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ARBITRATOR'S EVIDENT PARTIALITY: CURRENT U.S. STANDARDS AND POSSIBLE
SOLUTIONS BASED ON COMPARATIVE REVIEWS

By
Seung-Woon Lee*

I. INTRODUCTION

In international arbitration, the arbitrator should be impartial and independent when rendering an arbitral award.¹ This is especially important considering the fact that parties lack judicial protection in arbitral proceedings.² To avoid challenges to arbitral awards based on an arbitrator's evident partiality, many arbitral institutions require arbitrators to disclose a relationship with related parties.³ This is because challenges to arbitral awards based on an arbitrator's evident partiality necessarily invite courts to review the arbitral awards.⁴

Each jurisdiction reviews an arbitrator's evident partiality with different standards. In the United States, the Federal Arbitration Act ("FAA") Section 10(a)(2) permits an arbitral award to be vacated "where there was evident partiality," one of four limited grounds for vacatur in the FAA.⁵ The U.S. Supreme Court held in *Commonwealth Coatings v. Continental Casualty Co.* that an "arbitrator is required to disclose to the parties any dealings that might create an impression of bias."⁶ However, because Justice Black's opinion was plurality, there is a circuit split as to which standard

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¹ See Ann Ryan Robertson, *International Arbitration in the U.S.: Evident Partiality Based on Nondisclosure: Betwixt and Between*, 45 HOUSTON LAW. 22, 23 (2007).

² See Lindsay Melworm, *Biased? Prove It: Addressing Arbitrator Bias and the Merits of Implementing Broad Disclosure Standards*, 22 CARDOZO J. INT'L & COMP. L. 431, 435 (2014).

³ See American Arbitration Association, *AAA Code of Ethics for Arbitrators in Commercial Disputes Canon II, IV* (2004); see also The London Court of International Arbitration, *LCIA Arbitration Rules Art. 5.4* (2014); Singapore International Arbitration Centre, *SIAC Code of Ethics for an Arbitrator 2.1, 2.2* (2015); Hong Kong International Arbitration Center, *HKIAC Administered Arbitration Rules Art. 11.4* (2013); Hong Kong International Arbitration Center, *HKIAC Code of Ethical Conduct*, Rule Two <http://www.hkiac.org/arbitration/arbitrators/code-of-ethical-conduct> (last visited Apr. 19, 2017); The International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014).

⁴ See GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE*, 331 (2d ed. 2016).

⁵ 9 U.S.C. §10(a)(2) (2012).

⁶ *Commonwealth Coatings v. Continental Casualty Co.* 393 U.S. 145, 149 (1968).

courts will apply when reviewing parties' challenges.⁷ In *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Ben. Funds*, the Second Circuit applied a higher than "impression of bias" but lower than "actual bias" standard.⁸ In contrast, in *Positive Software Solutions v. New Century Mortg. Corp.*, the Fifth Circuit applied a "reasonable impression of bias" standard.⁹

This article will first address the current circuit split on the standard used when reviewing arbitrators' partiality after *Commonwealth Coatings*. This article will then address other jurisdictions' standards of review, particularly England, which applies an "actual bias" standard, and France, which applies a more liberal approach.¹⁰ This article will then focus on how international arbitration institutions regulate an arbitrator's duty to disclose to avoid partiality challenges. Finally, this article will assess the possible solutions to the current standard of review.

II. THE U.S. STANDARD OF REVIEW

A. *Foundation of Evident Partiality: Commonwealth Coatings*

The only case reviewing this issue by the U.S. Supreme Court is *Commonwealth Coatings v. Continental Casualty Co.*¹¹ In *Commonwealth Coatings*, the neutral arbitrator failed to disclose that he had previously served sporadically as an engineering consultant for one of the parties.¹² This relationship was sporadic in a sense that it was used only from time to time, and parties had no dealings for about a year immediately before the arbitral proceedings.¹³ However, the Court held that the neutral arbitrator's failure to disclose the prior relationship justified vacatur of the arbitral award on grounds of evident partiality.¹⁴

⁷ See *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281 (5th Cir. 2007) cert. denied, U.S., 127 S. Ct. 293 (2007); see also *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 82 (2d Cir. 1984).

⁸ *Morelite Constr. Corp.*, 748 F.2d at 84.

⁹ *Positive Software Sols., Inc.*, 476 F.3d at 283.

¹⁰ See Pedro Sousa Uva, *A Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence*, 20 AM. REV. INT'L ARB. 479, 488, 498 (2009).

¹¹ *Commonwealth Coatings*, 393 U.S. at 145.

¹² *Id.* at 146.

¹³ *Id.*

¹⁴ *Id.* at 149.

