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Scandinavian Reinsurance: Good News for Those Arbitrating in New York?

Jennifer Hartzler (Herbert Smith Freehills LLP) · Saturday, February 25th, 2012 · Herbert Smith Freehills

Following its June 2011 decision in the case of *STMicroelectronics, NV v. Credit Suisse Securities (USA) LLC*, 648 F.3d 68 (2d Cir. 2011), the Second Circuit has again considered the issue of vacating an award due to an arbitrator's non-disclosure. Earlier this month, the Second Circuit handed down judgment in the case of *Scandinavian Reinsurance Co Ltd v. Saint Paul Fire and Marine Ins Co*, 2012 WL 335772 (Scandinavian Re), refusing vacatur on the grounds that the vacating party failed to show 'evident partiality' – the Federal Arbitration Act's (FAA) standard for vacating an award for arbitrator bias.

The events leading to the Second Circuit's judgment began in August 1999 when Scandinavian Reinsurance (SR) and St. Paul Fire and Marine Insurance (St Paul) entered into a stop-loss retrocessional agreement, a specialised type of reinsurance contract. Several years later, St Paul sought indemnification from SR under the agreement. In September 2007, upon SR refusing to make payment, St Paul initiated arbitration proceedings pursuant to the dispute resolution clause in the agreement.

The dispute resolution clause required that disputes be submitted to a panel of three arbitrators. The arbitrators had to be disinterested active or former executive officers of insurance or reinsurance companies or Underwriters at Lloyd's, London. SR appointed Jonathan Rosen and St Paul appointed Peter Gentile as arbitrators, and Paul Dassenko was selected to serve as umpire. Although not required by the agreement, all three arbitrators were certified by the AIDA Reinsurance Arbitration Society (ARIAS).

In keeping with pre-arbitration procedure and the ARIAS ethical guidelines for certified arbitrators, all three arbitrators made initial disclosures to the parties. These disclosures concerned past and present employment, their relationships with the parties or their law firms, participation as witnesses or arbitrators in other proceedings involving the same parties, their affiliates, their law firms or the same arbitrators. Dassenko as umpire provided written responses to a nine-page disclosure questionnaire prepared jointly by the parties. Rosen and Gentile made their disclosures orally at a February 2008 organisational meeting. Following these oral disclosures, Dassenko acknowledged that the arbitrators each had an ongoing responsibility to make further disclosures as necessary.

In June 2008, some three months after the February 2008 organisational meeting and while the St

Paul arbitration proceedings were on foot, another reinsurance arbitration was commenced by Platinum Underwriters Bermuda (Platinum) against PMA Capital Insurance and several of its affiliates. Sometime between June and September 2008, both Gentile and Dassenko were selected to serve on the panel in the Platinum arbitration (by Platinum and as umpire, respectively).

The Platinum arbitration progressed more quickly than the St Paul arbitration: the organisational meeting was held in late September 2008; three one-day evidentiary hearings took place between March and May 2009; and on 22 May 2009 – about four weeks before the start of the St Paul arbitration evidentiary hearing – the Platinum panel issued its award.

Meanwhile, the St Paul arbitration continued to proceed and during this time, each of the arbitrators made various additional disclosures. Despite these additional disclosures, Dassenko and Gentile never disclosed to the parties their involvement in the Platinum arbitration. The final evidentiary hearing in the St Paul arbitration was held in June 2009. In August 2009, the St Paul panel issued their award, finding in favour of St Paul on all issues.

According to SR, it was not until two months after the St Paul award had been issued that it learned of Dassenko and Gentile's participation in the Platinum arbitration. Accordingly, in November 2009, SR petitioned the US District Court for the Southern District of New York to vacate the award on the grounds of evident partiality pursuant to section 10(a)(2) of the FAA. SR argued that the partiality of Dassenko and Gentile was evident as a result of their failure to disclose their participation in the Platinum arbitration which SR said involved 'a common witness, similar disputed issues and contract terms, and the company that succeeded to the business of St Paul.'

