If We Could, Then So Can You: The Seventh Circuit Resurrects Its Judge versus Arbitrator Analogy to Reinstate a Repeat Arbitrator Note

Collin Koenig

Follow this and additional works at: https://scholarship.law.missouri.edu/jdr

Recommended Citation
Available at: https://scholarship.law.missouri.edu/jdr/vol2012/iss1/11
If We Could, Then So Can You: The Seventh Circuit Resurrects Its Judge versus Arbitrator Analogy to Reinstate a Repeat Arbitrator

Trustmark Ins. Co. v. John Hancock Life Ins. Co.¹

I. INTRODUCTION

Arbitration clauses provide a method for companies to settle business disputes without expending the amount of time and resources required in judicial proceedings. When an arbitration clause is invoked, a neutral third party takes on the role of adjudicator, and the parties defer to the unbiased decision of that neutral. Sometimes what is “unbiased” becomes more uncertain when parties contract for the right to appoint their own arbitrators. Trustmark Ins. Co. v. John Hancock Life Ins. Co. stands for the principle that the Seventh Circuit will relax the impartiality standard to which they hold party-appointed arbitrators, especially compared to the standard for federal judges.² This note will dissect the Seventh Circuit’s use of its standards in reinstating a party-appointed arbitrator. It will also explain why the Seventh Circuit’s approval of an arbitrator required the court to precisely define the powers of the panel on which he served.

II. FACTS AND HOLDING

Plaintiff, Trustmark Insurance Company (Trustmark), contracted with Defendant, John Hancock Life Insurance Company (John Hancock), to provide reinsurance coverage³ for risks underwritten by John Hancock.⁴ A disagreement arose between the parties regarding a term in the contract language and its impact on the scope of Trustmark’s duty to reinsure.⁵ Pursuant to the arbitration clause in the

² Id.
³ Called the “insurance of insurance companies,” reinsurance is a transaction by which an insurance company receives indemnification against potential losses under its policies in exchange for premiums paid to the reinsuring company, called the reinsurer. Reinsurance Association of America, RAA Fundamentals of Property Casualty Insurance 1 (2007), available at http://www.rcinsurance.org/files/public/07FundamentalsandGlossary1.pdf (page numbers follow PDF) (last visited Oct. 10, 2011). Under a reinsurance contract, the insured company is indemnified against losses on its policies that are covered under the reinsurance contract. Id. at 7.
⁴ Trustmark Ins. Co., 631 F.3d at 870.
⁵ Id. at 870-71; Trustmark Ins. Co. v. John Hancock Life Ins. Co., 680 F. Supp. 2d 944, 945 (N.D. Ill. 2010), overruled sub nom. by Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.), 631 F.3d 869. John Hancock believed that the agreement required Trustmark to reinsure “retrocessional” business as well as “direct business.” Trustmark argued that the agreement covered only “direct business.” Trustmark Ins. Co., 680 F. Supp. 2d at 945. Direct business is insurance provided to the public and
parties’ contract, the dispute went to arbitration before a three-member panel.\(^6\) John Hancock selected Mark Gurevitz as its party-appointed arbitrator.\(^7\) The panel ruled in favor of John Hancock and construed the contract in favor of John Hancock’s interpretation of Trustmark’s duties.\(^8\)

The dispute between the parties did not end, however, with the initial award. John Hancock billed Trustmark according to its understanding of the arbitral award, but Trustmark refused to pay.\(^9\) John Hancock proceeded to arbitration again to collect payment from Trustmark.\(^10\) In response, Trustmark argued John Hancock fraudulently failed to disclose documents during discovery in the first arbitration, leading to an award in John Hancock’s favor.\(^11\) John Hancock again named Mark Gurevitz as its party-appointed arbitrator, while Trustmark selected a different arbitrator than in the first proceeding.\(^12\) Similar to the first arbitration, the two party-appointed arbitrators selected a third, neutral arbitrator to complete the three-member panel.\(^13\)

The panel considered how much deference it should give the first arbitration award.\(^14\) In doing so, the arbitrators necessarily began by determining the effect of a confidentiality agreement signed by the parties during the first arbitration.\(^15\) The confidentiality agreement prohibited the parties and arbitrators from disclosing the evidence, proceedings, and award of the first arbitration.\(^16\) The parties disagreed as to whether the agreement applied to disclosure of the prior proceedings to the parties’ lawyers and future arbitrators.\(^17\) Ultimately, the panel interpreted the agreement to permit disclosures to the lawyers and arbitrators involved.\(^18\)

Before the arbitration panel could hold a hearing on the merits, Trustmark filed suit in federal district court requesting an injunction of any further arbitration while Gurevitz remained on the panel.\(^19\) Trustmark argued that Gurevitz was not a “disinterested” arbitrator because he was aware of what took place in the first

---

6. *Trustmark Ins. Co.*, 631 F.3d at 871. The parties’ agreement provided for each party to select their own arbitrator and for those two arbitrators to select a third, neutral arbitrator to complete the three-member panel.

7. *Id.*

8. *Id.* The panel found retrocessional business was “covered and properly ceded to the contracts in dispute.” *Id.* at 945.

9. *Id.* at 871.

