

**CPLR 7511(b)(1)(ii): Arbitration Award Vacated Where Challenged Arbitrator Appointed by American Arbitration Association Previously Had Attorney-Client Relationship with One of the Parties**

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In *Board of Education of Central School District No. 1, Town of Clarkstown v. Cracovia*,<sup>198</sup> the Appellate Division, Second Department, was called upon to decide whether article 75 of the CPLR empowers a court to direct parties to arbitrate a dispute when the agreement between them provides for binding arbitration of certain disputes and advisory arbitration<sup>199</sup> of others. The board sought to stay arbitration of a contractual dispute which had been demanded by the Clarkstown Teachers' Association pursuant to their collective bargaining agreement. In a memorandum opinion, the court held that the board could properly be directed to proceed to arbitration since they saw no reason why article 75 should not apply to advisory arbitration if that was what the parties intended. Arbitration is a matter of contract, and the details can vary with the contract. The court did not decide whether the dispute was subject to binding arbitration.

The Second Department unhesitatingly gave full effect to the parties' unequivocal agreement to arbitrate their future disputes, without being deflected by the additional consideration of the advisory nature of the arbitration decision. There may be, however, an important problem to which the court did not expressly address itself: Is the court's directive to the parties to proceed to advisory arbitration indirectly an advisory opinion beyond its power?<sup>200</sup>

*CPLR 7511(b)(1)(ii): Arbitration award vacated where challenged arbitrator appointed by American Arbitration Association previously had attorney-client relationship with one of the parties.*

CPLR 7511(b)(1)(ii) empowers the court to vacate an arbitration award where the arbitrator appointed as a "neutral" was "partial."<sup>201</sup>

*dismissed*, 14 N.Y.2d 688, 198 N.E.2d 914, 249 N.Y.S.2d 886 (1964). It has been suggested that the first inquiry is more properly whether one party claims that there is a dispute. Since the answer is yes if the parties are in court, only the last two questions would remain. 8 WK&M ¶ 7501.20. However, the courts have chosen to decide whether the controversy is covered by the arbitration agreement. *See, e.g., Mohawk Maintenance Co. v. Drake*, 53 Misc. 2d 272, 275, 278 N.Y.S.2d 297, 301 (Sup. Ct. Queens County 1967), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV. 283, 310 (1967).

<sup>198</sup> 36 App. Div. 2d 851, 321 N.Y.S.2d 496 (2d Dep't 1971).

<sup>199</sup> Binding arbitration forecloses future litigation of a dispute. This contingency is not precluded by advisory arbitration. Advisory arbitration facilitates a settlement, however, and the arbitration decision can be an aid to the court in any subsequent litigation.

<sup>200</sup> *See Schollmeyer v. Sutter*, 3 App. Div. 2d 665, 158 N.Y.S.2d 354, 356 (2d Dep't 1957) ("The Supreme Court, Appellate Division, will not render advisory opinions. . ."); 667 E. 187th St. Corp. v. Lindsay, 54 Misc. 2d 632, 283 N.Y.S.2d 199 (Sup. Ct. N.Y. County 1967); Kuhn v. Curran, 184 Misc. 788, 56 N.Y.S.2d 737 (Sup. Ct. Albany County 1944).

<sup>201</sup> CPLR 7511(b)(1)(ii) provides:

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either

This provision takes cognizance of the common practice of "tripartite arbitrations," where each party designates one arbitrator and they in turn designate a third.<sup>202</sup> If the designated arbitrators cannot agree, selection is made by the American Arbitration Association (AAA).

The Advisory Committee on Practice and Procedure recognized that the nominees to the panel chosen by each party might not be "neutral," but concluded that such partiality should not constitute grounds for vacating an award.<sup>203</sup> Subsequently, in *Astoria Medical Group v. Health Insurance Plan of Greater New York*,<sup>204</sup> the Court of Appeals upheld this practice of "tripartite arbitration" and concluded that a party to such arbitration could nominate even one of its own directors.<sup>205</sup> Thus, CPLR 7511(b)(1)(ii) requires only that the arbitrator appointed by the "two partisan arbitrators" be neutral.<sup>206</sup>

In *Baar & Beards, Inc. v. Oleg Cassini, Inc.*,<sup>207</sup> petitioner and respondent entered into an exclusive licensing arrangement which embodied an agreement to arbitrate all controversies according to the AAA rules then in effect.<sup>208</sup> The petitioner, Baar & Beards, Inc., demanded arbitration of a dispute which arose from an alleged violation of the agreement. The AAA provided a list of prospective arbitrators, upon only one of whom the parties agreed. Therefore, the AAA appointed two other arbitrators. One of these designated arbitrators had represented petitioner's president as counsel six years before. Petitioner revealed this fact to both respondent and the AAA, and respondent protested. Nevertheless, the AAA adamantly ruled that the challenged

participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(ii) partiality of an arbitrator appointed as a neutral. . . .

