NYSBA

Staff Memorandum

EXECUTIVE COMMITTEE
Agenda Item #8

REQUESTED ACTION: Approval of an affirmative legislative proposal from the Dispute Resolution Section.

Attached is a memorandum from the Dispute Resolution Section outlining the Section's opposition to a current bill that would amend CPLR 7511 to provide for vacating an arbitrator's award where "the arbitrator has been affiliated in any way with a party to the arbitration, or any of its subsidiaries or affiliates; or where the arbitrator has a financial interest, directly or indirectly, in any party or in the outcome of the arbitration." The Section believes the bill is vague and unnecessary, and would be poorly received in the international community at a time when there are ongoing efforts to bring international arbitrations to New York. The legislation and the Section's memorandum in opposition are attached.

Since discussions with the Assembly Sponsor's office have indicated that the purpose of the legislation is to address situations in which an employer imposes on an employee an arbitrator who is affiliated with the employer and clearly is not neutral, the Section made the determination to submit its own proposal to address this specific situation. Accordingly, the Section is proposing a new CPLR 7502A, limited to employment arbitration, by which a person requested to serve as an arbitrator would be required to disclose interests that might affect impartiality. The employee would have the opportunity to object to the arbitrator's service. The Section notes that this proposal would not contain a ground for vacating an arbitration award.

This proposal was posted on the Reports Group website on March 9. In addition, it was circulated on March 2 to the Commercial and Federal Litigation Section, the International Section, the Labor and Employment Law Section, the Torts, Insurance and Compensation Law Section, and the Committee on Civil Practice Law and Rules. You will be advised of any comments received in advance of the meeting.

The report will be presented at the March 30 meeting by Section Vice-Chair John Wilkinson.

Section 7502A. Employment Arbitration

(a) **Disclosure.**

(i) Persons who are requested to serve as arbitrators in employment disputes ("Employment Arbitrators") shall, before accepting, disclose to the parties and any other arbitrators: 1. Any direct or indirect financial or personal interest in the outcome of the arbitration; 2. Any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias, such disclosure including any such relationships which the Employment Arbitrators personally have had with any party or its lawyer, or with any individual whom they have been told will be a witness and any such relationships involving members of their families, or their current employers, partners or business associates.

(ii) Persons who are requested to serve as Employment Arbitrators shall make a reasonable effort to inform themselves of any interests or relationships described in the preceding paragraph before making the required disclosure.

(b) **Effect of Disclosure.**

(i) If an Employment Arbitrator makes a disclosure pursuant to paragraph (a) above, the employer shall provide the employee with a written copy of the language of this Section 7502A of the NY CPLR at least three days in advance of the first in person or telephonic conference between the arbitrator and the parties and and/or their counsel ("First Conference").

(ii) If a disclosure pursuant to paragraph (a) above could lead a reasonable person to conclude there was an appearance of bias or prejudice on the part of the Employment Arbitrator in favor of the employer, then the employee may object to and strike the appointment of the Employment Arbitrator either at or before the First Conference and, following such objection, the Employment Arbitrator shall not serve in the arbitration.

(ii) In the event an employee strikes an arbitrator as set forth in paragraph (b)(i) above, a new and neutral arbitrator will be appointed by agreement of the parties or failing such agreement, by a Justice of the New York Supreme Court pursuant to NY CPLR, Section 7504.

(iii) If an employee does not make an objection as provided above, he or she may still object to continued service of the arbitrator based on new information which is disclosed or discovered subsequent to the First Conference. Any such subsequent objection shall be submitted for decision by a Justice of the New York Supreme Court, and any replacement arbitrator will be appointed either by agreement of the parties or by the Justice of the New York Supreme Court pursuant to NY CPLR, Section 7504.

March 1, 2012

To: NYSBA Executive Committee

From: The Dispute Resolution Section

Re: Proposed Legislation

The Dispute Resolution Section (DRS) is requesting that the NYSBA's Executive Committee ("Committee") give expedited consideration to certain New York legislation it is proposing and that it approve such legislation at its March 30 meeting. The background of this request is as follows:

In June of 2011 the NYS Assembly passed a bill (A.7002-A by Titone) that would amend CPLR, Section 7511, to provide for vacating an arbitration where: "the arbitrator has been affiliated in any way with any party to the arbitration, or any of its subsidiaries or affiliates; or where the arbitrator has a financial interest, directly or indirectly, in any party or in the outcome of the arbitration."