10. *Id.*

11. *Id.* Trustmark claimed that John Hancock committed fraud when they concealed material evidence pertaining to whether retrocessional business was covered according to the contract. *Trustmark Ins. Co.*, 680 F. Supp. 2d at 945.


13. *Id.*

14. *Id.*

15. *Id.* Gurevitz, as an arbitrator in the first proceeding, also bound himself to the confidentiality agreement.

16. *Id.*

17. *Id.* “During the Second Arbitration, [John] Hancock, over Trustmark’s objection, requested that the panel ‘expressly authorize the use of all materials from [the First Arbitration], without limitation[,]’ so that the parties could avoid relitigating issues decided in the First Arbitration—namely, whether retrocessional business was covered by the contracts.” *Id.* at 946.

18. *Id.* at 871.

19. *Id.*
arbitration. Trustmark also argued the second arbitration panel should be enjoined from ruling on disputes arising out of the confidentiality agreement, which did not itself contain an arbitration clause. Siding with Trustmark, the court held that Gurevitz was not “disinterested” due to his knowledge of the first arbitration. The court further noted that Gurevitz was a possible fact witness with respect to the first arbitration, because of his prior knowledge. Accordingly, the district court prohibited the second arbitration panel from considering the first arbitration award.

John Hancock appealed to the U.S. Court of Appeals for the Seventh Circuit. The Seventh Circuit reversed the decision of the district court, striking down the injunction. In addition to overturning the injunction, the court overturned the district court’s decision on the merits. The court held that Gurevitz was indeed a “disinterested” arbitrator because his knowledge of the first arbitration did not amount to a “financial or other personal stake in the outcome.” Finally, the court held that the current panel “[was] entitled to follow its own view about the meaning of the confidentiality agreement” when, as in this case, “the parties did agree to arbitrate their disputes about reinsurance.” The Seventh Circuit, for the first time at the federal appellate level, held that prior knowledge about a dispute is not grounds for disqualifying a party-appointed arbitrator for partiality.

III. LEGAL BACKGROUND

The U.S. court system employs a “liberal federal policy” in favor of arbitration agreements. This favorable treatment is compromised when the honesty and fairness of an arbitrator are called into question. When a party is dissatisfied with the conduct of an arbitrator, it can challenge the participation of that arbitrator prior to or after an award. Before an arbitrator or arbitration panel orders an award, a party may attempt to enjoin the proceeding. After an award has been made, a party may move to set aside or vacate the award under § 10 of the Federal

20. Id. The parties had agreed by contract that all of the arbitrators would be “disinterested.”
21. Id. Trustmark also suggested that the requirements of the confidentiality agreement should be determined by a judge.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id. at 872.
27. Id.
28. Id. at 873.
29. Id. at 874–75.
30. Id. at 873.
32. Blum, supra note 31.
Arbitration Act (FAA), which provides for vacation of arbitration awards when, upon the application of a party, a court finds “evident partiality” on the part of the arbitrator.35 However, this standard of impartiality is subject to agreement between the parties.36 Once it has been determined that the parties agreed to arbitrate the dispute, arbitrators enjoy a great deal of autonomy during the proceedings, and may generally resolve procedural questions as they see fit.37

A. Impartiality Standards for Arbitrators

In 1968, the U.S. Supreme Court interpreted § 10(a)(2) of the FAA with respect to Congress’ expectations of what “evident partiality” meant for arbitrators.38 Section 10(a)(2) permits federal courts to vacate arbitration awards when an arbitrator’s conduct is corrupt or evidently partial to one party.39 In Commonwealth Coatings Corp. v. Continental Casualty Co., the issue before the Court was whether the impartiality requirements of a judge applied to a neutral arbitrator in a tripartite panel.40 The neutral arbitrator failed to disclose prior business dealings he had with one of the parties prior to the arbitration, and then ruled in favor of that party.41 The arbitrator had a “repeated and significant” business relationship with one party over a five-year period, but had not conducted any business within one year of the arbitration proceeding.42 The business dealings included work on projects involved in the lawsuit.43

In a plurality decision, the U.S. Supreme Court reversed the lower court’s decision to uphold the arbitration award, construing § 10 to provide for vacation.44 The Court applied the impartiality standards for federal judges, reasoning that, on the same facts, a judge would be subject to a challenge to his impartiality.45 The Court analogized the facts in Commonwealth Coatings to Tumey v. State, a Supreme Court case where a judgment was set aside for a judge’s undisclosed prior business dealings with one of the parties.46 In Tumey, the Court held that a decision should be set aside if a federal judge held even “the slightest pecuniary interest.”47 The Commonwealth Coatings court ruled that the same standard extended to arbitrators, suggesting that arbitrators be required to disclose any dealings that

