

Party Appointed Arbitrators are Presumed to be Impartial

Many written contracts entered into by and between professional engineers and their clients provide for the arbitration of disputes. Some of these contracts will contain arbitration provisions permitting the owner to select one arbitrator and the professional engineer to select the second arbitrator with the two arbitrators selecting a third. The selection provisions often provide that if the first two arbitrators cannot agree on the third arbitrator, the circuit court shall appoint him. The decision of any two arbitrators would determine the outcome.

Additionally, such arbitration selection provisions may include obligations to pay the arbitrators. It would not be unusual to find provisions that compel the owner to pay for its appointed arbitrator, the professional engineer to pay for its appointed arbitrator, and the two parties to share the fees of the third appointed arbitrator.

Recently, an arbitration award was reviewed by the Wisconsin Supreme Court in Borst v. All State Insurance Company, 717 N.W.2d 42 (Wis. 2006). While that case involved the arbitration of a dispute between an insurer and an insured, the issues before the court dealt with the impartiality of the party-appointed arbitrators and the law announced by the Wisconsin Supreme Court is applicable to party-appointed arbitrators in contracts between owners and professional engineers. The Wisconsin Supreme Court made six rulings dealing with the issue of whether a party-appointed arbitrator must be an impartial neutral. The Supreme Court held:

1. all arbitrators are presumed impartial unless the parties contract for non-neutral arbitrators, or the arbitration rules otherwise provide for non-neutral arbitrators;
2. evident partiality due to a relationship between an arbitrator and a party cannot be avoided simply by full disclosure at the outset and a declaration of impartiality;
3. unless the parties have contracted to use a specific arbitrator, pre-arbitration challenges to arbitrators selected by the parties are permissible;

4. insured did not forfeit his right to make a post-arbitration challenge to arbitrator's appointment by insurer;
5. arbitrator who had ongoing attorney-client relationship with insurer that selected him was evidently partial, such that arbitration award had to be vacated; and
6. circuit court must vacate an arbitration award due to evident partiality if based on evidence a reasonable person would have serious doubts about the impartiality of the arbitrator.

In the Borst case, the parties selected arbitrators as provided for in the insurance policy.

The insured selected one arbitrator and the insurer selected the second. The insured immediately objected to the arbitrator selected by the insurer because the insurer was a client of that arbitrator's law firm. The lawyer appointed by the insurer disputed the insured's contention that he could not be neutral. The two selected arbitrators then selected a third arbitrator. In resolving the insured's objection to the appointment of an attorney from the law firm that represented the insurer, as a second arbitrator, the Wisconsin Supreme Court adopted some new law. It said, "The presumption we adopt today [of impartiality] also puts Wisconsin in line with 'the recent trend away from non-neutral party-appointed arbitrators and the heightened expectations of independents and neutrality of commercial arbitrators.'" The court also noted that the presumption of impartiality was in accordance with § 788.10(1)(b) of the Wisconsin Statutes which discusses the vacation of an arbitration award "where there was evident partiality or corruption on the part of the arbitrators, or either of them." The court interpreted that language to mean that every arbitrator on the panel is supposed to be unbiased absent express contractual language or applicable arbitration rules to the contrary.

The court noted that both neutral and non-neutral arbitrators in the arbitration process have been utilized, generating a great deal of confusion. In an effort to resolve that confusion the court interpreted the Wisconsin statutory language to mean that every arbitrator on the panel is

presumed to be unbiased. It concluded that statutory language demonstrated that the legislature did not contemplate partisan arbitrators. The court clarified that it did not regard its prior decisions on tripartite arbitration panels to mean that only the third arbitrator appointed was to be an impartial independent. Rather, the court concluded that there was a presumption under the statutes that all three arbitrators in a tripartite arbitration panel are presumed impartial.

By announcing its decision of the presumption of impartiality the court noted that Wisconsin was in line with “the recent trend away from non-neutral party-appointed arbitrators and the heightened expectations of independents and neutrality of commercial arbitrators.”

The court then turned to whether in the case before it there was evidence of partiality because the arbitrator appointed by the insurer was acting as an attorney for the insurer on other cases. The insurer argued that under a literal reading of Wisconsin case law there was no evident partiality based upon that disclosure alone. The court concluded that the insurer’s position was entirely unreasonable. The court rejected the insurer’s argument that all that was required was disclosure that the arbitrator it appointed was acting as its attorney in other cases. The court noted that the parties had agreed that the entire panel was intended to be neutral.

The court went on to approve the procedure of making a pre-arbitration challenge to the appointment of a party-appointed arbitrator. The court concluded that in most instances, in the interest of fundamental fairness, a challenged arbitrator should simply be replaced by the party appointing him. The court also approved the procedure of seeking court relief if a party refuses to replace the challenged arbitrator.

The Wisconsin Supreme Court clarified that it was adopting the rule that unless the parties have contracted to use a specific arbitrator, pre-arbitration challenges to arbitrators selected by the parties are permissible. The court noted that such pre-arbitration challenges

promote efficiency in the arbitration process when a party reasonably objects to the use of an arbitrator selected by an opposing party. The court stated that it believed pre-arbitration challenges were especially relevant in cases where the parties agree that the arbitrators are all to be neutral, and if such pre-arbitration challenges do not result in a party replacing the challenged arbitrator, the general equity powers of the circuit court may be sought to obtain a court order requiring the party to select another arbitrator.

The court also noted that arbitrators should always continue to disclose relevant relationships in accordance with the established Wisconsin law. After such disclosure the burden is on the opposing party to object. A failure to object to the selection of an arbitrator when information is timely disclosed may act as a waiver of any subsequent post-arbitration challenge based on the disclosed information. However, the court noted that post-arbitration challenges are permissible under the Wisconsin Statutes based on circumstances of the arbitration itself or on information discovered after the arbitration.

Professional engineers who are a party or a party-appointed arbitrator should therefore be expected to disclose any impartiality they believe may exist by virtue of past relationships. Absent an objection, it will be presumed that the party-appointed arbitrator is indeed impartial, i.e., a neutral.