The DRS has formally opposed this bill, as has the City Bar. In its opposition, the DRS made the points that: 1. The bill is hopelessly vague and would lead to endless litigation; 2. The bill is unnecessary because NY courts already vacate arbitration awards regularly in instances of evident partiality; 3. The bill is doubly unnecessary because arbitrating consumers are already fully protected by Section 399 (c) of the General Business Law; 4. The bill would foment the criticism that arbitration is becoming too much like litigation; 5. The bill would be poorly received in the international arbitration community and would stifle a major ongoing effort to bring more international arbitrations to New York; and 6. The bill would mandate vacatur even if the arbitrator made full disclosure of an affiliation with a party and even if the parties thereafter agreed to continued service by the arbitrator.

In discussions with the Assembly Sponsor's office, it was made clear that the Sponsor is trying to correct the situation where an employer imposes on an employee an arbitrator who is affiliated with the employer and who is clearly not neutral. They shared with us stories about such instances and that they were committed to doing something about it. In light of this conversation, it appears the Sponsor might well be receptive to language which is limited to the specific situation which concerns him.

At the DRS Annual Meeting, the clear sentiment was that we should try to improve the bill in the Assembly, rather than simply continuing to oppose it. The attached language is intended to improve the bill substantially. The primary benefits of this language are: 1. It is limited to employment disputes; 2. It does not contain a ground for vacating an arbitration award; 3. It enables parties to consent to continued service of an arbitrator following full disclosure; and 4. It addresses a situation which, at least in some instances, is a legitimate subject of concern.

We are currently seeking comments on the proposed language by the Labor and Employment Section and by other NYSBA Sections that might be interested. We are also sharing the language for comments by the NYC Bar Association and by the New York County Lawyers Association.

We request the Committee's fast approval of the proposed language because the Sponsor's Office has indicated that they intend to amend the bill and work towards passage once the State Budget is passed, on or about April 1. Thank you very much for your consideration.

The Dispute Resolution Section

A 7002-A Titone Same as S 5798 FUSCHILLO
Civil Practice Law and Rules
TITLE....Provides for vacating of an arbitration award on the ground that the arbitrator was affiliated with a party, or has a financial interest in a party or the outcome
04/07/11referred to judiciary
06/10/11amend (t) and recommit to judiciary
06/10/11print number 7002a
06/15/11reported referred to rules
06/16/11reported
06/16/11rules report cal.335
06/16/11ordered to third reading rules cal.335
06/16/11passed assembly
06/16/11delivered to senate
06/16/11REFERRED TO RULES
01/04/12DIED IN SENATE
01/04/12RETURNED TO ASSEMBLY
01/04/12ordered to third reading cal.232
01/19/12committed to judiciary

S5798 FUSCHILLO Same as A 7002-A Titone
ON FILE: 01/04/12 Civil Practice Law and Rules
TITLE....Provides for vacating of an arbitration award on the ground that the arbitrator was affiliated with a party, or has a financial interest in a party or the outcome
06/16/11 REFERRED TO RULES
01/04/12 REFERRED TO JUDICIARY

STATE OF NEW YORK

7002--A

2011-2012 Regular Sessions

IN ASSEMBLY

April 7, 2011

Introduced by M. of A. TITONE, COLTON, GOTTFRIED, REILLY, BRONSON, P. RIVERA, LAVINE -- Multi-Sponsored by -- M. of A. ABINANTI, CALHOUN, COOK, GABRYSZAK, GIBSON, MONTESANO -- read once and referred to the Committee on Judiciary -- committee discharged, bill amended, ordered

reprinted as amended and recommitted to said committee

AN ACT to amend the civil practice law and rules, in relation to grounds for vacating an arbitration award on the basis of partiality of the arbitrator

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subparagraph (ii) of paragraph 1 of subdivision (b) of
2 section 7511 of the civil practice law and rules is amended to read as
3 follows:
4 (ii) partiality of an arbitrator appointed as a neutral, except where
5 the award was by confession**; or where the arbitrator has been affiliated**
6 **in any way with any party to the arbitration, or any of its subsidiaries**
7 **or affiliates; or where the arbitrator has a financial interest, directly**
8 **or indirectly, in any party or in the outcome of the arbitration**; or
9 § 2. This act shall take effect immediately.