35. 9 U.S.C. § 10(a)(2) (2006). The statute provides, in pertinent part: “(a) . . . [The United States] court . . . may make an order vacating the award upon the application of any party to the arbitration . . . (2) where there was evident partiality or corruption in the arbitrators . . . .” Awards may also be set aside for findings such as fraud, corruption, or arbitrators exceeding their powers. Id. at § 10(a)(1).
36. See Sphere Drake Ins. Ltd v. All Am. Life Ins. Co., 307 F.3d 617, 620 (7th Cir. 2002).
41. Id. at 146.
42. Id.
43. Id.
44. Id. at 147.
45. Id. at 148. Title 28 of the United States Code mandates judges to self-disqualify in a number of circumstances. 28 U.S.C. § 455(b) (2006). 28 U.S.C. § 455(b)(1) instructs a judge to remove himself when he has a “personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .”
46. Commonwealth Coatings, 393 U.S. at 148 (citing Tumey v. State, 273 U.S. 510, 525 (1927)).
47. Tumey, 273 U.S. at 524 (1927).
would give an "impression of possible bias" in order to avoid giving "even the appearance of bias."48

Notably, Justice White's concurring opinion in Commonwealth Coatings purported to clarify the standard of partiality imposed on arbitrators by the plurality opinion.49 In the concurrence, Justice White noted, "[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges."50 He provided two instances where an arbitrator may not be disqualified based on prior business dealings with a party: 1) if both parties are informed of the prior dealings; and 2) if the relationship between the arbitrator and a party is trivial.51 White also advised courts to minimize their role in determining the impartiality of arbitrators.52 He supported this position by noting that parties to arbitration are in a better position to regulate arbitrator impartiality than courts.53

In subsequent years, the Seventh Circuit has wrestled with applying the Commonwealth Coatings definition of "evident partiality."54 In Merit Ins. Co. v. Leatherby Ins. Co., the court held that the standards for disqualification of an arbitrator "are not so stringent" as the standards for judges.55 This interpretation of impartiality standards was based on the theory that choosing arbitration over litigation involved a "tradeoff between impartiality and expertise."56 In 2002, the Seventh Circuit expressed that impartiality standards for a neutral arbitrator are more "relaxed" when comparing an arbitration panel to a court.57

The Second Circuit took a slightly different view on Commonwealth Coatings.58 In Morelite Const. Corp. v. N.Y. City Council Carpenters Benefit Funds, the Second Circuit agreed that the contrary opinions of Commonwealth Coatings left uncertainty with the evident partiality rule, but framed its own interpretation of § 10(a)(2).59 The court defined "evident partiality" as "more than a mere 'appearance of bias'" but less than proof of actual bias.60 The court held that "evident partiality" would be found where "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."61

48. Id. at 149-50.
49. Id. at 150.
50. Id. at 150-52 (White, J. concurring) (emphasis added).
51. Id.
52. Id. at 151.
53. Id. ("[The role of judging the impartiality of arbitrators] is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.").
54. See, e.g., United States Wrestling Federation v. Wrestling Division of AAU, Inc., 605 F.2d 313, 319 (7th Cir. 1979) (treating Justice White's concurring opinion as authoritative with respect to the impartiality requirements of arbitrators); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 682 (7th Cir. 1983) (acknowledging that the majority and concurring opinions in Commonwealth Coatings Corp., although in agreement on the result of the case, disagreed on the requirements for arbitrator impartiality).
56. Id.
58. Morelite Const. Corp. v. N.Y. City Council Carpenters Benefit Funds, 748 F.2d 79, 83-84 (2nd Cir. 1984).
59. Id. at 83.
60. Id.
61. Id. at 84.
With those precedents in mind, the Seventh Circuit decided a case of first impression with respect to evident partiality of a party-appointed arbitrator.\(^\text{62}\) In *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, the Seventh Circuit reviewed a district court’s decision to vacate an arbitration award due to the evident partiality of a party-appointed arbitrator.\(^\text{63}\) The party-appointed arbitrator whose impartiality was called into question had failed to fully disclose the details of his prior relationship to one of the parties.\(^\text{64}\) The arbitrator admitted to “know[ing]” the party but did not disclose the full details of his relationship which involved rendering legal services to a subsidiary of the party.\(^\text{65}\)

The court reversed the vacatur of the award, holding that the arbitrator did not display “evident partiality” because such failure to disclose would not have disqualified him if he were a federal judge hearing the case in court.\(^\text{66}\) The court distinguished party-appointed arbitrators from judges, stating that such arbitrators “are supposed to be advocates” of the party which appointed them.\(^\text{67}\) The court cited authority from several circuits in reasoning that the evident partiality standard of the FAA is a “subset of the conditions that disqualify a [federal] judge.”\(^\text{68}\)

The court narrowed the definition of “evident impartiality” for party-appointed arbitrators to “conduct in transgression of contractual limitations.”\(^\text{69}\) In other words, party-appointed arbitrators only need to be as impartial as the arbitration clause in the contract between the parties requires.

The *Sphere Drake* court also noted that parties may agree to alter the impartiality requirements of the § 10(a)(2) by contract.\(^\text{70}\) Invoking *Merit’s* “tradeoff” rationale, the court reasoned that it is often in the best interest of the commercial parties to appoint arbitrators with industry experience, sometimes at the expense of impartiality.\(^\text{71}\) One way parties have altered the impartiality standard is to require the arbitrators to be “disinterested.”\(^\text{72}\) The Supreme Court defined “disinterested” with respect to adjudication as being without a financial or personal stake in the outcome.\(^\text{73}\) Similarly, the arbitration industry defines “disinterested” as

---

62. *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, 307 F.3d 617 (7th Cir. 2002) (“[T]his is the first time . . . that a federal court has set aside an award because a party-appointed arbitrator . . . displayed ‘evident impartiality.’ ”). Notably, this opinion was written by Judge Easterbrook, the same author of the opinion in the instant case.