In his plurality opinion, Justice Black found that an arbitrator should disclose any relationships or dealings that might create an impression of bias.¹⁵ Relying on *Tumey v. Ohio*, Justice Black found that arbitral awards should be vacated when there is “the slightest pecuniary interest” on the part of arbitrator.¹⁶ Interestingly, Justice Black drew a hard line requiring that an arbitrator should be more impartial than judges, since the arbitrator has completely free rein to decide the law as well as the facts and are not subject to appellate review.”¹⁷ Thus, Justice Black’s opinion suggested that an arbitrator’s nondisclosure itself was sufficient to vacate an arbitral award.¹⁸

In contrast, in a concurring opinion, Justice White, somewhat clarified that “the Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges.”¹⁹ Furthermore, Justice White clarified that an arbitrator’s nondisclosure itself does not necessarily vacate an arbitral award.²⁰ This concurring opinion caused lower courts to interpret *Commonwealth Coatings* as a plurality opinion, thereby causing a circuit split with regard to how to interpret “evident partiality.”²¹ Thus, although *Commonwealth Coatings* established that an arbitrator’s nondisclosure may suffice for vacating arbitral awards based on evident partiality, it has caused a circuit split.

B. The Second Circuit: Reasonable Person Standard

With the uncertainty of the law following *Commonwealth Coatings*, the Second Circuit in *Morelite* established its own interpretation of evident partiality.²² The court recognized that the appearance of bias standard is too low, but that the actual bias standard is too high.²³ In addition, the court found that the standards for disqualifications of

¹⁵ *Id.*

¹⁶ *Commonwealth Coatings*, 393 U.S. at 148 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

¹⁷ *Commonwealth Coatings*, 393 U.S. at 149.

¹⁸ *Id.*

¹⁹ *Id.* at 150 (White, J., concurring).

²⁰ *Id.*

²¹ *See Morelite Constr. Corp.*, 748 F.2d at 83; *see also* *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 78 (2d Cir. 2012); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007); *Positive Software Sols., Inc.*, 476 F.3d at 282.

²² *Morelite Constr. Corp.*, 748 F.2d at 83; *see also* Collin Koenig, *If We Could, Then So Can You: The Seventh Circuit Resurrects Its Judge Versus Arbitrator Analogy to Reinstate a Repeat Arbitrator*, 2012 J. DISP. RESOL. 265, 269 (2012).

²³ *Morelite Constr. Corp.*, 748 F.2d at 84.

arbitrators are less rigid than those for federal judges.²⁴ Thus, the court adopted a reasonable person standard: the court would find “evident partiality” where “a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”²⁵

The reasonable person standard from *Morelite* was followed by *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*,²⁶ in which an arbitrator unilaterally erected a “Chinese Wall”²⁷ to avoid conflict.²⁸ In affirming the district court’s decision to vacate the arbitral award, the Second Circuit stated:

Arbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists. It therefore follows that where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.²⁹

The court further recognized that mere failure to investigate does not necessarily suffice to vacate an award; however, an arbitrator has a duty to investigate once he knows that potential conflicts may exist.³⁰ Thus, the Second Circuit concluded that failure to investigate is “indicative of evident partiality.”³¹ The court accordingly found that an arbitrator’s subjective good faith is not a test; instead, the arbitrator has a “continuing duty” to ensure partiality to parties.³²

In *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, the court showed that under the reasonable person standard for evident partiality is difficult to meet,

²⁴ *Id.* at 83 (quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009, 104 S. Ct. 529, 78 L. Ed. 2d 711 (1983)).

²⁵ *Id.* at 84.

²⁶ *Applied Indus. Materials Corp.*, 492 F.3d at 137.

²⁷ See *Black’s Law Dictionary* (10th ed. 2014), available at Westlaw BLACKS (providing legal definitions of “ethical wall” as, “A screening mechanism maintained by an organization . . . to protect client confidences from improper disclosure . . .”).

²⁸ *Applied Indus. Materials Corp.*, 492 F.3d at 135-36.

²⁹ *Id.* at 138.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 139.

reaffirming the idea that nondisclosure itself is not sufficient to vacate an arbitral award.³³ In *Scandinavian Reinsurance*, two of three panels failed to disclose that they were simultaneously serving as a panel member in another arbitration proceeding: “Platinum Arbitration.”³⁴ The district court found that the Platinum Arbitration “overlapped in time, shared similar issues, involved related parties, [and] included . . . a common witness.”³⁵ However, the Second Circuit reversed the district court’s decision, holding that there was no evident partiality.³⁶ The court considered four factors in applying the evident partiality test set by *Applied Industrial*.³⁷ The court found that an undisclosed relationship does not constitute evident partiality, because there was no “material relationship with a party.”³⁸ The court emphasized that closeness to the facts of the arbitration does not matter; what matters is how strongly the relationship indicates the possibility of bias to one party.³⁹ In conclusion, although the Second Circuit’s reasonable person standard is less rigid than the actual bias test, because the burden of proof falls to the challenging party, it is still difficult to prove that there is a material relationship that could tend to show evident partiality.

