SQUIRE PATTON BOGGS

Vacating an Arbitration Award for Evident Partiality Just Got Harder

Vacating an arbitration award has always been tough. The Federal Arbitration Act only has limited bases to seek vacatur. One of those bases is when there is "evident partiality" by the arbitrator. 9 U.S.C. § 10(a)(2). In "traditional" reinsurance arbitrations, the arbitration panel includes two party-appointed arbitrators, each of whom may be predisposed toward the position of the party that appointed them, and a third arbitrator or umpire, who is neutral. Where there is a challenge to an arbitration award rendered by an arbitration panel that includes party-appointed arbitrators that are not required to be neutral, what does the challenging party need to show to obtain vacatur based on evident partiality? In other words, what is the standard or burden of proof? Is it based on the standard governing neutral arbitrators, or should there be a higher standard of proof needed when there are party -appointed arbitrators? The Second Circuit Court of Appeals has now answered that question.

In *Certain Underwriting Members of Lloyd's of London v. State of Florida, Department of Financial Services*, No. 17-1137, 2018 U.S. App. LEXIS 15377 (2d Cir. Jun. 7, 2018), the district court had vacated a reinsurance arbitration award in the cedent's favor based on evident partiality of the cedent's party-appointed arbitrator for failure to disclose close relationships with parties associated with the cedent. The district court found that the arbitrator's pre-existing and concurrent relationships with the cedent's representatives were considerably more extensive than what the arbitrator disclosed. The district court held that the failure to disclose those relationships were significant enough to demonstrate evident partiality.

In reversing and remanding the case for reconsideration by the district court, the circuit court found that the district court weighed the arbitrator's conduct under the standard governing neutral arbitrators. the Second Circuit 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 appointed party."

The court noted that while evident partiality will be found where a reasonable person would have to conclude that an arbitrator was partial to one party in the arbitration, the challenging party must prove the existence of evident partiality by clear and convincing evidence. The court distinguished between what must be shown in a neutral arbitration setting from a party-appointed setting. In determining that there will now be a distinction in the Second Circuit between party-appointed and neutral arbitrators in considering evident partiality challenges, the court stated that "[e]xpecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution. " In other words, because reinsurance parties continue to seek out arbitral panels with expertise by using party-appointed arbitrators who are expected to serve as *de facto* advocates, the degree of partiality tolerated is set in part by the parties' contractual bargain.

The distinction, held the court, "is salient in the reinsurance industry, where an arbitrator's professional acuity is valued over stringent impartiality." But, said the court, "a party-appointed arbitrator is still subject to some baseline limits to partiality." For example, an undisclosed relationship is material if it violates the arbitration agreement. If, in this case, the party-appointed arbitrator had a personal or financial stake in the outcome, it would violate the "disinterested" qualification in the arbitration clause. Also, if the undisclosed fact results in a prejudicial effect on the award, it is material and warrants vacatur. But 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."

On remand, the district court is charged with determining whether the reinsurers have shown by clear and convincing evidence that the failure to disclose by the cedent's part-appointed arbitrator either violates the qualification of disinterestedness or had a prejudicial impact on the award. This might require further proceedings.

Notably, the same "expertise" that the Second Circuit discusses that comes with using party-appointed arbitrators in reinsurance disputes is still available to the parties by using the ARIAS•U.S. Neutral Panel Rules, but without the heightened scrutiny now required when challenging an award for evident partiality where the arbitrator is party-appointed and non-neutral.

Contacts

Larry P. Schiffer
Partner, New York
T +1 646 557 5194
E larry.schiffer@squirepb.com