

THE ARBITRATOR'S OBLIGATIONS OF IMPARTIALITY AND DISCLOSURE

Consistent with the public policy in favor of arbitration as a means of conserving the time and resources of the courts and the contracting parties (see Sablosky v. Edward S. Gordon, 73 NY2d 133 (1989); Mobil Oil Indonesia, Inc. v. Asamera Oil, Ltd., 43 NY2d 276 (1977); Nationwide General Ins. Co. v. Investors Ins. Co. of America, 37 NY2d 91 (1975); Weinrott v. Carp, 32 NY2d 190 (1973); Avon Prods. v. Solow, 150 AD2d 236 (1st Dept. 1989)), the courts have historically afforded great deference to arbitration awards. Thus, the grounds specified in CPLR 7511 for the vacatur of an arbitration award are few in number and are narrowly applied. See Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 7511:2, at 771-772. Because of the laudable purposes of arbitration -- which include a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense, delay and vexation of court proceedings (see, Sperry Intern. Trade, Inc. v. Government of Israel, 532 F.Supp. 901 (S.D.N.Y.), affd. 689 F. 2d 302 (2d Cir. 1982); Eagle Ins. Co. v. Ruiz, 141 Misc.2d 815 (Sup. Ct. Nassau Co. 1988)) – “there is a clear judicial policy in favor of noninterference in this necessary and desirable alternative to litigation for dispute resolution.” Apuzzo v. County of Ulster, 98 AD2d 869, 870 (3d Dept. 1983), affd. 62 NY2d 960 (1984). Accordingly, a party seeking to vacate an arbitrator's award has to meet a heavy burden in order to be successful. See No. Syracuse Cent. School Dist. v. No. Syracuse Educ. Assn., 45 NY2d 195 (1978). Every reasonable intendment is to be indulged in favor of the arbitrator's award. Hershkowitz v. L.B. Kaye Assoc. Ltd., 170 AD2d 272 (1st Dept. 1991). The burden is upon the party claiming an error or defect in the award to support his or her contention fully and by competent, credible evidence. Id.

It has been recognized that “[p]recisely because arbitration awards are subject to . . . judicial deference, it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded.” *Goldfinger v. Lisker*, 68 NY2d 225, 230 (1986). See also, *Shomron v. Fuks*, 286 AD2d 587 (1st Dept. 2001). The “basic, fundamental principles of justice required complete impartiality on the part of the arbitrator and mandate that the proceedings be conducted without any appearance of impropriety.” *Matter of Kern v. 303 East 57th Street Corp.*, 204 AD2d 152, 153 (1st Dept. 1994), citing *Matter of Fischer [Queens Tel. Secretary]*, 106 AD2d 314, 315-16 (1st Dept. 1984). See also *Santana v. Country-Wide Ins. Co.*, 177 Misc.2d 1, 7 (Civil Ct. Queens Co. 1998), affd. 184 Misc.2d 294 (App. Term, 2d Dept. 2000).

SUM Arbitrators

It is, or should be well-known to practitioners in the field of uninsured, underinsured supplementary uninsured motorist coverage that the Superintendent of Insurance of the State of New York has delegated the authority to administer arbitrations of such claims to the American Arbitration Association. See 11 NYCRR § 60-2.4(a). Moreover, the applicable rules and regulations promulgated by the Superintendent provide that individuals are appointed to serve as neutral arbitrators following the recommendation of a screening panel and they serve at the pleasure of the Superintendent. 11 NYCRR § 60-2.4[b][1], [3]. In order to be considered for appointment as an SUM arbitrator, an individual must be an attorney, licensed to practice law in New York State, with at least ten (10) years of experience which qualifies him or her to review and resolve SUM disputes. Such

individual must also disclose to the Superintendent “any circumstance which is likely to create an appearance of bias or which might disqualify such person as an arbitrator.” 11 NYCRR § 60-2.4[b][2], [3]. Once appointed, an arbitrator may not “have any practice or professional connection with any firm or insurer involved in any degree with automobile insurance or negligence law.” 11 NYCRR § 60-2.4[b][4]. Finally, the AAA “Rules for Arbitration of Supplementary Uninsured/Underinsured Motorist Insurance Disputes and Uninsured Motorist Insurance Disputes in the State of New York” (effective October 1, 1998) specifically provide that “No person can serve as an arbitrator in any arbitration in which such person has any financial or personal interest or bias.” (See Rule 9).