C. The Fifth Circuit: Reasonable Impression of Bias

In *Positive Software*, the arbitrator failed to disclose that he and other members in his firm represented Intel in litigation involving seven law firms, six lawsuits, and 34 lawyers.⁴⁰ The attorney who was representing New Century in the arbitral proceeding had also represented Intel.⁴¹ However, the facts indicated that the arbitrator and attorney

³³ *Scandinavian Reinsurance Co.*, 668 F.3d at 74.

³⁴ *Id.* at 68.

³⁵ *Scandinavian Reinsurance Co.*, 668 F.3d at 63 (quoting *Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, 732 F. Supp. 2d 293, 307-08 (S.D.N.Y. 2010)).

³⁶ *Id.* at 78.

³⁷ *Id.* at 74 (citing *Three S Del., Inc. v. DataQuick Info. Sys.*, 492 F.3d 520, 530 (4th Cir. 2007)). (explaining that these factors are, “(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”).

³⁸ *Id.*

³⁹ *Id.* at 75 (“[E]ven if a particular relationship might be thought to be relevant ‘to the arbitration at issue,’ . . . [it will] not constitute a material conflict of interest if it does not itself tend to show that the arbitrator might be predisposed in favor of one (or more) of the parties.”)

⁴⁰ *Positive Software Sols., Inc.*, 476 F.3d at 280.

⁴¹ *Id.*

did not engage in judicial proceedings together.⁴² Prior to the Fifth Circuit’s rehearing en banc, Judge Reavley, in accordance with Justice Black’s opinion in *Commonwealth Coatings*, affirmed the district court’s decision vacating the arbitral award, concluding that “evident partiality is demonstrated from the nondisclosure regardless of whether actual bias is established.”⁴³ Thus, Judge Reavley applied the reasonable impression of bias standard in assessing evident partiality.

Subsequently, the Fifth Circuit reheard the case en banc and reversed the district court’s vacatur of the arbitral award.⁴⁴ In accordance with Justice White’s opinion in *Commonwealth Coatings*, the Fifth Circuit focused on applying the reasonable impression of bias standard practically.⁴⁵ The court provided the standard will be: “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.”⁴⁶ The court focused on public policy issues supporting the practical application of the reasonable impression of bias standard.⁴⁷ The court stated that the “mere appearance of bias” standard will encourage the losing party to challenge the award after it has been rendered, thereby jeopardizing the finality of the arbitral award.⁴⁸ In addition, the court recognized that applying the mere appearance of bias standard may limit arbitrators where a repeat arbitrator problem exists because of arbitrator’s industrial expertise, thereby harming arbitration at large.⁴⁹

Following *Positive Software*, in *Dealer Compute Services v. Michael Motor Co.*, the Fifth Circuit addressed issues regarding parties’ waiver of arbitrator’s disclosure.⁵⁰ MMC moved to vacate the arbitral award arguing that one of arbitrator’s disclosures were insufficient.⁵¹ The court concluded that a challenging party waives its right to challenge

⁴² *Id.*

⁴³ *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 436 F.3d 495, 502 (5th Cir. 2006), *rev’d*, 476 F.3d 278 (2007).

⁴⁴ *Positive Software Sols., Inc.*, 476 F.3d at 286.

⁴⁵ *Id.* at 283.

⁴⁶ *Id.*

⁴⁷ *Id.* at 285.

⁴⁸ *Id.*

⁴⁹ *Positive Software Sols., Inc.*, 476 F.3d at 285; *see also* William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 653 (2009) (explaining that “repeat players” are arbitrators who might be appointed several times by the same party or the firms due to their industrial experiences).

⁵⁰ *Dealer Comput. Servs. v. Michael Motor Co.*, 485 F. App’x 724, 727 (5th Cir. 2012).

