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Recent Decision Highlights Importance of Arbitrators' Full Disclosure of All Potential Conflicts

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Do arbitrators exhibit "evident partiality," providing grounds to vacate an arbitration award, by failing to disclose that they are serving as arbitrators in a simultaneous but separate arbitration, where the two arbitrations involve tangentially related parties, share similar issues and include a common material witness? On February 23, 2010, the U.S. District Court for the Southern District of New York (Scheindlin, J.) vacated an award on these grounds in *Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, No. 09 Civ. 9531 (S.D.N.Y. 2010), holding that the arbitrators' participation in the second arbitration was, in the particular circumstances of the case, a material conflict of interest that should have been disclosed, notwithstanding the arbitrators' good faith belief that they would not be influenced by any information learned during the other arbitration.

The Scandinavian Re Arbitration

Scandinavian Re and St. Paul submitted a dispute to arbitration concerning a finite retrocessional agreement. Pursuant to the arbitration clause, each party appointed an arbitrator, and the two party-appointed arbitrators appointed a neutral umpire. Although not required by the agreement, all three arbitrators were ARIAS certified and, as such, were required to abide by the ARIAS-US guidelines, including the requirement that they disclose any interest or relationship likely to affect their judgment, resolving doubts in favor of disclosure. During the organizational meeting, and at various other times, the arbitrators disclosed their involvements with the parties, counsel for the parties, and each other.

The Platinum Bda Arbitration

Following the organizational meeting in the Scandinavian Re Arbitration, Platinum Bda, a reported successor in interest to St. Paul, demanded arbitration of a dispute relating to a finite retrocessional agreement it had entered with PMA Capital. Two of the arbitrators in the Scandinavian Re Arbitration, namely the umpire and St. Paul's party-appointed arbitrator, were appointed to serve on the Platinum Bda arbitration panel. Neither of the common arbitrators disclosed their involvement in the Platinum Bda arbitration to the parties in the Scandinavian Re arbitration.

Vacatur Proceedings

Following an award in St. Paul's favor in the Scandinavian Re Arbitration, Scandinavian Re learned that the two arbitrators had failed to disclose their involvement in the Platinum Bda arbitration and petitioned the federal district court in New York to vacate the award on the grounds of the arbitrators' "evident partiality." The court agreed. Concluding that the two arbitrators' involvement in the Platinum Bda arbitration constituted a material relationship that required disclosure, the court vacated the arbitration award. More specifically, the court held that failing to disclose such a relationship satisfied the Second Circuit's "evident partiality" standard.

The court rejected St. Paul's argument that there could not have been a conflict of interest because Platinum Bda and St. Paul had no direct corporate inter-relatedness, and neither arbitrator at issue had a direct relationship with a party or a financial interest in the outcome

of the arbitration. Instead, the court found that St. Paul and Platinum Bda had a “substantial relationship” and that, by participating in the two arbitrations which overlapped in time, shared similar issues, involved related parties and included a common witness, the arbitrators placed themselves in a position where they could receive ex parte information, be influenced by recent credibility determinations made regarding the common witness, and influence each other’s thinking on the issues. It further held that the failure to make appropriate disclosures had deprived Scandinavian Re of the opportunity to object to the arbitrators. Finally, the court concluded that the arbitrators’ good faith belief that they could remain impartial was irrelevant given the objective standard of evident impartiality. The case was remanded for arbitration in front of a new panel of arbitrators.

John E. Matosky, an associate in the Insurance and Reinsurance Practice Group, is also a founding member of the Massachusetts Reinsurance Bar Association. If you have any questions about the material presented here, or questions about insurance and reinsurance in general, please contact John directly at jmatosky@PrinceLobel.com or 617 456 8179.