



## The Second Circuit Court Differentiates the Standard for Determining Evident Partiality for a Neutral Arbitrator and a Party-Appointed Arbitrator

On June 7, 2018, the Second Circuit Court in Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs.,<sup>1</sup> held that a party-appointed arbitrator should not be held to the same standard as a neutral arbitrator. The Court vacated a district court's order vacating an arbitral award in a reinsurance dispute between Insurance Company of Americas ("ICA") and Certain Underwriting Members of Lloyds of London ("Underwriters"). The case was one of first impression for the Second Circuit on how to determine the standard of evident partiality challenged to a party-appointed arbitrator.

Underwriters reinsured ICA under a series of treaties. The treaties each contained an arbitration clause requiring that disputes be adjudicated by an arbitration panel consisting of three members: one party-appointed arbitrator for each party, and a neutral. The clause required only that the arbitrators "be active or retired disinterested executive officers of insurance or reinsurance companies or Lloyd's London Underwriters."

When Underwriters denied ICA's claims for coverage under the treaties, ICA demanded arbitration. ICA and Underwriters each selected their party-appointed arbitrator and the party-appointed arbitrators selected the neutral umpire. Prior to the start of the arbitration, the parties had a meeting where each arbitrator was called upon to disclose pre-existing or concurrent relationships with a party. At the meeting, ICA's party-appointed arbitrator disclaimed any appreciable link to ICA.

The arbitration was held and the panel issued an award in favor of ICA (the "Award"). Following the Award, Underwriters discovered that ICA's party-appointed arbitrator failed to disclose additional relationships and connections it had with ICA in the past. Underwriters moved to vacate the Award on several grounds, including "evident partiality" on the part of ICA's party-appointed arbitrator.<sup>2</sup> ICA cross-moved to confirm the Award.

The district court vacated the Award, concluding that ICA's party-appointed arbitrator was impermissibly partial to ICA. Using a reasonable person standard, the district court found that there was "evident partiality" because a reasonable person would have to conclude that the arbitrator was partial to ICA.<sup>3</sup> The district court noted "that the relationships here are far more significant, more numerous, and involved more financial entanglements than are present in other cases from this Circuit." ICA appealed.

The Second Circuit Court held that the district court applied the wrong standard for evident partiality. Unlike neutral arbitrators, party-appointed arbitrators are *de facto* advocates. As a result, "[t]he ethos of neutrality that informs the selection of a neutral arbitrator to a tripartite panel does not animate the selection and qualification of arbitrators appointed by the parties." The Court also notes that arbitration is a creature of contract and parties are free to choose for themselves what level of impartiality they require. Here, the only qualification the parties agreed to in the treaties was that the party-appointed arbitrator be "disinterested." In light of what the parties agreed, the court stated, "[e]xpecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution." The Court determined that the "disinterested" standard found in the treaties is breached only when the party-appointed arbitrator had a personal or financial stake in the outcome of the arbitration.

<sup>1</sup> No. 17-1137-CV, 2018 WL 27274982 (2d Cir. June 7, 2018)

Accordingly, the Court created a two-part test to determine when an undisclosed relationship between a party and its party-appointed arbitrator constitutes evident partiality, such that vacatur of the award is appropriate: 1) the relationship violates the contractual requirement of disinterestedness; or 2) it prejudicially affects the award. The Court remanded to the district court to determine whether Underwriters has shown by clear and convincing evidence that the failure of ICA's party-appointed arbitrator either violates the qualification of disinterestedness or had a prejudicial impact on the award.

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<sup>2</sup> 9 U.S.C. § 10(a)(2) of the Federal Arbitration Act states: "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-- ... (2) where there was *evident partiality* or corruption in the arbitrators, or either of them...." (Emphasis added).

<sup>3</sup> "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." Certain Underwriting Members of Lloyds of London, at \*3 citing Morelite Const. Corp. v. New York Dis. Council Carpenters Ben. Funds, 748 F.2d 79, 82 (2d Cir. 1984). "The party challenging the award must prove the existence of evident partiality by clear and convincing evidence." Id.