63. *Id.* at 619-620. The “tripartite” arbitration panel was composed of two party-appointed arbitrators, one appointed by each side, and a third, neutral arbitrator selected by the other two. *Id.* at 619.

64. *Id.* at 622.

65. *Id.*

66. *Id.* at 623. The court also held that evident impartiality would not have been found if the arbitrator was an umpire instead of a party-appointed arbitrator. *Id.* at 621.

67. *Id.* at 620. Discussing the difference in the impartiality standards of the two capacities, the court noted that, unlike in federal court, “only evident impartiality, not appearances or risks [of impartiality], spoils an award.” *Id.* at 621.

68. *Id.* at 621 (citing authority from the Second, Seventh, and Eighth Circuits). The court relied on this principle in reasoning that an arbitrator cannot be required to disclose prior legal representation of a party if a judge is not required to do so to escape disqualification. *Id.* at 622.

69. *Id.* at 622.

70. *Id.* at 620.

71. *Id.*


having “no financial stake in the outcome and not being under a party’s direct control.”

The Second and Fifth Circuits have defined this term of art more broadly than the Seventh Circuit. For example, the Second Circuit defines “disinterested” by a reasonable person’s conclusion from the “totality of the circumstances” that an arbitrator was not partial to one side.

Partiality requirements for judges and arbitrators have been distinguished by the Seventh Circuit and elsewhere since Commonwealth Coatings. It is clear that arbitrators are not held to the same high impartiality standards as federal judges. The issue in the instant case involves a question of impartiality of a party-appointed arbitrator similar to Sphere Drake. While it has been established in federal courts that prior knowledge acquired by a judge during judicial proceedings does not require recusal, the instant case confronts the issue of whether knowledge acquired during a prior arbitration should disqualify a repeat arbitrator on the grounds of impartiality.

B. Scope of an Arbitration Panel’s Power in the Arbitration Process

Arbitration is generally a less formal process than litigation. For example, arbitration does not adhere to the same evidentiary and procedural rules that give trials a more rigid structure. While the “question of arbitrability” is one for the courts, questions of procedure in arbitration fall under the broad powers of the arbitrator. Such procedural questions must “grow out of the [arbitrable] dispute and bear on [the dispute’s] final disposition.” An award may be vacated, however, if an arbitrator exceeds his powers.

The Seventh Circuit has extended the powers of an arbitration panel to include determining the preclusive effect of an earlier arbitration award. In Consolidation Coal Co. v. United Mine Workers of Am., the Seventh Circuit considered the issue of whether to confirm six arbitration awards in favor of an employer in a dispute with a union over the employer’s implementation of new staffing

---

76. See Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007).
79. Id.
81. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964) (holding that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration); see also Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002).
82. John Wiley & Sons, 376 U.S. at 557.
84. Consolidation Coal Co. v. United Mine Workers of Am., 213 F.3d 404 (7th Cir. 2000).
practices to avoid paying overtime. The arbitrator’s hearing and award, the first three awards were given in favor of the employer. The employer failed to notify the fourth arbitrator about the first three decisions prior to his award in favor of the union. In confirming the six arbitration awards, the Seventh Circuit held that, whether or not the parties contracted for a preclusive effect of arbitration awards in subsequent arbitrations, the “question of the preclusive force of the first arbitration is . . . an issue for a subsequent arbitrator to decide.”

The court also noted that an arbitrator is entitled to “arbitral notice” of prior awards when the arbitration deal[s] with the same or a related issue, just as a court is entitled to “judicial notice.”

Also among the powers of an arbitrator is that of interpreting language in a contract between the parties. The standard for vacating an award on the grounds that an arbitrator exceeded this power was established by the Supreme Court in an employer-union dispute in United Steelworkers of Am. v. Enterprise Wheel & Car Corp. The Court stated that arbitrators’ awards should be upheld as long as the arbitrator “draws [the award’s] essence from the [contract between the parties].” An arbitrator’s power to interpret a contract is limited to interpretation and application of the contract. The Seventh Circuit has held that arbitrators’ interpretations of contracts are not required to be correct to be enforceable.

The strong federal policy in favor of arbitration has affected the breadth of powers bestowed on arbitrators in an expansive way. Once it is determined by a court (or otherwise agreed by the parties) that a dispute is arbitrable, the appointed arbitrator or panel of arbitrators can decide most questions that arise on the way to their final disposition and award. These decisions include contract interpretation.

85. Id. at 405-06. The arbitrations stemmed from grievances made by the union about the new staffing practice. Each of the seven arbitrations had separate panels with no repeating arbitrators.

