Vacating of Arbitration Awards as Diminishment of Conflict Resolution

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Abstract

The traditional perspective about arbitration has been that the award of the arbitrator is final and binding on all parties. Generally, arbitration has resolved the conflict. However, a trend has emerged in which the losing party seeks a court as a second forum for the resolution of the dispute in order to have the decision of the arbitrator vacated. This study analyzed 101 randomly selected cases out of a population of 573 cases in which vacatur of an arbitration award was sought. In approximately 30% of these cases, the arbitration award was in fact vacated. Case characteristics, applicable laws, legally based behaviors and arbitrator behaviors were analyzed to develop an understanding of the contexts in which arbitration awards are vacated. Implications for arbitrators and the advocates are suggested.

Arbitration is one of the principal alternative dispute resolution forums utilized in unionized and in many nonunion organizations to achieve procedural justice. With arbitration of labor and employment disputes, there is an expectation that certain characteristics are present: representativeness, accuracy, consistency, freedom from bias, ethicality, and correctability (Leventhal, Karuza, & Fry, 1980). There also is an expectation that arbitration will be a rapid and inexpensive final solution to workplace conflicts. It is intended to be the ultimate form of representativeness, in that both the process and the content of the dispute are to be based on negotiation between the two parties. However, in reality, there is concern that the procedure is not always viewed as just, diminishing employee and group voice (Lind & Earley, 1992). In addition, lack of acceptance of the outcome can subsequently diminish the consistency of arbitration. The parties may seek other resolutions in subsequent disputes, such as mediation (Bingham, Hallberlin, Walker, & Chung, 2009), and perhaps collective bargaining

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modifications (such as the right to engage in unilateral action). Moreover, litigation and judicial review is an increasing possibility (LeRoy & Feuille, 2004).

What happens when the arbitration process is less than ideal? For example, what happens when there is a lack of accuracy, such as when efficiency is sought instead of accuracy (Burch, 2010) or when there is lack of consistency, such as in disregard for the law (Burch, 2010)? Freedom from bias is a characteristic that is diminished when the arbitrator exceeds his or her authority (LeRoy & Feuille, 2003). There can be lack of ethicality, such as corruption (Landry & Hardy, 2008). Increasingly, there are predispute agreements (Wood, 2011) and postdispute employment agreements (Maltby, 2003), both of which can act to reduce the consistency and perception of finality of arbitration. It is when a party seeks to vacate the award that an opportunity for correctability presents itself.

In the past, grievance arbitration always was viewed as final and binding. The parties saw that the award was implemented and the dispute was concluded. Normal operations continued without work disruption. Little or no consideration was given to the legal status of grievance arbitration. Rather, the parties, having chosen this forum of conflict resolution voluntarily, agreed in advance that the impartial and mutually selected private judge, would issue a decision on the merits of the case, and they would accept it. Similarly, the courts generally honored the private contractual nature of grievance arbitration, restricting their role to the enforceability of arbitral agreements, and the enforcement of the award that was rendered. This left the essence of the arbitration process to the control and determination of the parties and the arbitrator (Elkouri, Elkouri, Volz, & Goggin, 1997).

However, the current thinking, as expressed by many attorneys, practicing arbitrators, and other experts, is that increasingly, the process of grievance arbitration is not final, and the party who does not prevail seeks, through subsequent litigation, to reverse or vacate an arbitration award (LeRoy & Feuille, 2007). Arbitration has become an expensive, slow melding of litigation and arbitration. This is partly due to the parties' representatives, who are responsible for grafting the implements of litigation onto the much simpler system of arbitration. In addition, arbitrators are fearful that the courts, when reviewing their conduct, will vacate their awards (Robbins, 2005). That arbitration awards are being litigated is an increasing problem, as noted by Marinelli and Hoey (2007). Arbitrators risk sanctions, however, as judicial tolerance for litigating wanes (Marinelli and Hoey, 2007; Weiskopf, 2008).