⁵¹ *Id.* at 726 (providing that MMC argued that Butner fail to strictly comply with the requirements in light of the arbitration provision and AAA code of ethics because the “[arbitrator] did not disclose the fact that

arbitrator's partiality, if it fails to challenge during the arbitral proceedings.⁵² However, the court recognized that when the party did not have knowledge of the partiality, the waiver rule does not apply.⁵³ In *Dealer Compute Services*, the court concluded that the arbitrator's disclosure was sufficient to put MMC, the challenging party, on notice of the potential conflict.⁵⁴ Thus, the court found that MMC by failing to object during the arbitral proceedings, waived its right to challenge the arbitral award.⁵⁵

Thus, the Fifth Circuit's practical application of the reasonable impression of bias standard is less rigid than Justice Black's opinion in *Commonwealth Coatings*, and makes failure to disclose non-substantial relationships insufficient to vacate an arbitral award.⁵⁶ The underlying reasoning of the Fifth Circuit's approach is an effort to sustain the finality of arbitral awards in line with the "empathic federal policy favoring arbitration."⁵⁷

D. The Seventh Circuit: Less Rigid Impartiality Standards Than Federal Judges

In *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, on an issue of first impression, the Seventh Circuit decided that a party-appointed arbitrator has less rigorous impartiality standards than federal judges, thereby reversing district court's judgment vacating the arbitral award.⁵⁸ The court limited the standard for evident partiality for a party-appointed arbitrator to "conduct in transgression of contractual limitations."⁵⁹ The Seventh Circuit took a limited view on the arbitrator's impartiality by reasoning that *Commonwealth Coatings* only required the arbitrator to be "disinterest[ed]" in a sense of financial entanglements with related parties.⁶⁰ Thus, the Seventh Circuit's standard is defined more narrowly than the Second and Fifth Circuits' standards.⁶¹

she was an arbitrator on the Venus Ford arbitration panel, which considered similar contract language and heard from the same damages expert as in the MMC proceedings").

⁵² *Id.* at 727.

⁵³ *Id.*

⁵⁴ *Id.* at 728.

⁵⁵ *Dealer Comput. Servs.*, 485 F. App'x at 728.

⁵⁶ *Positive Software Sols., Inc.*, 476 F.3d at 285.

⁵⁷ *Id.* at 285-86.

⁵⁸ *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 622 (7th Cir. 2002).

⁵⁹ *Id.* at 621-22 (focusing on the difference between arbitration and adjudication, where arbitration, as a matter of contract, does not require an "appearance of partiality" ground of disqualification like that for judges).

⁶⁰ *Id.* at 623.

⁶¹ *See* Koenig, *supra* note 22, at 269.

In *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, the Seventh Circuit followed the standard from *Sphere Drake* and found that an arbitrator should not be disqualified for having knowledge regarding previous arbitral proceedings between the same parties.⁶² Thus, this decision is favorable to industries where repeat arbitrators are common.⁶³ However, this standard could leave room for uncertainty when the arbitrator is financially disinterested, but has a close relationship with a party that would require judicial recusal, such as close a personal relationship.⁶⁴

E. The Ninth Circuit: Appearance of Bias

The Ninth Circuit followed Justice Black's opinion in *Commonwealth Coatings* and applied the appearance of bias standard.⁶⁵ In *Schmitz v. Zilveti*, the court found that Justice White's concurring opinion did not reject the language of "appearance of bias," and thus viewed *Commonwealth Coatings* as a majority opinion despite existing conflicts between Justice Black and White's opinions.⁶⁶ Based on this reasoning, the Ninth Circuit defined evident partiality as "whether there are 'facts showing a reasonable impression of partiality.'"⁶⁷ Thus, the court concluded that, even if the arbitrator lacked actual knowledge, failure to disclose resulted by failure of investigating conflicts, which was sufficient grounds to vacate an arbitral award based on evident partiality.⁶⁸

Although the language "reasonable impression of partiality" appears in both the Ninth Circuit and the Fifth Circuit's standards, the application by each court differs.⁶⁹ The Fifth Circuit approach is more practical, because failure to disclose a trivial or insubstantial relationship between an arbitrator and related parties does not result in vacatur.⁷⁰ This therefore preserves the finality of an arbitral award and discourages the losing party from challenging the arbitral award.⁷¹

⁶² *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 631 F.3d 869, 874 (7th Cir. 2011).

⁶³ *See Koenig, supra* note 22, at 275.

⁶⁴ *See Koenig, supra* note 22, at 276.

⁶⁵ *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994).

⁶⁶ *Id.* at 1047.

⁶⁷ *Id.* at 1048.

⁶⁸ *Id.* at 1049; *see also* *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007) (following *Schmitz*, 20 F.3d 1043).

⁶⁹ *See Positive Software Sols., Inc.*, 476 F.3d at 283 (stating *Schmitz* is an outlier, and suggesting to read Justice White's opinion holistically, thereby applying the reasonable impression of bias practically).

⁷⁰ *Id.*

⁷¹ *Id.* at 285.

