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ARBITRATION

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Disqualification of Arbitrators: Before or After the Award?

Disqualification of an arbitrator for bias or other impropriety may have profound effects on the conduct of an arbitration proceeding. If disqualification occurs before arbitration hearings commence, the process may be disrupted and delayed. If, on the other hand, disqualification does not occur until after the tribunal renders an award, the entire dispute resolution effort may be wasted (if the arbitrator is, in fact, disqualified, and the award must be vacated).

These two divergent approaches to arbitrator disqualification are embodied in the federal and New York state case law on arbitration. The divergence in these authorities illustrates the diversity in application of arbitral procedure, made possible by the existence of separate federal and state arbitration procedural rules.

The Federal Approach

In general, under the Federal Arbitration Act (FAA), review of the conduct of arbitration proceedings is an after-the-fact matter, akin to an appeal (but with a much more relaxed standard of review). After an arbitral tribunal renders an award, a party aggrieved may seek vacatur of the award, on one or more enumerated grounds.[1] Although the FAA permits pre-award applications to the courts for relief, such applications are generally confined, under the terms of the statute, to petitions "for an order directing that [] arbitration proceed in the manner provided for in [the parties'] agreement[,]" and "application[s] [by] either party to…the court [to] designate and appoint an arbitrator or arbitrators[.]"[2]

The limited availability of pre-award relief under the FAA is consistent with one of the main goals of arbitration, "to expedite the disposition of commercial disputes without the restrictive conditions characteristic of judicial proceedings."[3] As such, federal arbitration law has developed to promote "a minimum of judicial interference" in the arbitral process.[4] Federal courts have recognized that applications to disqualify an arbitrator before an award is rendered may create undue judicial interference, which "would tend to defeat the very purpose" of such arbitration agreements.[5] To prevent interruption of the arbitral process, federal courts have "consistently held that courts do not have the power under the FAA to disqualify an arbitrator while proceedings are pending."[6] The courts have indicated that "questions of bias typically are for the arbitrator in the first instance,"[7] while the court's "power to deal with bias is limited to setting aside the award after it has been rendered."[8] This approach comports with the fact that the rules for many arbitration-sponsoring institutions permit applications to the sponsoring organization for disqualification of an arbitrator.[9]

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The after-the-fact federal approach to review of disqualification decisions combines with a relatively stringent standard for determining whether an arbitrator should be disqualified. The FAA permits vacatur of an award, where procured by "corruption, fraud, or undue means."[10] Federal courts have interpreted the "undue means" language of the FAA as requiring some type of "bad faith behavior" by the winning party; the term "connotes behavior that is immoral if not illegal."[11] Separately, the FAA permits vacatur "where there was evident partiality or corruption in the arbitrators[.]"[12] Again, the standard is quite high. The party seeking vacatur must show more than an "appearance" of bias; "[t]he alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator."[13]

The New York Approach

Despite the consistent after-the-fact approach of the federal courts applying the FAA, New York state courts applying the state arbitration law have taken a different view, following the lead of the New York Court of Appeals in *Astoria Medical Group v. Health Ins. Plan.*[14]

In *Astoria Medical*, the court answered the "inten[s]ely practical question" of whether "one party to a typical tripartite arbitration agreement [can] have the court intervene, before an award has been made, and disqualify the arbitrator designated by the other party because of his asserted personal interest and partiality." The claimants objected to the arbitrator designated by the respondent, alleging that he was one of the incorporators of the respondent, and its past president, and was, at the time of the arbitration, a member of its board of directors and one of its paid consultants. Claimants moved for an order (1) disqualifying the arbitrator on the ground of "personal interest, bias and partiality" arising out of his relationship with the respondent and (2) requiring the respondent to designate an "impartial arbitrator."[15]

The New York High Court was "persuaded that, in an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered."[16] The court explained that arbitration is a creature of contract and that the court was simply "called upon to interpret the contract in order to resolve a question as to who may sit on the arbitral tribunal." The court examined the contract to determine whether the respondent's appointed arbitrator satisfied the terms of the agreement—despite any partiality. The court also reviewed New York case law and public policy, and determined that "an arbitrator may not be disqualified solely because of a

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relationship to his nominator or to the subject matter to the controversy," however, he may not be "deaf to the testimony or blind to the evidence presented. Partisan he may be, but not dishonest."[17] The *Astoria Medical* court explained that to disqualify a party-appointed arbitrator, the claim "must be based on something overt, some misconduct on the part of an arbitrator, and not simply on his interest in the subject matter of the controversy or his relationship to the party who selected him."

