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By
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I. INTRODUCTION

Society relies on the fair resolution of disputes submitted to arbitration. Those who undertake the role of arbitrators hence have a duty to the parties as well as to the general public to refrain from unethical conduct during proceedings.[1] Although courts usually advocate legal standards that protect arbitrators from parties challenging their conduct, courts must ensure that arbitration proceedings remain free from corruption, bias, and the appearance of impropriety.[2] Therefore, if arbitrators violate ethical standards, the Federal Arbitration Act of 1925 (FAA) grants courts the right to vacate the award.[3]

Section 10 of the FAA lists the grounds under which a court may vacate an arbitral award.[4] Since partiality and corruption would fuel public distrust in the arbitration system, the drafters included subsection 2 within Section 10(a).[5] This portion of the FAA states that the losing party can challenge the award if there exists "evident partiality or corruption in the arbitrators, or either of them."[6] Since the FAA does not provide an explicit definition of what constitutes "evident partiality," the interpretation of the phrase has significant consequences on the success of parties challenging the award.[7] If read to demand only the "appearance

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[1] Linden Fry, *Letting the Fox Guard the Henhouse: Why the Fifth Circuit's Ruling in Positive Software Solutions Sacrifices Procedural Fairness for Speed and Convenience,* 58 CATH. U.L. REV. 599, 600-601 (2009).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 602-604.

[5] *Id.*

[6] 9 U.S.C. § 10(a)(2)

[7] Fry, *supra* note 1, at 604.

of bias," challenging an arbitration award under Section 10(a)(2) will be the sole method of vacating an award without the presence of "actual and prejudicial wrongdoing."[8] This is important because demonstrating actual bias requires a higher standard of proof than a mere appearance of bias.[9] Meeting an elevated standard is problematic because the arbitration process is generally private and lacks proper documentation.[10]

II. DASE PRECEDENT

A. Commonwealth Coatings Corp. v. Continental Casualty

In *Commonwealth Coatings Corp. v. Continental Casualty*, the Supreme Court examined the meaning of "evident partiality" within Section 10(a)(2) of the FAA.[11] The Court held that a secret financial relationship with a lawyer for one of the parties supplied the basis for vacating an arbitrator's decision.[12] After the three-arbitrator panel had given its decision, it was discovered that the neutral arbitrator had previously engaged in business transactions with one of the parties at regular intervals.[13] The Court noted that the parties exchanged about $12,000 during that partnership.[14] The relationship, however, was not constant and no dealings occurred between the party and the arbitrator for a year prior to the arbitration.[15] Nevertheless, the Court vacated the decision concluding that the arbitrator's lack of disclosure prior to the start of arbitration represented evident partiality.[16] In his analysis of Section 10(a)(2), Justice Black posited that Congress intended the

[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *See generally,* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968).
[12] *Id.* at 147-150.
[13] *Id.* at 146.
[14] *Id.*
[15] *Id.*
[16] *Commonwealth Coatings*, 393 U.S. at 150.

"evident partiality" clause to ensure an impartial and fair arbitral process.[17] Reasoning that Congress anticipated that arbitrators would abide by principles of "strict fairness and morality," Justice Black held that arbitrators should be subject to the "appearance of bias standard."[18]

In his concurrence, Justice White added that if both parties receive information of the relationship ahead of time and still agree to the arbitrator, they should be able to continue.[19] However, Justice White did note that if the arbitrator had a significant interest in a firm, such information must be disclosed.[20]

B. Positive Software Solutions v. New Century Mortgage Corp. (Positive Software II)

In *Positive Software Solutions v. New Century Mortgage Corp.*, two companies in the mortgage industry submitted their dispute to the American Arbitration Association.[21] After a seven-day arbitration hearing, the arbitrator issued an award in favor of New Century.[22] However, the arbitrator and his previous law firm had worked with New Century's lawyer in a previous case.[23] As a result, Positive Software filed a motion to vacate the award.[24] The district court granted the motion because the association between New Century and the arbitrator created the "appearance of impropriety."[25] The case was appealed.[26]

The United States Court of Appeals for the Fifth Circuit concluded that evident partiality cannot be founded on an "arbitrator's undisclosed trivial or

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[17] *Id.*
[18] *Id.*
[19] *Id.* at 151-152.
[20] *Id.*
[21] Positive Software Solutions v. New Century Mortgage Corp., 476 F.3d 278, 279 (5th Cir. 2007).
[22] *Id.* at 280.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Positive Software Solutions*, 476 F.3d at 280.

insubstantial prior relationship with one of the parties."[27] The court emphasized that the phrase "reasonable impression of bias" must be read broadly.[28] Accordingly, since the court found that the link between New Century's counsel and the arbitrator was minute, vacatur was inappropriate.[29]