86. Id. at 406. All seven arbitrations involved the same issue of whether the change in staffing practice violated the collective bargaining agreement. The six won by the employer involved claims for damages by the union, differing only by which employee(s) the union represented. In the fourth arbitration, won by the union, the union sought a declaration that the new staffing practices violated the collective bargaining agreement. The fourth arbitration award had already been confirmed by the district court when the case reached the Seventh Circuit.

87. Id.

88. Id.

89. Id. at 407 (citing Bd. of Mgmt. of Way Emps. v. Burlington N. R.R., 24 F.3d 937, 940 (7th Cir. 1994)). In Burlington Northern R.R., the Seventh Circuit cited a Supreme Court decision enabling arbitrators to determine the preclusive effect of an earlier award and applied the rule to labor arbitration.

90. Id. In this case, the parties had contracted for preclusive effect of prior awards, anyway, but the court’s language does not limit this “arbitral notice” to such a circumstance.

91. See, e.g., Major League Baseball Players Ass’n v. Garvey, 532 U.S. 504, 509 (2001) (citing additional United States Supreme Court authority that restricts judicial review of arbitrators’ interpretations of contract language).


93. Id. (holding that the Court of Appeals erred in refusing to enforce an arbitrator’s award because the court disagreed with the arbitrator’s construction of the contract).

94. Id. “[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.”

95. Hill v. N. Pacific Ry. Co., 814 F.2d 1192, 1195 (7th Cir. 1987) (“[A] party will not be heard to complain merely because the arbitrators’ interpretation is a misinterpretation.”).

96. Major League Baseball Players Ass’n, 532 U.S. at 509.
procedural questions, and the preclusive effect of earlier awards. In Trustmark, the Seventh Circuit applied these rules to a situation where an arbitration panel, in order to reach the merits, interpreted a confidentiality agreement signed during a prior arbitration.

IV. INSTANT DECISION

In the instant case, the Seventh Circuit of the U.S. Court of Appeals reversed the district court’s grant of a preliminary injunction to John Hancock. However, the Seventh Circuit did not end its discussion of the case after ruling on the injunction. The court also found error in two other holdings of the district court. First, it noted that the district court erred in its categorization of Gurevitz’ prior knowledge of the first arbitration. The court noted that Gurevitz’ knowledge made him sufficiently “disinterested” under the terms of the parties’ agreement. The court defined “disinterested” as “lacking a financial or other personal stake in the outcome.” The court noted that, although Gurevitz had an interest in maintaining a positive reputation among the parties, he lacked a “stake” in the outcome that would disqualify him under the definition of a “disinterested” arbitrator.

The court further reasoned that Gurevitz was a “disinterested” arbitrator by comparing the neutrality requirements of a party-appointed arbitrator and with that of a judge. The court followed U.S. Supreme Court precedent and its own reasoning in Sphere Drake that, because a judge cannot be disqualified based on his prior knowledge of a controversy and because “it takes more to disqualify an arbitrator than to disqualify a judge,” party-appointed arbitrators may proceed in their capacities despite having prior knowledge about a controversy. The court pointed out that all party-appointed arbitrators, including Gurevitz, risk losing future employment when they serve on panels because parties who are dissatisfied

98. Consolidation Coal Co. v. United Mine Workers of Am., 213 F.3d 404, 407 (7th Cir. 2000).
100. Id. at 872. Relying on Seventh Circuit precedent disfavoring motions for stays of arbitration, the court rejected Trustmark’s argument that it suffered “irreparable injury,” holding that Trustmark’s potential injuries of delay and out-of-pocket expenses did not amount to irreparable injury. Id.; Pain-careWebber, Inc. v. Farmam, 843 F.2d 1050, 1051 (7th Cir. 1988) (sanctioning a party for an insufficiently supported request for stay of arbitration). The court also disagreed with the district court’s holding that Trustmark suffered “irreparable injury” because Trustmark was forced to arbitrate an issue for which it never agreed to arbitrate. Trustmark Ins. Co., 631 F.3d at 872.
101. The court acknowledged that their opinion did not need to continue, but chose to review the district court’s decision on the merits because the decision “le[t] a cloud over [the] arbitration and the reputation of arbitrator Gurevitz.” Trustmark Ins. Co., 631 F.3d at 872.
102. Id. at 873.
103. Id. The terms of the contract required all of the arbitrators to be “disinterested.” Id. at 872.
105. Id.
106. Id.
107. Sphere Drake Ins. Ltd. v. All American Life Ins. Co., 307 F.3d 617, 621 (7th Cir. 2002)). In Sphere Drake, the court stated that it is illogical to deem prior knowledge of a case as a disqualifying interest because prior knowledge of the controversy is often the reason that a party appoints a particular arbitrator. Sphere Drake Ins. Ltd., 307 F.3d at 620.
with an arbitrator’s award can decide not to hire that arbitrator in the future.\textsuperscript{109} This differs from the interest of a judge, because federal judges “serve during good behavior and need not worry about how their decisions may affect their careers.”\textsuperscript{110} The opinion also stressed the importance of the parties’ contractual choices not only to avoid to arbitrate and avoid federal court but also to self-appoint arbitrators.\textsuperscript{111} The court stated that the existence of such pre-determinations should limit a court’s ability to aid a party in removing its opponent’s appointed arbitrator.\textsuperscript{112}

