# NOTE

# BIASED? PROVE IT: ADDRESSING ARBITRATOR BIAS AND THE MERITS OF IMPLEMENTING BROAD DISCLOSURE STANDARDS

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## I. INTRODUCTION

Individuals, corporations, and countries alike have utilized alternative means of dispute resolution,[1] in lieu of the more traditional litigation route, to resolve pending disputes.[2] ADR, sometimes called

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[1] Alternative dispute resolution or ADR is defined as "any process or procedure other than adjudication by a presiding judge in court-litigation in which a neutral third party assists in or decides on the resolution of the issues in dispute." Inessa Love, *Settling Out of Court: How Effective Is Alternative Dispute Resolution?*, THE WORLD BANK GROUP 1 (Oct. 2011), http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Setting-out-of-court.pdf.

[2] *Id.*

"appropriate dispute resolution,"[3] offers faster resolutions that are less expensive and less contentious to reach.[4] These methods of resolution can produce more creative solutions to disputes than conventional adjudication may be able to provide, while also enabling the parties, depending on the specific process chosen, to retain autonomy and control over the outcome.[5] While there are numerous types of dispute resolution processes, the most common facilitative and adjudicative processes[6] are mediation and arbitration, respectively.[7]

Arbitration involves the use of an impartial third party, an "arbitrator" or "neutral," who makes a decision about the outcome of the dispute that is final and binding, with only very narrow grounds on which the decision can be appealed.[8] Arbitrations typically consist of a sole arbitrator with decision-making authority, or a panel of three arbitrators chosen by the parties to the arbitration.[9] Arbitrators may be chosen for any number of reasons, including professional, technical, legal or commercial background, experience and skills, notability, and scheduling flexibility.[10] The selection of an appropriate arbitrator or

3 Mary Dunnewold, *Alternative Dispute Resolution: What Every Law Student Should Know*, 38 STUDENT LAW. 14 (Oct. 2009).

4 Scott J. Atlas, *Survey on Arbitration*, A.B.A. SECTION LITIG. TASK FORCE ON ADR EFFECTIVENESS 4 (Aug. 2003), http://apps.americanbar.org/litigation/taskforces/adr/surveyreport.pdf. A Task Force formed by the American Bar Association in 2002 sought to survey trial lawyers on their perceptions of the effectiveness of alternative dispute resolution processes. *Id.* at 2. In the study, 78% of those surveyed believed that arbitration was generally timelier than litigation, and 56% felt it was more cost effective. *Id.* at 4. Arbitration is widely seen as faster, simpler, and cheaper than going to court. *Arbitration: Simpler, Cheaper, and Faster Than Litigation*, U.S. CHAMBER INST. FOR LEGAL REFORM 5 (Apr. 2005), http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf.

5 Dunnewold, *supra* note 3, at 15.

6 A facilitative process is one in which a neutral third party is facilitating communication between parties, but not interjecting its own opinions or judgments into the conversation. This stands in direct contrast to an adjudicative process where the third party makes a decision. *Id.* at 15, 17.

7 *Id.*

8 Love, *supra* note 1, at 2; *see infra* Parts II and III.

9 Irene Warshauer, *The Benefits of Mediation and Arbitration for Dispute Resolution in Securities Law*, N.Y. ST. B.A. DISP. RESOL. SEC. 5, at 4. "Tripartite panels are common commercial arbitration. Unless otherwise provided for by a rule or an agreement, each party to the arbitration typically agrees to appoint one arbitrator. The two party-appointed arbitrators then select a third neutral arbitrator, often referred to as the "umpire." Susan A. Stone & Jen C. Won, *Arbitrator Impartiality In the Context of a Tripartite Tribunal*, A.B.A. SECTION LITIG 1, at 6 (Feb. 2013), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2013_corporate_counselcleseminar/9_2_arbitration_impartiality_in_context.authcheckdam.pdf.

10 Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation*," 7 DEPAUL BUS. & COM. L.J. 401, 450 (2009).

arbitrator panel is arguably the most important choice that parties make in the process of arbitration. With the parties' ability to design the process by retaining control and flexibility, the increased speed and efficiency of proceedings,[11] overall cost-effectiveness, and the process's final yet confidential nature, arbitration has quickly become a common means of resolving disputes among individuals and business entities.[12]

Parties in international disputes, in particular, have increasingly utilized arbitral proceedings to resolve conflict.[13] A survey conducted by Queen Mary University Law School in London concluded that:

> for the resolution of cross-border disputes, "73% of respondents prefer to use international arbitration, either alone (29%) or in combination with Alternative Dispute Resolution (ADR) mechanisms in a multi-tiered dispute resolution process (44%)," and that "the top reasons for choosing international arbitration are flexibility of procedure, the enforceability of awards, the privacy afforded by the process and the ability of parties to select the arbitrators."[14]

In the International Chamber of Commerce (ICC) International Court of Arbitration alone, there has been a substantial increase in the number of requests for Arbitration filed from 1999 to 2011, with an overall increase in the number of countries represented in such proceedings.[15]

Despite the growing attractiveness of the arbitral process, arbitration is not without its shortcomings. Unlike litigation, which boasts an extensive appeal process, arbitration awards handed down by an arbitrator or an arbitrator panel are final and subject to appeal only in certain narrow circumstances outlined in the governing arbitration

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11 "Leading dispute resolution providers report that the median time from the filing of the demand to the award was 8 months in domestic cases and 12 month [sic] in international cases compared to a median length for civil jury trials in the U.S. District Court for the Southern District of New York of 28.4 months and through appeals in the Second Circuit many months longer." Warshauer, *supra* note 9 (citing STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 172-4 (2009) (Table C-5)).

12 *Id.*

13 *Arbitration*, INT'L CHAMBER OF COM., http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/ (last visited Oct. 23, 2013).

14 *Id.*

15 *Statistics*, INT'L CHAMBER OF COM., http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ (last visited Oct. 23, 2013). In 1999, there were 529 requests for arbitration filed with the ICC Court. *Id.* Those requests concerned 1,354 parties from 107 different countries and the place of arbitration was located in forty-eight countries throughout the world. *Id.* Conversely, in 2011, there were 796 requests for Arbitration filed with the ICC Court. *Id.* These requests concerned 2,293 parties from 139 countries and independent territories, with place of arbitration located in sixty-three countries throughout the world. *Id.*

regulations.[16] The circumstances in which an arbitral award may be appealed are largely dependent on the jurisdiction and prevailing arbitral laws.[17]

Considering the finality and weight of an arbitral award, notions of fairness dictate that the unbiased arbitrators who issue the award should decide the dispute on the basis of the evidence presented, unbiased by personal interests. Nevertheless, issues relating to conflicts of interest increasingly plague international arbitration.

> Arbitrators are often unsure about what facts need to be disclosed, and they may make different choices about disclosures than other arbitrators in the same situation . . . . Thus, parties, arbitrators, institutions and courts face complex decisions about what to disclose and what standards to apply. In addition, institutions and courts face difficult decisions if an objection or challenge is made after a disclosure.[18]

To preserve the integrity of the process, virtually all arbitrations are governed by some set of rules or regulations that generally call for neutrals to promise a full and ongoing disclosure of any and all current and past relationships or connections that may affect their ability to be impartial.[19] But, "even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application."[20]

The purpose of this Note is to examine the varying disclosure requirements imposed on arbitrators, both in the United States and internationally, throughout the arbitration process, as well as the standards adopted in determining when an award may be vacated on grounds of an arbitrator's partiality or bias.

Part II of this Note will look specifically at arbitration in the United States and how different institutions and courts have treated instances of arbitrator impartiality. In particular, it will focus on how the United States Supreme Court's "evident partiality" standard has been interpreted and applied differently throughout the various circuits of the United States Courts of Appeal.

Part III will review arbitrator disclosure requirements and grounds

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16 Warshauer, *supra* note 9, at 5.

17 *See infra* Parts II and III.

18 IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, COUNCIL OF THE INT'L BAR ASS'N 3 (May 22, 2004) [hereinafter IBA GUIDELINES], *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14-4BBA-B10D-D33DAFEE8918.

19 Platt W. Davis III, *Nondisclosure of Arbitrator Conflicts and the "Evident Partiality" Standard*, 74 CPA J., no. 6, 2004, at 54.

20 IBA GUIDELINES, *supra* note 18, at 3.

for vacating an arbitral award at the international level. It will examine the general international arbitration institutions and codes that have been adopted, as well as how individual countries have handled and established benchmarks for determining arbitrator bias.

Finally, Part IV will analyze the intrinsic advantages and disadvantages of the varying requirements for disclosure across countries and institutions. Examining the intricacies of arbitration as a process, this section will weigh the benefits and shortcomings of implementing a less inclusive disclosure requirement as compared to a more stringent standard.

Taking all of these factors into consideration, this Note will argue that, in light of the underlying impetus and rationale for choosing arbitration as a process, there should be a strict standard imposed on arbitrators that requires the fullest disclosure possible. Despite the potential pitfalls of comprehensive and compulsory disclosures, the overarching arbitral process benefits from ensuring initial and ongoing transparency. As is the case with many forms of alternative dispute resolution processes, party self-determination is integral. To ensure parties are able to receive the most effective and just arbitral process, arbitrators rendering awards intended to be final and binding should be mandated to disclose any and all potential conflicts and bias they may possess.

## II. ARBITRATION IN THE UNITED STATES: A CROSS-CIRCUIT SNAPSHOT

### *A. Background on U.S. Arbitration Laws and Institutions*

Arbitration in the United States is typically the product of an agreement, and thus, turns on the language of the arbitration clause itself to determine the governing and applicable rules.[21] If the parties had a contractual provision stipulating the appropriate rules or arbitration institutions to refer to—for example, an agreement to arbitrate with prominent private institutions such as the American

[21] Robert L. Ebe, *The Nuts and Bolts of Arbitration*, 22 FRANCHISE L.J. 85, 85 (2002-2003).

