

## **VACATING ARBITRATION AWARDS DUE TO “EVIDENT PARTIALITY” UNDER THE FEDERAL ARBITRATION ACT**

*Timothy W. Stalker, Esq.*

*Ryan A Nolan, Esq.*

### **Introduction**

Arbitrations have become more commonplace in recent years. Many employment agreements, union contracts, insurance policies and reinsurance agreements require arbitration as means to resolve a dispute between the parties. The purpose of this paper is to provide an overview of one of the bases to overturn the award of an arbitrator or arbitration panel under the Federal Arbitration Act, that being the “evident partiality” of an arbitrator.

### **Timing under the Federal Arbitration Act**

Under the Federal Arbitration Act, a party has three (3) months from the date of the award to provide notice of motion to vacate the arbitration award for any reason.<sup>1</sup> In *R&Q Reinsurance Co. v. American Motorist Ins. Co.*, 2010 U.S. Dist. LEXIS 109349 (N.D. Ill. October 14, 2010), a Motion to Vacate was filed and served one day after the three (3) month period. The Court rejected the Motion to Vacate, finding that notice was untimely. Therefore, like any other motion or filing, it is imperative that counsel move quickly after an award is rendered in order to meet the three (3) month deadline.

### **Establishing Evident Partiality Following an Arbitration Award**

As a general rule, an arbitrator’s decision is entitled to “great deference” and only a narrow set of circumstances warrant vacatur. The Federal Arbitration Act is clear that an award

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<sup>1</sup> 9 U.S.C. §12

may be vacated where (1) the award was procured by corruption, fraud, or undue means or (2) where there was evident partiality or corruption in the arbitration, or either of them. See 9 U.S. Code § 10(a).

The Supreme Court addressed the meaning of “evident partiality” under 10(a)(2) in the case of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) and concluded that it existed when one of the parties was a regular, though sporadic, customer of an arbitrator, who failed to disclose that fact. *Id.* at 146-148. There, although there was no evidence of actual bias on the part of the arbitrator, Justice Black, stated “we can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.” *Id.* at 149. Justice White, concurring, also wrote, “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.* at 150.

### **Understanding “Evident Partiality” Amongst the Circuit Courts**

The Supreme Court did not articulate a clear standard for finding “evident partiality” and there have been variations across the Courts as what must be established to find “evident partiality”. The majority of Courts have agreed that “evident partiality” means “an appearance of bias” standard as requiring an objective assessment of whether a reasonable person would believe an arbitrator was partial to a party to the arbitration.<sup>2</sup>

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<sup>2</sup> *JCI Communs, Inc. v. IBEW, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003); *Nationwide Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir. 2002); *ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500-501 (4th Cir. 1999).

In the Second Circuit, “evident partiality within the meaning of 9 U.S.C. §10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.” *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Fund*, 748 F.2d 79, 84 (2d Cir. 1984).<sup>3</sup> “Among the circumstances under which the evident partiality standard is likely to be met are those in which an arbitrator fails to disclose a relationship or interest that is strongly suggestive of bias in favor of one of the parties.” *Id.*<sup>4</sup> Further, “an arbitrator is disqualified only when a reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one side.”<sup>5</sup>

In *Morelite*, the Court vacated an arbitration award where there was a non-disclosure father-son relationship between the arbitrator and president of the union party, which provided a strong evidence of partiality and was unfair to the construction contractor.<sup>6</sup> In finding this decision, the *Morelite* Court stressed the importance was on the disclosure of any potential bias before the arbitration recognizing that parties in small industries may have relationship with either side. *Id.* A conclusion of partiality can be inferred “from objective facts inconsistent with impartiality.”<sup>7</sup> “Disclosures by arbitrators should be encouraged; failure to make appropriate disclosures will justify setting aside an award.”<sup>8</sup>

The Ninth Circuit followed along with the Second Circuit adopting the “reasonable impression of partiality test” to evaluate vacatur of an award. *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Circuit 1994). In *Schmitz*, the arbitrator failed to disclose that his law firm represented the corporate parent of one of the parties in at least 19 cases during a 25 years period, with the most

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<sup>3</sup>; *Scandinavian Reinsurance Co v. Saint Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012); *Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 31 (2d Cir. 2004)

<sup>4</sup> *Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 31 (2d Cir. 2004)

<sup>5</sup> *Applied Indus. Materials Corp. v. Ovalar Making Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007).

<sup>6</sup> *Morelite Constr. Corp.*, 748 F.2d at 84.

<sup>7</sup> *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423 (2d Cir. 1986).