The Seventh Circuit also held that the district court errantly stripped the current arbitration panel of their power to interpret the confidentiality agreement signed during the first arbitration, as well as their power to subsequently review the first arbitration award.\textsuperscript{113} The opinion outlined several rules regarding the power of arbitrators to control their own proceeding.\textsuperscript{114} First, the court noted a U.S. Supreme Court rule that arbitrators have the power to “resolve ancillary questions that affect their task.”\textsuperscript{115} It supported this holding by reasoning that the confidentiality agreement is an arbitrable issue because it arose out of a dispute that was covered by the original arbitration clauses.\textsuperscript{116}

The court also cited Seventh Circuit precedent\textsuperscript{117} that arbitrators can decide procedural questions during arbitration proceedings “including the preclusive effect . . . of an earlier award.”\textsuperscript{118} Finally, the Seventh Circuit stated that, in determining whether or not to vacate an arbitration award, a court should not look at whether the arbitrators erred in their interpretation of an agreement, but that they interpreted it at all.\textsuperscript{119} The Seventh Circuit concluded by empowering the current arbitration panel, including Gurevitz, to interpret the confidentiality agreement as it saw fit, because interpreting such an agreement was within the scope of their powers as arbitrators.\textsuperscript{120}

V. COMMENT

\textit{Trustmark’s} importance arises from the analysis which the Seventh Circuit acknowledged was not essential to its decision on the merits.\textsuperscript{121} \textit{Trustmark} held

\begin{enumerate}
\item \textsuperscript{109} \textit{Id.}
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id.} at 873-74.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.} at 874. The current arbitration panel could not decide the effect of the first arbitration award until they determined that the confidentiality agreement signed during the first arbitration allowed the parties to disclose information about the first award. \textit{Id.} at 871.
\item \textsuperscript{114} \textit{Id.} at 871.
\item \textsuperscript{115} \textsuperscript{115} \textit{Id.} (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002)). The court was not particularly clear on which rule they relied on for this holding. \textit{See infra} part V.B.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} Consolidation Coal Co. v. United Miners Workers, 213 F.3d 404, 407 (7th Cir. 2000) (citing precedent from the Second, Third, Seventh, and Ninth Circuits).
\item \textsuperscript{118} \textit{Id.} at 874 (citing \textit{Consolidation Coal Co.}, 213 F.3d at 407). The court noted that a court would still be able to vacate an award made by arbitrators who exceeded their powers in deciding on such a procedural question.
\item \textsuperscript{119} \textit{Id.} (citing Hill v. Norfolk & Western Ry., 814 F.2d 1192, 1194-95 (7th Cir. 1987)).
\item \textsuperscript{120} \textit{Id.} at 874-75.
\item \textsuperscript{121} “We could stop here, but the district court’s decision leaves a cloud over this arbitration and the reputation of arbitrator Gurevitz, a reputation that Trustmark seems determined to tarnish.” \textit{Id.} at 872.
\end{enumerate}
that an arbitrator should not be disqualified for lack of the requisite impartiality because of specific knowledge gained in a prior arbitration between the same parties.122 In doing so, the Seventh Circuit continued a trend of distinguishing between the standards of partiality between a federal judge and an arbitrator.123 This decision is favorable to arbitrators in the reinsurance industry and other similarly specialized industries where repeat arbitrators are common.124 The court also construed the parties’ arbitration clause broadly to vest considerable power in the second arbitration panel.125 Even when the same issue remained unchanged between the first and second arbitration, a member of the second panel was permitted to not only remain on the panel, but also to disclose privileged information from the first arbitration to the other two panel members.126 This result underlines the concept that arbitration is not as secretive and confidential as parties may believe.127

A. The Seventh Circuit Recycled Its Own “Judge Versus Arbitrator” Analogy, Leaving Uncertainty in Impartiality Standards for Arbitrators

In many ways, the arbitration in Trustmark was standard fare for the reinsurance industry. Reinsurance agreements normally contain arbitration clauses because of the likelihood that the two parties will need to continue doing business together in the future.128 Commonly, a reinsurance arbitration clause requires arbitration of all issues related to a reinsurance agreement.129 The scope of reinsurance arbitration clauses are often construed broadly, as in Trustmark.130

In addition to scope, another provision commonly found in reinsurance arbitration clauses is the selection procedure for picking the arbitration panel.131 In Trustmark, the parties bargained for the power to appoint one arbitrator each with the third, neutral umpire to be selected by the two party-appointed arbitrators.132 Arbitration awards are final and binding, but may be vacated if a court finds that an arbitrator displayed “evident partiality.”133 As an alternative, parties may alter

Whether the court’s subsequent holdings on impartiality and the panel’s interpretation powers should be considered controlling precedent or dicta is for future courts to decide and is not within the scope of this note.
122. Id. at 873-74.
123. See supra note 68.
124. Stevens, supra note 75, at 21 (“The more specialized the industry . . . the smaller the pool of potential arbitrators . . . ”).
125. Trustmark Ins. Co., 631 F.3d at 874-75.
126. Id.
129. Id.
130. Id.; see Trustmark Ins. Co., 631 F.3d at 874 (holding that a dispute over a confidentiality agreement signed during an arbitration was within the scope of an arbitration clause).
131. PLITT ET AL, supra note 128.
this standard by contract.134 In Trustmark, the parties decided that all arbitrators had to be “disinterested.”135

