

Deflategate, Reinsurance Disputes And Arbitrator Bias

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In May 2015, the NFL suspended New England Patriots quarterback Tom Brady for four games in connection with the alleged deflation of footballs during the AFC championship game. Brady appealed his suspension and over Brady's objection, NFL Commissioner Roger Goodell served as the arbitrator to hear the appeal.

In July, Goodell upheld the suspension. In response, Brady requested that the federal court in New York vacate the arbitration award issued by Goodell. Brady has advanced four principal arguments for vacatur: (1) Goodell was an "evidently partial" arbitrator; (2) the arbitration proceedings were fundamentally unfair; (3) Brady did not have prior notice of the potential discipline; and (4) the suspension was unfair and inconsistent with prior NFL discipline.



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The Federal Arbitration Act permits a court to vacate an arbitration award where there was "evident partiality" by an arbitrator. Most courts have concluded that evident partiality only exists when a reasonable observer, considering all the circumstances, would have to conclude that an arbitrator was partial to one side. Although NFL fans do not routinely contemplate issues of arbitrator bias, the argument has arisen with some frequency — but little success — in reinsurance arbitrations. How do Brady's evident partiality arguments compare to similar arguments made in the reinsurance arena?

Why Brady Did Not Argue That Goodell Was Inherently Biased

NFL Commissioner Goodell's role as arbitrator was to rule on the propriety of the discipline issued by the league he runs. Some (especially those in New England) argued that it is improper for a chief executive to preside over an arbitration in which his own company is a party.

Brady, however, did not argue that Goodell — as NFL commissioner — possessed an inherent bias to uphold the NFL's chosen discipline. Brady avoided this argument, because the NFL's collective bargaining agreement expressly permits Goodell to serve as the arbitrator "at his discretion." Brady did not complain about an arrangement to which he and the NFL players' union consented.

Moreover, a number of courts have specifically rejected — in the professional sports context — the argument that an arbitration award issued by a league executive should be vacated, because the executive was predisposed to rule for the league. For example, in the 1994 NHLPA v. Bettman case, the

federal court in New York rejected a challenge to an arbitration award issued by the NHL commissioner, because the relevant collective bargaining agreement provided that the commissioner would resolve disputes concerning interpretation of league rules. The court concluded that the “limitations of the power of federal courts to interfere with arbitration awards based on asserted arbitral bias are still more pronounced when the parties have agreed to a particular arbitrator or a specific method of selection that will predictably lead to arbitration by individuals with ties to one side of the controversy.”

Although arbitration clauses in reinsurance contracts rarely require that a specific person must serve as umpire, arbitration clauses frequently require arbitrators to be active or former executives of insurance or reinsurance companies. Courts have pointed to this requirement when rejecting motions to vacate that argued that an umpire’s business dealings with one party demonstrated bias. Courts have recognized that in the context of industry arbitrations — especially the somewhat small circle of reinsurance disputes — it is not unusual for arbitrators to have some prior interaction with parties. Moreover, courts have acknowledged that parties agree to the service of industry veterans as arbitrators precisely because they can bring their experience and knowledge to the proceeding. Instead, courts tend to focus on whether a reinsurance arbitrator has a direct financial stake in the outcome of the case.

Brady Focuses Argument on Goodell’s Involvement in the Underlying Dispute

Rather than advance an argument that Goodell was inherently biased due to his role as NFL commissioner, Brady’s evident partiality argument emphasized — under the particular facts of Brady’s case — that “Goodell’s direct involvement in the issues to be arbitrated disqualified him from serving as arbitrator.” More specifically, Brady argued that: (1) Goodell improperly ruled that Goodell’s own delegation of the initial imposition of Brady’s discipline to a different NFL executive was permitted; and (2) before the arbitration begun, Goodell had issued a public statement praising the independence and competence of the NFL’s investigation into Brady’s conduct.

Brady relied on a 1991 New York state court case, *Morris v. N.Y. Football Giants*, in which the court ruled that the NFL commissioner could not serve as arbitrator in a dispute concerning, in part, whether an expired collective bargaining agreement governed player grievances. The court concluded that the NFL Commissioner could not be impartial, because he had previously “advocated on behalf of NFL owners the proposition that the terms of the CBA had continuing legal effect after its expiration (the very issue he would have to decide here).”

In the reinsurance arbitration context, losing parties have rarely argued that vacatur is appropriate, on the grounds that an arbitrator played a role in the underlying dispute. Unlike professional sports, reinsurance arbitrators are typically retired executives who have never been directly employed by either party to the dispute. Moreover, many reinsurance contracts specifically require that the arbitrators be “disinterested” in the dispute. The increased practice of asking umpire candidates to fill out questionnaires has also assisted with avoiding problems, because they specifically ask about any involvement with the subject matter of the dispute and the governing reinsurance contract.

Rather than identifying an arbitrator’s direct involvement in the subject matter of a reinsurance dispute, court challenges arguing evident partiality have tended to focus on whether the umpire had undisclosed relationships with one party or its counsel. Even when undisclosed connections existed, courts have been slow to embrace vacatur. Instead, courts have analyzed whether a reasonable person would have to conclude that an arbitrator was partial to one side. Courts have generally found no evidence that would require an objective observer to decide that a reinsurance arbitrator was necessarily biased.

These conclusions comport with the overall hesitancy of judges to interfere with arbitration results.

Judge Takes Active Role in Brady Litigation

Although some judges are not enthusiastic about resolving motions to vacate arbitration awards, the judge overseeing the Brady litigation — the Honorable Richard M. Berman — has taken an active role in the case. In the span of less than one month, the court accepted three rounds of briefing and heard two oral arguments from counsel. In an even more unusual development, Judge Berman has presided over several rounds of confidential settlement talks between the parties and counsel. The judge was careful, however, to put on the record at the initial oral argument that both parties had consented to the judge's direct participation in settlement conferences.

Some commentators have suggested that reinsurance umpires should similarly offer to facilitate settlement discussions between arbitrating parties. Because umpires are already familiar with the issues, evidence and personalities involved in their cases and because they have already gone through the conflict disclosure process, umpires can offer efficiencies to the parties when serving in a dual role as mediator. Many umpires, however, are deeply resistant to getting involved in settlement talks, in part because that role may invite later arguments of evident partiality. For example, if an umpire suggests that a client representative should lower settlement expectations, that pressure may trigger accusations of bias. Moreover, most mediation sessions involve shuttle-diplomacy where the mediator speaks alone with each party. Because this practice would involve ex parte communications with the umpire/mediator, many umpires would refuse to participate — even with the consent of both parties.

The Brady case involves unique facts and a great deal more attention than motions to vacate reinsurance arbitration awards. No matter how the deflategate saga ends, reinsurance arbitration losers may face uphill battles when seeking to vacate awards.

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