Arbitration Association (AAA)[22] or JAMS[23]—the rules and procedures of these bodies will prevail.[24] If a contract involves interstate commerce in the United States, the arbitration is guided by the Federal Arbitration Act (FAA),[25] which, when applicable, preempts state law.[26] If the FAA does not apply, however, then state statutes that define arbitration procedures will govern the process.[27] Many states have adopted the Uniform Arbitration Act (UAA)[28] in some form, or drafted arbitration protocol statutes of their own.[29]

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[22] AAA, or the American Arbitration Association, is a not-for-profit organization that provides alternative dispute resolution services to individuals and organizations throughout the United States. *About American Arbitration* Association, AM. ARBITRATION ASS'N, http://www.adr.org/aaa/faces/s/about?_afrLoop=1910420596185653&_afrWindowMode=0&_afrWindowId=jyufawa90_1#%40%3F_afrWindowId%3Djyufawa90_1%26_afrLoop%3D1910420596185653%26_afrWindowMode%3D0%26_adf.ctrl-state%3Djyufawa90_ (last visited Jan. 3, 2014). The organization also provides services abroad through its International Centre for Dispute Resolution® (ICDR). *Id.* Prior to appointment of an arbitrator to any case, the AAA requires that the arbitrator "shall disclose any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives." *Introducing: AAA® Arbitrator Select*, AM. ARBITRATION ASS'N, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_016003 (last visited Oct. 24, 2013). Furthermore, an arbitrator is subject to disqualification for "partiality or lack of independence," among other grounds. *Id.* AAA is the oldest and most widely used arbitration administration tribunal. Charles H. Resnick, *To Arbitrate or Not to Arbitrate*, 11 BUS. L. TODAY, no. 5, 2002, at 37, 37.

[23] JAMS is a private dispute resolution service that offers mediation and arbitration services for a wide array of cases. *About* JAMS, JAMS, http://www.jamsadr.com/aboutus/xpqGC.aspx?xpST=AboutUs (last visited Jan. 3, 2014). It produces a set of ethical guidelines for its arbitrators to refer to in addition to any law applicable to the dispute. *See Arbitrators Ethics Guidelines*, JAMS, http://www.jamsadr.com/arbitrators-ethics (last visited Oct. 24, 2013). These guidelines dictate that "[a]n Arbitrator should promptly disclose, or cause to be disclosed all matters required by applicable law and any actual or potential conflict of interest or relationship or other information, of which the Arbitrator is aware, that reasonably could lead a Party to question the Arbitrator's impartiality." *Id.*

[24] Ebe, *supra* note 21, at 85.

[25] *Id.* at 86. "Common law was traditionally hostile to arbitration. The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, was enacted in 1925 to provide a basis for enforcing commercial arbitration agreements. The U.S. Supreme Court extended the FAA to employment contracts tentatively in 1991 and definitively ten years later. The Court has recognized a strong federal policy favoring arbitration since the mid-1980s." Richard A. Bales, *An Introduction to Arbitration*, 70 BENCH & BAR (Ky.), no. 2, 2006.

[26] Ebe, *supra* note 21, at 86.

[27] *Id.*

[28] "The Uniform Arbitration Act (UAA), promulgated in 1955, has been one of the most successful Acts of the National Conference of Commissioners on Uniform State Laws. Forty-nine jurisdictions have arbitration statutes; 35 of these have adopted the UAA and 14 have adopted substantially similar legislation." *Alternative Dispute Resolution (ADR)*, HG.ORG LEGAL RESOURCES, http://www.hg.org/ADR.html (last visited Oct. 24, 2013).

[29] Ebe, *supra* note 21, at 86.

Recently, the number of challenges to arbitrators based on allegations of partiality or bias has been increasing.[30] As a result, arbitral institutions presumably have an interest in ensuring that the selected arbitrators remain neutral and at an arm's length from all parties to the arbitration agreement.[31] To safeguard such preservation of neutrality, there are typically disclosure requirements in place for neutral arbitrators, which seek to certify that no relationships or interests exist that may affect the impartiality of the arbitrator and his or her ability to render an unbiased decision.[32]

While specific arbitral institutions and organizations set forth the qualifications for arbitrators and requirements for disclosure, there are no statutory requirements regarding disclosure of conflicts.[33] United States courts have the authority to make an inquiry into an arbitrator's impartiality after an award has already been rendered and a motion has been made to vacate.[34]

> There are no legally mandated codes or rules concerning conflicts of interest for arbitrators. [Rather, courts] may refer to guidelines such as the [International Bar Association (IBA)] Guidelines on Conflicts of Interest or the AAA Code of Ethics for Arbitrators as guidance in determining whether an arbitrator's behavior warrants vacatur of an award.[35]

The AAA, for example, requires arbitrators to "reveal[] not just whether the arbitrators have a relationship with either party, but also whether any member of their families, their employers, partners, or business associates have any type of existing or past relationships that

30 Stone & Won, *supra* note 9, at 1.

31 Richard Chernick, *Arbitrator-Neutrality Rule Reflects Change in Ethics*, JAMS, http://www.jamsadr.com/arbitrator-neutrality-rule-reflects-change-in-ethics-04-14-2004/ (last visited Jan. 3, 2014). *See also* IBA GUIDELINES, *supra* note 18, at 3.

32 *Id.*

33 Mark W. Friedman, *United States Arbitration Guide*, IBA ARBITRATION COMM., INT'L BAR ASS'N 6 (Sept. 2012), http://www.ibanet.org/Document/Default.aspx?DocumentUid=939CE0D4-8D8A-4350-81D7-B7FEFE923C11.

34 *Id.*

35 *Id.* at 7.

might affect the arbitrator's impartiality or independence."[36] In compelling arbitrators to complete an extensive disclosure form, arbitral organizations seek to avoid engagement of arbitrators in disputes where their background may disqualify them on grounds of impartiality.[37]

### *B. The Duty to Disclose as Put Forth by the Uniform Arbitration Act*

The Uniform Arbitration Act (UAA) offers guidance for situations in which disclosure by an appointed arbitrator is necessary.[38] Provisions of the UAA address how, before accepting an appointment, an individual chosen to serve as an arbitrator should make a reasonable inquiry and then disclose to all parties and other neutrals "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding."[39]

The UAA stipulates two examples of facts that should be disclosed: "(1) a financial or personal interest[40] in the outcome of the arbitration proceeding and (2) an existing or past relationship with any of the parties . . . , their counsel or representatives, a witness, or another arbitrators [sic]."[41] This duty to disclose is ongoing, as the act imposes on arbitrators a "continuing obligation" of disclosure.[42] If an arbitrator fails to meet his or her disclosure obligations, the Act authorizes a court

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36 Ebe, *supra* note 21, at 89. *See also* AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES 17 (Oct. 1, 2013), *available at* http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased. Notably, the AAA amended their rules, effective October 1, 2013. Rule 17, Disclosure, provides that

> [a]ny person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

*Id.* The newly amended Rule is notable in that it imposes an obligation on not only the arbitrator to disclose any potential conflicts, but also the parties and their representatives. "Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator. . ." *Id.* at 17.

37 Ebe, *supra* note 21, at 89.

38 UNIF. ARBITRATION ACT, 7 U.L.A. 1 (2000) [hereinafter UAA].

39 UAA § 12(a).

40 Comment 2 to UAA § 12 draws attention to the Drafting Committee's decision to "delete the requirement of disclosing 'any' financial or personal interest in the outcome or 'any' existing or past relationship and substituted the terms 'a' financial or personal interest in the outcome or 'an' existing or past relationship. The intent was not to include *de minimis* interests or relationships." UAA § 12 cmt. 2.

41 UAA § 12(a)(1)-(2).

42 UAA § 12(b).

to vacate an award in accordance with Section 23(a)(2).[43] The determination of precisely what type of factual information falls within this standard, however, is not easily quantifiable in a bright-line rule, as is evidenced by varied determinations throughout the circuits of the United States federal courts.[44] The FAA, the predominant source for resolving questions regarding arbitrations at the federal level, does not include such explicit examples or stipulations.[45]

### *C. The Federal Arbitration Act and Its Implication on Judicial Review of Arbitral Awards*

Title 9 of the United States Code,[46] otherwise known as the Federal Arbitration Act (FAA), addresses questions regarding arbitrations at the federal level. Section 10 provides the court the ability to vacate an award upon a party's application in four distinct situations:

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[47]

Judicial review of awards, therefore, is limited to those specific circumstances referenced in the Act.[48] Moreover, "[t]he effect of the

43 UAA § 12(d). Section 23(a)(2) of the UAA states that "[u]pon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if . . . there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding." UAA § 23(a)(2). Section 12(e) states that an arbitrator that fails to disclose "a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Section 23(a)(2)." UAA § 12(e).

44 *See infra* Part II.E.

45 *See infra* Part II.C.

46 9 U.S.C. §§ 1-14 (2012).

47 9 U.S.C. § 10(a) (2012).

48 *See* Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 587 (2008) (holding that courts cannot expand the scope of judicial review beyond what is specified in §§ 10 and 11 of Title 9 on a motion to vacate).

FAA's restrictions on judicial review is significant: Courts overturn only about 10% of arbitration awards reviewed under that statute."[49]

Specifically, the "evident partiality" standard outlined in both the FAA and UAA has been subject to conflicting interpretations by various U.S. courts.[50] "Some U.S. courts have held that a failure to investigate and disclose conflicts warranted vacatur of an award for 'evident partiality' under Section 10 of the FAA . . . [but] the standard for evident partiality remains imprecise."[51] As a result, there does not appear to be a bright line rule for what constitutes an arbitrator's bias under this standard.[52] While a showing of prejudice has been necessary in order to vacate an award on grounds of misconduct, courts have not explicitly required such a showing when parties are challenging on the basis of evident partiality of the neutral arbitrator.[53]

### *D. The "Evident Partiality" Standard and its Foundational Applications*

The U.S. Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[54] which has been identified by some commentators as a pioneering case on the matter, addresses the FAA's "evident partiality" standard.[55] In *Commonwealth Coatings*, the Court was split, with a plurality of four judges led by Justice Black, two concurring justices led by Justice White,[56] and three dissenting justices.[57] The Court held that an undisclosed business relationship between one of the parties and an arbitrator satisfied the "evident partiality" standard and, therefore, vacated the arbitral award rendered.[58] In particular, there appeared to have been prior business dealings

49 Davis, *supra* note 19.

50 *See* Peter L. Michaelson, *In International Arbitration, Disclosure Rules at the Place of Enforcement Matter Too*, 62 DISP. RESOL. J., no. 4, Nov. 2007—Jan. 2008, at 82, 85.