The Seventh Circuit correctly applied its own precedent in analyzing Gurevitz’ impartiality in Trustmark, because it decided the same issue as in Sphere Drake: whether specific conduct of a party-appointed arbitrator amounted to grounds for disqualification. The Trustmark opinion continued the Seventh Circuit’s trend of distinguishing between the standards of partiality between a federal judge and an arbitrator.136 Just as in Sphere Drake,137 the Trustmark bench held again that an arbitrator should not be disqualified if a federal judge would not be required to recuse himself for the same conduct, because an arbitrator is not held to the same high standards of impartiality as a judge.138

While the Seventh Circuit applied the same standard (applying the judicial impartiality standard to the conduct of an arbitrator) in both Sphere Drake and Trustmark, the party-defined standard of impartiality for both cases differed slightly—both from one another and from the standard actually applied by the court. In Sphere Drake, the relevant standard was the statutory “evident partiality” standard.139 In Trustmark, the parties agreed, as they are allowed to do,140 to a “disinterested” arbitrator standard.141 The Trustmark opinion stated the Sphere Drake “evident partiality” rule, but never decided whether the conduct was evidently partial. Instead, the court implied that Gurevitz’ involvement in the second arbitration did not amount to disqualifying conduct according to judicial standards.142 The question left open by the Seventh Circuit is how it would view conduct of a party-appointed arbitrator that would require judicial recusal, but falls somewhere between sufficient partiality to require recusal and an impartiality limit imposed by statute or contract.

The open question left by the Seventh Circuit could prove problematic in future cases because the dispute in Trustmark is common in reinsurance.143 The autonomy provided to parties to set their own standard of impartiality is necessary in a specialized industry like reinsurance, where parties often seek arbitrators with knowledge of industry customs and practices.144 For the Merit trade-off theory145 to be beneficial, parties must be able to make contractual concessions with regard

134. Sphere Drake Ins. Ltd. v. All American Life Ins. Co., 307 F.3d 617, 620 (7th Cir. 2002). “To the extent that an agreement entitles parties to select interested (even beholden) arbitrators, [the Federal Arbitration Act’s ‘evident partiality’ rule] has no role to play.”
135. Trustmark Ins. Co., 631 F.3d at 872. “Disinterested” means lacking a financial or other personal stake in the outcome. Id. at 873.
136. See United Trans. Union v. Gateway W. Ry. Co., 284 F.3d 710, 712-13 (7th Cir. 2002) (citing Seventh Circuit authority that impartiality standards are more relaxed for arbitration proceedings than federal court); Sphere Drake, 307 F.3d at 621.
137. Sphere Drake, 307 F.3d at 621.
139. Sphere Drake, 307 F.3d at 621.
140. See supra note 70 and accompanying text.
141. Trustmark Ins. Co., 631 F.3d at 872.
142. Id. at 873.
143. Stevens, supra note 75, at 21 (“[A] party-appointed arbitrator’s previous involvement in earlier arbitrations has often been a contentious issue between parties [in the reinsurance industry].”).
144. Id. Disputes over the disqualification of arbitrators are not uncommon because the pool of desirable arbitrators, ones with the requisite expertise and industry knowledge, is small.
145. See Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983); see also supra note 71 and accompanying text.
to the statutory standard of partiality. It is important for courts to promote party-defined standards for arbitrator impartiality. This autonomy allows parties to account for prior knowledge that abounds in reinsurance arbitration by imposing looser grounds for disqualification. If future decisions follow the scheme of Trustmark, where the court does not apply a party-created standard of impartiality to the facts, reinsurance companies will not be able to predict how the Seventh Circuit will treat the conduct of the companies’ party-appointed arbitrators.

A solution to this problem is for the Seventh Circuit to adopt the reasonable person standard used in the Second Circuit. This standard would permit the court to shift away from its focus on the judicial standard of impartiality and focus more on the conduct of the arbitrator. The standard would only need to be utilized in cases where the parties did not otherwise agree to a different standard. Using this analysis, it is more plausible that Gurevitz’ would be disqualified for his knowledge. Gurevitz participated in the first arbitration where the panel ruled in favor of John Hancock. A reasonable person probably would expect Gurevitz to be partial to the party that he has already ruled in favor of once, especially on an identical issue. This problem is exacerbated when, as in Trustmark, the second panel has the power to permit the knowledge to flow to the other two non-repeat arbitrators.

Even if the Second Circuit’s rule is a more appropriate way to evaluate arbitrator partiality, applying the rule in Trustmark would have produced an unfair result for John Hancock that the Seventh Circuit seemed determined to avoid. The Seventh Circuit issued a decision on the merits in Trustmark when such a decision was not required, signaling its concern about the effect of its decision or lack thereof. The circuit court feared that the district court’s decision “le[fl] a cloud over [the] arbitration [proceeding] and the reputation of arbitrator Gurevitz.” It also implied its own partiality toward John Hancock’s position stating: “When one party is entitled to choose its own arbitrator, and in doing so follows all contractual requirements, a court ought not to abet the other side’s strategy to eject its opponent’s choice.” Thus, the Seventh Circuit may be reluctant to apply a rule that would potentially punish a party who obeyed the mutually agreed upon conditions of a contract.