In 2000, the Supreme Court revisited the issue of the review of arbitration awards, after having first declared its view in 1957. Interestingly, despite political changes in the Court's membership, the Court concluded, in a similar manner as it did 43 years ago. In the *Eastern Associated Coal v. Mineworkers*[1] decision, an arbitrator reinstated, with conditions, a driver of heavy machinery who had tested positive for drugs and who had been discharged for testing positive one year earlier, but who had been reinstated on that occasion by another arbitrator, again with conditions. The Court, in construing the public policy exception as one of highly limited judicial review of arbitration awards,

[1]Eastern Associated Coal Corp. v. Mine Workers, 531 U.S. 57 (2000).

conceded that public policy forbade such an employee from using drugs. However, the Court also found that the public policy declared employee rehabilitation was an important factor, and set forth regulations on that issue. Accordingly, the Court declared, the arbitrator did not violate public policy when he reinstated the employee, but penalized the employee by reinstating him with various conditions. Despite this decision, experience shows that parties continue to contest arbitration awards and that is why this research has been undertaken.

Thus, with the Eastern Associated Coal decision the Court upheld the doctrine from Lincoln Mills, 353 U.S. 448 (1957), and the Steelworkers Trilogy, 363 U.S. 564; 363 U.S. 574; 363 U.S. 593, that labor arbitration awards were entitled only to limited review. Labor arbitration was, as a matter of federal law, the preferred means of achieving labor peace. As a result, such awards would not be disturbed so long as the underlying claim was arguably governed by the applicable collective bargaining agreement, and so long as the award drew its essence from that collective bargaining agreement.

Reasons Why Courts Do or Do Not Overturn Awards

The purpose of this research is twofold. The first is to identify those factors, which the literature suggests may result in the vacating of an arbitration award brought by one of the parties into the judicial system. The second purpose is to test empirically litigated cases to see which factors did result in vacatur. In our review of the literature, various studies have identified factors that are said to increase, in some cases very significantly, the chance that an arbitrator's decision will be vacated by a reviewing court. Other factors have been stated that, when present, are said likely to lead to the upholding of the award by the court. This study examines empirically just what has occurred at various court levels over a recent, multi-year period. An objective of this research is to identify those factors that advocates and arbitrators alike might recognize as useful in predicting whether reviewing courts will vacate arbitration awards. Thus, the finality of the labor arbitration process is better achievable. This was the intent of those who created this system of conflict resolution.

The reader's attention is directed to Tables 1 and 2. Table 1 summarizes these factors, while Table 2 provides explanations for the meaning of a number of the variables discussed in this article.

Principal factors suggested in the literature that might lead to the vacating of an arbitration award are: manifest disregard of the law (Flanagan, 2000; Kennedy, 2008; although, as noted below, others have suggested this factor ordinarily will not result in vacatur); an award procured by corruption, fraud, bias, or ''evident partiality'' (Kratovil, 2007); an award that is ''irrational,'' irrespective of any applicable law (Davis, 1997; St. Antoine, 1976–1977); or an award that was the result of the arbitrator's having exceeded his or her contractual power (Choquette, 2005; Marcantel, 2009). An award that seemed to constitute an exception to public policy had been suggested. However, in the aftermath of the U.S. Supreme Court's decision in the Eastern Associated Coal case, that factor has now been viewed as less likely. The ''public policy'' issue has been identified as a creature of the common law, law created by courts, rather than the statutory law,

Table 1
Reasons Cited in the Literature as to Why Courts Have or Have Not Overturned Arbitrators' Decisions in Labor/Employment Cases

Reasons courts have overturned labor/employment arbitration decisions
Manifest disregard for the law*
Award procured by corruption, fraud, and bias
Award is irrational, irrespective of any applicable law
Arbitrator exceeded authority
Award conflicts with state laws
Award arose out of employment arbitration system which lacked typical labor arbitration safeguards
Reasons courts have not overturned labor/employment arbitration decisions
Manifest disregard for the law*
Insufficient/incorrect fact finding
Procedural errors: failure to adjourn a hearing on request, commission of serious error, and refusal to hear noncumulative evidence
Award based on wrong merits
Manifest disregard for evidence
Award is contrary to public policy

*This item is included in each portion of this table because it has been cited in the literature both ways.

laws passed by legislative bodies (Choquette, 2005; Marcantel, 2009), and therefore not properly a basis for vacatur, at least under federal law, i.e., principally the Federal Arbitration Act (FAA).

Where the court review is sought under state law rather than under the FAA, or federal laws, it has been suggested the likelihood of vacatur is greater, as the Supreme Court has indicated parties may contract for greater judicial review than the FAA provides, under state statute (Foster & Bigge, 2008). A growing number of states have adopted more intrusive standards concerning arbitrator conduct, the depth of disclosure required by arbitrators, and whether the arbitrator's awarding of attorney fees or punitive damages may constitute the grounds for vacatur of the award (LeRoy, 2008).

