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Arbitrators' Powers: Expansive, but Open to Challenge if Exceeded

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Like judges, arbitrators have broad powers when managing and deciding cases. But their powers are limited by the agreement to arbitrate from which those powers are derived and state and federal arbitration law or, in mandatory arbitrations conducted under RCW Chapter 7.06 and the MARs, by that statute and those rules.

The Federal Arbitration Act (9 U.S.C. §§1-16) declares a national policy in favor of arbitration where the parties have agreed to arbitration and governs arbitration in cases involving interstate or maritime commerce. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). For cases that fall within its reach, the FAA governs all aspects of arbitration procedure and pre-empts inconsistent state law. *See, e.g., Nitro-Lift Technologies LLC v. Howard*, 2012 WL 5895686 (U.S. Supreme Court, 2012); *Southland Corp. v. Keating*. However, as the FAA is silent on most issues related to an arbitrator's powers,[1] state law fills in those gaps and will govern as long as it does not conflict with or undermine the FAA's policy favoring arbitration.

Arbitration law in Washington was substantially changed in 2005 when the Legislature repealed RCW Chapter 7.04 and, in its place, adopted the Washington Uniform Arbitration Act, RCW Chapter 7.04A. The WUAA is modeled after, and practically a verbatim copy of, the Revised Uniform Arbitration Act promulgated by the National Commissioners on Uniform State Laws in late 2000.[2] For arbitrations to which the WUAA applies, the arbitrator, unless validly limited by the parties' arbitration agreement[3] or the rules applicable to the proceeding:

- "shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable" – RCW 7.04A.060(3).[4]

- "may issue such orders for provisional remedies . . . as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action" – RCW 7.04A.080(2).

- "may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding" and has power to "hold conferences . . . before the hearing and to determine the admissibility, relevance, materiality, and weight of any evidence" – RCW 7.04A.150(1).

- "may decide a request for summary disposition of a claim or particular issue by agreement of all interested parties or upon request of one party . . . if that party gives notice to all other parties . . . and the other parties have a reasonable opportunity to respond" – RCW 7.04A.150(2).

- "may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear" – RCW 7.04A.150(3).

- "may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths" – RCW 7.04A.170(2).

- "may [on request of a party to or witness in an arbitration proceeding] permit a deposition of any witness, including a witness who cannot be subpoenaed for or is unable to attend a hearing, to be taken under conditions determined by the arbitrator for use as evidence in order to make the proceeding fair, expeditious, and cost effective" – RCW 7.04A.170(2).[5]

- "may [if the arbitrator orders discovery] order a party . . . to comply with the arbitrator's discovery-related orders, including the issuance of a subpoena for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and may take action against a party . . . who does not comply to the extent permitted by law as if the controversy were the subject of a civil action in this state" – RCW 7.04A.170(4).

- "issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure as if the controversy were the subject of a civil action in this state" – RCW 7.04A.170(5).

- "may . . . incorporate [a pre-award ruling] into an award" – RCW 7.04A.180.

- "may [at the request of a party] modify or correct an award" on certain grounds – RCW 7.04A.200(1).[6]

- "may award punitive damages or other exemplary relief if such an award is authorized under applicable law in a civil action involving the same claim and the evidence . . . justifies the award under the legal standards otherwise applicable to the claim" (RCW 7.04A.210(1) providing the arbitrator specifies "in the award

the basis in fact justifying and the basis in law authorize the award" and states "separately the amount of punitive damages or other exemplary relief" – RCW 7.04A.210(5).

- "may award attorneys' fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties" – RCW 7.04A.210(2).

- as to all remedies other than those authorized by RCW 7.04A.210(1) and (2), "may order such remedies as the arbitrator considers just and appropriate under the circumstances . . . . The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under RCW 7.04A.220 or for vacating an award under RCW 7.04A.230" – RCW 7.04A.210(3).[7]

- may include in the award an award for the arbitrator's expenses and fees – RCW 7.04A.210(4).

After a hearing, the arbitrator must enter an award on the merits of the controversy heard, and the award may be confirmed by a court of competent jurisdiction. RCW 7.04A.190; 9 U.S.C. §9. The rules of any provider-organization under whose aegis an arbitration is conducted also provide the arbitrator substantial authority in these and other areas.[8]

In mandatory arbitrations conducted under the MARs and RCW Chapter 7.06, the arbitrator has authority to:

- decide procedural issues, except issues relating to his or her qualifications as an arbitrator; invite the parties to submit trial (hearing) briefs; examine any site or object relevant to the cause; issue a subpoena; administer oaths or affirmations to witnesses; rule on the admissibility of evidence; determine the facts and decide the law, and make an award; award costs and attorneys' fees as authorized by law; and perform other acts as authorized by the MARs or local MARs – MAR 3.2(a).

