DISQUALIFYING AN OPPOSING PARTY-ARBITRATOR *BEFORE* THE ARBITRATION

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Arbitration as a dispute resolution device is becoming increasingly common in insurance coverage and other insurance disputes. It is commonplace in reinsurance disputes. The two parties' own arbitrators are rarely the ideal choice of the other side. There is usually little an opponent can do about that choice. Typically, the opponent must await the outcome of the arbitration and challenge the result on the basis of Section 10 of the Federal Arbitration Act[1] or a similar state provision. Section 10 allows vacation of an award based on an arbitrator's "evident partiality."

But what if the opponent's party-arbitrator has such a close relationship with the opponent or dispute as to call his or her impartiality into question and that relationship is immediately apparent? The variety of circumstances which might caution against simply accepting the party-arbitrator include:

- The arbitrator worked for the party.
- The arbitrator handled the same issue to be resolved in the arbitration, either for the party or for someone else.
- The arbitrator drafted the contract or clause to be interpreted in the arbitration.
- The arbitrator has been a witness, or has published articles, on the issue to be resolved in the arbitration.
- The arbitrator has a substantial ongoing business relationship with the party.
- The arbitrator declines to disclose his or her connections with the party.

Must the party go through the time and expense of the arbitration and then challenge the "evident partiality" of the opposing party's arbitrator? Or do judicial remedies permit pre-award review of an arbitrator's credentials?

While the general rule is that pre-arbitration challenges to a panel can be addressed solely by the panel itself, there are exceptions to that rule. This article discusses the procedural and substantive issues presented when a party wishes to challenge an opponent's party-arbitrator before the award is entered.

Review The Contract Language

A party who seeks to make a pre-award challenge to an opposing party-arbitrator must first examine the language setting forth arbitrator qualifications in the policy or contract. Ordinarily, terms such as "impartial" or "neutral" are used to describe all three panelists, but not always. The "impartiality" or "neutrality" requirement may be imposed solely upon the "neutral" and not the entire panel, or the requirement may be omitted entirely. The challenging party has a much stronger case if the arbitration

clause specifically demands neutrality or impartiality from the arbitrator who is being challenged.

As another basis for challenge, the arbitration clause may require the arbitrators to be "a current or former insurance executive" or may require that they have other specific qualifications or experience which is pertinent to the coverage issue in dispute. When the challenged arbitrator falls outside those described qualifications, a court might be more willing to hear a pre-award challenge to that arbitrator[2].

Still another alternative is if the arbitration clause itself can be considered to be structurally biased. In Bennish v. North Carolina Dance Theater, Inc.,[3] the arbitration agreement allowed an employer to appoint two representatives of the panel, while the employee was allowed only to appoint one. The Court of Appeals granted the employee pre-arbitration relief by directing the trial court to appoint a neutral arbitrator in place of one of the two employer-appointed panelists. Bennish may be an extreme example of built-in pre-award bias, but it does show that a court has some ability to fashion pre-award relief rather than require the parties to submit to an arbitration which is destined to be vacated for partiality.

The Standard To Challenge An Arbitrator For Partiality

Those relatively few cases which have considered pre-award challenges to an arbitrator generally rely upon the standards used by courts to determine the arbitrator's "evident partiality" after the award. To vacate an award on the grounds of the arbitrator's "evident partiality", the party must show that "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[4] Because it is usually impossible to demonstrate collusion, the challenging party need not show actual bias[5]. Nevertheless, proof of the arbitrator's bias must be "direct and definite" rather than speculative[6].

The factors courts consider include: (1) the arbitrator's financial interest in the proceeding; (2) the nature of the alleged relationship between the arbitrator and the party; and (3) whether that relationship existed at the time of the proceeding[7].

An Arbitrator's Non-Disclosure Of Facts Supporting Bias Is Judged Harshly

Where the arbitrator does not disclose a substantial relationship with a party, a lower "appearance of bias" standard applies[8]. In a widely-cited case, the United States Supreme Court encouraged arbitrators to make full disclosure of direct and indirect relationships with the parties at the outset of the proceedings, "when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity."[9] The failure to provide this information alone is not often used to set aside awards after the fact[10], although it has been so used on occasion[11]. Courts generally look to other factors in addition to the non-disclosure, such as arbitrator misconduct, to show "evident partiality" to justify vacating the award[12].

Of course, these "non-disclosure" authorities were decided after the award was entered and when courts are reluctant to set aside the results of considerable party and panel effort. A court faced with a pre-award challenge to an arbitrator based on his or her non-disclosure of facts indicating bias may be inclined to follow a different rule, since the objection can easily be cured by the arbitrator's full disclosure[13].

Lower Standards Apply To Party-Appointed Arbitrators

Some cases have indicated that a party-designated arbitrator in a tripartite arbitration should not be "neutral in the same sense as a judge or neutral umpire."[14] However, this does not mean that a party-arbitrator need make no efforts at fairness or impartiality[15].

Courts Can Entertain Pre-Award Challenges To Arbitrators, But The Circumstances Are Relatively Limited

A leading arbitration treatise notes that the case law is not uniform on the authority of a court to entertain a pre-award challenge to arbitrators[16]. Some courts view themselves as strictly appellate tribunals as far as arbitration awards are concerned, and are reluctant to intervene in the arbitration process at any point before review of the award. These courts reason that pre-award challenges to the panel could delay the arbitration proceedings and lose much of the efficiency advantage this alternative dispute mechanism has[17]. Other courts consider these challenges in limited circumstances, because the prospect of proceeding with an arbitration which is doomed to be vacated for bias does not foster efficiency.