51 Friedman, *supra* note 33, at 6.

52 For example, the Court of Appeals for the Sixth Circuit stated that "mere personal friendship with one of the parties does not disqualify an arbitrator, and an arbitration carried on by such an arbitrator would not be contrary to ordinary concepts of fairness;" rather, "it is the proof of bias or unfairness or partiality on the part of an arbitrator that results in unjust advantage, and calls for the setting aside of the award." Kentucky River Mills v. Jackson, 206 F.2d 111, 117 (6th Cir. 1953).

53 UAA § 23(a)(2), (5), (6), (c) cmt. 1.

54 Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968).

55 Laurie E. Foster & Shana R. Cappell, *The Fifth Circuit's Positive Software Solutions v. New Century Mortgage—Underscoring the Need for a Positive Solution to Arbitrator Disclosure for a New Century*, 4 TRANSNAT'L DISP. MGMT., no. 5, Sept. 2007, at 2, *available at* http://www.morganlewis.com/pubs/FifthCircuitPositiveSoftware-TDM_sept07.pdf.

56 Justice Thurgood Marshall joined this concurrence. Michaelson, *supra* note 48, at 86.

57 *Commonwealth Coatings Corp.*, 393 U.S. at 145.

58 UAA § 12 cmt. 1.

between the prime contractor, who ultimately prevailed, and one of the arbitrators who was the owner of an engineering business that had conducted services connected to the project in dispute.[59]

The diverging opinions articulated by the justices in *Commonwealth Coatings* have been referenced frequently.[60] In his plurality, Justice Black focused on how the contractor was a regular, although sporadic, customer whose business profited the arbitrator.[61] Furthermore, the arbitrator failed to disclose this relationship prior to the hearing, enabling the bias to remain undiscovered until after the award had been rendered.[62] While there was no evidence to support a finding of actual bias, Justice Black believed that the evidence of prior dealings was sufficient to show "evident partiality" on the part of the arbitrator.[63]

Justice Black then went on to explain that the Court could "perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."[64] Moreover, the Court stated that tribunals must refrain from indicating even an *appearance* of bias, such that they should adhere to a "when in doubt, disclose" policy.[65]

In his concurrence, Justice White joined Justice Black's opinion but further added that "arbitrators are not automatically disqualified by a business relationship with the parties before them if . . . [the parties]

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59 *Commonwealth Coatings Corp.*, 393 U.S. at 146.

60 In particular,

> [t]he concurrence has drawn a great deal of commentary as the vote of one of the concurring Justices was required for a majority opinion. Some circuits view Justice White's concurrence as irreconcilable with Justice Black's opinion, thereby relegating Justice Black's opinion to dicta, and have focused instead on the language of Justice White's concurring opinion. This focus has led to the development of various standards in the circuit courts, and the lack of a uniform interpretation of the meaning of "evident partiality" under 9 U.S.C. 10(a)(2).

Ann Ryan Robertson & Loraine M. Brennan, *The Law on Overturning Arbitration Awards for Partiality is Confused*, 10 COMMITTEE ON COM. & BUS. LITIG., no. 3, 2009, at 1.

61 *Commonwealth Coatings Corp.*, 393 U.S. at 146.

62 *Id.* at 147-48.

63 *Id.*

64 *Id.* at 149. Justice Black likened this "simple" requirement to those imposed on a judge under Article III. He urged that the court should "be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id.* at 149. *See also* TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE (4th ed. 2009).

65 *Commonwealth Coatings Corp.*, 393 U.S. at 150; Foster & Cappell, *supra* note 55, at 2. *See also* Robertson & Brennan, *supra* note 60.

are unaware of the facts [and] the relationship is trivial."[66] Justice White focused on the importance of arbitrator disclosure when the arbitrator has a "substantial interest in a firm which has done more than trivial business with a party."[67] He went on to state:

> [I]t is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with the knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award.[68]

### *E. The Cross-Circuit Divide: Case Law Post-Commonwealth*

Courts after *Commonwealth Coatings* have continued to try to answer these questions while refining and interpreting the principles outlined by Justice Black and Justice White regarding the "evident partiality" standard.[69] "Although the Supreme Court has weighed in on this provision of the Federal Arbitration Act, the federal courts are still split with regard to how "evident partiality" should be interpreted."[70] Some courts opt to follow Justice Black's line of reasoning, adhering to an "appearance of bias" test.[71] The Second Circuit has introduced objective elements such as the reasonable person standard or a showing of something more than the mere appearance of bias, but short of proof of actual bias, whereby partiality can be inferred from "objective facts inconsistent with impartiality."[72] Others have increased the burden of proof[73] required to vacate awards on the grounds of arbitrator bias.

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66 *Commonwealth Coatings Corp.*, 393 U.S. at 150.

67 *Id*. at 151-52.

68 *Id.* at 151.

69 L.E. Foster and S.R. Cappell note that

> the Second, Fourth, Sixth, and Seventh Circuits . . . view Justice White's concurring opinion as limiting the majority opinion to a mere plurality. The Tenth and Eleventh Circuits have arrived at similar conclusions. The Ninth Circuit, however, has . . . endorsed the "reasonable impression of bias" standard as a majority opinion

and has rejected the notion that Justice White's concurrence limits the holding of Commonwealth. Foster & Cappell, *supra* note 55, at 3. "In short, although a majority of circuits ascribe to the view that in order to warrant vacatur of an arbitration award, the arbitrator's undisclosed connection must implicate a direct and substantial interest or relationship between a party and the arbitrator, there is still no consensus on the matter." *Id*.

70 Stone & Won, *supra* note 9, at 1-2.

71 *Id.*

72 Pitta v. Hotel Ass'n of N.Y.C., Inc., 806 F.2d 419, 423 n.2 (2d Cir. 1986).

73 "A greater number of other courts, mindful of the tradeoff between impartiality and expertise inherent in arbitration, have placed a higher burden on those seeking to vacate awards on grounds of arbitrator interests or relationships." UAA § 12 cmt. 1.

### *1. Evident Partiality: Interpretation and Application in the Second Circuit*

*Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Insurance Co.*,[74] a recent case decided by the Second Circuit, relied on the standard established in *Commonwealth Coatings* to reverse the District Court's finding of "evident partiality".[75] The main question faced by the Second Circuit is akin to the issues addressed in the aforementioned cases: does the fact that two arbitrators served on a prior arbitral panel in a similar case support a finding of "evident partiality," such that the award rendered should be set aside?[76]

In *Scandinavian Reinsurance*, tension arose because two arbitrators and one party's witness had disclosed that they had met "a few times in the past, mainly in Bermuda."[77] The arbitrators and the witness did not disclose, however, the nature of such meetings.[78] It was later revealed that they had met in the context of another arbitration involving a similar contractual dispute.[79] Furthermore, the witness' testimony in the two arbitrations was contradictory regarding the way in which the witness argued the respective contracts should be read.[80] The trial court held that the arbitrators' failure to disclose their service on both panels had constituted a material conflict of interest, and thus a

74 Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Insurance Co., 668 F.3d 60 (2d Cir. 2012).

75 Steven C. Schwartz & David Wax, *Arbitrator Disclosure Requirements and Enforceability of Awards*, 244 N.Y. L.J., no. 79, Oct. 22, 2012, at 4, *available at* http://www.lockelord.com/art_arbitratordisc_nylj2010.

76 *Id.*

77 Martin Flumenbaum & Brad S. Karp, *Court Reaffirms Stringent Showing Required to Overturn Arbitral Award*, 247 N.Y. L.J., no. 37, Feb. 27, 2012, at 3, *available at* http://www.paulweiss.com/media/102987/27Feb12SCR.pdf.

78 *Id.*

79 The previous arbitration was called the "Platinum Arbitration." *Id.* This arbitration involved a similar stop-loss retrocessional contract, as well as a party who was related to the arbitration at issue in *Scandinavian Reinsurance Co.*, an arbitration known as the "St. Paul Arbitration." *Id.*

80 The witness testified in favor of a less literal reading of the contract in the arbitration in question and testified in favor of a more literal reading of the contract at issue in the prior arbitration. *Id.*

reasonable person could conclude that they were partial.[81]

The Second Circuit, however, reversed the trial court's decision.[82] To support the finding that there had been no evident partiality, thereby denying the petition to vacate the award, the Court cited prior case law that had set an extremely high bar for overturning arbitral awards.[83] Specifically, the Second Circuit cited its decision in *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*,[84] where the court relied on the FAA's "evident partiality" standard to uphold the trial court's finding[85] that a reasonable person would have to conclude that the arbitrator had evident partiality.[86]

The Second Circuit had found in *Applied Industrial Materials* that "an arbitrator is disqualified only when a reasonable person, considering all the circumstances, 'would *have* to conclude' that an arbitrator was

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[81] Despite reversal by the Second Circuit, the district court's ruling illustrates an oft-held concern stemming out of arbitrators' concurrent service and failure to disclose such service. District Judge Shira Scheindlin's opinion held, in essence, that:

> the arbitrators' failure to disclose their concurrent service allowed them to make credibility judgments about the common witness and his possibly contradictory testimony, receive ex parte information about the kind of reinsurance contract at issue in the case, and influence more powerfully each other's thinking. Their failure to disclose their prior service had deprived Scandinavian of an opportunity to object to their service on the St. Paul Arbitration panel or adjust its arbitration strategy . . . these factors showed that the arbitrators' simultaneous service in the two proceedings constituted a material—that is, non-trivial—conflict of interest.

*Id.*

[82] Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Insurance Co., 668 F.3d 60 (2d Cir. 2012).

[83] *Id.*

[84] Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007). In *Applied Industrial Materials*, the arbitrator, who was CEO of a large corporation, learned that one of his company's subsidiaries had done business with the corporation that was acquiring the plaintiff. *Id.* at 135. Upon hearing such information, the arbitrator established a "Chinese wall" to ensure he would not learn anything further regarding the conflict and disclosed the relationship to the parties. *Id.* at 135-36. The Second Circuit affirmed the district court's refusal to confirm the award on grounds that there was "evident partiality" as a result of the arbitrator's failure to investigate the conflict further and to properly disclose its extent. *Id.* at 139. *See also* Robert B. Davidson, *Conflicts of Interest, What Are They, and Must They All Be Disclosed?*, AM. BAR ASS'N 2 (Mar. 5, 2012), http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Davidson_Conflicts_March_5.authcheckdam.pdf.

