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COMMERCIAL CASES
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Apparently, It's Not Always Who You Know

A respondent party in a pair of international arbitrations on the losing end of roughly $285,000,000 in adverse awards attacked the awards based upon arbitrator bias.

"If there is one bedrock rule in the law of arbitration, it is that a federal court can vacate an arbitral award only in exceptional circumstances. … The presumption against vacatur applies with even greater force when a federal court reviews an award rendered during an international arbitration."

Applying the Federal Arbitration Act (according to the court, the international arbitrations were "seated" in the United States and fell under the New York Convention, such that the FAA is required to be the basis for vacatur efforts), the court examined assertions that certain alleged non-disclosures by the panel "concealed information related to the arbitrators' possible biases and thereby 'deprived [respondent] of [its] fundamental right to a fair and consensual dispute resolution process.'" The aggrieved party urged that one arbitrator's undisclosed nomination of another arbitrator to serve as president of another arbitral panel – "a position that sometimes pays hundreds of thousands of dollars" – possibly influenced the second arbitrator to side with the first. Assertions were also levied that the arbitrators' undisclosed work with the attorneys for the claimant in other arbitrations "allowed them to become familiar with each other, creating a potential conflict of interest."

The appellate court, finding that nothing occurred which was nefarious, wrote: "It is little wonder, and of little concern, that elite members of the small international arbitration community cross paths in their work. As one of the [claimant's] expert witnesses testified, '[w]orldwide, there are only several dozen arbitrators who would be attractive candidates' for 'a proceeding such as the Panama 1 Arbitration.' We refuse to grant vacatur simply because these people worked together elsewhere."

Digging deeper, the appellate court assessed the circumstances under Article V of the New York Convention, "which provides a defense to an arbitral award if '[t]he recognition or enforcement of the award would be contrary to… public policy… . Undeniably, there is a public policy in the United States against 'evident partiality.' … But, as we have already discussed, that public policy was not violated in this case."

Finally, the appellate court examined whether the matter of the lack of initial disclosures violated the parties' agreement to arbitrate or United States law: "The record does not reflect an issue with the composition of the tribunal due to the arbitrators' late disclosures. … The parties appointed arbitrators, who affirmed their independence and disclosed any potential conflicts. … [Respondent] challenged the arbitrators based on the late disclosures, and the ICA followed the

proper procedure when denying that challenge. …True, the ICA noted that Gaitskell should have disclosed his case where McMullan appeared and that von Wobeser should have disclosed his case with Jana. But it did not disqualify either arbitrator for those reasons because it did not find any facts that led it to question either arbitrator's independence or impartiality."

Of course, the decision here could have gone either way, reinforcing the maxim directed to arbitrators: fully disclose!

Grupo Unidos por el Canal, S.A. v. Autoridad Del Canal de Panama, 78 F.4th 1252 (11th Cir. 2023)

This Is No Joke

"Down on the bayou, Boudreaux went into a bar…."

Although, here, the bar was allegedly serving up problematic rhetoric and not beverages.

Plaintiff, Boudreaux – on the heels of a United States Fifth Circuit Court of Appeals decision concerning the Texas State Bar Association, *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), declaring that a state bar must refrain from participating in "activities not germane to regulating the legal profession or improving the quality of legal services" – complained that the Louisiana State Bar Association was operating outside of those guidelines.

In fact, shortly after the ruling issued in *McDonald*, the Louisiana State Bar Association sought to toe the line, and, among other things, ceased all of its lobbying and similar efforts with the Louisiana legislature and amended its related bylaws.

Faced again with a question virtually identical to that considered in *McDonald* – albeit against the backdrop of a bar association which had substantially curtailed what it perceived to be obvious offending activities – the court nonetheless ruled in favor of the plaintiff.

Although the court did not require the LSBA to "renounce[] its prior political advocacy," the court found that ongoing bar association speech was not 100% germane to regulating the legal profession or improving the quality of legal services:

"Boudreaux challenges a group of 'Wellness Wednesday' tweets relating to the health and wellbeing of lawyers. For example, the LSBA 'tout[ed] the purported benefits of walnuts,' 'urg[ed] readers to . . . workout at least three times per week, and encouraged lawyers to get 'sunlight.'… Those statements fail the germaneness test from *McDonald*… because they do not sufficiently relate to legal practice or the legal profession. Even assuming healthier lawyers are generally more effective lawyers, the LSBA is not an all-encompassing wellness service that may comment on every facet of lawyers' health and fitness. …

"[I]f bar associations may opine, advise, and inform on anything that they deem is generally conducive to attorney health and wellness, there is no limiting principle. If a bar association may tout the health benefits of broccoli, may it also advise attorneys to practice Vinyasa yoga, adhere

to a particular workout regimen, or get married and have children… . The LSBA offers no clear answer, nor can we discern any principled line once we allow advice that is not inherently tied to the practice of law or the legal profession.”

The court felt similarly about LSBA “tweets regarding technology and safety” and sharing a third-party article on student loan debt for young lawyers, as well as communications concerning community-engagement opportunities for lawyers and an icon and a link celebrating “Pride Month,” all of which the court deemed “not germane for similar reasons”: “The… test is not whether speech is *objectionable*, but whether it is *germane*.”

The court issued a preliminary injunction preventing the LSBA from requiring Boudreaux to join or pay dues to the LSBA pending completion of the trial court’s determination of remedies.

Boudreaux v. La. State Bar Ass'n, 2023 U.S. App. LEXIS 30142 (5th Cir. Nov. 13, 2023)