III. FOREIGN JUDICIAL APPROACHES

A. English Approach: Actual Bias Standard

In England, international arbitration is governed by the Arbitration Act 1996 (“EAA”).⁷² Similar to the FAA, the EAA limits the ability of the courts to review an arbitral award.⁷³ Under the EAA, a procedural ground to challenge an award is referred to as a “serious irregularity.”⁷⁴ Lack of impartiality is not an express ground for challenges under the EAA.⁷⁵ However it is considered within the breach of the general duties of the tribunal.⁷⁶ The EAA considers lack of impartiality when it enumerates grounds on which a court may remove an arbitrator.⁷⁷ Although the EAA refers to a “justifiable doubts” standard, English courts have largely used a high standard of “real danger of injustice,” making it difficult for to challenge an arbitral award based on an allegedly biased arbitrator.⁷⁸

The “real danger of injustice” standard requires a showing of actual bias.⁷⁹ Thus, appearance of bias will not suffice to challenge an arbitral award.⁸⁰ The real danger test initially derived from a criminal case, *Regina v. Gough*, where a member of the jury turned out to be a neighbor of the appellant.⁸¹ In *Regina*, the court established the real

⁷² Arbitration Act 1996, c. 23, § 2 (Eng.).

⁷³ See *Uva*, *supra* note 10, at 482.

⁷⁴ Arbitration Act 1996, § 68. Serious irregularity refers to an irregularity, which caused or will cause substantial injustice to the applicant—“(a) failure by the tribunal to comply with section 33 (general duty of tribunal); (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67); (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; (d) failure by the tribunal to deal with all the issues that were put to it; (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; (f) uncertainty or ambiguity as to the effect of the award; (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; (h) failure to comply with the requirements as to the form of the award; or (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.”

⁷⁵ See *Uva*, *supra* note 10, at 486.

⁷⁶ See *id.*

⁷⁷ Arbitration Act 1996, c.23, § 24(1)(a) (“(a) that circumstances exist that give rise to justifiable doubts as to his impartiality.”)

⁷⁸ See *Uva*, *supra* note 10, at 488.

⁷⁹ See *id.*

⁸⁰ See *id.*; see also *Melworm*, *supra* note 2, at 459.

⁸¹ See *Uva*, *supra* note 10, at 488; see also *Regina v. Gough*, [1993] UKHL 1 (H.L.).

danger test as “whether there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavor.”⁸² The real danger test subsequently became an applicable test in arbitration.⁸³

In *AT&T v. Saudi Cable Co.*, a dispute arose between parties from an Agreement for the supply of cable in Saudi Arabia.⁸⁴ The dispute led to International Chamber of Commerce (“ICC”) arbitration in London, which led to three partial awards in favor of Saudi Cable.⁸⁵ Subsequently, AT&T challenged all three awards based on a lack of impartiality of the chairman of the tribunal in the Commercial Court.⁸⁶ Mr. Fortier on his CV, failed to disclose his role as a non-executive director of Nortel, AT&T’s competitor in the bidding process of the project in dispute.⁸⁷ The court considered the actual bias test and found no “real danger of bias,” aside from the procedural error.⁸⁸ The court found that the failure to disclose his directorship was “innocent non-disclosure” and it was unrealistic to suggest that Mr. Fortier would have an interest to affect his impartiality.⁸⁹ This case illustrate the high bar of proving the real danger test in England.⁹⁰

In *ASM Shipping v. TTMI*, on the other hand, the court applied the “justifiable doubts” test referred to in the Arbitration Act and found partiality of an arbitrator.⁹¹ The Court found that private meetings with a party’s counsel during the hearing created an

⁸² See *Regina v. Gough*, [1993] UKHL 1, 14 (H.L.).

⁸³ See *Uva*, *supra* note 10, at 489; see also *AT&T v. Saudi Cable Co.*, [2000] 2 Lloyd’s Rep. 127.

⁸⁴ *AT&T*, 2 Lloyd’s Rep. 127 at 1.

⁸⁵ *Id.*

⁸⁶ *Id.* (reviewing challenges, lower court dismissed AT&T’s request to set aside three partial award by the tribunal).

⁸⁷ *Id.* at 2 (describing this non-disclosure as “a most unfortunate secretarial error”).

⁸⁸ *Id.* at 7.

⁸⁹ *AT&T*, 2 Lloyd’s Rep. 127 at 7 (providing, “(1) Mr. Fortier’s position as a non-executive director of Nortel was an incidental rather than vital part of his professional life; . . . having neither the time nor inclination as a member of the bar and an international arbitrator to involve himself in the day to day commercial decisions of Nortel. (2) His shareholding of 474 common shares in Nortel was sufficiently small to be of no consequence. . . (4) The actual evidence of unconscious bias was no more than Mr. Fortier’s non-executive directorship and his small shareholding in Nortel. Nothing that he had said or done in the arbitration proceedings had shown any bias of any kind. . .”).

