Judicial Intervention in Arbitration Proceedings Pre-Award

By Gene J. Esshaki

The Federal Arbitration Act[1] was enacted in 1925 to counter widespread judicial hostility to private arbitration agreements. The act has been interpreted to ensure the enforcement of arbitration agreements according to their terms.[2] Since its inception, courts have recognized that the underlying purpose of the act was to ensure that parties to a contract containing an arbitration clause would enjoy the same right to enforce that clause as exists with respect to all other terms of an agreement. Courts have consistently held that the act establishes a strong federal policy in favor of enforcing arbitration agreements.[3]

Section 10 of the act sets forth four extremely limited grounds on which an arbitration award may be vacated:

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

(2) Where there was evident partiality or corruption in the arbitrators, or either of them;

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

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

In relying on this language and advancing the strong federal policy favoring enforcement of arbitration agreements, courts have consistently held that the scope of judicial review of arbitration awards is limited.[4] The United States Supreme Court has held that to maintain "arbitration's essential virtue of resolving disputes straightaway," courts may vacate an arbitration award "only in very unusual circumstances."[5] The Supreme Court indicated that "[i]f parties could take 'full-bore legal and evidentiary appeals,' arbitration would become 'merely a prelude to a more cumbersome and time-consuming judicial review process.'"[6]

The Court concluded there are only two stages at which a court may intervene in an arbitration proceeding. Initially, a court may intervene to decide gateway matters such as arbitrability or whether the parties have a valid arbitration agreement at all, or whether a certain type of issue falls within the confines of the agreement. Additionally, courts may intervene at the conclusion of the arbitration proceedings to confirm, vacate, or modify the award, but only on the narrow provisions referenced in Section 10 of the act. A long line of cases have held that judicial intervention in the middle of an arbitration proceeding is strictly prohibited.[7]

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Recently, the Michigan Court of Appeals deviated from the policy that courts should only intervene in arbitration proceedings to determine arbitrability issues or at the conclusion of the award, and authorized pre-award intervention in an action involving a challenge to the arbitrator selection process. In *Oakland-Macomb Interceptor Drain Drainage District v Ric-Man Construction, Incorporated*,[8] the Court of Appeals determined that judicial intervention was appropriate at an early stage of an arbitration proceeding when the administering agency—the American Arbitration Association—failed and refused to implement a detailed and distinct arbitrator selection protocol.

Fast Facts

- The historical rule has been that courts do not intervene in arbitration proceedings until the award is issued.
- The two stages at which a court could intervene are to decide gateway issues such as arbitrability or whether a valid arbitration agreement exists.
- *Oakland-Macomb Interceptor Drain Drainage District v Ric-Man Construction, Incorporated* must be viewed as an isolated case turning solely on its unique facts.

In *Ric-Man*, a case involving a significant municipal construction project, the parties agreed on several criteria for selecting the neutral chair of the arbitration panel. Those criteria were set forth in the arbitration agreement and specified four separate and distinct qualifications a potential arbitrator must meet to be considered for the chair position.[9] Additionally, the same criteria were to be applied to an alternate to be selected in the event the chair was unable or unwilling to proceed with the arbitration. If no person could be found who met all four requirements, the person who met the next three was deemed acceptable.

It was undisputed that the American Arbitration Association did not select an arbitrator that met all four qualifications established in the arbitration agreement. Even more confounding, the association selected an alternate who, in fact, met all four criteria. When the respondent objected to the selection of the panel chair, the association overruled the objection. The respondent moved for consideration of this decision by the Oakland County Circuit Court, which affirmed the association's position.

On appeal to the Michigan Court of Appeals, the decision of the trial court was reversed. The Court indicated that given the specific criteria that had been bargained for between the parties in establishing the position of panel chair for this complex commercial dispute, denying one party the benefit of the bargained-for criteria would create such an injustice that a party must have the right to petition a court for relief before entry of the final award.[10] The Court reasoned that if the objecting party waited until the final award, it was highly unlikely a reviewing court would reverse the decision of the administrator, and the aggrieved party would have been denied its bargained-for criteria in selecting an appropriate chair for the panel.[11]

Shortly following the decision of the Michigan Court of Appeals in *Ric-Man*, the United States Court of Appeals for the Sixth Circuit issued its decision in *Savers*

Property and Casualty Insurance Company v National Union Fire Insurance Company of Pittsburgh, Pennsylvania.[12] *Savers* involved arbitration under a reinsurance contract before a three-member panel composed of an "umpire" and two party-appointed arbitrators.[13] The dispute involved two interim procedural orders issued by one party-appointed arbitrator and the umpire while the other party-appointed arbitrator was on vacation.[14]

The aggrieved party filed a state court action to vacate the interim final award, which was removed to federal court based on diversity of citizenship. Despite acknowledging the general prohibition against judicial review before issuance of a final award, Judge Roberts nevertheless reviewed the matter by recasting it as a breach of contract dispute over the rules under which the arbitration was to proceed.[15] Judge Roberts then issued a preliminary injunction enjoining any further orders by the arbitration panel without the Court's approval.[16]

On appeal, a panel of the Sixth Circuit concluded that the longstanding policy favoring enforcement of arbitration provisions set forth in the Federal Arbitration Act and the limited review of awards provided in Section 10 of the statute permitted a court to intervene in an arbitration proceeding only at the initial stages involving questions of arbitrability and enforceability of the contract or after an award is entered.[17] The Court of Appeals therefore reversed the decision of the trial court and sent the matter back to the arbitration panel.[18]

The decision in *Oakland-Macomb Interceptor Drain Drainage District* cannot be reconciled with *Savers Property and Casualty Insurance Co.* The established policy discouraging pre-award intervention by courts in arbitration proceedings is beyond dispute. While the Michigan Court of Appeals may have carved out an exception based on the exceptional fact pattern in *Oakland-Macomb*, it is unlikely this decision will gain traction in any subsequent pre-award intervention cases. ■

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ENDNOTES

1. 9 USC 1 *et seq.*
2. See *AT&T Mobility LLC v Concepcion*, ___ US ___, ___; 131 S Ct 1740, 1748; 179 L Ed 2d 742 (2011).
3. *Moses H Cone Mem Hosp v Mercury Constr Corp*, 460 US 1, 24; 103 S Ct 927; 74 L Ed 2d 765 (1983).
4. See *First Options of Chicago, Inc v Kaplan*, 514 US 938, 942–946; 115 S Ct 1920; 131 L Ed 2d 985 (1995).
5. *Oxford Health Plans LLC v Sutter*, ___ US ___, ___; 133 S Ct 2064, 2068; 186 L Ed 2d 113 (2013) (citations omitted).
6. *Id.*, quoting *Hall Street Assoc, LLC v Mattel, Inc*, 552 US 576, 588; 128 S Ct 1396; 170 L Ed 2d 254 (2008).
7. See, e.g., *Savers Property & Cas Ins Co v Nat'l Union Fire Ins Co of Pittsburgh*, 748 F3d 708, 716–719 (CA 6, 2014 (and cases cited therein).
8. *Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Construction, Inc*, 304 Mich App 46; 850 NW2d 498 (2014).
9. *Id.* at 49.
10. *Id.* at 57–59.
11. *Id.* at 59.
12. *Savers Property & Cas Ins Co*, 748 F3d 708.
13. *Id.* at 712.
14. *Id.* at 713.
15. *Id.* at 715.
16. *Id.*
17. *Id.* at 717.
18. The Court also found that interlocutory judicial review was improper under 9 USC 2. *Id.* at 719–720.