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SEVENTH CIRCUIT COMES TO ARBITRATOR'S DEFENSE IN CLARIFYING NARROW SCOPE OF ARBITRATOR 'EVIDENT PARTIALITY' UNDER SECTION 10 OF THE FEDERAL ARBITRATION ACT

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I. INTRODUCTION

In *Trustmark Insurance Co. v. John Hancock Life Insurance Co.*, the United States Court of Appeals for the Seventh Circuit considered an appeal seeking review of an injunction barring the parties from further arbitration proceedings so long as a certain arbitrator remained a member of the arbitration panel.[1] The Plaintiff-Appellee argued, and the United States District Court for the Northern District of Illinois, Eastern Division agreed, that having previously arbitrated a dispute between the two parties over essentially the same issue, the arbitrator could no longer be considered disinterested in the proceedings.[2] The Plaintiff-Appellee argued this partiality was due to the arbitrator's preexisting knowledge of the previous arbitration and the dispute.[3] The Seventh Circuit Court of Appeals reversed, clarifying that under §10 of the Federal Arbitration Act ("FAA"), "partiality" means only having a personal or financial stake in the outcome of the arbitration, and that mere knowledge of previous events or arbitrations or interest in reemployment by the parties is not enough to establish partiality.[4]

II. BACKGROUND

Appellant John Hancock Life Insurance Company ("Hancock") and Appellee Trustmark Insurance Company ("Trustmark") entered into an agreement under which Trustmark would reinsure risks underwritten by Hancock.[5] The two insurance companies later disagreed over the meaning of "London Market Retrocessional Excess of Loss Business" and submitted their dispute to arbitration under the terms of the contract.[6] A three-member panel consisting of one party-chosen arbitrator appointed by each side and a neutral umpire found in favor of Hancock in March 2004, and a district court later affirmed the award.[7] In October 2004, Hancock

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[1] Trustmark Ins. Co. v. John Hancock Life Ins. Co., 631 F.3d 869 (7th Cir. 2011).

[2] *Id.* at 871.

[3] *Id*.

[4] *Id.* at 873.

[5] *Id.* at 870.

[6] *Id.* at 871.

[7] *Id.*

commenced another arbitration action after Trustmark refused to pay any of the bills Hancock had sent, claiming that the arbitral award alone governed all its dealings with Hancock.[8]

Once the second arbitration was commenced, Trustmark argued that Hancock had only secured its award by fraud because it failed to disclose four documents during discovery.[9] When picking the arbitrators for the second panel, Hancock chose Mark S. Gurevitz, ("Gurevitz") whom Hancock had chosen in the initial arbitration as well.[10] Trustmark chose an arbitrator who had been uninvolved in the prior proceeding.[11] Once the arbitrators were selected, it was necessary to determine what weight to give the previous arbitral decision. Hancock argued the results were dispositive, but Trustmark contended that the proceedings should be started from scratch, and that the confidentiality agreement the parties had signed during the first arbitration prevented any disclosure of the first arbitration.[12] Gurevitz and the neutral umpire agreed with Hancock, and concluded that they, as arbitrators, were entitled to know the evidence and results of the first arbitration.[13]

Trustmark filed suit to vacate the initial court decision confirming the award, but having been filed in 2009, the suit was held to be untimely.[14] Trustmark then sought an injunction to prevent further arbitration so long as Gurevitz remained on the panel, arguing his knowledge of the previous arbitration proceedings prevented him from being a disinterested party and rendered him partial in the outcome of the dispute.[15] Under FAA §10(a) an arbitral award may be vacated "where there was evident partiality or corruption in the arbitrators" or "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[16] Moreover, both the contract between Trustmark and Hancock and general principles of arbitration require that the arbitrators to a dispute be disinterested and impartial, such that the arbitrator have no financial or other personal stake in the outcome.[17] Trustmark used this and the requirement of arbitrator impartiality and disinterest to argue that because of his knowledge of the first arbitration, Gurevitz was rendered partial and should be excluded from the proceeding because any decision he rendered would be open to vacatur by a district court.[18]

