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Arbitration--Competency of Arbitrators (In Re Amtorg Trading Corp., 277 App. Div. 531 (1st Dep't 1950))

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creed an annulment when it was satisfied that other evidence existed.

The present case is not without precedent. It bears a striking similarity to the decisions in actions for divorce which appear to support the conclusion reached here. At an early date, the 105th canon was applied to such actions.²¹ These decisions uniformly recognize that the confessions of the parties are insufficient proof.²² They differ, however, in respect that they held the testimony of the parties to the marriage to be admissible; corroboration thereof merely being required to avoid collusion.²³ It logically followed, therefore, that a confession of adultery, when free from all taint of collusion, justified a decree of divorce.²⁴ The theory was that when the reason for the rule fails, the rule itself ceases.²⁵ Still another interesting comparison is presented by the cases requiring corroboration of the testimony of private detectives and prostitutes.²⁶ But again the court refused to be bound by a rigid rule of evidence, and accordingly determined the rule to be one for the guidance of the judicial conscience.²⁷

The resemblance between annulment and divorce cases can be discerned more vividly, however, in the rationale of the decisions which appear to leave to the court an area in which to exercise its discretion; at once, flexible enough to provide bona fide petitioners with the redress permitted by law, and yet, at the same time, sturdy enough to protect the purpose for the requirement of corroboration. The wisdom of a decision which leaves to the judiciary the function of safeguarding public policy cannot be questioned.



ARBITRATION—COMPETENCY OF ARBITRATORS.—During recent years arbitration has been resorted to more and more for the settlement of business controversies. With this increase there has been

betrothal . . . is eloquent corroborative evidence that . . . he had no intention to live with her . . . in accordance with his promise. . . ."

²¹ See *Betts v. Betts*, 1 Johns. Ch. 197 (N. Y. 1814). When the canon was embodied in statutory form no mention was made of its applicability to divorce actions. N. Y. Rev. Stat., part II, c. VIII, tit. I, § 36. "No sentence of nullity . . . shall be pronounced. . . ."

²² *Fowler v. Fowler*, 29 Misc. 670, 61 N. Y. Supp. 109 (1899); *Montgomery v. Montgomery*, 3 Barb. Ch. 132 (N. Y. 1848); *Betts v. Betts*, 1 Johns. Ch. 197 (N. Y. 1814).

²³ *Madge v. Madge*, 42 Hun 524 (N. Y. 1886); *Lyon v. Lyon*, 62 Barb. 138 (N. Y. 1861); *Doe v. Roe*, 1 Johns. 25 (N. Y. 1799).

²⁴ See note 23 *supra*.

²⁵ Cf. *Lyon v. Lyon*, 62 Barb. 138, 142 (N. Y. 1861).

²⁶ *McCarthy v. McCarthy*, 143 N. Y. 235, 38 N. E. 238 (1894); *Moller v. Moller*, 115 N. Y. 466, 22 N. E. 169 (1889); *Platt v. Platt*, 5 Daly 295 (N. Y. 1874).

²⁷ *Yates v. Yates*, 211 N. Y. 163, 105 N. E. 195 (1914); *Winston v. Winston*, 165 N. Y. 553, 59 N. E. 273, *aff'd*, 189 U. S. 506 (1901). Cf. *McKeon v. Van Slyck*, 223 N. Y. 392, 398, 119 N. E. 851, 852 (1918).

a corresponding growth of judicial determinations concerning principles of law applicable to arbitration. Recently, the First Department of the Appellate Division of the Supreme Court of New York spoke in two cases on the competency required of arbitrators.