Since the decision in *Astoria Medical*, New York courts have taken the view that "[t]he law is well-settled that 'in an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered'" where "there exists a real possibility that injustice will result."[18] New York courts have justified interruption of an arbitration proceeding to "consider an application of a party challenging the misconduct or bias of the arbitrator," because "basic, fundamental principles of justice require complete impartiality on the part of the arbitrator and mandate that the proceedings be conducted without any appearance of impropriety."[19] New York courts often cite the decision in *Rabinowitz v. Olewski*, that "[t]he proper standard of review for the disqualification of arbitrators is whether the arbitration process is free of the appearance of bias."[20] Such bias, however, "must be clearly apparent based upon established facts, not merely supported by unproved and disputed assertions."[21]

For example, New York courts have held that allegations that an arbitrator's prior rulings are generally insufficient to establish the appearance of bias.[22] Likewise, where an arbitrator issues a "warning" as to how she "would likely rule on the issue, given her understanding of the facts prior to the written submissions…[such warning] does not amount to a showing of bias, or even the appearance of bias."[23]

By contrast, in *Rabinowitz*, after the claimant submitted his claim against respondent to the Diamond Dealers Club Inc. (DDC), for arbitration, but before arbitration commenced, a "disparaging letter" concerning claimant surfaced in the DDC. The letter, written in Hebrew, linked the claimant to the Palestine Liberation Organization and accused him of committing various criminal acts in the United States and in the state of Israel. The letter was circulated among the membership of the DDC, a predominantly Jewish organization, including those who might serve as arbitrators. The court held that "the devastating impact of this letter to a predominantly Jewish organization [could] not be overemphasized. Plaintiffs should not be required to arbitrate their claims in such a charged atmosphere."[24] Similarly, in *Uniformed Firefighters Assoc., Local 287 v. City of Long Beach*, the court upheld a pre-award order disqualifying the arbitrator where "the petitioner's attorney and the appointed arbitrator were former law partners whose relationship disintegrated and culminated in a lengthy and acrimonious judicial dissolution."[25]

Potential Pre-Emption Issue

Part of the reason for the divergent federal and New York State approaches to arbitrator disqualification is that while the FAA requires enforcement of arbitration agreements within its scope, the FAA does not pre-empt varying procedures in state arbitration laws or command any specific form of state procedure code, for purposes of enforcing arbitration agreements.[26] As the U.S. Supreme Court has pointed out, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."[27]

Thus, for example, state law defenses to the enforcement of contracts, so long as they are "generally applicable" to all contracts, may be applied without contravening the FAA.[28] Similarly, although premature consideration of arbitrator disqualification motions (under the New York approach) "can be highly disruptive to the expeditious arbitration process fostered by the FAA,"[29] the FAA itself does not mandate that state arbitration code drafters (or state courts) must adopt procedures that are identical to those in the federal courts. Thus, to the extent that parties choose New York law as the governing law in their arbitration agreements, pre-award motions to disqualify are probably not subject to pre-emption, even if, arguably, such motions may interfere with expedited resolution of claims so often characterized as integral to the arbitration process.

1. See FAA, §10 (listing potential grounds for vacatur). In addition, an implied ground, "manifest disregard" of law has often been referenced by the courts. See Steven C. Bennett, "Excessive Punitive Damages Award May Constitute 'Manifest Disregard' of Law," 2003:1 Stockholm Arb. Rep. 348.

2. See FAA, §§4-5. Federal courts have also noted the power of courts to entertain applications for preliminary relief, in aid of an arbitration proceeding, *Castle v. Wells Fargo Financial, Inc.*, 2007 WL 703609, at * 2 (N.D. Cal. March 5, 2007), and courts have suggested that §4 of the FAA (which authorizes enforcement of valid arbitration agreements) also authorizes courts to declare the opposite (i.e., that there is no valid arbitration agreement, and that arbitration thus may be prohibited). *Matterhorn v. NCR Corp.*, 763 F2d 866, 868-69 (7th Cir. 1985).