[85] The Southern District of New York consulted both the Ethics Code and the IBA Guidelines to come to its decision. Foster & Cappell, *supra* note 55, at 7. It cited the IBA Guidelines' duty imposed on arbitrators to investigate potential conflicts of interest, as well as the Ethics Code's proposition that an arbitrator has an ongoing duty to disclose and any doubts should be resolved in favor of disclosure. *Id*.

[86] *Applied Indus. Materials Corp.*, 492 F.3d at 132.

partial to one side."[87] Consequently, to satisfy "evident partiality" such that an arbitrator would be disqualified, a party must establish that a reasonable person would conclude the arbitrator had favored one particular side.[88] Therefore, an arbitrator's disclosure would have to implicate a predisposition towards one party in particular, rather than merely indicate a general prior relationship or interest that overlaps with the matter.[89] Such a finding of partiality can be obtained through indirect evidence, such as when an arbitrator fails to disclose a relationship, but the "evident partiality" denotes bias towards one of the parties over another.[90]

In *Applied Industrial Materials*, the court focused on the fact that the arbitrator had "a continuing duty" to ensure that neither he nor his corporation had an interest in the outcome, that he only disclosed the fact that the companies had discussions, and that *had* he investigated the potential conflict he would have discovered the relationship between the companies was significant.[91] "Arbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists" and must investigate the conflict and disclose "reasons for believing there might be a conflict and his intention not to investigate."[92] Failure to do such is "indicative of evident partiality."[93]

Thus to resolve whether the undisclosed relationship rose to the requisite level of "evident partiality," the court in *Scandinavian Reinsurance* looked to the four factors that the Fourth Circuit utilizes, among others, to make such determinations:

> (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding.[94]

In light of these factors, the Second Circuit highlighted that the mere fact that the two arbitrators had served together did not suggest that they

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87 *Id.* at 137 (citing Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984)).

88 Flumenbaum & Karp, *supra* note 77, at 2.

89 *Id.*

90 *Id.*

91 *Applied Indus. Materials Corp.*, 492 F.3d at 139.

92 *Id*. at 138.

93 *Id.*

94 Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Insurance Co., 668 F.3d 60, 74 (2d Cir. 2012) (citing Three S. Del., Inc. v. DataQuick Info. Sys. Inc., 492 F.3d 520, 530 (4th Cir. 2007)).

were inclined to favor either party more than the other.[95] "Such overlapping service is not only a circumstance inherently indicative of bias; it is also not unusual. In specialized fields . . . where there are a limited number of experienced arbitrators, it is common for the same arbitrators to end up serving together frequently."[96] Absent specific facts to suggest such a one-sided predilection, the standard of "evident partiality" is not satisfied.[97] Here, the court found no facts that indicated any professional or financial incentives to prejudice the arbitrators to favor one party over another.[98] Notably, this factor was present and persuasive for Justice Black in *Commonwealth Coatings*.

Moreover, the Second Circuit held that nondisclosure of a relationship does not imply that the undisclosed relationship biased the arbitrator.[99] "[N]ondisclosure does not by itself constitute evident partiality. The question is whether the *facts* that were not disclosed suggest a material conflict of interest."[100] The court did maintain, however, that the requirement that arbitrators disclose prior relationships and dealings that may signify bias is still in place.[101] But, in the event an arbitrator fails to do so, there is still no sufficient cause for overturning or setting aside the award absent a showing of bias as a result of the non-disclosure.[102]

As commentators have noted, "[t]he FAA provides a district court with an opportunity to overturn an arbitral award where an arbitrator's ruling is based on evident partiality; it does not provide an arbitral party with a right to know an arbitrator's background before an arbitration begins."[103] As noted in *Scandinavian Reinsurance*, "[a]lthough it would have been far better for [the arbitrators] to have disclosed [the "actual knowledge" of their concurrent service, the court] did not think disclosure was required to avoid a vacatur of the Award in light of the fact that the relationship did not significantly tend to establish partiality."[104]

95 *Scandinavian Reinsurance Co. Ltd.*, 668 F.3d at 74.
96 *Id.*
97 *Id.* at 72-73.
98 Flumenbaum & Karp, *supra* note 77, at 2.
99 *Id.*
100 *Scandinavian Reinsurance Co. Ltd.*, 668 F.3d at 77.
101 *Id.* at 78.
102 Flumenbaum & Karp, *supra* note 77, at 2.
103 *Id.*
104 *Scandinavian Reinsurance Co. Ltd.*, 668 F.3d at 78.

*2. Evident Partiality: Interpretation and Application in the Fifth Circuit*

Following *Scandinavian*, the Fifth Circuit addressed additional concerns about disclosure, particularly in regard to responsibility for educating about prior interests and relationships. In *Dealer Computer Services, Inc. v. Michael Motor Company*,[105] the losing party to the arbitration petitioned the court to vacate the award on grounds that one of the arbitrators failed to disclose that she had sat on a panel that involved a similar dispute.[106] The court denied this petition, asserting that the party seeking the vacatur had effectively waived its right to bring an objection based on evident partiality because a party who seeks to set aside an award should raise this objection during the arbitration proceedings in a timely manner.[107] Observing that the arbitrators had all made various disclosures prior to the arbitration, the court believed that sufficient disclosure had been made to offer constructive notice of any potential for bias.[108] Moreover, a party has a duty to do its own diligence in probing arbitrators for potential subjectivity.[109]

The Fifth Circuit decision creates interesting implications for challenging awards on the grounds of arbitrator bias and/or failure to disclosure. For one, there is a clear time component to bringing such a challenge. As the court expressed, if there is ample opportunity to have constructive knowledge of bias, a party must bring any objection in a timely fashion.[110] This alleviates a major concern arising from the challenge process: a losing party cannot simply use non-disclosure or questionable prior dealings as grounds for vacating awards rendered against it. Furthermore, this decision puts responsibility on parties, in addition to arbitrators, to be proactive about investigating potential conflicts, relationships, or interests that may indicate bias.

105 Dealer Computer Servs., Inc. v. Michael Motor Co., No. 11-20053, 485 F. App'x 724 (5th Cir. 2012).

106 Abby Cohen Smutny et al., *Fifth Circuit Finds That a Party Waived Its Rights to Raise Evident Partiality Objection,* PRACTICAL LAW CO. (Sept. 6, 2012), http://us.practicallaw.com/2-521-2326.

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

In *Positive Software Solutions v. New Century Mortg. Corp.*,[111] the Fifth Circuit, on rehearing en banc, held that an arbitrator's failure to disclose a prior relationship with a party's attorney did not constitute "evident partiality" and thereby did not warrant vacatur of the award.[112] Concluding that the appropriate interpretation of *Commonwealth Coatings* is based in practicality, the Fifth Circuit found the "resulting standard is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding."[113]

Prior to the Fifth Circuit's rehearing en banc, a panel of the court had affirmed the district court's vacatur, finding that the prior relationship "might have conveyed an impression of possibility partiality to a reasonable person."[114] As commentator Peter L. Michaelson noted, the district court "held that the arbitrator deprived one of the parties of knowing that the arbitrator had a prior association with opposing counsel; hence his conduct reflected 'evident partiality.'"[115] Relying on the Ninth Circuit's interpretation of *Commonwealth Coatings* in its decision in *Schmitz v. Zilveti*,[116] the Fifth Circuit had initially adopted a broad standard of "evident partiality."[117]

*Schmitz* had established a reasonable impression of partiality standard, holding that the arbitrator's prior relationship warranted vacatur of the award because, as a result of his nondisclosure, the arbitrator had conveyed an "impression of possible partiality to a reasonable person."[118] "Showing a 'reasonable impression of partiality' is sufficient in a disclosure case because . . . parties should choose their arbitrators intelligently. The parties can choose their arbitrators intelligently only when facts showing potential partiality are

111 Positive Software Solutions, Inc. v. New Century Mortg. Corp., 476 F.3d 278 (5th Cir. 2007). This case involved an arbitrator who had served as counsel in an unrelated litigation with an attorney to one of the parties in the present arbitration. *Id.* at 280. The prior litigation had occurred seven years prior to accepting the present appointment and had lasted for six years, involving thirty-four different lawyers from seven different law firms throughout the process. *Id.* at 283-84. Neither the attorney nor the arbitrator had ever met each other, despite having had both their names appear on ten different pleadings. *Id.* The arbitrator did not disclose this relationship with the attorney. *Id.* at 280; *see also* Michaelson, *supra* note 50, at 85-86.

112 *Positive Software Solutions, Inc.*, 476 F.3d at 279.

113 *Id.* at 283.

114 *Id.* at 280 (citing Positive Software Solutions, Inc. v. New Century Mortgage Corp., 337 F.Supp.2d 862, 865 (N.D.Tex.2004)).

115 Michaelson, *supra* note 50, at 86.

116 Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994).

117 Positive Software Solutions, Inc. v. New Century Mortgage Corp., 436 F.3d 495 (5th Cir. 2006).

118 *Id.* at 504.

disclosed."[119] While the arbitrator did not have any actual knowledge, the court held that the arbitrator did have constructive knowledge.[120] Thus, the court implied that there may be a duty to investigate, in addition to the *Commonwealth Coatings* imposed duty to disclose, whereby failure to adhere may create a "reasonable impression of partiality."[121]

Nevertheless, only the Ninth Circuit has interpreted *Commonwealth Coatings* in the same way the panel did.[122] In the Fifth Circuit's en banc[123] review of the decision, the court shifted to an interpretation requiring the nondisclosure to have involved a "significant compromising connection" to the parties in order to warrant vacatur.[124] "Nondisclosure alone does not require vacatur of an arbitral award for evident partiality."[125]

Finding that there was no precedent in which an arbitration award was vacated for nondisclosure of such a "slender connection," the Fifth Circuit en banc in *Positive Software Solutions* reversed the panel's prior ruling.[126] The court reasoned:

> Awarding vacatur in situations such as this would seriously jeopardize the finality of arbitration. . . losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made.[127]

Unless a nondisclosure by an arbitrator constitutes a concrete, not speculative impression of bias, vacatur of arbitral awards is inappropriate.[128]

As evidenced by the varying degrees of "evident partiality" expressed among the U.S. Circuits, there remains no consensus regarding the level of disclosure an arbitrator must provide when serving on an arbitral panel.[129] Moreover, there is no uniformity in how to approach "evident partiality."[130] Thus, in the United States, challenges to arbitral awards on the basis of arbitrator partiality are

119 *Id.* at 501 (citing Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994)).
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.* at 283.
125 *Id.* at 282.
126 *Id.* at 284.
127 *Id.* at 285.
128 *Id.*
129 Robertson & Brennan, *supra* note 60, at 3.
130 *Id.*

largely dependent on the jurisdiction and prevailing set of rules.[131]

## III. ARBITRATION AT THE INTERNATIONAL LEVEL: A CROSS-CULTURAL SNAPSHOT

### *A. Background on International Arbitration Laws and Institutions*

The prevalence of arbitrations in the international context has grown rapidly, particularly within international commercial disputes, in which arbitration remains the "preferred method" of resolution.[132] Traditionally, arbitration has been viewed as faster and more cost-efficient.[133] For many international disputes, the use of a single forum for multi-jurisdictional disputes is especially attractive, as litigation in multiple countries carries not only the likelihood of additional expense and length, but also may provide inconsistent results.[134] The process offers a neutral forum, and as a result of the New York Convention,[135] arbitral awards are relatively easy to enforce throughout the world—a favorable attribute within the international context.[136] Moreover, under the provisions of the New York Convention, signatory countries must enforce foreign arbitral awards without review of the merits, absent evidence of any of the enumerated grounds for properly refusing enforcement.[137]

Article V(1) of the New York Convention, in particular, sets forth the limited grounds that are available to oppose enforcement or recognition of a foreign award. One of such grounds is outlined in

131 *See* Stone & Won, *supra* note 70.