In the first case plaintiff sued defendant for breach of a contract made in 1947. Defendant moved for specific performance of an arbitration provision in the contract. Plaintiff then moved to stay the arbitration proceeding on the ground that defendant corporation is beneficially owned by the Soviet government and that the arbitrator named in the contract, the U.S.S.R. Chamber of Commerce Foreign Trade Arbitration Commission, is an instrumentality of the Russian Government and thus an impartial arbitration could not be had before such a body. *Held*, Plaintiff, having entered into an agreement designating such Commission, was precluded from declaring his ignorance of the matter of common knowledge that the Commission could not function in Russia, unless it were subject to the Soviet Government's over-all control. The dissenting opinion felt the appointment was void because of the relationship, but in any event thought that plaintiff's knowledge of the relationship was a question of fact. In *re Amtorg Trading Corp.*, 277 App. Div. 531, 100 N. Y. S. 2d 747 (1st Dep't 1950).

In the second case, petitioner moved to vacate an award claiming arbitrator's attorney was also attorney for one of the parties. Arbitrator denied he knew of this situation. There was also a question whether the petitioner knew or should have known of the relationship complained of before the arbitration was concluded. The lower court denied the motion. *Held*, on appeal reversed. Considering all of the circumstances, substantial issues were raised concerning the knowledge of the arbitrator of the relationship of his attorney to the submitted controversy and of the petitioner's prior knowledge of this situation. Issues were referred to an official referee to report. *Atlantic Rayon Corp. v. Goldsmith*, 277 App. Div. 554, 100 N. Y. S. 2d 849 (1st Dep't 1950).

It may be said as a general rule that any disinterested person may be selected to serve as an arbitrator.¹ Since the contract of the parties determines the power of the arbitrators it seems that even those under legal or other disability may be selected provided no statute requires otherwise.² There are general statements that infants, the physically handicapped, committees of boards of trade and unincorporated associations may act as arbitrators.³ But from

¹ ". . . two or more persons may submit to the arbitration of one or more arbitrators. . . ." N. Y. CIV. PRAC. ACT § 1448.

² The New York statute contains no limitation. See N. Y. CIV. PRAC. ACT § 1448. See *Davis v. Rochester Can Co.*, 124 Misc. 123, 124, 207 N. Y. Supp. 33, 34 (Munic. Ct. 1924), *rev'd on other grounds*, 220 App. Div. 487, 221 N. Y. Supp. 666 (4th Dep't 1927), *aff'd without opinion*, 247 N. Y. 521, 161 N. E. 166 (1928). For statutory limitation, see MASS. ANN. LAWS c. 251, § 16 (1933).

³ See *Davis v. Rochester Can Co.*, 124 Misc. 123, 124, 207 N. Y. Supp.

the nature of corporate powers which are defined and limited by statute and articles of incorporation, it follows that the power to act as an arbitrator cannot be conferred on a corporation or governmental agency by mere consent of the parties.⁴

In most instances the parties voluntarily appoint the arbitrator or arbitrators.⁵ Notwithstanding this, they are chosen not as agents of the parties⁶ but to act in a quasi-judicial position in place of their counterparts, the judges of the legal forum.⁷ Thus, it can readily be seen that an arbitrator's first essential requirement is a judicial impartiality of such a nature that he can render an award that gives each party equally and exactly what is due. Conversely, anyone incapable because of partisanship or bias of rendering an award that adequately sustains the notion of fair play is disqualified from the office.⁸

A claim that an arbitrator's interest should cause him to be ineligible or should cause the award to be set aside⁹ must be certain and well-founded, that is, capable of demonstration and not indirect or conjectural.¹⁰ Consequently, a person is incompetent to act as an arbitrator if he himself is a party to the dispute.¹¹ Rela-

33, 34 (Munic. Ct. 1924), *rev'd on other grounds*, 220 App. Div. 487, 221 N. Y. Supp. 666 (4th Dep't 1927), *aff'd without opinion*, 247 N. Y. 521, 161 N. E. 166 (1928).

⁴ *Davis v. Rochester Can Co.*, 220 App. Div. 487, 221 N. Y. Supp. 666 (4th Dep't 1927), *aff'd without opinion*, 247 N. Y. 521, 161 N. E. 166 (1928).

⁵ Section 1452 of the New York Civil Practice Act provides for court appointment of an arbitrator when the parties fail to provide for it or when their own arrangement has not succeeded. Section 1453 of the same Act sets forth the procedure for the appointment of an additional arbitrator. But, unless the contract expressly states that an additional one shall be selected an extra one cannot be named.