The literature suggests additional conditions favorable to the vacatur of an arbitrator's award where the case is one of employment arbitration (no union present) rather than one of labor arbitration (union present). There the employer may have exclusive control of the arbitrator selection process (Berman & McCabe, 2006). In addition, the system created may enable the arbitrator to be chosen frequently to arbitrate for the same employer (Bingham, 1995). Alternatively, the employer as the party with the superior bargaining power may want an expanded review clause that increases the chances an unfavorable decision could be overturned by the courts (LeRoy & Feuille, 2004). More generally, simply because it is a matter of employment arbitration and does not fall under the longer, more well-established labor arbitration standards of the union-management collective bargaining system, the likelihood of vacatur of an arbitrator's award by the reviewing court has been suggested as more likely to occur than in other cases (LeRoy, 2008).

On the other hand, while the literature has identified some variables present in arbitration awards that may lead to vacatur, there are other factors that the literature

suggests ordinarily will not result in the reversal of the arbitration decision. These include "manifest disregard of the law" (unless state law expressly permits it as a basis for vacatur), because such a claim does not represent a charge that the arbitrator "exceeded his/her powers" (Choquette, 2005). Courts are reluctant to vacate arbitrator decisions even when the judge disagrees with the arbitrator's factual findings, so long as the arbitrator is acting within the scope of his/her authority, and is arguably construing or applying the contract (LeRoy & Feuille, 2007). Moreover, the arbitrator's failure to adjourn a hearing, upon request, does not normally lead to vacatur (Choquette, 2005). Even if the court is convinced that the arbitrator committed a serious error, judges are reluctant to vacate arbitration decisions (LeRoy & Feuille, 2007). An arbitrator's finding on the merits that a court considers "wrong" will not normally lead to vacatur (Weiskopf, 2008), nor will his/her manifest disregard for evidence (Kesselman & Ehrlich, 2005). Among other arbitrator behaviors, which ordinarily will not lead to court vacatur, is the refusal to hear noncumulative testimony. It is not necessarily to be viewed as arbitrator misconduct (Rossein & Hope, 2007).

Case Characteristics Related to Case Outcomes

Numerous case characteristics of arbitrated cases have been identified in the literature as related to case outcomes. However, since most of these variables were not found to be significant in this study with respect to vacatur, they are mentioned only briefly here. Among those factors cited are type of employer/employee, sector differences, court differences, legal bases, and evident partiality of arbitrator.

Type of Employer/Employee

Research showing occupational differences in the arbitration process has included differences in the occupations themselves (Lewin, 1990; Thornicroft, 1989, 1992); differences related to teachers (Clark & Ogata, 2006; Marmo, 1986); IRS agents (Guffey & Helms, 2001); police, law enforcement and firefighters (Johnson, McKenzie, & Crawley, 2007; LaVan & Carley, 1985; LaVan (2007b); LaVan, Katz, & Carley, 1993); and nurses or nurse practitioners (Philipsen, 2008; Turner, 2009). Sex differences may also occur, owing to sex segregation in various occupations (Bemmels (1988a, 1988b); Biernat & Malin, 2008; Oswald & Caudill, 1991).

Sector Differences

Public and private sector differences also have been examined (Dilts & Samavati, 2007; Haber & Karim, 1995; LaVan 2007a; Mesch, 1995).

Court Differences

LeRoy's (2008) data in 426 federal and state court cases concluded that federal courts confirmed 92.7% of arbitrator awards, compared to 78.8% for state courts. This statistically

significant difference also was observed for appellate courts, where the confirmation rate in federal courts was 87.7%, contrasted to 71.4% for state courts. Zuckerman (2000) noted that the Supreme Court has ruled that when the parties are seeking to vacate an arbitration award, they are not limited to the venue where the award was issued.

Legal Bases

The number of arbitrated cases for which judicial review is being sought is increasing despite deference to arbitration under the FAA and various court rulings.