- order an examination under CR 35 and permit discovery beyond that available as of right under the MARs – MAR 4.2.

- issue a subpoena for the attendance of a witness at the arbitration hearing or for the production of documents at the hearing – MAR 4.3.

- "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence" – MAR 5.3(a).

- record the hearing electronically or by other means – MAR 5.3(b).

- determine the extent to which the rules of evidence will be applied – MAR 5.3(c).

- hear and determine a matter in the absence of a party "who after due notice fails to participate or to obtain a continuance" – MAR 5.4.

Once the MAR arbitrator has entered an award (MAR 6.1 and 6.2), the arbitrator's powers are at an end and the *functus officio* doctrine (discussed below) prevents the arbitrator from amending or modifying the award except to "correct an obvious error in stating the award if done within the time for filing an award or upon application to the superior court to amend." MAR 6.2. Thus, except for seeking a correction under MAR 6.2, the sole remedy for any party unhappy with any aspect of the MAR arbitrator's award is to timely seek a trial *de novo* under RCW 7.06.050(1).

Arbitration awards issued under the FAA or the WUAA are generally immune from merits-based challenges. *See, e.g., Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995). While the courts may not engage in a *de novo* review of the evidence in arbitration, under both state and federal arbitration law an award may be vacated on certain enumerated grounds. 9 U.S.C. §10; RCW 7.04A.230.

Among the powers-related grounds for *vacatur* of an arbitration award under the WUAA are:

- There was evident partiality by a neutral arbitrator, corruption by the arbitrator, or misconduct by an arbitrator prejudicing the rights of a party to the proceeding.

- "An arbitrator refused to postpone the hearing upon showing of sufficient cause, refused to consider evidence material to the controversy, or otherwise conducted the hearing . . . so as to prejudice substantially the rights of a party . . . ."

- "An arbitrator exceeded the arbitrator's powers."

RCW 7.04A.230(1)(b)-(d). The equivalent (and substantively identical) FAA provisions are found in 9 U.S.C. §10(a)(2)-(4).[9]

Although parties disappointed with an arbitration award seek *vacatur* with some regularity, those efforts are largely unavailing at least based on a review of reported decisions; the chances of obtaining a *vacatur* order, however, depend on the ground asserted and the facts of the case, as demonstrated by two empirical studies. L.Mills, *et al.*, "Vacating Arbitration Awards: A Real-World View of the Case Law," DISPUTE RESOLUTION MAGAZINE (AAA) 29 (Summer 2005); L. Mills and T. Brewer, "When Arbitrators Exceed Their Powers," DISPUTE RESOLUTION JOURNAL (ABA) 46 (February/April 2009).

While the powers-related statutory grounds for *vacatur* of an arbitrator's award are set out in RCW 7.04A.230 and its federal counterpart, there are a number of judicial glosses that expand on them. For instance:

Error of Law/Exceeding Power: Washington follows the "error of law/face of the award" doctrine, under which an arbitrator's award may be vacated if an "error of law appears on the face of the award or some paper delivered with it." *School District v. Sage,* 13 Wash. 352, 356-57, 43 Pac. 341 (1896), a standard reiterated in numerous cases since then: s*ee, e.g., Boyd v. Davis, supra.*. Although many Washington cases prior to *Boyd* applying the "error of law" doctrine can be read as implicitly premising the application of the doctrine on the "exceeding powers" ground, more recent Washington cases (*see, e.g., McGinty v. Autonation, Inc.,* 149 Wn. App. 277, 282, 202 P.3d 1009, *review denied* 166 Wn.2d 1022, 217 P.3d 782 (2009)) have specifically justified application of the doctrine on the exceeding powers ground.[10] No federal decision has been found which has vacated an award based merely on an arbitrator's erroneous legal conclusion. The law of many states is in accord with the federal rule.