<sup>8</sup> *Andros Compania Martima v. Marc Rich & Co., A.G.*, 579 F. 2d. 691, 699 (2d Cir. 1978)

recent case ending approximately 21 months before the arbitration was submitted.<sup>9</sup> The Court adopted the “reasonable impression of partiality” finding that actual bias need not be demonstrated if there was an appearance of impropriety.<sup>10</sup>

The First Circuit has required a party seeking to set aside an award on the basis of “evident partiality” must show the alleged partiality was “direct, definite, and capable of demonstration rather than remote, uncertain or speculative.” *USW, Local 12003 v. Keyspan Energy Delivery*, 2009 U.S. Dist. LEXIS 68427 (D. Mass. Aug. 3, 2009). In *USW*, the First Circuit denied a petition to vacate the arbitration award where it was learned the arbitrator’s husband had once conducted a two-hour career development training program for the law firm representing the defendants at the arbitration.<sup>11</sup> The Court found the relationship between the arbitrator’s husband the defendant’s law firm too be too attenuated for any reasonable person to believe the arbitrator acted with partiality towards the defendant during the arbitration in question.<sup>12</sup> The Court provided that “evident partiality” requires a direct, definite, and capable of demonstration in order to vacate an award.<sup>13</sup>

### **Disclosure by An Arbitrator**

At this time there is no clear rule of what information an arbitrator must disclose to avoid future motions regarding partiality. Along with the case law, arbitrators have duties to disclose pursuant to the American Arbitration Association Code of Ethics including,

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<sup>9</sup> *Schmitz* at 1044.

<sup>10</sup> *Schmitz* at 1047.

<sup>11</sup> *USW* at 5.

<sup>12</sup> *USW* at 6.

<sup>13</sup> *USW* at 4.

- (1) any known direct or indirect financial or personal interest in the outcome of the arbitration;
- (2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have told will be a witness. They should also disclose any such relationships with their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
- (3) the nature and extent of any prior knowledge they may have of the dispute; and
- (4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution or applicable law regarding arbitrator disclosure.

This standard is further articulated in the ARAIS-US, *Code of Conduct – Canon IV, Disclosure*: “Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.” The duty remains with the arbitrator and in order to avoid any potential arguments of ‘evident partiality’ any evidence of bias should be presented to parties prior to the commencement of the arbitration.

#### **Understanding the Timing Issue to Raise “Evident Partiality”**

The Second, Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits all agree that parties must wait until the conclusion of the arbitration and rendition of the final award prior to raising issues of evident partiality. The Courts have consistently found judicial intervention before the rendition of an arbitration award would defeat the advantages of an efficient and inexpensive

forum for dispute resolution inherent in arbitration and instead invite costly and protracted litigation challenging preliminary and procedural rulings of the arbitrators.<sup>14</sup>

It is well established in the Second Circuit that an attacks on the qualifications or partiality of arbitrators is only proper after the conclusion of the arbitration and rendition of an award.<sup>15</sup> In the Sixth Circuit, the Court reversed a decision from the Eastern District of Michigan which halted an ongoing arbitration proceeding based in part upon allegations of ex parte communication with an arbitrator<sup>16</sup>. In adopting the majority rule, the court noted that parties to an arbitration are precluded from challenging “the proceedings or the partiality of the arbitrators until the conclusion of the arbitration and the rendition of a final award.” The Seventh Circuit agreed summarizing the majority view, “The time to challenge arbitration, on whatever grounds, including bias, is when the arbitration is completed and an award rendered.”<sup>17</sup> The Ninth Circuit followed its sister circuits concluding there was no exception which warranted any mid-arbitration intervention, even where the district court held the arbitrator would likely be found partial and future award would be subject to vacatur.<sup>18</sup>

In *USW*, the First Circuit denied a petition to vacate the arbitration award where it was learned the arbitrator’s husband had once conducted a two-hour career development training program for the law firm representing the defendants at the arbitration<sup>19</sup>. The Court found the relationship between the arbitrator’s husband the defendant’s law firm too be too attenuated for

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<sup>14</sup> *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d, 16, 19 (2d Cir. 1997).

<sup>15</sup> *Avail, Inc. v. Ryder Sys.*, 110 F.3d 892, 895 (2d. 1997); *Travelers Indemnity v. Gerling Global Reinsurance Corp.*, 2001 U.S. Dist. LEXIS 6684 (S.D. N.Y. 2001).

<sup>16</sup> *Savers Prop. and Cas. Co., et al v. Nat’l Union Fire Ins. Co.*, 748 F.3d 708, 717 (6th Cir. 2014)

<sup>17</sup> *Smith v. Am. Arbitration Ass’n*, 233 F.3d 502, 506 (7th Cir. 2000).

<sup>18</sup> *Sussex v. United States Dist. Court for the Dis. of Nev.*, 781 F.3d 1065 (9th Cir. 2014).

<sup>19</sup> *USW, Local 12003 v. Keyspan Energy Delivery*, 2009 U.S. Dist. LEXIS 68427 (D. Mass. 2009).

any reasonable person to believe the arbitrator acted with partiality towards the defendant during the arbitration in question.

### **Conclusion**

Arbitration provisions are added contracts in an effort to expedite disputes between the parties. However, fundamental fairness is key to the process. As noted in the above case law, the American Arbitration American Code of Ethics and in particular, the ARIAS Code of Conduct, arbitrators have an affirmative obligation to disclose “any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.” Otherwise, an arbitration award may be vacated under the Federal Arbitration Act due to the “evident partiality” of the arbitrator.