Courts are largely faithful to the Supreme Court's pronouncements requiring substantial deference to the arbitrator. Yet, there has been an increase in the propensity to litigate arbitration awards. LeRoy and Feuille (2004) examined 152 employment arbitration rulings that were reviewed in 278 federal and state court decisions from 1977 to 2003. While they found that the courts had vacated only 8% of the awards when the narrow standards under the FAA were considered, they also found arbitration agreements that were providing for an expanded judicial review of awards. These clauses called for the courts to engage in a *de novo* review for any fact-finding or legal errors. While only nine of the appeals courts had participated in such expanded reviews of either employment or commercial awards, the authors found that in five of the appeals courts arbitral awards had been vacated. In only one instance, the Tenth Circuit, had this expanded review approach been rejected, on the basis that it threatened to undermine the independence of the bargained for arbitration process and would dilute the finality of arbitral decisions. LeRoy and Feuille urged the U.S. Supreme Court to resolve this conflict among the circuits by reaffirming its consistent findings that protect arbitration from judicial interference.

Arbitrator Behavior

A review of the literature suggests a variety of arbitrator behaviors may be indicative of whether or not an award will be vacated. These include how various disclosures are handled, what decisions are made about requests to postpone hearings, the responses to actual or perceived questions of partiality or conflicts of interest, and considerations where there is a refusal to hear evidence (Anonymous 2006a, 2006b; Anonymous, 2007; Choquette, 2005; Rossein & Hope, 2007).

Instances of ''manifest impropriety'' such as actual fraud, corruption, or misconduct on the part of the arbitrator are ''exceedingly rare'' and require clear evidence of bias that is direct, definite, and capable of demonstration, rather than evidence that is remote, uncertain, or speculative (Kratovil, 2007). His study did not find any statistically significant findings for any of these arbitrator behaviors and vacatur of arbitration awards.

Methodology

The purpose of this research is to identify case characteristics that are incidents of cases litigated with the intention to have the award vacated. This study adds to what we

already know about the vacating of arbitration awards, in that it considers more variables in one study. This allows the case characteristics to be compared and the cases to be discussed more holistically. Previous studies have focused only on a few variables in any given study. Moreover, in the tradition of legal writing and law reviews, cases there were selected for citing or illustrating in a somewhat selective manner. However, here, by the use of a random sample, the conclusions of this study can be generalized to the whole population of over 500 cases that sought to vacate arbitration awards in the recent period under review.

This study uses the same data initially discussed by Jedel, LaVan, and Perkovich (2008), but it extends this prior work by identifying the magnitude of the relationships between various case characteristics and case outcomes. It uses multivariate analysis to identify relationships between various case characteristics and case outcomes. This study goes beyond the earlier research and uses phi coefficients and chi-square analyses to better understand the extent of these relationships. It seeks to examine the extent to which these proffered explanations are true and the extent to which the outcomes of arbitration have changed, especially in light of those cases that have been litigated.

The Lexis Nexis database of litigated cases was queried using the search strategy: "Vacate AND Arbitration" for the years 2003–2007. This yielded 573 cases, from which the cases in this study were drawn randomly.[2] One hundred and one cases are included in the empirical analysis. They are cases that were litigated to have the award vacated. The variables that have been examined are Type of Employee, Type of Employer, Sector Differences, Court Level Differences, Legal Basis, Procedural Differences, Union Involvement, Public Policy Exceptions, Court Level Differences, Arbitrator Behavior during Process,[3] and Arbitrator Conceptualization of Result[4] (See Table 2 for further definitions and clarifications).

The methodology used in this study is a policy-capturing approach. Policy-capturing research draws its data from the information contained in written judicial opinions. Thus, it is constrained by what judges choose to include in such opinions. One must assume that the most important facts have been highlighted in the judicial opinions and are the ones that will provide direction for future policy-capturing cases.

Multiple raters were used to discern case characteristics. This approach has been used to analyze both litigated and arbitrated cases. In fact, the use of coding in the analysis of public decisions is well established in the literature (Carp & Rowland, 1983; Rowland & Carp, 1996). Similar coding methodology has been used in comprehensive decision data sets (Songer, 1998 and Spaeth, 1999). In addition, while not relevant to the current study, similar coding of arbitrated cases is well established (Bemmels, 1988a, 1988b; Mesch, 1995; Mesch & Shamayeva, 1996).

[2]Random sampling is used to draw a small number of items that as a set are representative of the characteristics of the entire population from which that sample has been drawn. This allows the results of the analysis to be generalized to the population.