The district court that heard Trustmark's request for an injunction agreed, and held that Gurevitz was not disinterested because of his knowledge of the first arbitration.[19] In addition, the court found that the second panel was not entitled to consider the decision made by the first, effectively halting the arbitration.[20] Hancock then appealed the district court's decision.[21]

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[8] *Id.* at 871.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 871.
[15] *Id.*
[16] Federal Arbitration Act, 9 U.S.C. §10 (2006).
[17] *Trustmark*, 631 F.3d at 871. (citing Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009)).
[18] *Id.* at 871.
[19] *Id.*
[20] *Id.*
[21] *Id.*

III. ANALYSIS

The main issue for the circuit court's review was whether the injunction was properly granted by the district court. An injunction, because it is a form of equitable relief, requires a showing of irreparable harm – a showing that Trustmark failed to meet, according to the court.[22]. The court concluded that the district court erred in finding that Trustmark had not agreed to arbitrate the reinsurance of certain risks, it also held that there would be no irreparable harm done to Trustmark by proceeding to arbitration.[23] The only conceivable injury would be that of time and cost.[24] Even if Gurevitz were later found to have been partial, Trustmark would not be deprived of its ability to seek vacatur of the award in court under FAA section 10, and thus would not have been caused any irreparable harm if the injunction was not granted.[25]

The Seventh Circuit, in addition to finding a lack of the irreparable harm necessary for injunctive relief, also took unusual and considerable steps to clarify the meaning of "disinterested arbitrator."[26] "Disinterested" adjudicators, according to the Supreme Court, are merely required to be "lacking a financial or other personal stake in the outcome."[27] The court then held that Gurevitz's knowledge of the previous arbitration did not constitute either financial or personal stake, but merely the same reputational stake any arbitrator has in the proceedings he or she is tasked with overseeing.[28] Next, the court made sure to clarify that unless an arbitrator has such personal or financial stake in the outcome of the proceedings, he will not be disqualified from adjudicating on grounds of partiality or interest.[29] Despite the assumption that he would rule in favor of the party appointing him, Gurevitz was no different than any other arbitrator, or even any other judge.[30] Adjudicators often have knowledge of the parties or disputes, and such knowledge is not sufficient to disqualify them.[31] In fact, as the court pointed out, the district court judge who issued the injunction was the very same judge who issued the order enforcing the 2004 arbitration award.[32] Such knowledge is insufficient to disqualify either a judge or an arbitrator, as "knowledge acquired in a judicial [or here, arbitral] capacity does not require disqualification."[33]

The court then went on to clarify the higher burden set for disqualifying arbitrators from adjudicating disputes.[34] While the parties involved in a suit cannot handpick judges, the rules of arbitration allow parties to pick their arbitrators. Additionally, under FAA §10 only "evident partiality", as opposed to the risk or appearance of such partiality, is sufficient to disqualify an arbitrator or result in the vacatur of an arbitral award.[35] The court then reasoned that where a

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[22] *Id.* at 872.

[23] *Id.* at 872.

[24] *Id.*; Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209, 222 (1938); Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974); FTC v. Standard Oil Co., 449 U.S. 232 (1980).

[25] *Trustmark,* 631 F.3d at 872. (citing 9 U.S.C. §10 (2006)).

[26] *Id.*

[27] *Id.* (citing Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009)).

[28] *Id.* at 873.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 873.

[32] *Id.*

[33] *Id.* (citing Liteky v. United States, 510 U.S. 540 (1994)).

