

An Arbitrator's Failure To Tell All: Will It Translate Into Vacating His or Her Award?

by Neal M. Eiseman



The standard of review of arbitration awards is one of the narrowest in all of American jurisprudence and whenever a disgruntled party asks a court to review an award, it is safe to say that unless that party can demonstrate a discernable lack of integrity in the arbitral process, the award will be confirmed. The reason is that in arbitration, unlike our court system, the emphasis is on finality, not necessarily due process of law. Factual or legal errors by the arbitrators do not, in and of themselves, authorize courts to vacate their awards because by agreeing to arbitrate their disputes, the parties have elected to waive the procedures and opportunity for review for the efficiency, informality and expedition of arbitration.¹ Accordingly, when called on to confirm arbitration awards, the principal question the courts ask is "whether the arbitration

proceedings were fundamentally unfair."

Courts Will Inquire What The Arbitrator Disclosed To The Parties

Underlying its review of an award is the court's expectation that prior to the evidentiary hearings, a neutral arbitrator has disclosed to the parties everything that ought to have been revealed. So as to maintain the integrity of their role in confirming or vacating awards, courts will not hesitate to inspect the record to determine whether an arbitrator acted fairly, impartially and without bias.³ While it is rare that an arbitration award will be vacated under the Federal Arbitration Act or the various state arbitration statutes due to "corruption, fraud or other undue means", not infrequently, courts do vacate awards when an arbitrator

fails to disclose some significant aspect of his or her background and/or any prior or current dealings that reasonably might have been of interest to one or both of the parties during the arbitrator-selection process.

Article 10(2) of the Federal Arbitration Act provides fertile ground for the argument that an arbitrator's failure to disclose certain information may require the award to be vacated.⁴ It states that an arbitration award should be set aside where an arbitrator demonstrates "evident partiality". Almost 40 years ago in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, the U.S. Supreme Court held that an arbitrator's failure to disclose a material relationship with one of the parties can constitute "evident partiality".⁵ Since that time, not surprisingly, myriad judges have attempted to interpret what "evident partiality" means, whether the particular facts of their case rose to that level and, in some cases, courts have broadly defined the words to encompass anything that might create the potential for bias.

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The threshold question is whether the party seeking to vacate an arbitration award must show actual bias or simply demonstrate the appearance of possible bias.⁶ A federal

district court in Texas recently examined the "evident partiality" standard and noted:

In a failure to disclose case, the integrity of the process by which arbitrators are chosen is at issue; in an actual bias case, the integrity of the arbitrator's decision is at issue (citation omitted). Thus, the standard a court uses to evaluate a claim of evident partiality varies depending on whether the parties seeking to vacate the award argues non-disclosure or actual bias.

Appearance Of Bias v. Actual Bias

In *Commonwealth Coatings Corp.*, a four-judge plurality decision endorsing the broad appearance of bias standard, Justice White noted in a concurring opinion that there was a split of authority in the lower federal courts regarding what standard to follow. Three justices dissented, advocating that an arbitrator's failure to disclose certain information should give rise to a rebuttable presumption of partiality. This split continues today.⁸

In canvassing court decisions addressing arbitrator disclosure over the past few years, it is clear that some courts require a showing of more than an appearance of bias, but less than actual bias⁹, while others require only the appearance or "reasonable impression" of arbitrator bias.¹⁰ As one court observed, bias is difficult and often impossible to prove: "Unless an arbitrator publicly announces his partiality, or is overheard in a moment of private admission, it is difficult to imagine how 'proof' would be obtained."¹¹

A number of courts have construed "evident partiality" to mean circumstances where a reasonable person would have to conclude

that an arbitrator was partial to one party to the arbitration.¹² A federal appeals court in Michigan requires a slightly higher standard. It held that to satisfy the evident partiality test, "the alleged partiality must be direct, definite and capable of demonstration", plus the party asserting evident partiality must establish specific facts that indicate the arbitrator's improper motives. In so noting, the court stated that an adverse award, in and of itself, does not constitute evidence of arbitrator bias unless it is accompanied by proof of improper motivation.¹³

In deciding whether to vacate arbitration award due to a failure to disclose, courts frequently note that in 1977 the American Bar Association and the American Arbitration Association adopted the "Code of Ethics for Arbitrators in Commercial Disputes". Canon II provides that "An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality." The American Arbitration Association has commented that the Code is "intended to be applied realistically so that the burden of detailed disclosure does not become so great that it is impractical for persons in the business world to be arbitrators, thereby depriving parties of the services of those who might be best informed and qualified to decide particular types of cases."

