMENT CAN DEFER FILING OF PETITION TO CONFIRM AWARDS

Another tactic sometimes employed by the prevailing party in an arbitration to ensure more efficient enforcement of arbitration awards is to deliberately delay in the actual filing of a petition to confirm an award.[23] Waiting beyond the statutory period for challenges may have the effect of "lulling the adverse party to sleep." Frequently, parties subject to an adverse arbitration award are spurred into action by the entry of a petition to confirm an award. If enforcing parties wait until after the statutory period for challenges, they may be able to avoid all challenges.

Waiting to confirm, however, also increases the risk that the losing party will dissipate assets, as pre-judgment arbitral awards do not pose a duty on a losing party to preserve or protect assets other than under a particular jurisdiction's fraudulent conveyance statutes. Thus, one should consider the ability of the adverse party to pay in considering adopting the policy of delay.

The converse of this tactic is represented by the diligent litigant who, unsuccessful at arbitration, quickly brings an action to vacate the award. Should this happen, the

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[23] *See generally*, Stephen S. Lux, *Considerations for Confirming Your Securities Arbitration Award*, Shustak and Partners Newsletter, http:// www. shufirm.com/ newsletters/ pdf/ Legal_article_by_SteveLux.pdf (last visited on August 9, 2007)

litigant challenging the award would get first crack at choosing venue, since there typically exists more than one permissible venue in any particular case. A litigant who moves to challenge an improper award early my therefore have a better chance of quickly obtaining vacatur.

C. Include Substantive Terms in Arbitration Agreements Requiring Expedited Voluntary Compliance

Another method of ensuring more efficient enforcement of arbitration awards is the introduction of a clause providing for payment of additional interest if the award is not paid quickly. Such a clause may allow a prevailing party to recoup some of the costs required to fight off a challenge to its award. These clauses may also spur losing parties to quickly move to vacate improper awards, thus improving the overall speed and efficiency of the process.

Several arbitration associations have included terms in their contracts that require payment of monetary awards within 30 days of issuance unless a motion to vacate/modify has been filed. Under the standard clauses, if unpaid after 30 days, the award accrues interest. The NASD's provision (NASD Procedural Rule 13904), for example, reads in pertinent part as follows:

> (h) Fees and assessments imposed by the arbitrators under the Code shall be paid immediately upon the receipt of the award by the parties. Payment of such fees shall not be deemed ratification of the award by the parties.
>
> (i) All monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award: if not paid within 30 days of receipt; if the award is the subject of a motion to vacate which is denied; or as specified by the panel in the award. Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).

VIII. Conclusion

It is clear that, oftentimes, after the arbitrators have issued an award, the process may be just beginning. The factors that make arbitration appealing to parties in the first place - efficiency, fairness, and relative inexpensiveness - should be, wherever possible, carried over to the enforcement or challenge of the award as well. Both the legislature and the Courts have plainly attempted to do so, by enacting detailed and narrow statutory provisions for the enforcement and vacatur of awards, and the strict construction of such provisions, respectively. Time limits for confirming or vacating an award, narrow statutory grounds for vacating awards, and limited non-statutory grounds in the federal courts for vacatur, all seek

to ensure arbitration remains a relatively quick, uncomplicated alternative method of dispute resolution while giving losing parties the ability to challenge the most egregious actions by arbitrators and assure the process remains a fair and neutral one. The controversy over the practice of contracting for expanded judicial review merely illustrates the tension between the desire for a full and fair determination of the propriety of an arbitrator's award and the desire to maintain the speed and efficiency parties associate with arbitration. The current developments in the enforcement and vacatur of arbitration awards shows that the legislature, the courts, and parties are all working to advance arbitration as an accepted, and sometimes preferred, process.