The AAA Rules provide that after the appointment of an arbitrator and prior to the commencement of the arbitration hearing, a party shall have the right to challenge the appointment for reasonable cause, which challenge is to be determined by the AAA in a decision which is to be “final and binding” (see Rule 9; see also *Santana v. Country-Wide Ins. Co.*, supra), and that CPLR 7511[b][ii] includes “partiality of an arbitrator appointed as a neutral”¹ as one of the specific grounds upon which an arbitration award may be vacated “if the court finds that the rights of [a] party were prejudiced” thereby.²

Relationship to Parties

One of the most common bases for disqualification of an arbitrator is the existence of some relationship between the arbitrator and a party that may give rise to at least an appearance of partiality, and one of the most common bases for vacatur of an arbitration award is the failure by the arbitrator to disclose facts regarding his or her relationship and/or connections – past or present – to a party to the proceeding.

To be sure, a “mere inference” of impartiality is insufficient to warrant interference with an arbitrator and/or his or her award. See *Rose v. JJ Lowrey & Co.*, 181 AD2d 418, 419 (1st Dept. 1992). And, it is well-settled that “mere occasional associations between an arbitrator and a party . . . will not warrant disqualification of the arbitrator on the ground of the appearance of impropriety” especially when such associations are known and not hidden. See *Artists & Craftsmen Builders, Ltd. v. Shapiro*, 223 AD2d 265, 266 (1st Dept. 1996); *Henry Quentzel Plumbing Supply Co. v. Quentzel*, 193 AD2d 678 (2d Dept. 1993); see also, *Chernuchin v. Liberty Mutual Ins. Co.*, 268 AD2d 521 (2d Dept. 2000) (where the court rejected the insurer’s contention that an \$850,000 award should have been vacated based upon the appearance of impropriety because the arbitrator and one of the attorneys for the claimant [the author] had previously appeared together as CLE lecturers on the same panel).

In *Labenski v. Kraizberg*, 234 AD2d 296 (2d Dept. 1996), the court held that the appellant failed to prove that the arbitrator was prejudiced. As stated by the court, “The mere fact that the arbitrator had previously represented parties opposed to the appellant in a different arbitration proceeding involving some of the same properties is insufficient to permit an inference of prejudice where the parties had explicitly chosen the arbitrator in question, and the representation was known to the appellant prior to the commencement of the arbitration in the matter at bar.” In *Arner v. Liberty Mut. Ins. Co.*, 233 AD2d 321 (2d Dept. 1996), the court noted that a claim relating to the alleged bias of an arbitrator may be waived by proceeding with the arbitration after learning of a prior relationship between the claimant’s counsel and one of the arbitrators. And, in *Rothman v. Re/Max of New*

York, Inc., 183 Misc.2d 402 (Sup. Ct. Suffolk Co. 1999), revd. on other grounds, 274 AD2d 520 (2d Dept. 2000), the court noted that “A party who knows of a relationship between his adversary and the arbitrator and nevertheless assents to the choice of that arbitrator waives his right to later object.”

Yet, when it is demonstrated that the arbitrator and the party (or witness) actually have some ongoing relationship (see, Artists & Craftsmen Builders, Ltd. v. Shapiro, supra; Henry Quentzel Plumbing Supply Co. v. Quentzel, supra), or the connection between the arbitrator and the party, although in the past, was particularly strong, disqualification and/or vacatur may be deemed appropriate. See In re Conley [Ambach], 61 NY2d 685 (1984) (an arbitrator must be free of both actual bias and the appearance thereof; accordingly, the Chairman of an arbitration panel who accepted a remunerative position with a union involved in the arbitration should have been disqualified).

In any event, the failure to reveal such a relationship will usually constitute grounds for disqualification and/or vacatur. As stated by the Court of Appeals in J.P. Stevens & Co. v. Rytex Corp., 34 NY2d 123 (1994), “in the interest of fairness . . . all arbitrators before entering upon their duties should make known any relationship direct or indirect that they have with any party to the arbitration, and disclose all facts known to them which might indicate any interest or create a presumption of bias.”

Still, even in such circumstances, there is no bright-line rule, and each case must be decided on its own facts and merits. For example, in Cross Properties, Inc. v. Gimbel Bros., Inc., 15 AD2d 913 (1st Dept. 1962), affd. 12 NY2d 606 (1962), the court rejected the notion that “any undisclosed relationship, no matter how peripheral, superficial or

insignificant,” compelled the disqualification of an arbitrator or the vacatur of his or her award.

In that case, the unsuccessful party in arbitration argued in support of vacatur of the award, inter alia, that there had been an improper and inappropriate relationship between the arbitrator and the Respondent which had not been disclosed. In refusing to vacate the award, the court noted as follows:

“The type of relationship which would appear to disqualify is one from which it may not be unreasonable to infer an absence of impartiality, the presence of bias or the existence of some interest on the part of the arbitrator in the welfare of one of the parties.