St Paul opposed SR's petition and cross-petitioned the District Court to confirm the arbitration under section 9 of the FAA. St Paul accepted that Dassenko and Gentile did not disclose to the parties their involvement in the Platinum arbitration, however St Paul argued that such non-disclosure did not constitute or indicate bias.

The District Court granted SR's petition, finding that the arbitrators' non-disclosure of the Platinum arbitration amounted to evident partiality. The District Court reasoned that, in addition to the commonality of arbitrators, the two arbitrations 'overlapped in time, shared similar issues, involved related parties, [and] included [a common witness].' The District Court found that Dassenko and Gentile's participation in both proceedings amounted to a 'material conflict of interest' which had to be disclosed. Because such conflict was not disclosed, the Circuit's test for evident partiality had therefore been met. St Paul appealed.

In reviewing district court judgments, the Second Circuit Court of Appeals reviews questions of law *de novo*. Thus, the Second Circuit was not constrained by the District Court's decision with respect to the issue of evident partiality.

The Second Circuit focussed its analysis on the distinction between non-disclosed information which merely should have been disclosed, and non-disclosed information regarding a relationship or interest which strongly suggests that an arbitrator is biased in favour of one of the parties. The Second Circuit stated that, 'at its core, [the evident partiality standard] is directed to the question of bias.' The FAA, it said, allows for vacatur of arbitral awards in circumstances where it is evident that the arbitrator was indeed partial to one of the parties. Therefore, if a non-disclosure does not indicate bias, then an award cannot be vacated for evident partiality on the basis of that non-disclosure.

In considering the circumstances surrounding the award in the St Paul arbitration, the Second Circuit was not convinced that Dassenko and Gentile's participation in the Platinum arbitration was sufficient to indicate 'bias in these proceedings so as to constitute a nontrivial conflict of interest.' The Second Circuit considered such participation in the Platinum arbitration to be 'overlapping arbitral service,' not a 'material relationship with a party.' The Second Circuit was also not persuaded that the similarities between the two arbitrations were indicative of bias.

The Second Circuit emphasised that in order to determine whether a relationship is material, a court must focus on the 'question of how strongly that relationship tends to indicate the possibility of bias in favour of or against one party, and not on how closely that relationship appears to relate to the facts of the arbitration.' While the Second Circuit accepted that the arbitrators' participation in the concurrent arbitrations and the similarities between the proceedings might indicate a relationship relevant to the St Paul arbitration, it was insufficient to establish a material conflict of interest if the relationship did not also indicate that the arbitrator might have a predisposition in favour of one or more of the parties. On this basis, the Second Circuit did not consider there to be evident partiality and therefore found that the District Court erred in vacating the award. The Second Circuit reversed the District Court's judgment and remanded the case with instructions to grant St Paul's cross-petition to confirm the award.

Although the FAA vacatur procedure as discussed in Scandinavian Re does not affect foreign-seated New York Convention awards simply seeking enforcement in New York, it directly affects New York-seated New York Convention awards. The Scandinavian Re judgment comes at a time when many eyes in the arbitration world are focussed on New York: the International Court of Arbitration has recently announced that it will open an office in New York City, and the New York State Bar Association Task Force on New York Law in International Matters has declared in its Final Report that it seeks to continue to promote the use of New York Law in international agreements and New York as a forum for international dispute resolution, namely international arbitration. Parties and practitioners seeking to conduct arbitrations in New York should be heartened by the Second Circuit's general reluctance to review arbitral awards and the heavy burden the Second Circuit places on parties seeking to vacate an award.

Additionally, it bears mentioning that the underlying arbitration dealt with complex reinsurance issues for which the pool of competent arbitrators was quite small. The Second Circuit acknowledged this issue in footnote 20 of the judgment, saying that overlapping service of arbitrators does not necessarily equate to bias nor is it unusual. The Second Circuit did not have to go any further in this regard to reach its decision. However, future courts interpreting the evident partiality standard may well take the opportunity to distinguish disclosure/bias standards between general arbitrators and those arbitrators who practice in more specialised areas. Parties arbitrating disputes arising out of specialised areas should keep these complexities in mind when considering and vetting potential arbitrators.

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