Addressing the issues of policy and practicality, the court reasoned that permitting vacatur for trivial relationships would undermine the finality of arbitration.[30] The court further reasoned that commonly permitting vacatur would remove many of the best arbitrators from practice since those arbitrators who tend to have the greatest amount of specialized knowledge and expertise in the field also tend to have the greatest amount of prior contacts with parties seeking arbitration.[31]

III. DURRENT CASE LAW

A. Midwest Generation EME, LLC v. Continuum Chemical Corp.

In *Midwest Generation*, Continuum Chemical Corporation (Continuum) filed a petition to vacate the award due to the evident partiality of an arbitrator.[32] Continuum asserted that it should be permitted to engage in limited discovery of one of the arbitrators (Mr. Sklar) since it had substantial evidence that the arbitrator purposefully hid a continuous business relationship between the Construction Law Group, Bell Boyd & Lloyd, Schiff Hardin LLP, and himself.[33] Continuum contended that by not disclosing his professional contacts, Mr. Sklar

[27] *Id.* at 285-286.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Positive Software Solutions*, 476 F.3d at 285-286.
[32] Midwest Generation EME, LLC v. Continuum Chem. Corp., 2010 U.S. Dist. LEXIS 61635 (N.D. Ill. June 21, 2010).
[33] *Id.* at 1-6.

breached his duty to disclose any relationship or circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality and that which might reasonably affect lack of independence or impartiality.[34]

Continuum argued that it needed to merely establish "clear evidence of impropriety that might create an appearance of bias."[35] The United States District Court for the Northern District of Illinois, however, rejected such a theory, contending that an objective standard must be applied in determining whether adequate evidence of impropriety exists.[36] The court proposed the following definition: "evident partiality exists when an arbitrator's bias is 'direct, definite, and capable of demonstration rather than remote, uncertain, or speculative.' "[37] If a reasonable observer would decide that an arbitrator was partial, it could only then be said that an arbitration award should be vacated.[38] As such, this case established that it is necessary to inquire whether the reasonable observer would conclude that there exists "clear evidence of impropriety."[39]

B. Vinco Painting v. Painters District Council

In *Vinco Painting v. Painters District Council*, Vinco Painting Inc. (Vinco) brought a class action pursuant to Section 301 (a) of the Labor Management Relations Act of 1947 to vacate two arbitration awards entered against the Painters District Council.[40] Vinco challenged the arbitration awards on three grounds, one of which was the purported evident impartiality of the board.[41] Vinco contended that Joint Trade Board (JTB) member Anderson displayed "evident partiality," or

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[34] *Id.* at 39-46.
[35] *Id.* at 10.
[36] *Id.* at 12-14
[37] *Midwest Generation EME,* 2010 U.S. Dist. LEXIS 61635, at *5.
[38] *Id.*
[39] *Id.* at 14.
[40] Vinco Painting v. Painters Dist. Council, 2010 U.S. Dist. LEXIS 72896, at *1 (N.D. Ill. July 19, 2010).
[41] *Id.* at 1-3.

at a minimum, "had a real or apparent conflict of interest" under the regulations of JTB.[42] Vinco brought forth the following two pieces of evidence to support his contention: 1) Anderson's engagement in a hearing in which an award was rendered against Vinco even though Vinco was not at the hearing; 2) Anderson's offensive comments towards Vinco.[43]

The United States District Court for the Northern District of Illinois rejected Vinco's first argument simply stating that such an argument served as insufficient grounds for vacating an award.[44] The court also rejected Vinco's second argument stating that even if the offensive comments were actually made, they did not demonstrate evident partiality on the behalf of the entire board.[45] Anderson was one of only eight board members who unanimously opposed Vinco.[46] No evidence existed that he influenced the other board members to vote against Vinco.[47] Rejecting both of Vinco's arguments, the court held that Vinco did not raise a genuine issue of material fact as "to the existence of evident partiality on the part of the JTB."[48] As such, the court found that the Union was entitled to summary judgment on the evident partiality claim.[49]

In its analysis, the court reasoned that the parties agreed on a "joint arbitration board structure."[50] The JTB realized that each conflict before the board would place an employer against Union Representatives.[51] Anticipating such a dilemma, the board allowed for equal voting groups of employer-appointed and Union representatives.[52] As such, the manner in which the JTB was organized was

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[42] *Id.*
[43] *Id.* at 17.
[44] *Id.* at 27.
[45] *Vinco Painting*, 2010 U.S. Dist. LEXIS 72896, at *23-30.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 31.
[49] *Id.*
[50] *Vinco Painting*, 2010 U.S. Dist. LEXIS 72896, at *27-28.
[51] *Id.*
[52] *Id.*

meant to counterbalance the inherent biases of the board members.[53] Hence, the court concluded that there was insufficient proof of evident partiality.[54]