132 Steven Seidenberg, *International Arbitration Loses Its Grip*, 96 A.B.A. J., no. 4, Apr. 2010, at 50, 51.

133 As Seidenberg discusses, however, there has been increasing discourse over whether arbitration actually offers a more cost-effective and time-efficient solution. *Id.* at 50-51. The traditional argument rested on the fact that unlike court systems where there are multiple levels of appeals, the arbitration awards can only be challenged on very narrow procedural grounds, and thus lengthy trials and appeals are avoided. *Id.* at 52.

134 Joseph P. Zammit & Jamie Hu, *Arbitrating International Intellectual Property Disputes*, 24 MEALEY'S INT'L ARB. REP., no. 6, June 2009, *reprinted in* 64 DISP. RESOL. J., no. 4, Nov. 2009—Jan. 2010, at 74.

135 The New York Convention, officially titled the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is a treaty that was signed in New York City in 1958. Seidenberg, *supra* note 132, at 51. It requires any signatory nations to not only give effect to arbitration agreements that are valid, but also enforce the awards. *Id.* at 51-52. One hundred forty-four nations, approximately 75% of the world, are signatories to the treaty, which requires that nations' courts must decline to hear any disputes that would otherwise be resolved in arbitration as stipulated by the arbitration agreement. *Id.*

136 *Id.*

137 Zammit & Hu, *supra* note 134.

section (1)(b), which provides a ground for opposition or recognition if parties "were not afforded adequate notice of the proceedings, a hearing on the evidence or *an impartial decision by the arbitrator*."[138] "In international arbitrations, party arbitrators are expected to be independent and not to engage in ex parte communications with their appointing party after appointment."[139] Within the international arbitration schema, substantial issues have arisen regarding how to define the extent to which an arbitrator's prior conduct establishes a threat to rending such an "impartial decision."[140]

### *B. The IBA Guidelines on Conflicts of Interest in International Arbitration*

In an effort to combat confusion as to what facts need to be disclosed, the International Bar Association (IBA) has established guidelines[141] to "help parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection."[142] A finding of arbitrator partiality and lack of independence is appropriate where "a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."[143]

The IBA General Standards Regarding Impartiality, Independence and Disclosure stipulate that "every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding . . . ."[144] The IBA advocates for a "justifiable doubts"

138 Friedman, *supra* note 33, at 18 (emphasis added).

139 Chernick, *supra* note 31.

140 Friedman, *supra* note 33.

141 The Committee on Arbitration and ADR of the International Bar Association appointed a Working Group of nineteen experts in international arbitration from fourteen countries to study the "national laws, judicial decisions, arbitration rules and practical considerations and applications regarding impartiality and independence and disclosure in international arbitration." IBA GUIDELINES, *supra* note 18, at 3-4. Finding that the existing standards had lacked clarity, the Working Group assembled the IBA Guidelines on Conflicts of Interest in International Arbitration to offer a consistent set of standards for arbitrators. *Id.* at 4. The Guidelines are not legal provisions and, as a result, do not take precedence over any applicable law or rules that parties have chosen. *Id.* at 5.

142 *Id.*

143 *Id.* at 8.

144 *Id.* at 7.

standard based on the point of view of a "reasonable third person . . . having knowledge of the relevant facts . . . ."[145]

This "justifiable doubts" standard is derived from the UNCITRAL Model Law on International Commercial Arbitration,[146] which has been broadly adopted.[147] Under UNCITRAL's Article 12, there is a requirement that an arbitrator "shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."[148] UNCITRAL limits challenges to an arbitrator to only those situations where "circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties."[149] The issue then becomes how to classify the circumstances that invoke reasonable justifiable doubts.

### *1. Classification of Conflict: The Red, Orange, and Green Lists*

In an attempt to further clarify how to categorize and handle potential conflicts of interest, the IBA Guidelines separate conflicts into three lists: Red, Orange, and Green.[150]

#### a. The Red List

The Red List is sub-divided into the Non-Waivable Red List and the Waivable Red List.[151] The Non-Waivable Red List denotes the most severe and rudimentary conflicts that serve to automatically disqualify an arbitrator candidate.[152] One prime example is if an arbitrator represents one of the parties in the arbitration.[153] Conversely, the Waivable Red List consists of conflicts which, while less serious, may only be waived if the parties expressly opt to allow the arbitrator to act.[154] If the arbitrator currently represents one of the parties in a matter outside of the arbitration, for example, this would fall under the

145 *Id.* at 7-8.

146 U.N. COMM'N ON INTERNATIONAL TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Doc. A/40/17, annex I and A/61/17, annex I, U.N. Sales No. E.08.V.4 (adopted 1985, amended 2006).

147 IBA GUIDELINES, *supra* note 18, at 8.

148 U.N. COMM'N ON INTERNATIONAL TRADE LAW, *supra* note 146, at 7.

149 *Id.* In terms of challenging an arbitrator who was appointed by the parties themselves, such a challenge may only occur when reasons for challenge are made aware of after the appointment is made. *Id.*

150 Michaelson, *supra* note 50, at 2.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.* The waiver can be made either in writing or orally; if waived orally, however, it must be on the record during a hearing. *Id.*

Waivable Red List. [155]

b. The Orange List

The Orange List consists of a non-exhaustive listing of all those conflicts that are less severe than the Red List, but "nevertheless may, in the eyes of the parties, give rise to justifiable doubts as to the arbitrator's impartiality or independence."[156] In practice, the conflicts on this list generally must be disclosed, but if the parties fail to object within thirty days after disclosure, the conflicts are simply waived.[157]

c. The Green List

The Green List consists of situations in which, from the "relevant objective point of view," there is no appearance of, or actual, conflict of interest.[158] Consequently, these situations do not require disclosure.[159] Within the Green List, the IBA includes a hypothetical "where '[t]he arbitrator and counsel for one of the parties . . . have previously served together . . . as co-counsel,' the exact relationship presented in *Positive Software Solutions* . . . indicating that such a relationship does *not* give rise to a duty to disclose."[160]

*C. The Cross-Country Divide: Standards and Interpretations of Arbitrator Bias*

The nature of international arbitrations and, in particular, the increasingly intertwined business relationships and the presence of many varied standards among countries, presents obstacles in ensuring arbitrator impartiality and neutrality.[161] As the IBA noted in its Guidelines on Conflicts of Interest in International Arbitration:

> [e]ven though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application. As a result, quite often members of the international

155 *Id.* at 3.

156 *Id.*

157 *Id.* Within the Orange List is also a three-year "look-back" period. *Id.* This period relates to conflicts involving prior service of an arbitrator or the arbitrator's firm to one of the parties in an unrelated matter. *Id.* Situations of this nature must only be disclosed if they occurred within the preceding three years. *Id.* If the situation occurs outside the scope of the three-year period, it falls within the Green List, and thus does not require disclosure. *Id.*

158 *Id.*

159 *Id.*

160 Foster & Cappell, *supra* note 55, at 6.

161 *See* IBA GUIDELINES, *supra* note 18, at 3.

> arbitration community apply different standards in making decisions concerning disclosure, objections and challenges.[162]

Due to the wide range of standards employed throughout the international community regarding arbitrator disclosure, it is useful to delve deeper into the specific approaches adopted within various countries.

### *1. The Swiss Approach*

> In Swiss law, there is authority for the proposition that arbitrators are subject to a *lower* standard of independence than cantonal and federal court judges: it seems that a 'bare minimum of independence' will suffice where arbitrators are concerned. Swiss courts take this view for the practical reason that, in contrast to judges, arbitrators regularly have contact with parties and their lawyers. Generally speaking, these kinds of professional contacts will not be enough to establish a lack of independence in a Swiss court.[163]

As such, the courts' standard for permissible arbitrator challenges is somewhat stringent.

In *Schweizerisches Bundesgericht*, the Swiss Supreme Court addressed a situation where an arbitrator had previously sat on another arbitral panel with counsel for one of the parties.[164] The court held that there was no sufficient basis for challenge on the impartiality of the arbitrator.[165] Despite the arbitrator's prior contact with one party's counsel, the Court refused to allow the setting aside of the award that had been rendered by the Geneva Court of Arbitration as the two panels were unrelated.[166]

Furthermore, the court noted the importance of adherence to procedural standards, stating that, in any event, the challenge should have been raised during the arbitration proceeding.[167] Following a similar logic as the United States' Fifth Circuit, which suggested the parties may have a duty, in addition to the arbitrators', to do their own due diligence regarding conflicts,[168] the Swiss court held that even if the party was unaware of the circumstances giving rise to disclosure, proper

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162 *Id.*

163 SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST 263 (2009).

164 VÁRADY ET AL., *supra* note 64, at 467.

165 *Id.*

166 *Id.*

167 *Id.*

168 *See* Smutny et al., *supra* note 106.

diligence and research into the Geneva Court of Arbitration website's published records could have revealed such and led to a more timely objection.[169] This multifaceted holding served to highlight how, in addition to the Swiss court's expectation that arbitrators adhere to certain levels of disclosure, there is also a shared responsibility placed on the parties themselves to investigate any possible indicators of biased relationships or interests.[170]

### *2. The Russian Approach*

The 1993 Russian Arbitration Act, Article 12(1),[171] provides that an arbitrator should disclose, "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."[172] Russian courts have further heightened this "justifiable doubts" standard for disclosure.[173] In a case before the Federal Arbitrazh Court of the Moscow Region in 2007,[174] the court relied on this provision to set

169 VÁRADY ET AL., *supra* note 64, at 467-68.

170 The Fifth Circuit in *Dealer Computer Services, Inc.* similarly expressed this view in holding that parties were expected to have conducted their own due diligence to determine the subjectivity of arbitrators. Dealer Computer Servs., Inc. v. Michael Motor Co., No. 11-20053, 485 F. App'x 724 (5th Cir. Aug. 14, 2012).