⁹⁰ See *Uva*, *supra* note 10, at 490.

⁹¹ See *ASM Shipping Ltd of India v TTMI Ltd of England*, [2006] 1 Lloyd’s Rep. 375 (finding partiality where one of the arbitrators had formerly acted as counsel in proceedings in which a key witness to the pending arbitration had allegedly failed to disclose documents).

“appearance of bias for a fair-minded observer.”⁹² The justifiable doubts test, which is also mentioned in Article 12 of the UNICITRAL Model Law, requires that “a fair minded and informed observer would conclude having considered the facts . . . real possibility that the tribunal was biased.”⁹³ Although English courts seems to have two distinct standards there is no actual distinction between the “real danger of injustice” test and “justifiable doubts” test.⁹⁴ Rather, the real meaning of the actual bias test or justifiable doubts test will rely on factual circumstances on a case by case basis.⁹⁵

In conclusion, the English approach— “real danger of injustice” or “justifiable doubts” test—requires a higher standard than the current U.S. standards; “reasonable person standard,” “reasonable impression of bias” standard, and the “appearance of bias” standard.⁹⁶ The English approach, which requires the finding of actual bias or real possibility for bias, is inconsistent with *Commonwealth Coatings*, and subsequent circuit courts’ approach, which requires reasonable doubts but less than the actual bias.⁹⁷ Because actual bias is one’s mental state, it is extremely difficult for parties to prove in the court with the limited facts or circumstantial evidences.⁹⁸ Thus, the English courts approach would not be suitable for U.S. courts to adopt in the future.

B. French Approach: More Liberal Approach, but Strict Compliance

French courts approach the challenge of international arbitration awards more liberally than other European countries.⁹⁹ By doing so, it has less restrictive grounds for challenging arbitral award than the grounds established under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“NY Convention”).¹⁰⁰ Thus, under *Code de Procedure Civile* (“CPC”) the courts apply grounds for the challenge

⁹² *ASM Shipping Ltd of India*, 1 Lloyd’s Rep. 375.

⁹³ *Id.*

⁹⁴ See Geoff Nicholas & Constantine Partasides, *LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish*, 23 ARB. INT’L 1, 15-16 (2007).

⁹⁵ See CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION*, 92 (2014).

⁹⁶ See *AT&T*, 2 Lloyd’s Rep. 127 at 7; see also *ASM Shipping Ltd of India*, 1 Lloyd’s Rep 375; but see *Commonwealth Coatings*, 393 U.S. at 149; *Morelite Constr. Corp.*, 748 F.2d at 83; *Positive Software Sols., Inc.*, 476 F.3d at 282; *Applied Indus. Materials Corp.*, 492 F.3d at 137; *Scandinavian Reinsurance Co.*, 668 F.3d at 78.

⁹⁷ See Rogers, *supra* note 95, at 93-94.

⁹⁸ See *id.* at 93.

⁹⁹ See Uva, *supra* note 10, at 498.

¹⁰⁰ See *id.*

narrowly, and interfere only in extreme situations.¹⁰¹ Lack of impartiality of the arbitrator may be a ground for a setting aside a decision when the arbitrator fails to comply with due process.¹⁰² The French courts adopted the justifiable doubts test similar to other European countries; however, they apply stricter standards for the duty to disclose.¹⁰³ The duty to disclose is ongoing throughout the arbitral proceedings.¹⁰⁴

In *J&P Avax Sa v. Societe Tecnimont SpA*, a dispute arose between an Italian company and a Greek company regarding a contract to construct a propylene plant in Greece, which led to ICC arbitration.¹⁰⁵ After the award was rendered, J&P Avax challenged the award based on partiality.¹⁰⁶ Mr. Javin, the chairman of the tribunal, was working for an international law firm that had provided several legal services to Tecnimont in the past.¹⁰⁷ However, the issue in the case was not failure to disclose these facts, but rather that Mr. Javin failed to disclose that his law firm had been providing some of the legal services during the arbitral proceeding.¹⁰⁸ The court held that the arbitrator had an ongoing duty to disclose throughout the arbitral proceeding, and failure to disclose all relevant facts was sufficient to raise justifiable doubts on the arbitrator's impartiality.¹⁰⁹

In *SA Auto Guadeloupe Investissements v. Columbus Acquisitions Inc.*, the court addressed the difficulty in complying with this strict standard for an arbitrator.¹¹⁰ The sole arbitrator disclosed that his firm, another branch, had advised Leucadia, one of the related groups of companies, in unrelated matters in the past.¹¹¹ The parties consented to

¹⁰¹ See Uva, *supra* note 10, at 499; see also CODE DE PROCEDURE CIVILE [C.P.C] [CIVIL PROCEDURE CODE] art. 1520 (Fr.) (“An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy”).