EXPLANATION--Matter in **italics** (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD09411-04-1

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A7002A

SPONSOR: Titone

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to grounds for vacating an arbitration award on the basis of partiality of the arbitrator

PURPOSE OR GENERAL IDEA OF BILL: To clarify the intent and protect the purpose of the existing laws regarding arbitration by creating a definition of the term arbitration.

SUMMARY OF SPECIFIC PROVISIONS: Amends Article 75 Civil Practice Law and Rules by adding a provision to subdivision (b)(ii) of Section 7511 which adds the fact that an arbitrator has been affiliated with any party or has a direct or indirect financial interest in any party or in the outcome of the arbitration, as grounds to vacate an arbitration award.

JUSTIFICATION: The public policy in favor of arbitration which is codified in Section 7501 of the Civil Practice Law and Rules, is based upon the fact that arbitration can be a more efficient and cost-effective method for parties to resolve disputes. The presumption that an arbitration clause is enforceable has, however, become a sword to wield against parties of lesser means rather than a shield to protect against unnecessary litigation.

Currently, a party must prove, either during the course of misconduct by the arbitrator or after an award by an arbitrator is perceived to be unfair, that the arbitrator was biased - even if the arbitrator clearly has an economic stake in the outcome of the dispute. This outcome is in direct opposition to the reasons (efficiency and fairness) why arbitration is favored. As arbitration is commonly thought to be a dispute resolution procedure that occurs in front of a neutral third party, codifying it as such will enforce the original intent of the law.

PRIOR LEGISLATIVE HISTORY: None.

FISCAL IMPLICATIONS: None,

EFFECTIVE DATE: This act shall take effect immediately.

New York State Bar Association

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NYSBA

Memorandum in Opposition

Dispute Resolution Section

Dispute Resolution #2 August 29, 2011

S. 5798	By:	Senator Fuschillo
A. 7002-A	By:	M. of A. Titone
	Senate Committee:	Rules
	Assembly Committee:	Judiciary
	Effective Date:	Immediately

AN ACT to amend the civil practice law and rules, in relation to grounds for vacating an arbitration award on the basis of partiality of the arbitrator.

LAW AND SECTION REFERRED TO: CPLR 7511

THE DISPUTE RESOLUTION SECTION OPPOSES THIS LEGISLATION

This legislation would amend New York State's arbitration statute, CPLR Article 75, by expanding, with uncertain and unpredictable effect, the grounds for vacating an arbitration award. We oppose this change because broadening the grounds for overturning an arbitration award is unnecessary and harmful. At present an award may be vacated upon a showing of various forms of arbitrator error or misconduct and notably, "partiality by an arbitrator appointed as a neutral.... " Thus, if evidence is brought to the court's attention that the arbitrator was not impartial but was unfairly disposed toward one side, for whatever reason, such as family connection or personal relationship not disclosed to and waived by both of the parties at the time of arbitrator selection, then the award must be vacated unless the parties agree otherwise. The proposed amendment would expand the grounds for vacating an arbitration award by directing annulment, not only in cases of arbitrator "partiality", but also: *"where the arbitrator has been affiliated in any way with any party to the arbitration, or any of its subsidiaries or affiliates; or where the arbitrator has a financial interest, directly or indirectly, in any party or in the outcome of the arbitration."*

We strongly object to the insertion of this new language into New York's arbitration statute. We believe it would lead to an unending stream of litigation challenging arbitral awards in the courts and would negatively impact parties' choice of New York as an arbitral venue. A call to set aside the arbitration award where the arbitrator *"has been affiliated in any way with any party to the arbitration, or any of its subsidiaries or affiliates"* without taking account of arbitrator disclosure and the facts known to the parties at the time they agreed on appointment of the arbitrator, is so broad and uncertain in meaning as to be legislatively unreasonable. Would "affiliated in any way" encompass membership by an arbitrator and a party in the Elks' Club, the state legislature or the state bar? Would it include religious affiliation or membership in a minority group? Would it matter that the parties knew of such affiliation at the time they chose the arbitrator, that the arbitrator had disclosed it without encountering any objection, or that the parties could readily have discovered it by "googling" the arbitrator's name? As noted above, every variety of presumed "affiliation," whether or not disclosed, would provide a ground for challenge of an arbitration award pursuant to expensive and time-consuming litigation directed at placing an interpretation on this hopelessly open-ended term.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