⁶ While an arbitrator is selected by one of the parties to the proceeding he is not subject to the direction and control of the party nor to the general principles of law with respect to agents.

⁷ There is a distinction between a referee or judge and an arbitrator. Persons may be brought before a judge without their consent while parties may voluntarily select their own arbitrators. A judge's authority springs from the statute or constitution which created the court over which he presides. An arbitrator exercises that jurisdiction granted to him by the contract of the parties subject, of course, to express limitations found in the statutes. A judge's decision is subject to reversal on many more grounds than an arbitrator's award. See Note, *Arbitration Proceedings Under Article 84*, 24 St. JOHN'S L. REV. 254 (1950).

⁸ "Every litigant is not only entitled to present his claims to an impartial judge, but to one who by no act on his part has justified a doubt as to his impartiality." *Matter of Friedman*, 215 App. Div. 130, 135, 213 N. Y. Supp. 369, 374 (1st Dep't 1926).

⁹ ". . . the court must make an order vacating the award . . . 2. Where there was evident partiality or corruption in the arbitrators or either of them." N. Y. CIV. PRAC. ACT § 1462.

¹⁰ *Davy v. Faw*, 7 Cranch 171 (U. S. 1810); *Brush v. Fisher*, 70 Mich. 469, 38 N. W. 446 (1888).

¹¹ See *Supreme Council C.B.L. v. Grove*, 176 Ind. 356, 96 N. E. 159, 161, 162 (1911).

tionship by consanguinity,¹² affinity¹³ or business,¹⁴ *i.e.*, servant, employee or agent, of debtor and creditor¹⁵ and attorney and client¹⁶ *if unknown to the other party* may cause disqualification. Of course, any person who would derive benefit in any manner from the award is included within the terms of this relationship restriction.¹⁷

It should be noted, however, that while the relationships just enumerated do not *ipso facto* make a person ineligible as a matter of law, it will in most situations be enough to vacate the award if unknown to the other party. The relationship is considered in connection with other facts in deciding as a matter of fact whether he is a prejudiced or impartial arbitrator.¹⁸

On the other hand, most if not all causes to disqualify or vacate are held to be waived in either of the following situations: (1) where the complaining party having knowledge of the alleged cause for *disqualification* submits his case without objection; (2) where the complaining party learns the facts of disqualification subsequently and does not promptly object to such arbitrator continuing; and (3) where the complaining party knew or should have known of the alleged disqualification when he agreed to the arbitrator at the time the contract was executed.¹⁹

¹² Pool v. Hennessy, 39 Iowa 192 (1874) (brother and business agent of party choosing him).

¹³ Cf. Empire Plexiglass Corp. v. Levitt Corp., 192 Misc. 251, 77 N. Y. S. 2d 85 (Munic. Ct. 1948) (husband of law assistant to attorney for one of the parties); Robb v. Brachman, 38 Ohio St. 423 (1882) (son-in-law, objection waived however).

¹⁴ American Guaranty Co. v. Caldwell, 72 F. 2d 209 (9th Cir. 1934); Matter of Knickerbocker Textile Corp. v. Sheila-Lynn, Inc., 172 Misc. 1015, 16 N. Y. S. 2d 985 (Sup. Ct. 1939) (arbitrator received notice of his designation three days after president of other party to arbitration had decided another arbitration proceeding in favor of company of which arbitrator was treasurer); Pool v. Hennessy, 39 Iowa 192 (1874) (brother and business agent of party choosing him). *But cf.* Matter of Meinig Co. v. Katakura & Co., Ltd., 241 App. Div. 406, 272 N. Y. Supp. 735 (1st Dep't), *aff'd without opinion*, 266 N. Y. 418, 195 N. E. 134 (1934) (one of the arbitrators selected pursuant to the rules of the Silk Association not disqualified because he was officer of corporation which at times bought material from one of the parties); St. George Textile Corp. v. Brookside Mills, Inc., 85 N. Y. S. 2d 621 (Sup. Ct. 1948) (disqualification does not follow because arbitrator chosen by one of the parties was president of a corporation which was a customer of another corporation whose president was also the party's sales agent).