¹⁰² See Uva, *supra* note 10, at 500.

¹⁰³ See *id.*; see also Melworm, *supra* note 2, at 457.

¹⁰⁴ See Melworm, *supra* note 2, at 457.

¹⁰⁵ *J&P Avax Sa v. Societe Tecnimont SpA*, Cour d'Appel, Paris, Feb. 12, 2009, 2009 Rev. Arb. 186.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* The decision was overturned by the Cour de cassation on other grounds on Nov. 4, 2010.

¹¹⁰ *SA Auto Guadeloupe Investissements v. Columbus Acquisitions Inc.*, Cour d'Appeal, Paris, Oct. 14, 2014, 13/13459.

¹¹¹ *Id.* (disclosing that his firm's Toronto office has represented Leucadia, however no longer representing or providing legal advice to Leucadia).

his appointment.¹¹² However, after the arbitrator rendered several interim awards, AGI challenged the awards on the ground that the arbitrator failed to disclose that, at some point during the arbitral proceeding, the client relationship between arbitrator's law firms and Leucadia resumed.¹¹³ The Paris Court of Appeal held that, although, at the time of appointment, the arbitrator did not acknowledge his law firm had resumed legal advice to Leucadia, it was sufficient to raise reasonable doubt for AGI of his impartiality.¹¹⁴

In conclusion, the French courts' liberal approach of reviewing an arbitral award, burdens arbitrators greatly to disclose all relevant facts that could raise reasonable doubts of his or her impartiality.¹¹⁵ This burden raises an issue in the current legal markets.¹¹⁶ International law firms have several branches in different countries and not all conflicts of interest are easily or readily discoverable for the arbitrator.¹¹⁷ Therefore, imposing a duty on the arbitrator to disclose all relevant facts would unreasonably burden arbitrator to check possible conflicts of interest among different branches of his law firm.¹¹⁸

IV. INSTITUTIONAL APPROACH

Although many European countries adopt the UNICITRAL model law—"justifiable doubts" standard—it does not give clear guidelines for arbitrators on what information and how much information they have to disclose to the parties.¹¹⁹ Given this uncertainty, it is worthwhile to discuss international arbitration institutions' approaches governing an arbitrator's duty to disclose.

In particular, the International Centre for Settlement of Investment Disputes ("ICSID") allows parties to challenge an award in full or in part by composing an *ad hoc* committee under Article 52 of the ICSID Convention.¹²⁰ An *ad hoc* committee will be

¹¹² *SA Auto Guadeloupe Investissements*, 13/13459.

¹¹³ *Id.* (challenging the award based on that while the arbitration proceedings were ongoing, three lawyers from the arbitrator's law firm were assisting Leucadia with a transaction).

¹¹⁴ *Id.*

¹¹⁵ See Melworm, *supra* note 2, at 457; see also Uva, *supra* note 10, at 501; Elie Kleiman, *Independence and impartiality: Supreme Court confirms stern approach to duty of disclosure*, Lexology (2016), <http://www.lexology.com/library/detail.aspx?g=28cb7ca6-4c1d-4faf-bbe9-fd4b019c4f45>.

¹¹⁶ See Kleiman, *supra* note 115.

¹¹⁷ See *id.*

¹¹⁸ *Id.*

¹¹⁹ See Arbitration Act 1996, c.23, § 24(1)(a) (Eng.); see also CODE DE PROCEDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1520 (Fr.); ZICILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 1059 (Ger.).

¹²⁰ International Centre for Settlement of Investment Disputes, *ICSID Convention*, Art. 52 (2006), (“(1) Either party may request annulment of the award by an application . . . on one or more of the following five grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded

compromised of three panelists, who were not originally involved in the arbitral proceedings upon parties' request.¹²¹ This appeal procedure precludes judicial intervention, thereby providing confidentiality and efficiency for the parties. However, if the unsatisfied party chooses to challenge the final award in national court, it will further delay the arbitral proceedings.

Many institutions including the American Arbitration Association ("AAA") and the Singapore International Arbitration Centre ("SIAC"), introduced ethical guidelines for arbitrators to comply with the duty to disclose, thereby establishing a self-regulating system.¹²² The AAA Code of Ethics for Arbitrators in Commercial Disputes ("AAA's Code of Ethics"), contains a provision stressing an arbitrator's duty to disclose.¹²³ Interestingly, the AAA states that "any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure."¹²⁴ Canon II first established a broad range of matters to be disclosed when one is appointed as an arbitrator.¹²⁵ At the same time, the AAA's Code of Ethics also imposes on an arbitrator a duty to investigate.¹²⁶ The duty to disclose is an ongoing duty throughout the arbitral proceedings.¹²⁷ The AAA imposes on an arbitrator a duty to disclose any interest or relationship that will "reasonably affect

its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based"); *see also* Park, *supra* note 49, at 667.