[34] *Id.*

[35] *Id.* (citing Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 621 (7th Cir. 2002)).

valid bargained-for contract allows the parties to choose their arbitrator, a court should not interfere with their ability to do so, provided all contractual requirements are followed and there is no other reason to disqualify the arbitrator.[36] In concluding that Gurevitz's prior knowledge of the first arbitration between Trustmark and Hancock was not enough to show the evident partiality necessary for arbitrator disqualification, the Seventh Circuit made clear the requirements for a showing of such evident partiality and made explicit the need for either personal or financial interest sufficient to render the arbitrator incapable of hearing the dispute with disinterest.[37] The court concluded that barring a showing of such evident partiality by Gurevitz, no irreparable injury would befall Trustmark should an injunction not be granted and the parties are allowed to proceed to arbitration.[38]

IV. SIGNIFICANCE

Trustmark is significant because the court makes explicit the requirements for arbitrator disqualification due to evident partiality. The Seventh Circuit signals its reluctance to divert from anything other than the narrowest view of what constitutes evident partiality and refuses to find it other than where there is a showing of personal or financial interests in the parties or disputes.[39] The court in *Trustmark* makes clear its deference towards arbitration and its unwillingness to interfere with bargained-for arbitration agreements unless a party can prove that an arbitrator's disinterest would be impossible.[40] In essence, the decision in *Trustmark* makes clear to parties engaged in arbitration in the Seventh Circuit that not only will it take a significant conflict to disqualify an arbitrator, but that the disputing sides can select an arbitrator with intimate knowledge of the parties' businesses or previous arbitration proceedings without fear of disqualification of the arbitrator or vacatur of the eventual award.[41] The court also makes certain that in the future all parties to arbitration will be aware of the Seventh Circuit's reluctance to interfere with arbitration proceedings. The decision establishes unless there is a clear case of abuse of discretion or arbitrator evident partiality, the Seventh Circuit will respect the arbitration agreement and not intrude on the bargained-for proceedings.

V. CONCLUSION

While the majority of the court's decision is a fairly simple matter of determining whether any irreparable harm would befall Trustmark should the parties proceed to arbitration, the court's decision to go further and address the question of arbitrator partiality is a significant step, as it was not an issue that needed to be addressed by the court.[42] The court could have

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[36] *Id.* at 874.
[37] *Id.*
[38] *Id.* at 874.
[39] *Id.* at 872–73.
[40] *Id.* at 873.
[41] *Id.*
[42] *Id.* at 872.

merely concluded that Trustmark would receive no irreparable injury should a stay of arbitration not be granted, and left the parties to their own devices.[43] Instead, the court chose to devote a good portion of its decision to the accusations made by Trustmark that Gurevitz was a partial arbitrator and should have been disqualified. The court, in forceful language, makes clear that it will not take the opportunity to expand the definition of arbitrator partiality and will only step in to disqualify an arbitrator where there is a clear case of evident partiality.[44] Moreover, the court refuses to expand its understanding of such evident partiality, reinforcing the idea of arbitration as a bargained-for contract, meaning that if the parties were silent on an issue, the court should not be the one to step in and interpret that silence.

In coming to defend Gurevitz's honor, the court also continues to make clear the stark differences between arbitration and traditional judicial proceedings. The Seventh Circuit unequivocally rejects any instance where a party would seek to narrow that difference, and to either make arbitrators no different than judges, or to limit the amount of knowledge either could have about a dispute. In its decision here, the Seventh Circuit Court of Appeals hews closely to previous arbitration cases that staunchly defend the right of parties to choose arbitration, as well as parties' rights to contract for exactly what they get in the resulting decision. The court here, instead of merely deciding the issue of whether the injunction was properly granted, takes the extra step in chastising a party that it thinks launched a baseless and defamatory attack against one of the arbitrators and makes clear its disinclination to involve the courts in arbitration where there is not a clear and previously established statutory or judicial reason to do so. In addition, the court warns other potential litigants that it will not allow attacks on arbitrator credibility to derail arbitration proceedings unless the litigating party can prove one of the already established indicators of evident partiality; that is, either personal or financial stakes that would make the arbitrator interested in the outcome of the proceedings and unable to impartially decide the outcome of the dispute.

[43] *Id.*
[44] *Id.* at 873.