171 The full text of Article 12—Grounds for Challenge of an Arbitrator, sets forth in relevant part (as translated):

> 1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances which may give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties, unless they have already been informed of them by him.
>
> 2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications required by the agreement of the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] [Code of Arbitration Procedure] art. 12 (Russ.), *translated in Russia—Law of the Russian Federation on International Commercial Arbitration—In force 14 August 1993*, LEX MERCATORIA (Sept. 21, 2010), http://www.jus.uio.no/lm/russia.international.commercial.arbitration.1993/portrait.pdf.

172 VÁRADY ET AL., *supra* note 64, at 468.

173 *Id. See also* Sergey Yuryev & Konstantin Kantyrev, *Arbitration in Russia*, 1 CMS GUIDE TO ARB. 651, 661 (2012) *available at* http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_RUSSIA.pdf.

174 The case stemmed from an award rendered by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) in September 2006. Dmitry Kurochkin & Francesca Albert, *Arbitrators' Impartiality and the Duty of Disclosure*, INT'L LAW OFFICE (June 19, 2008), http://www.internationallawoffice.com/newsletters/Detail.aspx?r=16456#facts.

aside an arbitral award.[175] The arbitrators in the case failed to disclose that on two separate occasions they had participated as speakers at seminars of which the claimant's lawyer had been a co-organizer.[176]

The court noted that disclosure of such information did not necessarily encumber the case, but the failure to disclose altogether, as required by law, eliminated the parties' ability to decide whether or not to challenge an arbitrator based on their prior relationship.[177] The court found that "the sense of this rule lies in excluding any doubts the parties might have in relation to impartiality or independence of the arbitrators."[178] The court therefore viewed the rule as requiring exclusion of *any* doubts, rather than merely those that are justifiable.[179]

This interpretation of "justifiable doubts," as established by the Russian Arbitration Act, reflects the high premium that the court placed on disclosure, such that parties are ensured the opportunity to alleviate any doubts regarding the impartiality of their arbitrators. The court reasoned that since the parties were only privy to the appropriate disclosures after the case was heard, they were deprived of the opportunity to exercise the right to challenge the arbitrators based on their conflicts.[180] Thus, the court found that in the event that arbitrators do not comply in providing comprehensive disclosures, setting aside the arbitral award rendered is appropriate.[181]

### *3. The French Approach*

In France, courts have adopted a "strict but pragmatic view of the duty to disclose, requiring arbitrators to reveal any circumstance that can affect their judgment and create in the parties' mind a 'reasonable doubt' as to their impartiality and independence."[182] This duty to disclose is broad and ongoing throughout the arbitration.[183]

The issue of disclosure arose in *Creighton Ltd. v. State of Qata*r[184]

175 VÁRADY ET AL., *supra* note 64, at 468.

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 Nicolas Bouchardie & Celine Tran, *Arbitration in France*, PRACTICAL LAW ARBITRATION, 11-12, http://uk.practicallaw.com/4-536-9585 (last visited Jan. 14, 2014).

183 *Id.*

184 *See Court Decisions on Arbitration: Cour de Cassation, 6 July 2000, Creighton Limited v. State of Qatar*, 25 Y.B. COM. ARB. 458 (2000).

as the Court of Cassation,[185] in reviewing the Court of Appeal's decision, sought to determine the independence and impartiality of "Mr. X," an arbitrator appointed by Creighton, one of the parties to the dispute.[186] The court acknowledged that independence and impartiality are "essential" characteristics of the arbitral function, and relied on examination of the circumstances to decide whether the arbitrator's judgment was affected, such that it would "raise a reasonable doubt in the mind of the parties, as to the arbitrator's [independence and impartiality]."[187]

The lower court had found that Mr. X had assisted Creighton in procuring a lawyer prior to the start of the arbitral proceedings.[188] Despite this connection, the court did not believe that the assistance given by the arbitrator to one party was a sufficient ground for challenge.[189] The court focused on how there was no material connection between Creighton and Mr. X, either before or during proceedings.[190] Furthermore, the court held that the participation of Mr. X in another arbitration with Creighton and a third party not involved in the present dispute did not affect the arbitrator's partiality in the matter at hand.[191] The logic for this finding by the lower court, which formed the crux of the Court of Cassation's decision to uphold the decision, was further grounded in the fact that the parties opposing Creighton were different in the two arbitrations.[192]

In light of the holding of *State of Qatar*, it is apparent that the Court of Cassation chose to adopt a particularly stringent standard for overturning an arbitral award on the basis of arbitrator bias. The relationship and interactions between Mr. X and Creighton, even including the arbitrator's assistance to one party in finding an attorney in the matter pending, did not rise to the level of raising a "reasonable doubt" as to the arbitrator's impartiality in the court's view.[193]

185 The Court of Cassation is the highest court of criminal and civil appeal in the French judiciary. *Cour de Cassation*, BRITANNICA.COM, http://www.britannica.com/EBchecked/topic/140505/Cour-de-Cassation (last visited Nov. 3, 2013).

186 VÁRADY ET AL., *supra* note 64, at 457.

187 *Id*. at 458.

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.* "In 2010, the Cour de cassation quashed two Court of Appeal decisions on the ground that the systematic appointment of an arbitrator by companies of the same group created a 'business stream' between the arbitrator and the group of companies, which should have been fully disclosed." Bouchardie & Tran, *supra note* 182, at 12.

192 *Id.*

193 *Id.*

Moreover, the court placed substantially less emphasis on the value of arbitrator disclosures and transparency for parties' sake than Russian courts in particular have conveyed.[194]

This case, especially, highlights the range of issues that experienced international arbitrators may face in avoiding allegations of arbitrator bias. By Creighton appointing Mr. X as an arbitrator in several similar cases, his ability to remain impartial in all subsequent arbitrations may be in question.[195] However,

> [t]he role of a party-appointed arbitrator is somewhat ambiguous. Even though party-appointed arbitrators are members of the decision-making tribunal, they are permitted to have some amount of predisposition about the issues in the favor of the parties who appointed them. In some senses, party-appointed arbitrators can be viewed as playing a dual role, where they serve both as judge and advocate.[196]

### *4. The British Approach*

"Although the American standard for disqualification of a sole arbitrator or a tribunal chairman may be less stringent than the English standard, in neither jurisdiction will a showing of an 'appearance of bias' suffice."[197] The England Court of Appeal decision in *AT&T Corp. v. Saudi Cable Co.*[198] addresses the British courts' perspective on arbitrator disclosures.[199] Mr. Fortier, the QC,[200] failed to disclose his role as non-executive director of Nortel, an AT&T competitor in the bidding process of the project in dispute.[201] Viewing the material in front of them, including Fortier's failure to disclose what was ultimately deemed a secretarial error, the trial judge dismissed the challenge to the arbitrator, applying the "real danger of bias" test utilized at common

194 *See supra* Part III.C.2.

195 *See infra* Part IV.A.2.

196 Stone & Won, *supra note* 9, at 1.

197 Laurence Shore, *Disclosure and Impartiality: An Arbitrator's Responsibility vis-à-vis Legal Standards*, 57 DISP. RESOL. J., no. 1, Feb. —April 2002.

198 AT&T Corp. v. Saudi Cable Co., [2000] 2 All E.R. (Comm) 625 (Eng.).

199 VÁRADY ET AL., *supra* note 64, at 469.

200 Members of the Queen's Counsel in England are often referred to as QCs. Robert Verkaik, *The Big Question: Should We Abolish Queen's Counsel*, THE INDEPENDENT (July 27, 2006), http://www.independent.co.uk/news/uk/crime/the-big-question-should-we-abolish-queens-counsel-409395.html. The Queen's Counsel consists of senior lawyers who are recognized as experts in particular areas of law. *Id.*

201 VÁRADY ET AL., *supra* note 64, at 469.

law for judicial disqualification.[202] The Court of Appeal, in turn, "established the disqualification test for arbitrators on grounds of bias," leaving the English common law test clear.[203] "The test to be applied on a complaint of bias against an arbitrator is the same as that applied to a judge. Absent a showing of a 'real danger of bias,' an arbitrator will not be removed by the English courts."[204]

Under this test, the court found that Fortier's nondisclosure did not constitute a real danger of bias such that the court should intervene in AT&T's favor.[205] Aside from the procedural error, the court found no proof of bias through anything explicitly said or done by the arbitrator in the arbitral proceedings.[206] Citing similar rationales, the trial judge believed that Fortier's position "was more of an incidental than a vital part of his professional life," while the Court of Appeal acknowledged that such "innocent non-disclosure" does not rise to the level of demonstrating that Fortier would have an interest which would affect his impartiality.[207]

Notably, the House of Lords has since done away with the "real danger of bias" test subscribed to in *AT&T Corporation*.[208] Rather, the House of Lords in *Magill v. Porter* adopted a new test, termed "the observer test," that looks to "whether [all the circumstances which have a bearing on the suggestion that the judge was biased] would lead a fair-minded and informed observer to conclude that there was a real possibility . . . that the tribunal was biased."[209] While *Magill v. Porter* is not about arbitral panels per se, the court's shift in treatment of bias is notable given *AT&T Corp. v. Saudi Cable Co.*, which established that the test for bias against an arbitrator and a judge are one in the same. Now, the appropriate test to apply requires the consideration of a "fair-minded and informed" observer's view of the potential threat to partiality, such that they would view the bias as "a real possibility."[210]

202 AT&T Corp. v. Saudi Cable Co., [2000] 2 All E.R. (Comm) 625 (Eng.). *See also* Shore, *supra* note 197, at 3.

203 *Id.*

204 *Id.* at 3.