For arbitrators in the reinsurance industry, Trustmark is good news: the Seventh Circuit eliminated another situation in which party-appointed arbitrators may be found inappropriately partial. This case should also teach commercial parties

146. Stevens, supra note 75, at 21.
147. See Morello Const. Corp. v. N.Y. City Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984) (evident partiality is found where “a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration”).
149. Id. at 872 (“We could stop here, but . . . we therefore add that the district court erred . . . ”).
150. Id.
152. See, e.g., Sphere Drake Ins. Ltd. v. All American Life Ins. Co., 307 F.3d 617 (7th Cir. 2002) (holding that no evident partiality existed when a party-appointed arbitrator failed to disclose that he provided legal services to one party’s subsidiary more than one year prior to the arbitration).
to take full advantage of the impartiality standard in the arbitration clause, especially if they bargain for the power to appoint their own arbitrator. Trustmark did not appoint a repeat party-appointed arbitrator, and no amount of complaining to the Seventh Circuit redeemed the company’s mistake. As reinsurance companies continue to contract for such a specific, tailored standard of impartiality for arbitrators, Trustmark does not provide much more certainty regarding how a court will apply the language the parties agreed to in their contract. However, at least in the Seventh Circuit, companies can be certain that if a party-appointed arbitrator would satisfy the impartiality requirements of a federal judge, he will be permitted to remain on a panel.

B. The Court Correctly Permitted Construal of the Confidentiality Agreement

The second non-essential holding made by the Seventh Circuit in Trustmark permitted the second arbitration panel to construe the confidentiality agreement signed in the first arbitration.153 This decision opens the door for Gurevitz, a signatory to the confidentiality agreement from the first arbitration, to disclose his knowledge of the first arbitration to his two fellow arbitrators on the second panel. The holding exemplifies the gap between the privacy expectations of arbitrating parties and the reality of that privacy.154 While parties often turn to arbitration for the very purpose of confidentiality, they must still contract for it because it is generally not required by law.155 Even when the parties contract for confidentiality, courts may still find reasons to not enforce the agreement, such as unconscionability, waiver, or when the subject matter of an award pertains to public health or safety.156 Additionally, information from arbitrations may become public through discovery and trial in subsequent judicial proceedings.157

Trustmark lacks an abundance of guidance as to why the Seventh Circuit decided to permit disclosure of the information from the first arbitration. Writing for the majority, Judge Easterbrook spelled out several rules about the broad powers of arbitrators to conduct arbitrations as they see fit,158 but gave little justification for allowing the second panel to ignore the confidentiality agreement. If the Seventh Circuit held that Gurevitz’ prior knowledge was not a disqualifying factor, then permitting the other two arbitrators to also obtain such knowledge would do no further harm. In fact, placing all three arbitrators on the same footing would improve the ability of the panel to consider the first award’s validity. If the parties agreed to arbitrate disputes arising out of the reinsurance agreement, then they probably did so expecting to be able to quickly deal with disputes and move on with their business together.159 Extending the confidentiality agreement to the

154. Schmitz, supra note 127.
155. Id. at 1214; see also Reuben, supra note 78, at 1273 (“[F]ederal courts . . . have rejected arguments that [adherence to confidentiality agreements] may be compelled by . . . the parties general understanding that arbitration proceedings are confidential.”).
156. Schmitz, supra note 127, at 1220.
157. Reuben, supra note 78, at 1273.
158. See Trustmark Ins Co., 631 F.3d at 874-75.
159. There is no indication that the parties did not intend to carry on with their reinsurance agreement after the resolution of the dispute. In fact, the dispute only involved the “retrocessional business” in the
other two panel members was therefore in the best interest of the parties if doing so streamlined the process.

VI. CONCLUSION

In Trustmark, the Seventh Circuit allowed an arbitration to recommence when it reversed the district court’s grant of an injunction to stay arbitration. This allowed parties to a reinsurance agreement to continue resolving a dispute using a method to which they originally agreed. Taking its opinion a step further, the Seventh Circuit concluded by empowering the newly-reinstated arbitration panel with the authority to determine their own view of a confidentiality agreement signed by the parties during the preceding arbitration. The holding confirms that the Seventh Circuit will permit a party-appointed arbitrator to remain on a panel despite allegations of partiality as long as recusal would not be required of a federal judge in a judicial proceeding. Significantly, an already small pool of reinsurance arbitrators will not be narrowed further by disqualifications for prior knowledge of a dispute. The Seventh Circuit infringed upon the privacy expectations of the parties but made a logical and necessary decision to permit construal of the confidentiality agreement by the second panel.

COLLIN KOENIG

contract, not the “direct business,” so it is likely that the parties continued to do “direct business” during the proceedings and in the future. Trustmark Ins. Co., 680 F. Supp. 2d at 945 & n.1; see supra note 3.
161. Id. at 871-72.
162. Id. at 874-75.