[3]Disclosure, refusal to postpone hearing, partiality, refusal to hear evidence.

[4]Award exceeded authority, manifest disregard for the law, irrational ruling.

Table 2
Description of Variables

Union involvement	A case in which a labor union was a plaintiff or defendant
Legal basis for vacating	Where the basis for vacating involved an alleged conflict with a law
Award causes injustice	Where the arbitration award offended a court's sense of what a just result should have been
Award not linked to contract or where arbitrator exceeded his/her authority	Where the award did not ''draw its essence'' from the underlying contract*
Manifest disregard of the law	Where the award ignored governing law
Award arbitrary and/or capricious	Where the award in the eyes of the court was based on, for example, the arbitrator's preference, notion, and/or whim rather than a fixed set of rules or principles†
Award irrational but no disregard for law	Where the award had no rational basis without regard to any governing or applicable law
Arbitrator behavior basis for vacating	Where the basis for vacating involved some alleged misconduct of the arbitrator affecting the arbitral process
Arbitrator disclosure issue	Where the arbitrator's failure to disclose some fact allegedly affected the arbitral process improperly
Procedural issues	Before the reviewing court rather than before the arbitrator
Timeliness	Whether the action seeking to vacate was timely filed before the court
Public policy exception	Whether the award violated some public policy‡, an exception to the narrow review of awards customarily followed by courts

*See, e.g., Supreme Court cases known as the Steelworkers' Trilogy.
†Black's Law Dictionary.
‡See, e.g., Paperworkers v. Misco, Inc., 484 U.S. 29 (1987).

Hall and Wright (2008) note the increased potential contribution of this type of methodology. ''Our case material is a gold mine for scientific work. It has not been scientifically exploited…. We should critically examine all the methods now used in any of the social sciences and having any useful degree of objectivity…. We maintain that content analysis makes legal scholarship more consistent with the basic epistemological underpinnings of other social science research.'' See also Cross, 2002; Epstein & King, 2002; Heise, 2002; Revesz, 2002; Sisk & Heise, 2005.

The following studies recently have employed the methodology of using litigated case analysis as an integral part of their research methodology: Hall & Wright, 2008; Johnson, Stidham, Carp, & Manning, 2008; Kotkin, 2007; Kulik, L.Perry, & Pepper, 2003; Lahey, 2008; Lockwood, 2008; Lucero, Allen, & Middleton, 2006; and Perry, Kulik, & Bourhis, 2004.

Roehling's (1993) concerns (changes in the law over time, sample bias, and data aggregation problems) can be addressed largely via methodological means. Two of the ''dangers'' he highlighted (using data drawn from judicial opinions, and using statistical analyses to study legal issues) that strike at the essence of this form of policy-capturing

research also have been addressed directly (Werner & Bolino, 1997). Traditional legal research selectively cites cases that support or do not support a given opinion. However, these case reviews do not test for other interactions, which may exist between the independent variables.

Hypotheses

There are two sets of proposed hypotheses in the present study: one set relates to whether a given case was vacated and a second set relates to the prevailing party. Thus, the prior research allows for empirical validation in the current study:

(1) Case outcomes in terms of a vacatur of an award or a finding in favor of management are negatively related to arbitrator behaviors, such as corruption, fraud, bias, or partiality as suggested by Flanagan (2000), Kennedy (2008), and Kratovil (2007). Manifest disregard for the law occurred in 27.7% of the cases and the award was irrational but there was no disregard for the law in 16.8% of the cases. There is moderate, statistically significant support for this hypothesis chi square 2.94, $p > .086$, $\varphi = .171$.

(2) Case outcomes in terms of a vacatur of an award or a finding in favor of management are positively related to the arbitrator exceeding contractual authority as suggested by Choquette (2005) and Marcantel (2009). This occurred quite frequently, in 65% of the cases. This hypotheses is supported that when the award was not linked to the contract or the arbitrator exceeded his or her authority the award was statistically significantly more likely to be vacated $\chi^2 = 6.332$, $p > .012$, $\varphi = .252$.

(3) Case outcomes in terms of a vacatur of an award or a finding in favor of management are positively related to court review under state law rather than the FAA as suggested by Foster and Bigge (2008) and LeRoy (2008) and Zuckerman (2000). Our study did not find any statistical differences between state and federal courts with respect to either vacating of the award or a finding for management. This finding is surprising in view of the fact that LeRoy's recent study found significant differences.

