

February 7, 2012

Second Circuit Reinstates Arbitration Award Obtained By Chadbourne for Travelers; Finds No "Evident Partiality"

On February 3, 2011, a panel of the Second Circuit Court of Appeals unanimously concluded in *Scandinavian Reinsurance Co. v. St. Paul Reinsurance Co.*, 10-0910-cv, that the failure of two arbitrators on a tripartite arbitration panel "to disclose their simultaneous service as arbitrators in another proceeding" did not manifest bias and was an insufficient basis upon which to vacate a final arbitral award, even where the second (undisclosed) proceeding involved "a common witness, similar legal issues, and a related party." Slip op. at 1. The Second Circuit reversed the district court which had found that the two arbitrators' overlapping service "constituted a 'material conflict of interest'" requiring disclosure to the parties. The district court had also ruled that the arbitrators' nondisclosure was indicative of "evident partiality." The Second Circuit not only rejected the district court's rulings, but went further and remanded the matter to the district court with instructions to confirm the underlying arbitral award that St. Paul Fire & Marine Insurance Company ("St. Paul") had obtained against Scandinavian Reinsurance Company ("SRe"), following a three week evidentiary hearing. The arbitration award had a value exceeding \$275 million.

Chadbourne's Role in the St. Paul/SRe Controversy

A team of Chadbourne lawyers led by David Raim, Joy Langford and John Finnegan represented St. Paul in the arbitration and in the district court proceedings in which SRe challenged the arbitral award. In the district court, Chadbourne fashioned the arguments that were later reiterated in -- and accepted by -- the Second Circuit. Chadbourne's team together with a team of appellate specialists from Dechert LLP, a team led by G. Eric Brunstad, Jr., represented St. Paul before the Second Circuit.

Background

In 2007, St. Paul commenced an arbitration against SRe seeking to recover unpaid losses under a retrocessional reinsurance agreement (the "Treaty"). SRe sought to defeat its liability altogether arguing that the Treaty should be rescinded (on myriad grounds) or, in the alternative, to limit its exposure arguing that St. Paul had misapplied the Treaty's experience account provision, thereby overstating SRe's obligations. After discovery and an evidentiary hearing, a majority of the arbitration panel ruled that the Treaty was valid and enforceable. A unanimous arbitration panel rejected SRe's arguments concerning the application of the Treaty's experience account provision.

After the arbitration panel issued its final award, SRe allegedly learned that two of the three arbitrators who had served on the St. Paul/SRe panel had concurrently served "as arbitrators in another proceeding in which a common witness, similar legal issues, and a related party were involved." SRe argued that the two arbitrators' undisclosed service on this other arbitration panel established "evident partiality" entitling SRe to vacate the arbitration award in the St. Paul proceedings. The district court agreed with SRe -- a decision that received substantial attention in many legal publications and in the insurance and international arbitration communities. The Second Circuit "disagreed" with the district

court (slip op. at 3), and concluded that "there was insufficient evidence before the district court on which to base a finding of 'evident partiality.'" In the words of the Second Circuit: "We conclude that, under the circumstances of this case, the fact of overlapping service . . . [by two arbitrators on two arbitration panels] does not, in itself, suggest that they [or either of them] were predisposed to rule in any particular way in the St. Paul Arbitration. As a result, their failure to disclose that concurrent service is not indicative of evident partiality."

The Second Circuit's Decision

The Second Circuit began its analysis by reaffirming that evident partially sufficient to vacate an arbitration award may be found only where "a reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one side." Slip op. at 22 (emphasis in original). As explained by the Second Circuit, this principle is firmly rooted in the Federal Arbitration Act (the "FAA"), which "provides for vacatur of arbitral awards whenever it is 'evident' that an arbitrator was 'partial[]' to one of the litigating parties." *Id.* at 25 (brackets in original). The Second Circuit then observed: "It follows that where an undisclosed matter is not suggestive of bias, vacatur based upon nondisclosure cannot be warranted under an evident-partiality theory."

The focus of the Second Circuit's decision was determining whether the two arbitrators' "overlapping arbitral service" in two separate proceedings was a circumstance that a reasonable person "would have to conclude" was indicative of bias or partiality. The court concluded that "overlapping service was not only not a circumstance inherently indicative of bias; it was also not unusual." Indeed, as noted by the court, "[i]n specialized fields such as reinsurance, where there are a limited number of experienced arbitrators, it is common for the same arbitrators to end up serving together frequently."

The Second Circuit rejected SRe's argument that SRe was misled by the two arbitrators' "repeated assurances to the parties that they understood themselves obligated to make thorough and ongoing [supplemental] disclosures" as additional circumstances arose or as memories became refreshed. The court concluded that it was not "appropriate to vacate an [arbitral] award solely because an arbitrator fails to consistently live up to his or her announced standards for disclosure, or to conform in every instance to the parties' respective expectations regarding disclosures." *Id.* at 32. The court also "reject[ed] Scandinavian's assertion that the [two arbitrators'] nondisclosure [could] only be explained by bias in favor of St. Paul," concluding, as St. Paul had argued, that the arbitrators' might have believed that their concurrent service was "non-material," or that they had earlier disclosed their appointment in the other proceeding.

With respect to SRe's assertion that it was potentially prejudiced by the arbitrators' nondisclosure of their concurrent service -- SRe having argued it might have "adjusted its arbitration strategy" had it known -- the Second Circuit responded stating: "The FAA does not bestow on a party the right to receive information about every matter that it might consider important or useful in presenting its case. A party is not entitled to the 'complete and unexpurgated business biograph[ies] of the arbitrators whom the parties have selected.'" *Id.* at 34 (brackets in original).

The essence of the Second Circuit's ruling is captured by a single sentence from the decision: "We agree with St. Paul that 'the mere fact of [the arbitrators' undisclosed] overlapping arbitral service suggests nothing inherently negative about the impartiality of the arbitrators.'" *Id.* at 27 (quoting St. Paul's Reply Brief).

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For More Information

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