Several authorities have held that the refusal of an allegedly partial arbitrator to step down or of an arbitration panel to compel the arbitrator to do so is not reviewable before the entry of an award[18]. In Tamari v. Bache & Co.[19], the Seventh Circuit declined to issue injunctive and declaratory relief at the request of a party who had alleged, *inter alia*, that the arbitrators were operating under a conflict of interest[20]. The court described that objection as "premature." It also commented that "the district court lacked authority to interfere with arbitration proceedings already in progress."[21]

However, there is contrary authority which suggests that a court has the inherent authority to appoint a neutral arbitrator or force a biased arbitrator to step down "when the potential bias of a designated arbitrator would make arbitration proceedings simply a prelude to later judicial proceedings challenging the arbitration award."[22] . Even a case following the rule against pre-award challenges to arbitrator partiality acknowledged that "[a]bsent extraordinary circumstances not present here, such a finding [of evident partiality] must necessarily come after the conclusion of proceedings."[23] This comment implies that some courts will recognize the authority to act before an award, even if that authority is limited to use in "extraordinary circumstances."

One court, describing as "unsettled" the law governing judicial power to remove arbitrators before the entry of an award, held that it had such power to remove a party-appointed arbitrator before an award "in the context of allegations of overt arbitrator misconduct."[24] In that case, the party's arbitrator reviewed the party's documentation before the arbitration, and accepted "hospitality" from the party during pre-arbitration discussions of the case at the party's corporate headquarters[25].

Other situations have also supported pre-award relief. In Third National Bank in Nashville v. WEDGE Group, Inc.,[26] the court ordered appointment of a neutral arbitrator in place of the designated accounting firm which had an ongoing accountant-client relationship with one of the parties. In Erving v. Virginia Squires Basketball Club,[27] the court affirmed an injunction removing as the sole arbitrator the Commissioner of the American Basketball Association (who was designated by contract) whose law firm represented one of the parties to the dispute. And in Cristina Blouse Corp. v. Int'l. Ladies Garment Workers' Union, Local 162,[28] the court entered a pre-award order directing the appointment of a neutral arbitrator in the stead of an arbitrator who was a former lawyer for one of the parties.

It is beyond the scope of this brief article to catalog the situations in which a court has considered an arbitrator to be or to have been "partial." Nevertheless, before a party consider a pre-award court challenge to an opposing party's arbitrator, full research of the post-award "partiality" decisions should be undertaken, to determine whether the facts known to the challenging party would fit within those cases in which an award has been vacated on partiality grounds.

Does A Party Risk Waiving An Arbitrator's Partiality By Proceeding With The Arbitration?

Some courts have held that a party to an arbitration may waive grounds to vacate the award if it, with full knowledge of the grounds to object, participates in the proceedings without objection[29]. For example, in Kiernan v. Piper Jaffray Companies, Inc.,[30] the losing party was held to have waived its right to challenge an arbitrator's impartiality when it knew about prior relationships between the arbitrator and the opponent, but proceeded with the arbitration and did not object to the arbitrator until after the award was entered. The challenging party's counsel was aware of some details of this relationship but wrote to opposing counsel stating that he had "no choice" but to allow the arbitrator to participate in the decision, because the opponent would not stipulate to a decision by two arbitrators.

Another factor to be considered is the application of any waiver rules in the procedural rules governing the arbitration itself. In York Research Corp. v. Landgarten,[31] the court interpreted a rule of the American Arbitration Association[32] to state that a party who, with knowledge of grounds to object to an arbitrator before the hearing, fails to state those grounds before the hearing has waived them.

One Seventh Circuit case has suggested that if a party makes the appropriate objections before the award, it does not waive them simply by participating in the hearing. In Health Services Management Corp. v. Hughes,[33] the court stated that a litigant should state objections to the arbitrator's partiality for the record, knowing that they might be overruled, and the hearing continued over objection. It commented that these acts would preserve objections for the purpose of later moving to vacate the award.[34]

A party's ability to preserve later partiality objections is a factor which a court should consider in deciding whether to entertain a pre-award challenge to an arbitrator. If the governing authority in the applicable jurisdiction holds, like Kiernan and similar cases, that the objecting party waives those objections by proceeding with the arbitration, then the court should entertain the pre-award challenge. Otherwise, there will be no remedy to the aggrieved party who is unable to persuade the challenged arbitrator to step aside voluntarily or to persuade the opponent to designate a replacement.

Conclusions

The case law provides some support for an action to remove an opposing party's arbitrator for bias before the award, although it may be limited. Before considering whether to undertake such a challenge, a party should consult the law in the jurisdiction in which the challenge is to be brought[35]. The law in the Second Circuit, for example, seems particularly unreceptive to these challenges.

If the jurisdiction for the pre-award challenge is not unfavorable, the party must look to the relevant "partiality" jurisprudence to see whether the facts known about the opposing party's arbitrator would support a finding of partiality, non-disclosure and/or misconduct.

Finally, the party must weigh the practical effects of making such a pre-award challenge. The disadvantages are that: (1) a court could follow those cases which discourage pre-award review; (2) a

court may apply a relatively high standard of proof to disqualify a party arbitrator; (3) the proceedings to challenge the party arbitrator could delay the arbitration; and (4) the proceedings, if unsuccessful, may make the challenged arbitrator's sympathies or cooperation even more difficult to obtain.

However, if the challenging party has specific evidence to support a claim of bias, the case law provides some limited support for a pre-award challenge. This case law may not be honored in all jurisdictions, but it is far from a foregone conclusion that any particular court will simply decline to intervene in such a dispute as a matter of principle. The possibility of obtaining relief alone may give the challenging party some leverage in convincing the opponent to appoint a new arbitrator, or may even encourage a settlement of the entire dispute, which may be the best outcome of all.