

2011 IL App (1st) 093610-U

FIRST DIVISION  
October 31, 2011

No. 1-09-3610

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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IN THE MATTER OF ARBITRATION BETWEEN )	Appeal from the
EDMOND MEKERTICHIAN and MF GLOBAL, )	Circuit Court of
INC., )	Cook County.
)	)
EDMOND MEKERTICHIAN, )	No. 09 CH 25713
)	)
Applicant-Appellant, )	)
)	Honorable
v. )	Daniel A. Riley,
)	Judge Presiding.
MF GLOBAL, )	)
)	)
Respondent-Appellee. )	)

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JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* Denial of the applicant's motion to vacate an arbitration award and confirmation

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of the award was not error where the applicant: (1) failed to establish a violation of the procedure for selection of the arbitration panel set forth in the arbitration agreement, and (2) failed to establish good cause for the removal of the challenged arbitrators.

¶ 2 The applicant, Edmond Mekertichian, appealed an order of the Circuit Court of Cook County denying his motion to vacate an arbitration award issued in favor of the respondent, MF Global, Inc. and against Mr. Mekertichian, and the confirmation of that award by the hearing committee of the Chicago Mercantile Exchange (the CME). Following the death of Mr. Mekertichian during the pendency of this appeal, Beverly Mekertichian, the administrator of Mr. Mekertichian's estate, was substituted as a party. As the parties have done, we will refer to the applicant as EMO, which was Mr. Mekertichian's trading acronym.

¶ 3 On appeal, EMO contends that ineligibility of two arbitration panel members to serve as arbitrators rendered the arbitration award invalid. We affirm the decision of the circuit court.

¶ 4 The following facts alleged in the motion to vacate are pertinent to our resolution of the issue on appeal. On January 25, 2008, MF Global filed an arbitration claim with the CME market regulation department against EMO pursuant to the CME's rules of arbitration. Following a hearing in October 2008, the arbitration panel awarded MF Global \$982,982.97. EMO appealed the panel's decision to the hearing committee of the CME group board of directors.

¶ 5 EMO believed that it had been unfairly treated by the arbitration panel during the hearing and that the panel had been hostile to its defense. As a result, following the arbitration hearing, EMO investigated the trading relationships of the arbitrators and learned that two of the arbitrators, Elliott Solomon and John Margelewski, cleared their trades through MF Global. It

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further discovered that Mr. Solomon was not a member of the CME or the CME 2008 group arbitration committee and argued that he should not have been appointed to the arbitration panel.

At the review hearing, EMO informed the hearing committee of its discoveries, and the committee agreed to consider its objections to the arbitration panel.

¶ 6 On April 29, 2009, the hearing committee ruled that EMO had failed to establish the grounds for vacating the award it raised in its appeal: that the arbitrators exceeded their powers or that the arbitrators acted in manifest disregard of the applicable law. The hearing committee further ruled that issues related to any other basis for appeal were not timely filed and therefore were waived. On July 27, 2009, EMO filed its motion to vacate the award and confirmation of the award by the hearing committee. Following a hearing, the circuit court denied the motion to vacate. This appeal followed.

¶ 7

## ANALYSIS

¶ 8

### I. Standard of Review

¶ 9 Our resolution of the issue on appeal requires us to interpret the agreement to arbitrate. The parties acknowledge that the CME rules govern this arbitration. A court's interpretation of an agreement to arbitrate involves a question of law, which is reviewed *de novo*. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011).

¶ 10

### II. Discussion

¶ 11 The Uniform Arbitration Act (the Act) specifies that where the arbitration agreement provides a method for selecting the arbitrators, that method must be followed. 710 ILCS 5/3 (West 2008). CME Rules 600.F and 614.A address the selection of the arbitrators. Section

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600.F provides as follows:

"Any claim involving only members shall be heard by a Member panel and its decision shall be rendered in accordance with the rules of this Chapter. A Member panel shall mean an arbitration panel consisting of a co-chairman of the Arbitration Committee and five Members as defined in Rule 400."

Section 614.A provides as follows:

"The Market Regulation Department shall select a panel of arbitrators from the Exchange's Arbitration Committee to hear and decide a dispute. The panel shall consist of five arbitrators and one chairman."