Subparagraph A of Canon II states:

Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) any known direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any known existing or past

"An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality."

financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) the nature and extent of any prior knowledge they may have of the dispute; and

(4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

In 2000, the National Conference of Commissioners on Uniform State Laws adopted the Revised Uniform Arbitration Act ("RUAA"). Its Section 12, entitled "Disclosure By Arbitrator", was modeled after Canon II of the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes. Section 12 (a) states:

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) a financial or personal interest in the outcome of the arbitration proceeding; and

(2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrators.

Not all states automatically adopt the RUAA as written. For example, New Jersey's arbitration statute, as amended in January 2003, represents a modified version of the RUAA. It provides that an individual appointed as a neutral arbitrator who does not disclose a known, direct and material interest in the outcome of the arbitration or a known, existing and substantial relationship with the party is presumed to act with "evident partiality". This rather broad standard comports with a seminal 1981 decision from New Jersey's highest state court containing the following holdings:

- Standards of honesty, fairness and impartiality must govern the conduct of all arbitrators in whose hands the dispute resolution process is entrusted.
- The goal ensuring that arbitrators adhere to high standards will best be obtained by requiring them to avoid not only actual partiality, but also the appearance of partiality.
- Every arbitrator is required to make full disclosure of possible conflicts of interest to the parties prior to the commencement of arbitration proceedings.
- An arbitrator is required to make every disclosure which reveals any relationship or transaction that the arbitrator has had which will suggest to the reasonable person that the arbitrator might be partial to one side.

A court reviewing an arbitration award may vacate it if it includes that an undisclosed fact would have been such as to lead a reasonable person to object to the designation of the arbitrator in question; there need not be evidence that the arbitrator was actually biased.¹⁵

Use Every Possible Resource To Learn About the Background Of A Prospective Arbitrator

In view of the technological advances in recent years, it is now possible for parties to conduct their own independent due diligence regarding an arbitrator's background and his or her obligation to disclose. Three years ago, the losing party in an arbitration in New Jersey was successful in convincing the court to overturn the award when it demonstrated to the court that the arbitrator

had once acted as the president of a condominium association. The underlying arbitration did not involve the arbitrator's condominium, but, interestingly, it did involve a dispute over the interpretation of a transition agreement executed by a developer of condominiums and a condominium association. The arbitrator found in favor of the condominium association, yet the record established that the arbitrator had never disclosed to the parties its prior experience as president of the unrelated condominium association. The condominium developer had discovered this fact when, after receiving the award, its attorney, on a lark, decided to "Google" the arbitrator's name. What appeared on the computer screen was a direct quote from the arbitrator commenting about the need for condominiums to initiate maintenance programs for swimming pools. A copy of the web page was attached as an exhibit to the papers supporting the order to show cause to vacate the arbitration award. As he granted the application, the judge mentioned from the bench that he viewed the arbitrator's failure to disclose as "odorous". And, although not particularly relevant, when the dispute was presented to a new arbitrator, he found in favor of the condominium developer.

Neal M. Eiseman is currently Co-Chair of the ABA's Sub-Committee on Arbitration and a partner at the NY-NJ-based law firm of Goetz Fitzpatrick LLP. He specializes in the litigation, arbitration and mediation of construction and real estate disputes.

He also teaches Legal Principles and Practices at New York University's Masters in Real Estate and Construction Program and serves as an arbitrator for the American Arbitration Association. He can be reached at neiseman@goetzfitz.com.

1. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337 (1968)
2. *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 2006 WL 2583183 (N.D.Tex).
3. *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79 (2nd Cir. 1984).
4. 9U.S.C. §10.
5. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, supra.
6. See e.g., *Lucent Technologies Inc. v. Tatung Co.*, 379 F.3d 24,29 (2nd Cir. 2004).
7. *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, supra.
8. As of early 2006, federal courts in the 2nd, 4th, 6th, 7th and 10th Circuits endorsed a narrower standard whereas the 5th, 9th and 11th Circuits followed the broad standard.
9. *Fortier v. Morgan Stanley DW, Inc.*, WL 3020926 (N.D. Cal.); *U.S. Haseotes & Sons, L.P. v. Haseotes*, 819 A.2d 1281 (R.I. 2003)
10. *Crow Construction Company v. Jeffrey M. Brown Assoc, Inc.*, 264 F. Supp.2d 217 (E.D. Penn. 2003); *Schmotz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994).
11. *Morelite Construction Corp. v. New York District Council Carpenters Benefit Fund*, supra. 748 F.2d at 84.
12. *Crow Construction Company v. Jeffrey M. Brown Assoc, Inc.*, supra, 264 F. Supp 2d at 221; *Lucent Technologies Inc. v. Tatung Co.*, supra. 379 F.3dat31.
13. *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308 (6th Cir. 1998).
14. N.J.S.A. 2A:23B-12(e) entitled "Vacating Award".
15. *Barcon Associates, Inc. v. Tri-County Asphalt Corporation*, 86 NJ 179 (N.J. 1981).