(4) Case outcomes in terms of a vacatur of an award or a finding in favor of management are positively related to differences in occupations as suggested by numerous authors including Lewin (1990), Thornicroft (1989, 1992), Clark and Ogata (2006), Marmo (1986), Guffey and Helms (2001), Johnson, McKenzie & Crawley (2007), LaVan and Carley (1985), LaVan (2007b), LaVan et al. (1993), Turner(2009), and Philipsen (2008). Nonprofessional employees comprise 58.8% of our sample. Despite numerous studies concluding that case outcomes are related to occupational differences, this hypothesis was not supported by our data.

(5) Case outcomes in terms of a vacatur of an award or a finding in favor of management are positively related to the male sex of the individual as suggested by (Bemmels (1988a, 1988b); Biernat and Malin (2008); and Oswald and Caudill (1991). One problem in this hypothesis is that in the court cases the identity of

the individual was not always disclosed. This hypothesis was not supported by our data.

(6) Case outcomes in terms of a vacatur of an award or a finding in favor of management are more likely in the private vs. the public sector as suggested by Dilts and Samavati (2007); LaVan (2007a); Mesch (1995); and Haber and Karim (1995). While 32% of the cases in our study were in the public sector, this hypothesis was not supported by our data.

(7) Case outcomes in terms of a vacatur of an award or a finding in favor of management are more likely when there is no issue of public policy, as suggested by Choquette (2005) and Marcantel (2009). A public policy issue occurred in only 12.9% of the cases in the study. Hence this hypothesis of no difference is supported.

Results

Relevant terms are defined in Table 2. Table 3 contains the frequencies of all variables. The results of the multivariate analysis are in Table 4. A list of included cases is available on request.

The years in which the cases were litigated are shown in the first set of data under case characteristics. Seventy-nine percent of the cases are considered union cases, in which a labor union was either a plaintiff or defendant. The other cases are employment cases, but without union involvement. Cases are substantially in the private sector, with 68% of the cases occurring in the private sector. In the total sample, 32.7% of the cases are at the state court level. However, this percent increases in the vacated cases, the cases that are in violation of the law, and in cases where the arbitrator's award was considered irrational. Slightly over 40 percent of the cases are at the district court level, which means that they are still appealable. It is not known whether this would significantly change the findings in the study. However, while at the district court level, 33% of the cases have been vacated, and at the appeals court level only 23% of the cases have been vacated.

To the authors, two of whom have been active arbitrators for decades and all of whom have taught about the finality of arbitral awards, these percentages are considerably higher than what would have been expected. LeRoy (2008) similarly noted an apparent decline in the finality of arbitration. His study, and those of others that he cited, concluded that courts vary in terms of the deference to arbitration with a reversal rate of 8% or less to over 40%. This is in part attributable to the subject matter of the arbitration. A major shortcoming of these studies was they examined a long-time perspective, so that the reader could not discern the current condition. Alternatively, the studies focused on narrowly defined issues, such as employee discrimination. However, based on previous studies, arbitration awards are being vacated at a rate of as high as 56% (LeRoy, 2008).

Some of the cases had procedural issues—at least 24.8% of them. A smaller portion of these, 8.9%, had an issue related to timeliness of filing. A ruling on whether to vacate was made in 28.7% of the cases in the sample. Cases that contained issues of a public

Table 3
Frequencies

Case demographics	All cases $N = 101$ Percentages
Year	
2002	2.0
2003	29.0
2004	20.0
2005	21.0
2006	11.0
2007	17.0
Professional	41.2
Nonprofessional	58.8
Union involvement	79.2
Private sector	68.0
Court level %	
State	32.7
District	40.6
Appeals	26.7
Procedural issues %	24.8
Timeline issues	8.9
Public policy exception	12.9
Ruling made on whether to vacate	28.7
Legal basis for vacating %	20.8
Federal arbitration act	6.9
Title VII	4.0
State laws	21.8
Award not linked to contract or arbitrator exceeded authority	65.0
Manifest disregard for law, award arbitrary, and/or capricious	27.7
Award irrational but no disregard for law	16.8
Vacated cases at various court levels %	
State	43.3
Federal district	33.3
Federal appeals	23.3
Arbitrator behavior basis for vacating %	19.8
Outcome %	
Remanded	20.8
Management/employer	46.5
Split	10.9
Union	35.6
Employee	10.9
Arbitration award vacated	29.7
Private sector outcomes %	
Management/employer	42.0
Split	11.6
Union	33.3
Employee	15.9

Table 3
(Continued)

Case demographics	All cases $N = 101$ Percentages
Vacated	24.6
Union case outcomes %	
Management/employer	46.3
Split	11.3
Union	45.0
Employee	2.5
Vacated	32.5

policy exception, such as whether the award violated some public policy, were 12.9% of the sample.