As previously noted, the concept of arbitrator bias or "partiality" is already quite broad. "Affiliation" with a party and possession of a "financial interest" in the dispute are already included in existing law as elements that would disqualify an arbitrator as being "partial" to one of the parties, unless disclosed and agreed to. The bill, however, disregards the accepted practice under present state and federal law of requiring the arbitrator to disclose all facts that would place his or her impartiality and fairness in doubt and then permitting the parties to object at that time or to waive any objection, thus allowing the chosen arbitrator either to withdraw or to decide the dispute without fear that the award will be challenged on grounds previously disclosed. In our view, if parties of relatively equal bargaining power have knowingly agreed to submit their future disputes to trusted individuals who are known to be "affiliated" with one or both of the parties, then their decision should be respected, absent one of the grounds suggested by Chief Judge Breitel, such as "grossly unequal bargaining power, fraud, duress, overreaching or illegality." In re Siegel v. Lewis, 40 N.Y.2d 686, 691-92 (1976); see Westinghouse Elec. Corp. v. New York State Transit Authority, 82 N.Y.2d 47 (1993) (Claimant Westinghouse had agreed to arbitrate a dispute before an arbitrator who was the Superintendent of the Respondent Transit Authority. The court held that Westinghouse had acquiesced in this method of dispute resolution "with its business eyes open" and would thus be held to its bargain.)

The term "partiality," present in the statute since its enactment in 1920, has undergone the process of interpretation for some ninety years and yet it is today again before the Court of Appeals in the case of U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc. , 73 A.D. 3d 497 (1st Dep't 2010), where the court is asked to decide whether an arbitrator's award should be vacated on grounds that he failed to discover and disclose to the parties that his adult son, a member of Congress, had taken legislative positions that were favorable to one of the parties in the arbitration. Present law is aggressive in insisting upon arbitrator disclosure of facts that would give an appearance of bias, and the courts are effectively dealing with this issue case by case.

In presenting our opposition to the proposed amendment, NYSBA's Dispute Resolution Section is fully aware of concerns about misuse of arbitration, especially in the consumer context. In this regard we point out that New York consumer law, Section 399 (c) of the General Business Law, already forbids any requirement that consumers agree to use of mandatory arbitration, where there is no judicial review. In the consumer context, it is only the Federal Arbitration Act, preempting New York state law in cases involving interstate commerce, such as credit cards, telephones and computer services, that would require enforcement of consumer agreements to arbitrate. The present bill, therefore, would have no effect on this aspect of federal law.

The New York Bar Association has recently made substantial efforts to increase the efficiency of international arbitration in New York and to promote New York as an ideal site for international arbitration. Contrary to these efforts, the bill would create fundamental concern in the international community about New York as an appropriate and accommodating site for international commercial arbitration. New York competes in this regard with all the other international arbitration centers, such as London, Paris, Geneva, Stockholm, Hong Kong, Singapore, etc. Parties choosing to arbitrate here may arbitrate under federal law but may also choose to arbitrate under New York State arbitration law, a law that dates back to 1920 and served as the model for the Federal Arbitration Act itself. New York's arbitration law, despite its divergence from federal law on some points, is a known quantity upon which foreign trading partners may wish to rely at the same time that they choose New York as a site for international arbitration and New York's respected commercial law to govern business terms of their relationship. Amending our arbitration law to throw into doubt the validity of arbitration awards rendered here because of potentially broad claims that the arbitrator was affiliated with the other party in some way, "any way," or that such affiliation, even though known or disclosed in connection with the arbitrator's selection cannot be waived or ratified, would create a harmful procedural mess that parties could avoid only by agreeing to arbitrate elsewhere or under a law other than that of New York.

Based on the foregoing, the Dispute Resolution Section of the New York Bar Association **OPPOSES** this legislation.

Report Prepared by: John Wilkinson, Esq. and William J.T. Brown, Esq.

Section Chair: Charles J. Moxley, Jr., Esq.