¹⁵ Matter of Friedman, 215 App. Div. 130, 213 N. Y. Supp. 369 (1st Dep't 1926) (arbitrator by asking for and accepting loan from one of the parties immediately became disqualified).

¹⁶ Matter of Albert v. Spiegelberg, 146 Misc. 811, 262 N. Y. Supp. 795 (Sup. Ct. 1932); *accord*, Matter of Avalon Fabrics, 195 Misc. 267, 89 N. Y. S. 2d 166 (Sup. Ct.), *aff'd without opinion*, 275 App. Div. 1032, 92 N. Y. S. 2d 310 (1st Dep't 1949).

¹⁷ See Note, 104 A. L. R. 563 (1936).

¹⁸ Cf. National Fire Insurance Co. v. O'Bryan, 75 Ark. 198, 87 S. W. 129 (1905); Matter of Newburger v. Rose, 228 App. Div. 526, 240 N. Y. Supp. 436 (1st Dep't 1930).

¹⁹ Matter of Avalon Fabrics, 195 Misc. 267, 89 N. Y. S. 2d 166 (Sup. Ct.), *aff'd without opinion*, 275 App. Div. 1032, 92 N. Y. S. 2d 310 (1st Dep't 1949);

It is by utilization of the above-mentioned rules of waiver that the two reported cases find a basis for their decisions. The courts are reluctant to interfere with an arbitration proceeding and will not vacate an award unless there is shown a ground as set forth specifically in Section 1462 of the New York Civil Practice Act.²⁰ Moreover, if none is forthcoming, the award is considered impregnable.²¹

Since arbitration has been accepted by businessmen as a practical device to settle their mercantile differences, it is submitted that both reported decisions are convincing and in accord with the purposes of arbitration. The court, appreciating the real significance of arbitration, refused to allow the plaintiff's claim of a legal technicality in the *Amtorg* case. One of the many beneficent features of arbitration is the settlement of controversies unencumbered by legal technicalities. On the other hand, while in the *Amtorg* case there was no real question as to the plaintiff's prior knowledge of the conflict of interest, in the *Atlantic Rayon* case it could not be said that an issue of fact did not exist as to a waiver by the petitioner or partiality of the arbitrator and therefore the court was correct in remanding the case to determine the issues of fact involved.

From these two decisions it can be observed that while the courts will take cognizance of the spirit of arbitration and thus help keep it simple and free from the many technicalities which confront and retard judicial litigation, it will insist in a proper case that the notion of justice and fair play be adhered to in all arbitration proceedings.



CONFLICT OF LAWS—REVENUE LAW—ACTION ON TAX CLAIM BY MUNICIPAL CORPORATION OF ANOTHER STATE.—In an action by a foreign municipal corporation to recover delinquent taxes against the defendant as owner of personal property located in that foreign municipality, a motion to dismiss on the ground that the court lacked jurisdiction of the subject of the action was granted. The New York courts as a matter of state policy do not lend themselves to the enforcement of the revenue laws of another state. *Wayne County [Michigan] v. American Steel Export Co.*, 277 App. Div. 585, 101 N. Y. S. 2d 522 (1st Dep't 1950).

That portion of the law commonly referred to as "Conflict of Laws" or "Private International Law" determines whether in a particular legal situation the courts of the forum shall take cognizance of

see *Matter of Newburger v. Rose*, 228 App. Div. 526, 528, 240 N. Y. Supp. 436, 438, 439 (1st Dep't), *aff'd without opinion*, 254 N. Y. 546, 173 N. E. 859 (1930).

²⁰ *Goff and Sons, Inc. v. Rheinauer*, 199 App. Div. 617, 192 N. Y. Supp. 92 (1st Dep't 1922).

²¹ *Pine Street Realty Co. v. Controulos*, 233 App. Div. 404, 253 N. Y. Supp. 174 (1st Dep't 1931).