See generally H. WACHTELL, *NEW YORK PRACTICE UNDER THE CPLR* 368-71 (3d ed. 1970). See also *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 345 (1968).

<sup>202</sup> SECOND REP. 146.

<sup>203</sup> *Id.* This recommendation was intended to alleviate the prevalent practice of vacating awards upon the ground of partiality of an arbitrator appointed by one party. Neutrality was a fiction, for it was common knowledge that each arbitrator designated by a party would be partisan to some extent. See 8 WK&M ¶ 7511.16.

However, it is to be noted that, in *Astoria Medical Group v. Health Ins. Plan of Greater New York*, 11 N.Y.2d 128, 137, 182 N.E.2d 85, 89, 227 N.Y.S.2d 401, 407 (1962), the Court held that, while the arbitrators selected by the parties may be partisan, they may not be dishonest, i.e., "deaf to the testimony or blind to the evidence presented."

<sup>204</sup> 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962).

<sup>205</sup> The Court concluded that

if they choose to have their disputes resolved by a body consisting of two partisan arbitrators, and a third neutral arbitrator, that is their affair.

<sup>206</sup> 11 N.Y.2d at 136, 182 N.E.2d at 88, 227 N.Y.S.2d at 406. "It is now clear that only an arbitrator 'appointed as a neutral' need be impartial." H. WACHTELL, *NEW YORK PRACTICE UNDER THE CPLR* 372 (3d ed. 1970).

<sup>207</sup> 37 App. Div. 2d 106, 322 N.Y.S.2d 462 (1st Dep't 1971) (4-1).

<sup>208</sup> *Id.* at 107, 322 N.Y.S.2d at 463.

arbitrator would remain a designated arbitrator.<sup>209</sup> Both parties finally signed a statement signifying their acceptance of the panel.

After the award, petitioner made application for confirmation and respondent cross moved to vacate. The salient issue before the Supreme Court, New York County, was whether a reasonable individual would conclude that the challenged arbitrator *gave the appearance* of partiality by reason of his prior fiduciary relationship with petitioner's president. The court held that the appearance of bias was present, and the Appellate Division, First Department, affirmed.<sup>210</sup> The AAA, which was obligated to select neutral arbitrators, should have removed the challenged arbitrator.<sup>211</sup>

The appellate court cited *Commonwealth Coatings Corp. v. Continental Casualty Co.*,<sup>212</sup> in which the United States Supreme Court interpreted the Federal Arbitration Act,<sup>213</sup> which is in part similar to section 18 of the AAA's Commercial Arbitration Rules. In *Commonwealth*, the Court enunciated the principle "that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid *even the appearance of bias*."<sup>214</sup>

Respondent's written acceptance of the panel was procured under circumstances in which it was apparent that further protest would have been unavailing.<sup>215</sup> If the arbitration award were sustained, confidence in that procedure certainly would be undermined. Hence, the courts have rendered a decision which is both equitable and pragmatic.

#### NEW YORK CITY CIVIL COURT ACT

*CCA 103: Operation of the conference and assignment method of disposition of cases.*

In *De La Cruz v. Kahama Realty Inc.*,<sup>216</sup> counsel failed to answer the calendar on the scheduled day, so the action was dismissed. Counsel

<sup>209</sup> The challenged arbitrator was a member of the Board of Directors of the AAA. It is understandable that a Tribunal Administrator might find it difficult to exercise his power to remove this arbitrator from the panel. *Id.* at 109, 322 N.Y.S.2d at 465.

<sup>210</sup> *Id.* at 110, 322 N.Y.S.2d at 465. See AMERICAN ARBITRATION ASSOCIATION, RULES OF COMMERCIAL ARBITRATION No. 18, which imposes upon a "neutral Arbitrator" the duty to "disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator" (emphasis added). However the provision further provides that the arbitration proceeding may proceed if after disclosure of such circumstances the parties sign a written waiver.

<sup>211</sup> 37 App. Div. 2d at 109, 322 N.Y.S.2d at 465.

<sup>212</sup> 393 U.S. 145 (1968).

<sup>213</sup> 9 U.S.C. § 10 (1970).

<sup>214</sup> 393 U.S. at 150 (emphasis added).

<sup>215</sup> See note 209 *supra*. Furthermore, the challenged arbitrator had indicated that he would not disqualify himself. 37 App. Div. 2d at 107, 322 N.Y.S.2d at 463.

<sup>216</sup> 66 Misc. 2d 770, 322 N.Y.S.2d 126 (N.Y.C. Civ. Ct. N.Y. County 1971).