“While there was a ‘relationship’ here between the respondent and the arbitrator, we find it not to be a disqualifying one. The transactions between them were isolated and involved nothing of such a nature as would cause [the arbitrator] to act other than with the requisite impartiality. The nature and magnitude of the real estate company with which [the arbitrator] was affiliated would make it most likely that at one time or another there would be some contact with [the respondent]. Whether or not [the arbitrator] disclosed such relationship to the tribunal clerk is of no consequence. The rules of the arbitration association required a disclosure only if the circumstances were ‘likely to create a presumption of bias’ or were such as would make the arbitrator believe ‘might disqualify him as an impartial arbitrator.’ In the light of the nature of the relationship a failure to disclose would not have been violative of the rules.”

Seligman

It was against this backdrop that Justice Peter B. Skelos found himself called upon to decide the interesting and important recent case of Seligman v. Allstate Insurance Company, ___ Misc.2d ___, 756 NYS2d 403 (Sup. Ct. Nassau Co. 2003). Therein, the Claimant moved, pursuant to CPLR 7511[b][1], for an Order vacating an SUM arbitration award rendered against him by one of the professional AAA SUM arbitrators. Claimant alleged that his right to a fair and impartial arbitration hearing had been violated by reason of the fact that the arbitrator (and the AAA, as well as the Respondent insurer), failed to disclose to him the fact that the arbitrator had been “a long-time employee” of that insurer. Specifically, it only became known to Claimant’s attorney after they received the adverse ruling that the arbitrator had, in fact, been employed as a senior trial attorney for the Respondent insurer for a period of 20 years, 25 years ago (i.e., from 1958-1977). [It was also suggested (albeit not ultimately established) that the arbitrator was still receiving a pension from the insurer].

Although there was no proof that the arbitrator was employed at the time of the arbitration in any way that violated the Regulations’ proscription of “any practice or professional connection with any firm or insurer involved in any degree with automobile insurance” (11 NYCRR § 60-2.4[b][4]), Justice Skelos found that the Claimant had been foreclosed by the arbitrator’s non-disclosure of his prior relationship “from making an inquiry into the nature of his prior employment.” Accordingly, Justice Skelos found that Claimant did not waive his right to later challenge the designation of the arbitrator by not voicing a challenge before the hearing. He also noted that “While the courts recognize some obligation on the part of the parties to the arbitration to ascertain the potentially

disqualifying facts, the ultimate burden falls upon the one with personal knowledge of those facts.”

Because the arbitrator (and the AAA) had a duty to disclose “any facts within their knowledge which might in any way support an inference of bias” in order “to protect the integrity of the arbitral process,” and because “[a]n existing or past attorney-client-relationship requires disclosure [citation omitted] in order to afford the parties the opportunity to make an independent judgment as to whether the past relationship should serve as a basis to challenge the arbitrator,” Justice Skelos concluded that “a twenty year relationship is not so trivial as to preclude disclosure even with the twenty-five year gap Under these circumstances, the arbitrator’s award must be vacated by reason of the non-disclosure of his past long-term relationship with [the Respondent insurer].”

ENDNOTES

1. The standard of complete impartiality refers, of course, to arbitrators appointed as neutrals, as opposed to party-selected arbitrators in tripartite arbitrations. In Meehan v. Nassau Community College, 243 AD2d 12 (2d Dept. 1998), lv. to appeal denied, 92 NY2d 814 (1998), the court noted that “The terms of CPLR 7511(b)(ii), which specify that the ‘partiality’ of an arbitrator ‘appointed as a neutral’ may be a basis for vacatur, imply that the ‘partiality’ of a party-designated member of an arbitral board may not be the basis for vacatur The law recognizes the practical reality that, in a standard tripartite arbitration, ‘each party’s arbitrator is not individually expected to be neutral’ (Matter of Astoria Med. Group v. Health Ins. Plan of Greater NY, 11 NY2d 128, 134).”

2. It is axiomatic that “Prior to vacating any award the court must make a threshold determination that the rights of the party seeking to vacate the award were prejudiced.” Thermasol, Ltd. v. Dreiske, 78 AD2d 838 (1st Dept. 1980). “A party who seeks to vacate an arbitration award based on one of the enumerated statutory grounds must satisfy the additional requirement of showing that the defect in the conduct of the arbitrator or of the proceedings prejudiced his rights”. Indeed, the very language of the statute itself makes clear that a showing of prejudice is required. “An attack based upon the ground of partiality . . . requires a showing of prejudice to the aggrieved party as a result of the arbitrator’s actual partiality or the appearance of such partiality.” See Artists & Craftsmen Builders, Ltd. v. Schapiro, 232 AD2d 265 (1st Dept. 1996), quoted in Landro v. D’Amond, 180 Misc.2d 420 (N.Y.C. Civ. Ct. 1998).