¶ 12 The parties' agreement to arbitrate fixes the conditions, limitations and restrictions to be observed by the arbitrator in making his award. *Board of Education of Community School District No. 4, Champaign County v. Champaign Education Ass'n*, 15 Ill. App. 3d 334, 340 (1973). The court will not enforce an award where the arbitrator was not chosen in conformance with the procedure specified in the parties' agreement to arbitrate. *R.J. O'Brien & Associates, Inc. v. Pipkin*, 64 F.3d 257, 263 (7th Cir. 1995).

¶ 13 *A. Ineligibility of Mr. Solomon*

¶ 14 In his affidavit in support of the motion to vacate, Mr. Mekertichian averred that, at the time of the October 2008 arbitration hearing, Mr. Solomon was not a member of the CME's arbitration committee and was no longer a member of the CME. Therefore, EMO asserts that the CME selection procedure for choosing an arbitrator was not followed.

¶ 15 MF Global maintains that under CME Rule 400, retired members with floor privileges

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qualify to serve as arbitrators. However, the record before us does not contain a copy of Rule 400. Moreover, MF Global provided no evidence to contradict Mr. Mekertichian's averments in his affidavit that Mr. Solomon was no longer a member of the CME or any affirmative evidence that his status was that of a retired member with floor privileges. MF Global argued that no foundation had been laid to support Mr. Mekertichian's argument that Mr. Solomon was not a member of the CME.

¶ 16 A trivial departure from the contractual method of choosing an arbitrator does not necessarily bar enforcement of the award. *R.J. O'Brien & Associates, Inc.*, 64 F.3d at 263. In *Avis Rent A Car System, Inc. v. Garage Employees Union, Local 272*, 791 F.2d 22 (2nd Cir. 1986), the court of appeals determined that the failure to select an arbitrator according to the parties' contract was not a "trivial departure" where the deviation "created a method for settling disputes" arising under the parties' contract "significantly different from that contemplated by that contract." *Avis Rent A Car System, Inc.*, 791 F.2d at 25. In the present case, there is no evidence that the deviation in this case significantly changed the method provided for in the CME rules for arbitrating disputes between the members of the CME.

¶ 17 Even if we were to find that this deviation from the CME rules was not "trivial," EMO waived its right to object to the defect in the selection process. CME Rule 614.B deals with requests to remove an arbitrator, providing as follows:

"Each party may request the removal of any arbitrator(s) from a panel for good cause shown. Such request must be made no later than the start of testimony at the first scheduled hearing. Failure of a party to timely request the removal of any arbitrator(s)

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will be deemed a waiver of that party's right to any further objection to the arbitrator's participation in the hearing and decision of the dispute."

¶ 18 "[D]espite its asserted efficiencies over judicial proceedings, arbitration remains an adversarial event, and parties must insist upon the enforcement of their contractual rights before the arbitrators as they do in court." *Brook v. Peak International, Ltd.*, 294 F.3d 668, 673 (5th Cir. 2002). The court in *Brook* noted that where the federal courts vacated arbitration awards because of irregularities in the selection process, the complaining parties had preserved their objections during the arbitration proceeding. *Brook*, 294 F.2d at 273.

¶ 19 EMO failed to request the removal of Mr. Solomon as an arbitrator prior to the commencement of the arbitration hearing. In addition, EMO failed to justify its delay in objecting to Mr. Solomon serving as an arbitrator. See *First Health Group Corp. v. Ruddick*, 393 Ill. App. 3d 40, 49 (2009).

¶ 20 In *Craig v. United Automobile Insurance Co.*, 377 Ill. App. 3d 1 (2007), the plaintiff's uninsured motorist claim under his policy with the defendant resulted in an award to the plaintiff. The defendant later learned that the plaintiff was not the owner of the vehicle and sought to vacate the award on that basis. This court held that the otherwise valid issue was waived by failing to present the issue to the arbitrator and failing to provide any justification for waiting to do a records search. *Craig*, 377 Ill. App. 3d at 3. In this case, the motion to vacate failed to allege facts establishing that EMO was unable or was prevented from discovering that Mr. Solomon was not a member of the CME arbitration committee or the CME prior to the commencement of the arbitration hearing.

