Second Circuit Sets Evident Partiality Standard for Party-Appointed Arbitrators on Industry Tripartite Arbitration Panels

Section 10(a)(2) of the Federal Arbitration Act (the ?FAA?) authorizes courts to vacate awards ?where there was evident partiality. . . in the arbitrators. . . .? 9 U.S.C. § 10(a)(2). As respects neutral arbitrators, the U.S. Court of Appeals for the Second Circuit has long held that ?[e]vident partiality may be found only where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.? Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire and Marine Ins. Co., 668 F.3d 60, 64 (2d Cir. 2012) (quotations and citations omitted).

But, particularly in industry and labor arbitration, the parties do not necessarily intend that party-appointed arbitrators on tripartite panels are neutral, that is, disinterested in the outcome, impartial and independent. Can a party vacate an award based on the ?evident partiality? of a non-neutral, party-appointed arbitrator, and if so, what standard applies to such a challenge?

In 2012 the Second Circuit in the landmark Scandinavian Re case left open the question ?whether the FAA imposes a heightened burden of proving evident partiality in cases in which the allegedly biased arbitrator was party-appointed.? Scandinavian Re, 668 F.3d at 77 & n.21. But in June 2018 the Second Circuit, in Certain Underwriting Members of Lloyds of London v. State, Department of Financial Services, ___ F.3d ___, No. 17-1137-cv., slip op. at 2 (2d Cir. June 7, 2018), held that ?a party seeking to vacate an award under Section 10(a)(2) must sustain a higher burden to prove evident partiality on the part of an arbitrator who is appointed by a party and who is expected to espouse the view or perspective of the appointing party.? Certain Underwriting Members, ___ F.3d at ___, No. 17-1137-cv., slip op. at 2 (2d Cir. June 7, 2018).

The Second Circuit vacated the district court decision, which had overturned a reinsurance arbitration award on evident partiality grounds. The district court did so because a party-appointed arbitrator had not disclosed the full extent of his relationships with the party which appointed him.

The only arbitrator qualification set forth in the tripartite arbitration agreement was that ?the arbitrators ?be active or retired

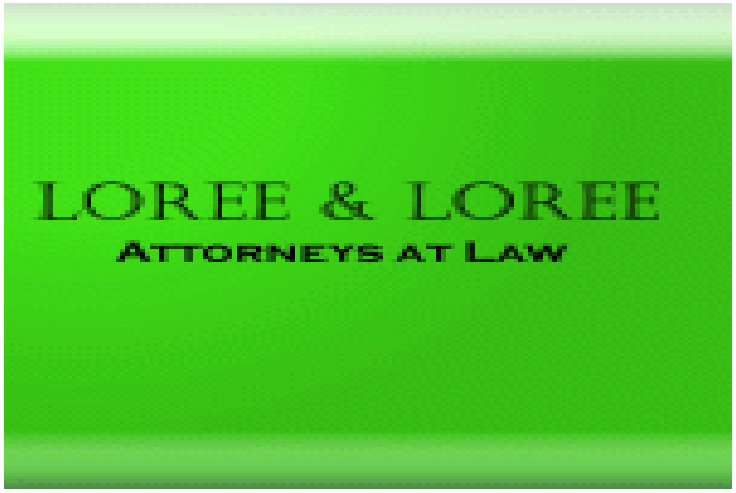
disinterested executive officers of insurance or reinsurance companies or Lloyd's London Underwriters.'? Slip op. at 4 (quoting J. App'x at 593.) Each party agreed to bear the expense of its appointed arbitrator and to allow the parties to engage in ex parte discussions during discovery. Slip op. at 4. The arbitrators were ?relieved of all judicial formalities and? were permitted to ?abstain from following the strict rules of law.? Slip op. at 11 (quoting J. App'x at 593).

The district court held that the party-appointed arbitrator's ??conduct must be considered under the same evident partiality standard as is required in all arbitrations.'? Slip op. at 12 (quoting Certain Underwriting Members v. Insurance Co. of Am., 16-cv-323(VSB), 2017 WL 5508781, at *11 (S.D.N.Y. Mar. 31, 2017)).

The award defending party appealed, and the Second Circuit vacated the district court's decision and remanded the case to the district court ?to reconsider under the proper standard.? Slip op. at 2. Under what the Second Circuit found to be the ?proper standard,? ?[a]n undisclosed relationship between a party and its party-appointed arbitrator constitutes evident partiality, such that vacatur of the award is appropriate if: (1) the relationship violates the contractual requirement of disinterestedness [or another contractual requirement of the arbitration agreement] (see Sphere Drake Ins. v. All American Life Ins., 307 F.3d 617, 620 (7th Cir. 2002)); or (2) it prejudicially affects the award (see Delta Mine Holding Co. v. AFC Coal Properties, Inc., 280 F.3d 815, 821-22 (8th Cir. 2001)).?

As respects the arbitration agreement's ?disinterestedness? requirement, the Second Circuit explained that requirement ?would be breached if the party-appointed arbitrator had a personal or financial stake in the outcome of the arbitration.? Slip op. at 13-14 (citing and quoting Trustmark Ins. Co. v. John Hancock Life Ins. Co., 631 F.3d 869, 872-73 (7th Cir. 2011); and ARIAS-U.S. Practical Guide to Reinsurance Arbitration Procedure, ¶ 2.3 (rev. ed. 2004)). As respects prejudicial affect on the award, the Second Circuit said: ?[i]n the absence of a clear showing that an undisclosed relationship (or the non-disclosure itself) influenced the arbitral proceedings or infected an otherwise-valid award, that award should not be set aside even if a reasonable person (or court) could speculate or infer bias.? Slip op. at 14.

Circuit Judge Dennis G. Jacobs wrote the opinion for a three-judge panel, which included Circuit Judge Reena Andrea Raggi, and Circuit Judge Peter W. Hall.



The author, Philip J. Loree Jr., represented the award defending party before the district court and the Second Circuit. In 2005, the author, then a partner at Cadwalader, Wickersham & Taft LLP, successfully argued before the Court of Appeals for the Sixth Circuit Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 645 (6th Cir. 2005), a case cited in the Second Circuit decision, which also addressed whether party-appointed arbitrators were subject to the same evident partiality standard as neutral arbitrators. See slip op. at 11 & 14 (citing Nationwide v. Home with approval).