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IN PRACTICE

ALTERNATIVE DISPUTE RESOLUTION

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Have You Googled Your Arbitrator?

An arbitrator's failure to disclose potential conflict could vacate award

Many litigators can relate to the following scenario: A client contacts you to say that he has received an adverse award as a respondent in an arbitration proceeding and asks what you can do to vacate the award. After getting over the initial blow to your ego from not being retained for the arbitration, you give the advice that your client definitely does not want to hear: a disgruntled party has very limited grounds to set aside an arbitration award. You explain that the emphasis in arbitration is more on finality, not necessarily based upon the procedural and substantive law associated with litigation.

Bottom-line: you tell your client to send the file over so that you can review it, pointing out that absent fraud, arbitrator bias or an award that exceeded the scope of the dispute presented to the arbitrator, it is highly unlikely a court would overturn the award. NJSA 2A:24-8 entitled "Vacation of Award," states that the court shall vacate an arbitration award where it was "procured by corruption, fraud or undue means," where there was "evident partiality" by the arbitrators, where the arbitrators

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denied a party due process rights by refusing to hear evidence or other misbehaviors prejudicial to the rights of any party and where the arbitrators "exceeded or so imperfectly executed their powers that a mutual, final and definite award" was not made.

After you receive the file from your client, you see that the sole arbitrator awarded the claimant, a condominium association, a specific sum of money plus interest at an exorbitantly high rate. Although there are no hearing transcripts, it is clear from the briefs filed by the parties that the critical issue before the arbitrator was whether your client, a condominium developer, had complied with all of the terms and conditions of a written transition agreement between it and the condominium association. The transition agreement required your client to perform certain post-development construction work in return for receiving a general release from the condominium corporation. The high interest rate awarded by the arbitrator bothers you, but you feel that the arbitrator's interpretation of a legal document—right or wrong—does not constitute sufficient grounds to challenge the entire award.

Later in the day when you are checking e-mails, for the heck of it, you decide to google the arbitrator's name. You get a number of hits and, to your surprise, one leads you to a Web site maintained by condominium associations containing a quote from the arbitrator. The substance of the quote is not important, but after the arbitrator's name, it states that he is "president" of a certain homeowners association. A red light immediately goes off. A condominium association filed the arbitration proceeding involving your developer-client.

You wonder whether the arbitrator ever disclosed to your client that he, at least at one time, served on a condominium board. When you raise the issue with your client, he states that he obliquely remembers the arbitrator—in the middle of an arbitration hearing—

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referring to his familiarity with transition agreements, but your client says that he construed the statement anecdotally and not as any disclosure as to possible bias.

Your review of your client's files confirms that the arbitrator never made any such disclosure in writing, either prior to his appointment or before the start of the hearings. Prior to being appointed as arbitrator, The American Arbitration Association requires the proposed arbitrator to disclose to both parties all information about the arbitrator's past and present business and personal contacts which might create any appearance of impropriety or possible bias. Each party is then given the opportunity to present "factual objections" and the Association will consider those objections and decide whether to confirm the arbitrator's appointment.

With today's technology, there are independent ways to confirm whether all that ought to have been disclosed was in fact revealed.

You hit the books and take a fresh look at the grounds for vacating awards under New Jersey's arbitration statute. The words "evident partiality" catch your eye. You conduct additional research and confirm that the reported case law is in line with the statute's proscription that arbitration awards may only be vacated based upon those very limited grounds set forth in the statute. See e.g., *Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc.*, 135 N.J. 349 (1994); *South Plainfield Board of Education v. South Plainfield Educational Association Ex Rel. English*, 320 N.J. Super. 281, (App. Div. 1999), cert denied 161 N.J. 332; *Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 160 N.J. Super. 559 (Law Div. 1978), aff'd 171 N.J. Super. 186, cert granted 84 N.J. 422, aff'd 86 N.J. 179, 430 A.2d 214 (arbitrator's decision cannot be judicially altered because of mistake of law or fact).

Then you come across *Barcon Associates, Inc. v. Tri-County Asphalt Corporation*, 86 N.J. 179 (N.J. 1981), which contains the following point headings:

> Standards of honesty, fairness and impartiality must govern the conduct of all arbitrators in whose hands the dispute resolution process is entrusted.
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> 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.
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> Every arbitrator is required to make full disclosure of possible conflicts of interest to the parties prior to the commencement of arbitration proceedings.
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> 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.

In view of the foregoing, you prepare, file and serve an order to show cause seeking to vacate the arbitration award supported by a complaint, a legal brief, your client's affidavit setting forth the procedural history and your certification bringing to the court's attention the results of your "googling" of the arbitrator's name. Thereafter, the condominium association's attorney cross-moves to convert the award into a judgment and claims "no harm, no foul" with respect to the issue of arbitrator disclosure.

During oral argument before the court, you point out that the exorbitantly high interest rate seems punitive and you cite *Barcon* for the proposition that there is no need to show bias, only whether a reasonable person would have asked some questions had the disclosure been made at the outset of the hearings. You point out that if the disclosure had been made, undoubtedly your client would have wanted to ask whether the arbitrator had any prior involvement with condominium developers, plus you would have questions regarding the nature of his role as president of his condominium board.

When rendering its decision, the court takes notes of the unusually high interest rate awarded by the arbitrator as well as the arbitrator's failure to disclose a prior position as a condominium board president:

> Even though there may not have been any partiality in this case, when you put it all together it has a certain odor to it, that someone looking out—from the outside in can say, something's not right here. Even though it may have been perfectly done, it gives that aura, that appearance that just something sticks in your craw. So I'm going to set this aside and send it back.

The lesson to be learned from all the foregoing? For prospective arbitrators, prior to being appointed, they must reveal to the parties anything that might have a tangential effect on their impartiality. For the litigator, clearly, arbitrator bias—or even the appearance of possible bias—provides the best shot for a disgruntled client seeking to vacate an unfavorable award. And with today's technology, there are independent ways to confirm whether all that ought to have been disclosed was in fact revealed. ■