

CLIENT ALERT

Vacatur Based On Evident Partiality: Second Circuit Holds That Different Standards Apply To Party-Appointed Arbitrators and Umpires

July 19, 2018

On June 7, 2018, the Second Circuit Court of Appeals ruled that the standard to show evident partiality as a basis for *vacatur* under the Federal Arbitration Act (FAA) is different for a party-appointed arbitrator than it is for a neutral umpire. *Certain Underwriting Members of Lloyds of London v. State of Florida, as Receiver for Insurance Company of the Americas*, 892 F.3d 501 (2d Cir. 2018).

The decision involved an arbitration between Insurance Company of the Americas (ICA) and various Lloyds' syndicates (Underwriters) under an excess of loss reinsurance contract. The governing arbitration clause provided that all disputes would be resolved by a tripartite arbitration panel consisting of two party-appointed arbitrators and a neutral umpire, and required that all of the arbitrators, including the neutral umpire, had to "be active or retired disinterested executive officers of insurance or reinsurance companies of Lloyd's London Underwriters."

Each of the arbitrators made disclosures at the onset of the arbitration regarding relationships they had with the parties. ICA's party-appointed arbitrator (Alex Campos) disclosed only that he had "potential business dealings" ten years earlier with ICA's chairman and, thereafter, did not update or supplement his disclosures. The arbitration panel ultimately ruled in favor of ICA and awarded damages in excess of \$1.5 million. Underwriters moved in federal district court to vacate the arbitration award on several grounds, including that Mr. Campos had not disclosed other much more extensive relationships with ICA representatives, and that, as a result of those relationships, the "evident partiality" standard under the FAA had been satisfied.

The district court granted Underwriter's motion to vacate. The court found that Mr. Campos's relationships with ICA representatives were considerably more extensive than he had disclosed and that those "undisclosed relationships" were "significant enough to demonstrate evident partiality" under existing Second Circuit precedent. 892 F.3d at 505. The court also stated it was "troubl[ed] by the apparent willfulness of [Mr. Campos's] non-disclosures." *Id.* The court did not, however, "take issue with the substance of the Award, did not connect Campos's conduct to the panel's decision, and made no finding that Campos had a personal or financial interest in the outcome of the arbitration." *Id.*

The Second Circuit reversed, finding that the district court had improperly evaluated Mr. Campos's conduct under the standard applicable to neutral arbitrators. The Second Circuit ruled that the district court should have applied a different standard applicable to party-appointed arbitrators "who are expected to serve as *de facto* advocates." *Id.* at 508 (citations omitted). The Second Circuit noted that distinguishing between the roles played by party-appointed arbitrators and neutral umpires is particularly important in reinsurance arbitrations "where an arbitrator's professional acuity is valued over stringent impartiality." *Id.* at 509. Accordingly, the Second Circuit concluded that "the process of self-governing dispute resolution" would be impaired if one were to expect party-appointed arbitrators to adhere to "the same level of institutional impartiality applicable to neutrals." *Id.* at 510.

The Second Circuit made clear, however, that party-appointed arbitrators are “still subject to some baseline limits to partiality.” *Id.* While declining to “catalogue all ‘material relationships’ that may bear upon the service of a party-appointed arbitrator,” the Second Circuit stated that “an undisclosed relationship is material if it violates the arbitration agreement.” *Id.* (citations and internal brackets omitted). Applying that standard, the Second Circuit noted that Mr. Campos’s undisclosed relationships with ICA would constitute “evident partiality” under the FAA if they violated the contract’s requirement that the arbitrators must be “disinterested,” *i.e.*, “if the party-appointed arbitrator had a personal or financial stake in the outcome of the arbitration.” *Id.* (citations omitted).

In addition, the Second Circuit held “evident partiality” by a party-appointed arbitrator would warrant *vacatur* only if it “had a prejudicial effect on the award.” *Id.* “In 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.” *Id.* The Second Circuit therefore vacated and remanded to the district court to determine whether “the failure to disclose by party-appointed arbitrator Campos either violates the qualification of disinterestedness or had a prejudicial impact on the award.” *Id.* at 511.

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