205 *Id.* at 4.

206 *Id.*

207 VÁRADY ET AL., *supra* note 64, at 475.

208 Simon Atrill, *Who Is the "Fair-Minded and Informed Observer"? Bias after Magill*, 62 CAMBRIDGE L.J. 279, 279 (2003) (quoting Magill v. Porter, [2001] H.L. 67 at [102]-[103]).

209 Magill v. Porter, [2001] H.L. 67, at [102].

210 Atrill, *supra* note 208, at 279.

## IV. RECONCILING THE DIVERGENT DISCLOSURE STANDARDS: THE IMPACT OF BROAD DISCLOSURE REQUIREMENTS ON THE ARBITRATION PROCESS

Largely hailed as a cost-effective alternative to litigation, arbitration operates on the premise that the decision rendered will be binding, subject to challenges on a limited basis.[211] Consequently, one of the more predominant goals of arbitration should be seeking to ensure, with the greatest amount of certainty, that an award will be upheld and enforceable. Unlike court findings, which are subject to an extensive appeals process, arbitration awards are intended to be final in nature.[212] As a result, the scope in which a party may challenge an award is intrinsically narrow.[213]

Given the limited grounds on which an arbitral award can be vacated, it follows that there is value in reducing the exposure of any award to possible grounds for vacatur.[214] One such ground for vacating an award arises when an arbitrator's impartiality or independence is compromised.[215] Therefore, preventative measures that may curb the likelihood of allegations of arbitrator bias should be implemented whenever possible.

As discussed previously in this Note, arbitration necessarily requires a certain level of impartiality within the arbitral panel in order to preserve the integrity of the neutral decision-maker.[216] Decisions rendered are intended to be binding and final, subject only to limited grounds upon which they can be set aside depending on the prevailing laws and/or rules of the arbitration.[217] Notably, arbitrator partiality is one such ground in many jurisdictions.[218] As a result, awards already rendered and "final" may be vacated on grounds of arbitrator bias, thereby opening the door for disgruntled losing parties, for example, to challenge otherwise binding awards.

Allowing a court the ability, albeit narrowly, to set aside an arbitral award is ostensibly a necessary way to ensure fairness of process that cannot be eliminated. As a result, issues regarding arbitrator bias are

211 Davis, *supra* note 19.

212 *Id.*

213 Arbitral awards are not normally subject to the appeal process in court. Zammit & Hu, *supra* note 134, at 2. Under the provisions of the New York Convention, signatory countries are required to enforce foreign arbitral awards without review on the merits. *Id.* There are only seven limited grounds within which a signatory may refuse to enforce an award. *Id.*

214 *See* Chernick, *supra* note 31.

215 *Id.*

216 *See supra* Part I.

217 *See* Warshauer, *supra* note 9.

218 *See supra* Parts I and II.

best addressed through modification of arbitrator disclosure standards. Specifically, in order to decrease the likelihood of an award being vacated on grounds of partiality or of an arbitrator being disqualified mid-process, is it necessary to alter the extent to which an arbitrator must disclose prior relationships and dealings before he or she is selected to serve on the panel.

### *A. All-Encompassing Disclosure Standards Run Contrary to the Process*

#### *1. Extensive Disclosure Requirements Undermine the Use of Arbitration as a Fast and Cost-Effective Process*

As the Southern District of New York reasoned in *Applied Industrial Materials*, "[i]t is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, secure in the knowledge that arbitrators will adhere to these standards."[219] Considering the high value that has been placed on arbitration as a means of dispute resolution that is both timely and cost-effective, there is concern that a wide-ranging disclosure standard, in which all prior relationships and potential conflicts are required to be divulged, might jeopardize the process's efficiency.[220] Moreover, "[s]ome international arbitrators have expressed unhappiness about a. . . tendency to overburden arbitration with excessive punctiliousness about impartiality."[221]

The IBA has noted how "the growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine."[222] If even the most diminutive of relationships is enough to disqualify a potential arbitrator, there is a fear that the process itself would no longer provide a more effective solution, especially in situations where parties seek to vacate awards that have already been

219 Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., No. 05 CV 10540(RPP), 2006 WL 1816383, at *9 (S.D.N.Y. June 28, 2006), *aff'd*, 492 F.3d 132 (2d Cir. 2007). *See also* Foster & Cappell, *supra* note 55 at 7.

220 *See id.*

221 Shore, *supra* note 197, at 10.

222 IBA GUIDELINES, *supra* note 18, at 3.

rendered.[223] In fact, the power to call for setting aside an award on accusations of arbitrator bias might actually perpetuate disputes—parties now have increased opportunity to lengthen arbitrations, all the while incurring time and additional expense, pending determination of arbitrator partiality.[224]

In stressing the need for the IBA Guidelines, the IBA pointed to concern over "reluctant parties hav[ing] more opportunities to use challenges of arbitrators to delay arbitrations or to deny the opposing party the arbitrator of its choice."[225] As the IBA Guidelines note, "[d]isclosure of any relationship, no matter how minor or serious, has too often led to objections, challenge and withdrawal or removal of the arbitrator."[226] The greater the range of situations in which an award may be vacated because of a failure to disclose, the more likely losing parties will be to challenge an award.[227] Disputes will invariably take far more time and money to resolve, and any awards rendered are less likely to be final.[228]

Unintended consequences may also arise from arbitrators erring on the side of caution and making disclosures that may be unnecessary.[229] For many parties, the disclosure of any information about an arbitrator's past relationships or prior dealings can raise the automatic—and potentially incorrect—implication that the disclosed facts will affect an arbitrator's impartiality or independence.[230] As a result, excessive disclosure seemingly may become an impediment to arbitration as the parties' confidence in the process is undermined. However, the AAA, for example, has sought to mitigate this concern through Rule 17(c) which states that "[d]isclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence."[231]

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223 "[T]he increase in international trade, multinational conglomerates, and large global law firms, have created increasingly difficult conflict of interest issues. This, in turn, has provided more opportunities for disgruntled losing parties to commence post-award litigation to challenge arbitral awards in court." Foster & Cappell, *supra* note 55, at 1.

224 IBA GUIDELINES, *supra* note 18, at 3.

225 *Id.*

226 *Id.*

227 Schwartz & Wax, *supra* note 75, at 4.

228 *Id.*

229 IBA GUIDELINES, *supra* note 18, at 11.

230 *Id.*

231 AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, *supra* note 36, at 17.

### *2. Disqualifying Arbitrators Based on Prior Associations Undercuts Their Ability to Achieve Expertise as an Arbitrator*

Moreover, parties frequently choose arbitrators based on their knowledge of the field in dispute.[232] Often, arbitration provides a method of dispute resolution wherein parties welcome and/or opt for arbitrators who have familiarity with the subject matter, such that any decision rendered is inevitably informed by the arbitrator's prior knowledge of the field.[233] However, too much knowledge or exposure in any particular area can lend itself to generating conflicts of interest or may necessarily involve prior relationships that compromise the independence and impartiality of the arbitrator.[234] Thus, tension may arise between the expectation of arbitrator impartiality and the desire for expertise in a panel.

Inherent in the increasing growth of international business ventures is an inevitable overlap within certain industries and corporate organizations.[235] As a result, arbitrators face a heightened likelihood of intersecting prior relationships or dealings. This type of overlap consequently invokes questions regarding the proper extent to which an arbitrator must make disclosures about such prior associations and affiliations.[236] While wide disclosure of pre-existing relationships or connections seeks to alleviate the partiality of arbitrators, it also threatens to prevent those that possess any significant level of expertise in the relevant field from being able to serve as arbitrators or to

232 Stone & Won, *supra* note 9, at 6.

233 According to Landsman:

> [P]arties agree to arbitrate precisely because they prefer a tribunal with expertise regarding the particular subject matter of their dispute. Familiarity with a discipline often comes at the expense of complete impartiality. Some commercial fields are quite narrow, and a given expert may be expected to have formed strong views on certain topics, published articles in the field and so forth. Moreover, specific areas tend to breed tightly knit professional communities.

Kim J. Landsman, *Holding Arbitrators to Higher Standards of Impartiality*, 243 N.Y. L.J., no. 97, May 21, 2010, at 4 (citing Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984)).

234 Stone & Won, *supra note* 9.

235 IBA GUIDELINES, *supra* note 18.

236 *Id.* at 3.

contribute to resolving the dispute.[237]

As Judge Richard Posner has stated, "the expert adjudicator is more likely than a judge or juror not only to be precommitted to a particular substantive position but to know or have heard of the parties (or if the parties are organizations, their key people)."[238] Impartiality is most in jeopardy in situations where an arbitrator comes with preconceived opinions about a pending arbitration as a result of previously serving on a panel with similar parties or disputes.[239]

> Where an arbitrator brings to a proceeding knowledge of facts or prior decisions specific to the issues in dispute but extraneous to the proceeding, there is a real potential threat to the arbitrator's impartiality and to the fundamental fairness on which arbitration relies. . . . If not disclosed by the arbitrator, or if not waived by the parties once disclosed, the exposure to related facts or adjudications extraneous to the parties' presentation should be a basis for arbitrator disqualification (if, as with some arbitral bodies, there is a mechanism for it) or for a court to vacate the award ultimately rendered.[240]

This concern regarding bias, however, is not novel or unique to arbitration. In fact, as with any "neutral" decision maker, there is always a concern that preconceived biases may inappropriately affect their decision-making. "[I]t is accepted that experienced arbitrators often have opinions that might preclude a completely neutral view of

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237 The court in *Positive Software Solution* stated:

> [R]equiring vacatur on . . . attenuated facts would rob arbitration of . . . the benefit of specialized knowledge, because the best lawyers and professionals, who normally have the longest lists of potential connections to disclose, have no need to risk blemishes on their reputations from post arbitration lawsuits attacking them as biased.

Positive Software Solutions, Inc. v. New Century Mortg. Corp., 476 F.3d 278, 285 (5th Cir. 2007).

238 Schwartz & Wax, *supra* note 75 (citing Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983)).

239 Landsman, *supra* note 233.

240 *Id.* Experienced international arbitrators have voiced similar concerns:

> If . . . an arbitrator has served on a prior panel involving one of the parties, and that panel's decision effectively prejudged the liability issue brought by or against a party who was not involved in the prior arbitration, then the arbitrator should be disqualified." Furthermore, "if an arbitrator is likely to have heard or seen material evidence that is different from that which the other panel members and one of the parties in the subsequent arbitration will see, then the appointing party may obtain an advantage because of the arbitrator's unique knowledge. In that situation, it may be proper to disqualify the arbitrator as a matter of fundamental fairness.