The various laws under which the cases are brought are primarily state laws, while the FAA is the next most frequent legal basis. However, when one examines the cases that are in violation of the law, 67% of the cases that are filed under state law are considered in violation of the law, whereas 21.2% of the cases that are considered in violation of law are brought under the FAA.

In examining arbitrator behavior, 19.8% of the cases had arbitrator behavior as a proffered reason for seeking to vacate. In the actual vacated cases, this percentage was 13.3%. Arbitrators' behaviors that occurred with the most frequency in the cases that the parties sought to vacate were that the award was either not linked to the contract or the arbitrator exceeded his or her authority. This occurred in 65% of the cases. Additionally, manifest disregard for the law occurred in 27.7% of the cases. In 11.9% of the cases, the arbitrator refused to hear pertinent and material evidence or failed to cross-examine. Other behaviors of the arbitrator suggested by other researchers did not appear with any frequency, including a claim the award caused injustice, the arbitrator refused to postpone the hearing with cause, or the arbitrator did not disclose a possible conflict of interest.

In thirty cases, which comprise 29.7% of the sample, the arbitrators' awards were vacated. When the arbitrator exceeded his or her authority, this figure increases to 38.5%, but when the arbitrator's award was deemed irrational, 47.1% of the cases were vacated.

Twenty-seven percent of the cases were returned to the arbitrators. Management or the employer prevailed in 46.5% of the cases, 10.9% of the cases were split, 35.6% of the cases had the union prevailing, and in 10.9% of the cases the employee prevailed.

A separate analysis was made of only the private sector cases, as was carried out by Jedel et al. (2008). The prevailing party and the percent of cases vacated are similar to the results in the total sample. An additional, separate analysis was made of only union case outcomes. In these cases, while the union prevails in 45%, the employee prevails in only 2.5%. In the private sector, the percent of vacated cases is slightly less than in the total sample (24.6%). In the union cases, the percent vacated is slightly more (32.5%).

Table 4
Chi-Square Analysis Award Vacated

	Award vacated: Yes	Award vacated: No	Total	Chi square	Phi coefficient	Significance
	Award irrational but no disregard for the law: Yes	Award irrational but no disregard for the law: No				
Yes	8	22	30	2.94	.171	.086
No	9	62	71			
Total	17	84	101			
	Award not linked to contract or arbitrator exceeded authority: Yes	Award not linked to contract or arbitrator exceeded authority: No				
Yes	25	5	30	6.332	.252	.012
No	40	30	70			
Total	65	35	100			
	Finding for management: Yes	Finding for management: No				
Yes	24	6	30	19.21	.436	.000
No	23	48	71			
Total	47	54	101			

Chi-square Analyses and Phi Coefficients

The chi-square analysis for that dependent variable ''award being vacated'' is found in Table 4. Phi coefficients were computed for the significant chi-square relationships and appear in Table 3. Phi is a chi-square–based measure of association. Computationally, phi is the square root of chi square divided by n, the sample size. Phi is used with nominal data. There are three results that are statistically significant: Award Not Linked to Contract or Arbitrator Exceeded Authority ($\chi^2 = 6.332$, $p = .012$); Award Irrational But No Disregard for the Law ($\chi^2 = 2.94$, $p = .086$); and a Finding for Management ($\chi^2 = 19.21$, $p = .000$). This suggests that if the goal of the arbitration is for the award to be sustained in court, the arbitrator should link the ruling clearly to the contract.

The arbitrator should not act irrationally nor render an award that can be viewed by the court as irrational. Differences relating to type of employer, type of employee, and sector were not supported by the data.

It is not surprising that the variables ''Award Not Linked to Contract or Arbitrator Exceeded Authority'' and ''Award Irrational But No Disregard for the Law'' predicted whether a case was vacated, since these are well-settled legal bases for vacating an award. With respect to the irrational standard, there is less legal basis and well-settled law, but some courts have been following it.