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¶ 21 We conclude that EMO waived its objection to Mr. Solomon's eligibility to serve as an arbitrator on the basis that he was not a member of the CME or the 2008 CME arbitration committee.

¶ 22 *B. Good Cause*

¶ 23 EMO contends that Messrs. Solomon's and Margelewski's failure to disclose that they cleared their trades through MF Global also violated the selection of the arbitrators process. CME Rule 627.D provides that members of the arbitration committee "pledge to immediately disclose any matter, relationship or interest with any party or subject of a dispute which may affect the arbitrator's ability to be, or create the impression that the arbitrator is not impartial in deliberating and deciding a dispute." EMO did not seek removal of Messrs. Solomon and Margelewski as arbitrators for not disclosing their relationship to MF Global prior to the commencement of the arbitration. In his affidavit, Mr. Mekertichian averred only that he relied on the CME rules requiring disclosure of conflicts by arbitrators. EMO failed to allege any facts establishing that it was unable or prevented from discovering Messrs. Solomon's and Margelewski's connection to MF Global prior to the hearing. Therefore, under Rule 614.B, EMO waived its right to seek removal of Messrs. Solomon and Margelewski based Rule 627.D.

¶ 24 Even if Messrs. Solomon and Margelewski had disclosed that they cleared their trades through MF Global and EMO had timely objected to their participation as arbitrators, we reject EMO's claim that the arbitration panel would have been reconstructed.

¶ 25 Under Rule 614.B, a request to remove an arbitrator is not automatically granted. Only if the chairman determines that good cause has been shown will the request for the arbitrator's

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removal be granted. In his affidavit, Mr. Mekertichian explained that all traders were required to clear their trades through "houses" such as MF Global. Mr. Mekertichian used MF Global to clear his trades. As a trading house, MF Global "financially guarantees a member's trades of futures contracts \*\*\*[and] [i]f a trading member defaults on his contracts, then the clearing [house] must satisfy all of his contract obligations. \*\*\* As a result, it is vital that all trading members, such as [Mr. Mekertichian], maintain close personal and financial relations with the clearing [house] because, without the agreement and financial guarantee of the clearing member, a trading member would be unable to do business."

¶ 26 In *Drinane v. State Farm Mutual Insurance Co.*, 153 Ill. 2d 207 (1992), the plaintiffs sought to vacate an arbitration award, alleging bias on the part of the arbitrator, which they did not discover until after the arbitration hearing. The attorney-arbitrator had a case pending against an individual insured by State Farm. Recognizing that an arbitrator had the duty to disclose to the parties any dealings that might create the impression of possible bias, our supreme court addressed the issue of when the presumption of bias arose. The court determined that "[t]he existence of an interest or bias is a very real possibility when an arbitrator and a party to the arbitration meet separately to negotiate a separate matter. Thus, it is proper to create a presumption of bias in a factual situation such as here." *Drinane*, 153 Ill. 2d at 216. However, the court also found that, "where no advantage exists, then no presumption of bias should be made." *Drinane*, 153 Ill. 2d at 217.

¶ 27 Mr. Mekertichian's description of the relationship between the traders and their clearing houses was insufficient to raise the presumption of bias on the parts of Messrs. Solomon and

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Margelewski in favor of MF Global. In *Drinane*, the presumption arose because the arbitrator and a party to the arbitration were meeting separately to negotiate a separate matter. In the present case, Mr. Mekertichian failed to provide any facts establishing that Messrs. Solomon and Margelewski's use of MF Global as a clearing house provided opportunities to exchange information relevant to arbitrations in which they were participating.

¶ 28 The evidence does not establish good cause for the removal of Messrs. Solomon and Margelewski from the arbitration panel based on their failure to disclose their relationship with MF Global. In the absence of good cause, even a timely objection by EMO would not have required the removal of Messrs. Solomon and Margelewski from the arbitration panel.

¶ 29 **CONCLUSION**

¶ 30 We conclude that EMO failed to establish that the CME's procedure for the selection of arbitrators was violated and failed to establish good cause for the removal of the arbitrators it challenged. Therefore, we affirm the order of the circuit court denying the motion to vacate the arbitration award and confirmation of the award.

¶ 31 Affirmed.

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