*Id.* (citing Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395, 421 (1998)).

the issues."[241] Rather, it highlights the importance of (1) establishing clear-cut disclosure standards, such that determination of what circumstances do and do not constitute bias on the part of the arbitrator may be more readily and universally understood, and (2) ensuring that such disclosures are made at the outset of the arbitration, such that there is no basis for arbitrator disqualification or need for a court to vacate an award after substantial time and money has already been expended.

### *B. "When in Doubt, Disclose": Comprehensive Disclosure Requirements and Preservation of the Process*

#### *1. Implementing Broad Disclosure Prerequisites at the Onset of an Arbitration Safeguards the Binding and Final Nature of the Process*

Arbitration rests on the premise that decisions rendered are binding and final.[242] This is a fundamental proposition that is further highlighted by the limited grounds upon which an arbitral award may be vacated in most countries.[243] There is undoubtedly an overarching need to preserve the integrity and efficiency of the arbitration process so that it remains a useful and effective means of dispute resolution. When safeguards are not put in place to eliminate claims of arbitrator bias from arising after the rendering of an award, however, the entire foundation of the process is in jeopardy. Therefore, the most effective way to minimize the possibility of arbitrator disqualification or vacatur of awards is to require arbitrators to make comprehensive and broad disclosures about prior relationships and dealings at the commencement of the arbitration process.

The ABA and the AAA have attempted to reconcile conflicting perspectives on arbitration disclosure through adoption of the Code of

241 Stone & Won, *supra* note 9, at 8.

242 Warshauer, *supra* note 9, at 5.

243 *See infra* Parts II and III.

Ethics for Arbitrators in Commercial Disputes in 2004.[244] In particular, the Code seeks to address some of the concerns about the feasibility of requiring extensive disclosure, especially in the international business context.[245] The AAA has commented that the Code is "intended to be applied realistically so that the burden of detailed disclosure does not become so great that it is impractical for persons in the business world to be arbitrators, thereby depriving parties of the services of those who might be best informed and qualified to decide particular types of cases."[246] The IBA expressly provides in its General Standards that, in the case of doubt, the arbitrator should, in fact, disclose.[247]

### *2. Broad Disclosure Standards Enable Parties to Retain the Power to Make Educated and Informed Decisions about Selection of Neutrals*

Imposition of unambiguous disclosure standards would have the added effect of preserving party autonomy and choice of neutrals in the arbitration process. "There is a tension between, on the one hand, the parties' right to disclosure of situations that may reasonably call into question an arbitrator's impartiality or independence and their right to a fair hearing and, on the other hand, the parties' right to select arbitrators

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244 Specifically, subparagraph A of Canon II states:

> Persons who are requested to serve as arbitrators should, before accepting, disclose:
>
> (1) any known direct or indirect financial or personal interest in the outcome of the arbitration;
>
> (2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationship which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
>
> (3) the nature and extent of any prior knowledge they may have of the dispute; and
>
> (4) any other matters, relationships or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

AM. ARBITRATION ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon II A (2004), *available at* http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867; *see also* Neal M. Eiseman, *An Arbitrator's Failure to Tell All: Will It Translate Into Vacating His or Her Award*, 11 CONFLICT MGMT., no. 1, winter 2007, at 25-29; *see also* Foster & Cappell, *supra* note 55, at 1.

245 AM. ARBITRATION ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 244.

246 Eiseman, *supra* note 244, at 27.

247 IBA GUIDELINES, *supra* note 18, at 11.

of their choosing."[248] After potential arbitrators make comprehensive disclosures regarding any prior affiliation, relationship, or dealing that may inform their decision-making, parties would retain the ultimate decision as to whether or not an arbitrator's background creates enough of a conflict of interest to warrant choice of another arbitrator. Even "[i]f the prior experience is disclosed, the parties may wish to waive an objection if prior experience of the arbitrator is considered a neutral . . . factor."[249]

In attempts to prevent instances of arbitrator bias altogether, proponents of a more extreme standard have emerged such that in the case of *any* objective doubt as to an arbitrator's impartiality, he or she should not take part in the panel, whether or not a party or a third person appointed them.[250] In advocating for such, the ultimate goal remains to encourage and guarantee arbitrator impartiality and independence.[251] This view has been further articulated as a blanket rule whereby "[arbitrators] should err on the side of disclosing everything, even if doing so requires making a thorough prior investigation to reveal underlying facts, long since forgotten, of the relationship. Reliance on relatively loose disclosure standards readily invites vacatur by U.S. Courts."[252] While mandating an arbitrator to recuse herself from a panel, even with the explicit waiver of any conflict by the parties, is extreme, it speaks to the sanctity of impartiality to the process. As evidenced from discussion herein, disclosure standards are essential in preempting challenge of awards on grounds of arbitrator bias.[253]

Viewing various courts' approaches to disclosure and the corresponding standards imposed for setting aside awards on grounds of bias, it is evident that there is a wide array of viewpoints concerning how to determine instances of arbitrator bias.[254] Given the increasing use of arbitral proceedings, particularly in the international setting, it would be useful to provide a uniform standard regarding arbitrator disclosure obligations.[255]

> As the Southern District itself pointed out in the *Applied Industrial Materials* opinion, "[b]ecause of the increase in international transactions and the corresponding increase in disputes it is crucial

248 *Id.* at 3.
249 Landsman, *supra* note 233.
250 *See* VÁRADY ET AL., *supra* note 64, at 444.
251 *Id.*
252 Michaelson, *supra* note 50, at 6.
253 *See supra* Part IV.
254 *See supra* Parts II and III.
255 Foster & Cappell, *supra* note 55, at 8.

> that there exist a requirement of an appearance of impartiality in arbitrations conducted in this jurisdiction, and that courts take actions designed to assure foreign entities that arbitrations in the United States are free from the suggestion of partiality."[256]

Nevertheless, despite discrepancies in determining precisely when arbitrators' past relationships or dealings render their decision "partial," there does appear to be a universal trend towards invoking a stringent standard of vacatur, such that an award rendered should be set aside only upon substantial showings of an arbitrator's partiality.[257] Likewise, courts seem to universally emphasize the importance of arbitrators making disclosures, particularly at the onset of an arbitral proceeding.[258] The scope of, and responsibility for, making such disclosures, however, varies depending on the specific country and the governing cases or provisions.[259]

## V. CONCLUSION

The recent U.S. Court of Appeals for the Second Circuit decision in *Scandinavian Reinsurance*[260] joins the expanding arbitration-related case law, both in the U.S. and internationally, that evaluates what is necessary to overturn an arbitral award on the basis of an arbitrator's failure to disclose relationships and/or associations which may be indicators of possible bias.[261] The issue, in and of itself, has been hotly contested in its application by courts throughout the United States' various circuits.[262] Other countries, in particular those discussed herein, have similarly addressed arbitrator disclosure requirements and developed their own standards relating to when it is appropriate to vacate an award on grounds of arbitrator bias.[263]

Although requiring comprehensive disclosures may have the effect of designating many prospective arbitrators as those with "potential conflicts," especially given the increasing intersections within the international commercial arbitration domain, it also necessarily infuses

256 *Id.* (citing Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., No. 05 CV 10540(RPP), 2006 WL 1816383 (S.D.N.Y. June 28, 2006), *aff'd*, 492 F.3d 132 (2d Cir. 2007)).

257 *See supra* Parts II and III.

258 *See supra* Parts II and III.

259 *See supra* Part III.

260 Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Insurance Co., 668 F.3d 60 (2d Cir. 2012).

261 Stone & Won, *supra* note 9.

262 *See supra* Part II.

263 *See supra* Part III.

transparency into the arbitral process. Parties retain the ultimate discretion as to their choice of arbitrator. Emphasis on broad and all-encompassing disclosures ensures a preservation of party autonomy, such that the parties themselves are left to reconcile the disclosed conflicts.

By providing all disclosures up front, arbitrators then place the parties in the best position to opt to disregard the conflicts or to use the knowledge to find a more suitable neutral. It follows therefore, that post-award challenges on grounds of arbitrator bias would be substantially reduced, thereby reinforcing the efficiency and finality of arbitration as a process. As Justice White observed in *Commonwealth Coatings*, "it is far better for a potential conflict of interest '[to] to be disclosed at the outset' than for it to 'come to light' after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award."[264] Emphasis on candidness at the forefront of arbitration by the chosen neutrals ensures the continued likelihood of a streamlined means of dispute resolution throughout.

The best way to address issues of arbitrator bias, therefore, is to ensure that from the onset, arbitrators are required to openly and broadly disclose prior relationships and dealings that may overlap or intertwine with the pending arbitration. "[I]t is unrealistic to expect that all arbitrators will be neutral. However, disputants should ensure that their arbitrators have fully disclosed any potential conflict at the outset, in an effort to prevent any post-award challenges."[265] While this is not without the conceivable consequence of declaring many otherwise suitable arbitrators as those with conflicts,[266] even at the most inconsequential level, it ultimately is the most effective way to ensure that parties retain the capacity to make fully informed arbitrator panel selections.

Any doubt as to whether or not to divulge information should be resolved in favor of disclosure.[267] "Disclosure not only enhances the actual and apparent fairness of the arbitral process, but it helps to ensure that the process will be final, rather than extended [. . .]."[268] By exposing all potential conflicts at the forefront of the arbitration process, the likelihood of allegations emerging that would provide appropriate grounds for vacating awards is substantially decreased. "Disclosure may

264 *Scandinavian Reinsurance Co. Ltd.*, 668 F.3d at 78 (citing Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 151 (1968)).

265 Stone & Won, *supra* note 9, at 8.

266 *See* IBA GUIDELINES, *supra* note 18.

267 *Id.* at 9; AM. ARBITRATION ASS'N, *supra* note 244, at Canon II(D).

268 *Scandinavian Reinsurance Co. Ltd.*, 668 F.3d at 78.

not completely remove all predispositions in arbitrators, but thorough disclosure can maximize the risks of a subsequent challenge to, and potential vacatur of, a final arbitration award."[269]

269 Stone & Won, *supra* note 9, at 8.