3. *In re Dover Steamship Co.*, 143 FSupp 738, 740-41 (D.C.N.Y. 1956).

4. *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 FSupp2d 926, 935 (N.D. Cal. 2003).

5. *In re Dover Steamship Co.*, 143 FSupp at 740-41.

6. *Argonaut Ins. Co.*, 264 FSupp2d at 935.

7. *Roth v. Carvel Corp.*, 905 FSupp 196, 198 (SDNY 1995).

8. *In re Dover Steamship Co.*, 143 FSupp at 742.

9. See, e.g., AAA Commercial Dispute Resolution Procedures, Rule 17.

10. FAA, §10(a)(1).

11. *Barcume v. The City of Flint*, 132 FSupp. 2d 549, 556 (E.D. Mich. 2001) (internal quotations omitted).

12. FAA, §10(a)(2).

13. *Barcume*, 132 FSupp2d at 557 (internal quotations omitted).

14. *Astoria Medical Group v. Health Ins. Plan*, 11 NY2d 128 (1962).

15. *Astoria Medical*, 11 NY2d at 131-32.

16. *Astoria Medical*, 11 NY2d at 132.

17. Id. at 133-37.

18. *Rabinowitz v. Olewski*, 473 NYS2d 232, 234 (2d Dept. 1984) (citing *Astoria Medical*, 11 N.Y. 2d 128, 132); see also *Nationwide Mutual Ins. Co. v. Michaels*, __NYS2d__, 2006 WL 3759560, at *1 (4th Dept. Dec. 22, 2006) (same); *Bronx-Lebanon Hospital Ctr. v. Signature Medical Mgmt. Group LLC*, 775 NYS2d 279, 280 (1st Dept. 2004) (affirming the trial court's denial of defendant's motion to disqualify the arbitrator); *Excelsior 57th Corp. v. Kern*, 630 N.Y.S.2d 528, 529-30 (1st Dept. 1995) (reversing the trial court's ruling that petitioner was judicially estopped from asserting that the respondents' appointed arbitrator was biased, noting that "in an appropriate case, the courts have inherent power to disqualify an arbitrator before an award has been rendered where there is a real possibility that injustice will result.") (internal quotations omitted). At least one New York court has expressed the view that authority to entertain pre-award motions to disqualify an arbitrator is "limited, if not doubtful." *Gilmore v. Zurich Ins. Co.*, 455 N.Y.S.2d 903, 904 (Sup. Ct. N.Y. Co. 1981).

19. *Uniformed Firefighters v. City of Long Beach, Local 287*, 762 N.Y.S.2d 819, 819 (2d Dept. 2003) (internal quotations omitted).

20. *Rabinowitz*, 473 N.Y.S.2d at 234; see also *Nationwide Mutual Ins. Co.*, 2006 WL 3759560, at *1 (citing *Rabinowitz*) *Uniformed Firefighters Assoc.*, 762 N.Y.S.2d at 819 (citing *Rabinowitz*); *Excelsior 57th Corp.*, 630 N.Y.S.2d at 495 (citing *Rabinowitz*).

21. *Bronx-Lebanon Hospital Ctr.*, 775 N.Y.S.2d at 280.

22. *Nationwide Mutual Ins. Co. v. Michaels*, 2006 WL 3759560, at *1; see also *County of Niagara v. Bania*, 775 N.Y.S.2d 744, 745-46 (4th Dept. 2004) (holding that arbitrator's rulings that allegedly reflected partiality in favor of one party were insufficient to establish actual bias or appearance of bias).

23. *Bronx-Lebanon Hospital Ctr.*, 775 N.Y.S.2d at 281.

24. *Rabinowtiz*, 473 N.Y.S.2d at 233-34.

25. 763 NYS2d 819.

26. See *Hayes v. County Bank*, 811 N.Y.S.2d 741 (2d Dept. 2006) (FAA creates body of substantive, not procedural, law); *Ames v. Garfinkle*, 2006 WL 304796 (N.Y. Cty. Sup. Ct. Jan. 26, 2006) (state procedure regarding bases for vacatur of award applied, despite claim of preemption).

27. *Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Jr. Univ.*, 489 US 468, 476 (1989).

28. *Doctor's Assoc., Inc. v. Casarotto*, 517 US 681, 687 (1996).

29. *Argonaut Ins. Co.*, 264 FSupp2d at 936.