Manifest Disregard of the Law: The doctrine of "manifest disregard" (*i.e.,* the arbitrator, having been advised of what the law is, has consciously chosen to disregard it) remains a ground for *vacatur* in some federal circuits (including the Ninth Circuit: *see Biller v. Toyota Motor Corp.*, 668 F.3d 655 (9th Cir. 2012)), notwithstanding the U.S. Supreme Court's suggestion in *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), that the only grounds for *vacatur* are those prescribed by statute.

Violation of Public Policy: Another judicial gloss on *vacatur* law is the "public policy" exception: if the arbitrator's award clearly violates an "explicit, well-defined and dominant public policy," the award may be vacated. *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 434, 291 P.3d 675 (2009). Division 1 of the Court of Appeals recently reaffirmed that principle in *International Union of Operating Engineers, Local 286 v. Port of Seattle*, 164 Wn. App. 307, 264 P.3d 268 (2011). Review was granted by the Washington Supreme Court and the case has been argued. A decision will be rendered in due course.

***Functus Officio*:** Finally, once a final award has been entered, dealing with all issues submitted to arbitration, the arbitrator loses all power and authority to act further in a case under the doctrine of *functus officio* ("having performed the office"), except in the limited circumstances expressly permitted by statute (*see* RCW 7.04A.200) or as to issues for which the arbitrator has retained jurisdiction because they were not finally decided in the award. *See, e.g., Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, 2012 WL 5232180 (E.D. Pa. 2012); *Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009); *see also* Rule R-46, AAA Commercial Arbitration Rules.

In short, while an arbitrator has broad power to manage a WUAA or FAA arbitration to which he or she has been appointed (his or her discretionary case-management powers are generally limited only by the plain language of the parties' arbitration agreement and applicable statutes and rules), the arbitrator's power – as reflected in his or her final award – is subject to somewhat more scrutiny . . . and *vacatur* if those powers have been exceeded.

For over 30 years Phil Cutler has arbitrated hundreds of cases privately and under the MARs and the rules of the American Arbitration Association and FINRA. Learn more about his arbitration practice from www.cnhlaw.com/adr-services or contact him at philcutler@cnhlaw.com.

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[1] 9 U.S.C. §7 specifically gives the arbitrator power to summon witnesses and documents for a "hearing." See note 5 below regarding arbitrator authority under the FAA to issue discovery subpoenas to non-parties.

[2] The full text of the RUAA, including valuable section-by-section comments, is available at http://uniformlaws.org.

[3] RCW 7.04A.040(2) and (3) list the statutory sections that may not be waived or varied by agreement of the parties.

[4] Note that under RCW 7.04A.060(1) "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate" is for the court to decide. However, after a dispute has arisen, the parties can agree that the arbitrator will resolve any such issues. *Compare* RCW 7.04A.060(2) *with* RCW 7.04A.060(3). The rules of some provider-organizations expressly provide that the arbitrator is empowered to determine the arbitrator's jurisdiction, "including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Commercial Rule R-7(a). *But see Rent-a-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (the parties' arbitration agreement must specifically grant to the arbitrator the authority to decide arbitrability issues).

[5] But note that in a number of Circuits the courts have held that the FAA (9 U.S.C. §7) does not authorize discovery subpoenas to non-parties. Arbitrators do have the power under the FAA to order parties to provide discovery.

[6] While the FAA permits courts to modify or correct an award in certain circumstances, there is no FAA counterpart to RCW 7.04A.200(1) which permits the arbitrator to do so.

[7] There have, however, been no Washington cases interpreting the scope of this potentially expansive provision.

[8] *E.g.*, the American Arbitration Association's Commercial Rules (www.adr.org, "Rules and Procedures"), the JAMS Comprehensive Rules (www.jamsadr.com, "Rules/Clauses"), JDR's rules (www.jdrllc.com, "Arbitration"), and the WAMS's rules (www.usamwa.com, "Arbitration"); *see also*, FINRA's (securities cases) Code of Arbitration Procedure (www.finra.org, "Arbitration and Mediation").

[9] The "exceeding powers" section of the FAA is slightly broader than the similar provision under the WUAA: "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." 9.U.S.C. §10(a)(4) (emphasis added). *See also* 9 U.S.C. §11(c), which permits the court in an FAA case to modify or correct an award where it is "imperfect in matter of form not affecting the merits of the controversy."

[10] In essence, they reason that unless the parties' arbitration agreement specifically gives the arbitrator the power to decide the case *ex aequo et bono* ("according to what is right and just") the arbitrator is required to apply – and decide the case under – the law.