C. CRC v. Computer Sciences Corp.

In *CRC,* plaintiffs proposed that since a professional association existed between the law firm of the arbitration panel chairman and the law firm acting on behalf of Computer Sciences Corporation (Computer Sciences), the chairman was biased toward Computer Sciences.[55] JP Morgan had hired Computer Sciences to do some work. Their contract stated that Computer Sciences must use CRC "as its subcontractor for internet technology consulting services."[56] Computer Sciences entered into an agreement with CRC which required the presence of three unbiased arbitrators.[57] CRC appointed Francis Conrad to serve as one of the arbitrators while Computer Sciences appointed John Lovi to serve as the other arbitrator.[58] Conrad and Lovi then choose Richard Silberberg to serve as the chair of the panel.[59]

The ethical conflict stemmed from CRC's suspicions of Richard Silberberg.[60] Within his disclosure statement, Silberberg referred to only one prior situation between the law firm acting on behalf of Computer Sciences (McDermott, Will & Emery LLP) and his law firm (Dorsey & Whitney LLP).[61] However, CRC pointed out that Dorsey & Whitney LLP worked with McDermott on "at least five federal cases pending before and/or during Silberberg's tenure as chairman and in four of those cases the two firms served as co-counsel."[62] Since

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[53] *Id.*
[54] *Id.*
[55] CRC v. Computer Sciences Corp., 2010 U.S. Dist. LEXIS 109562, at *1-2 (S.D.N.Y. Oct. 14, 2010).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *CRC*, 2010 U.S. Dist. LEXIS 109562, at *10-11.
[61] *Id.*
[62] *Id.*

Silberberg was an equity partner, CRC proposed that Silberberg obtained significant monetary compensation as a result of this relationship.[63] Both firms have been listed on signature pages of court records, Dorsey attorneys have supported *pro hac* admissions of McDermott lawyers, and Silberberg was directly responsible for nine lawyers working as co-counsel with McDermott lawyers throughout his time as chairman.[64] CRC argued that the importance of such relationships is magnified by the fact that several of the cases concerned a client with an established relationship with Computer Sciences.[65]

After an analysis of the facts, the United States District Court for the Southern District of New York held that the facts would not cause a reasonable person to conclude that evident partiality existed.[66] The court concluded that although it would have been ethically proper to disclose the information, the evidence proved insufficient to establish the evident partiality necessary to vacate an award since the relationships proved too weak to establish more than a "speculation of bias."[67]

IV. ANALYSIS

Although the Supreme Court has previously interpreted "evident partiality" to require a "reasonable impression of possible bias" by the arbitrator, the line distinguishing what constitutes a "reasonable impression" and what constitutes "actual bias" is not definite.[68] There is also currently no agreement among the various circuits as to what information an arbitrator needs to disclose and when exactly nondisclosure turns into evident partiality. The only thing that is

[63] *Id.*
[64] *Id.*
[65] *CRC*, 2010 U.S. Dist. LEXIS 109562, at *10-11.
[66] *Id.* at 12.
[67] *Id.* at 14.
[68] *See generally,* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968).

clear is that evident partiality can arise either through prejudicial conduct during the arbitral trial or through a failure to disclose.

Most of the vagueness surrounding evident partiality would be eliminated if Section 10(a)(2) of the FAA were expanded to include a clear definition of evident partiality and a separate section was added detailing exactly what should be disclosed, when it should be disclosed, etc. This section should be very detailed since then arbitrators would have clear guidelines that they could follow. In rewriting Section 10(a)(2), an important question to consider is whether different standards should apply to neutral arbitrators as opposed to party appointed arbitrators. It can be argued that the neutral arbitrator should be subject to higher disclosure standards since oftentimes, the outcome of an arbitral decision hinges on the neutral arbitrator. As such, even the slightest hint of partiality could be detrimental to the fairness of an arbitral proceeding. Although subjecting neutral arbitrators to such an elevated standard may lend credibility to arbitration, it may become difficult to find arbitrators who are completely neutral yet are still experts in the relevant field.

V. CONCLUSION

The influx of recent case law surrounding evident partiality emphasizes not only the importance of erring on the side of caution when it comes to disclosure but also that parties have a duty to conduct due diligence in the investigation of arbitration. An arbitrator has an ethical duty to provide a hearing that is "fundamentally fair" yet the line separating a fundamentally fair hearing from one that is not is blurry. Hence, to ensure the continued validity of the arbitral process, there is an immediate need to update Section 10 of the FAA. By providing an explicit definition of evident partiality and including a section on disclosure requirements, arbitral proceedings will be one step closer to freedom from corruption and bias.