Further research likely is needed as to why a Finding for Management is more likely to result in vacatur. It may simply be that the opposing party has limited funds to

appeal and restricts their attempts at overturning arbitration awards in court to those cases where they are more certain they will prevail. Otherwise, they simply accept the decision as final. By contrast, the employers might have a greater tendency, and more funds available, to challenge cases in which the decision went against them, even though their chances of prevailing in vacatur of the award are far less likely.

As to why the other hypothesized variables were not significantly related to whether a case was vacated, it is simply a matter that they have little if anything to do with the resolution of a legal/contractual issue that arises in arbitration. The fact that they were not relevant further confirms the usefulness of arbitration in the resolution of conflict in organizations. Additionally, none of the arbitrator behaviors hypothesized to predict whether an award was vacated proved to be significant. This is not surprising in that if arbitrators do not behave in a rational and neutral way, they will not be selected for subsequent hearings. This should also reconfirm the usefulness and lack of bias in settling organizational conflicts. With regard to the public policy exception, some arbitration awards are overturned on this basis. However, that was not true with the sample in this study and may require further research. Some of this initial work has already been carried out by Carbonneau (2000); Harris (2007); Kochan, Guillen, Hunter, and O'Mahony (2009); and Murphy (2010).

Conclusion

The findings in this research suggest that for the most part arbitration is working the way it should be and it is status blind with respect to sex, occupational level, court, or sector. When one looks for an explanation as to why there was little empirical validation of what the previous literature suggested, a major point should be made. For the most part, the prior research examined characteristics of arbitration cases that led to certain case outcomes. What makes this current vacatur of the arbitration study groundbreaking is that the current study is an examination of those extreme cases, when despite the agreement that the arbitrator's decision is binding, one or the other of the parties sought to litigate the outcome.

Just what lessons can be learned from the results of this analysis of 101 cases reflecting a population of over 500 cases? A surprising proportion of the cases were filed under state laws. This might suggest that this is the legal route to follow if the desired outcome is the vacating of awards and probably reflects the fact that state law covers a broader range of legal issues than federal law. (For example, one of the authors once heard a case where the employer sought to vacate his award reinstating, with conditions, a police officer who had been convicted of a crime, arguing that the reinstatement order violated the public policy enshrined in state law prohibiting the employment of convicted felons in law enforcement.) Additionally, these awards are vacated almost exactly in proportion to their existence in the sample. There is clearly a predominance of private sector cases in the sample (68%). Perhaps public sector employers do not have the resources to litigate, after they have arbitrated, or perhaps they have additional, internal mechanisms to challenge the decision of the arbitrator.

It speaks well of arbitrator behavior that only 20% of the cases had arbitrator behavior as a basis for seeking to vacate. Additionally, failure to disclose conflicts of interest was only an issue in one case.

In unionized cases, as opposed to individual employee cases, management wins in 46% and the union wins in 45% of the case outcomes. This does not mean that the award was vacated, but that the party had its viewpoint upheld. While there may be a tendency to want to pursue cases that would fall under a ''public policy exception,'' such arbitrator awards are upheld more than 90% of the time indicating that reviewing courts largely are adhering to the Supreme Court's proclamations in the *Steelworkers Trilogy* and its progeny.

Recommendations

The analysis establishes that arbitrators' awards are vacated only 27.7% of the time when there is a manifest disregard of the law. However, if the arbitrator and the parties desire finality to the arbitral process, the arbitrator should take care to fully regard all applicable laws and to make his or her consideration of those laws clear in the award. Similarly, our analysis indicates that more than 80% of the time an arbitration award is vacated because, at least in the eyes of a reviewing court, the arbitration award did not draws its essence from the collective bargaining agreement. Thus, again, the arbitrator must make clear that the award does in fact do so and he or she must clearly and unambiguously demonstrate in the award the manner in which it does so. In so doing, an arbitrator will meet the goals of organizational justice. For example, he or she will ensure consistency between the award and applicable laws, fully explain the award's rationale, and provide a neutral disposition of the dispute. While the recommendation that arbitrators should err on the side of explicating their rationale more rather than less is arguably laudable, it also raises the question of whether doing so will sacrifice the speed and informality of labor arbitration. For that not to happen, arbitrators will need to balance those two competing but legitimate interests.

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