¹²¹ International Centre for Settlement of Investment Disputes, *ICSID CONVENTION, ART. 52(3)* (2006).

¹²² *See* Rogers, *supra* note 95, at 83.

¹²³ *See* American Arbitration Association, *AAA The Code of Ethics for Arbitrators in Commercial Dispute*, (2004), https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestrelease.d.

¹²⁴ *Id.* at Canon II D; *see also* Melworm, *supra* note 2, at 467 (The Code will be applied realistically to prevent that detailed disclosure duty does not become so great burden to arbitrator).

¹²⁵ *Id.* at Canon II A ("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. . . 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.")

¹²⁶ *Id.* at Canon II B ("Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.")

¹²⁷ *Id.* at Canon II C ("The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.")

impartiality or lack of independence in the eyes of any of the parties.”¹²⁸ In addition to the AAA’s Code of Ethics, the AAA also applies a “one-strike-you’re-out” policy to regulate arbitrators.¹²⁹

The SIAC’s Code of Ethics for an Arbitrator is less extensive and detailed as compared to the AAA’s Code of Ethics.¹³⁰ Similar to the AAA’s standard, the SIAC requires arbitrators to disclose all relevant facts throughout the arbitral proceedings.¹³¹ However, it adopts the justifiable doubts standard.¹³²

Aside from these two institutions, other institutions such as the Milan Chamber of National and International Arbitration,¹³³ the Canadian Commercial Arbitration Centre,¹³⁴ the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada,¹³⁵ and the Arbitration Centre of the Portuguese Chamber of Commerce and Industry,¹³⁶ have adopted their own code of ethics. Other institutions such as, the International Chamber of Commerce (“ICC”) and the London Court of International Arbitration (“LCIA”) have not introduced separate code of ethics.¹³⁷ Despite, international arbitration institutions’ efforts to regulate arbitrator’s impartiality, one of the practical criticisms is that most institutions do not publicize any sanctions, and

¹²⁸ AAA *The Code of Ethics for Arbitrators in Commercial Dispute* at Cannon II A.

¹²⁹ See Rogers, *supra* note 95, at 83.

¹³⁰ See Singapore International Arbitration Centre, *SIAC Code of Ethics for an Arbitrator*, Art. 1.1 (2015), <http://www.siac.org.sg/our-rules/code-of-ethics-for-an-arbitrator>. (“A prospective arbitrator shall disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence, such duty to continue throughout the arbitral proceedings with regard to new facts and circumstances.”)

¹³¹ *Id.* at Art. 2.1.

¹³² *Id.*

¹³³ See Milan Chamber of Commerce, *International Arbitration Rules: Code of Ethics of Arbitrators*, (2004), <http://www.camera-arbitrale.it/en/Arbitration/Arbitration+Rules/Code+of+ethics.php?id=104>.

¹³⁴ See Canadian Commercial Arbitration Centre, *Code of Ethics*, <http://www.ccac-adr.org/en/code-deontologie.php>.

¹³⁵ See Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, *Code of Ethics of the CAM-CCBC*, (2011), <http://www.ccbc.org.br/Materia/1384/codigo-de-etica-do-arbitro>.

¹³⁶ See The Arbitration Centre of the Portuguese Chamber of Commerce and Industry, *Arbitrators’ Code of Ethics*, (2014), http://www.centrodearbitragem.pt/images/pdfs/Legislacao_e_Regulamentos/Regulamento_de_Arbitragem/Arbitrators_Code_of_Ethics_2014.pdf.

¹³⁷ See International Chamber of Commerce, *Arbitration Rules Art. 14* (2017), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_14; see also The London Court of International Arbitration, *LCIA Arbitration Rules Art. 5.4* (2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx - Article 5.

therefore lacking practical impacts.¹³⁸ Although a sanctioned arbitrator may be barred to sit in an arbitral proceedings in a particular institution, if the record is not shared to other institutions or parties, the arbitrator may still sit in other arbitral proceedings without any limitations. In addition, the lack of a unified standard may impose a burden on arbitrators to investigate each institutions standards.

Apart from the arbitration institutions, the 2004 International Bar Associations (“IBA”) Guidelines on Conflicts of Interest in International Arbitrators (“IBA Guidelines”) provides extensive and detailed guidelines on arbitrator’s disclosure on possible conflicts of interest.¹³⁹ The IBA Guidelines adopts an objective standard of justifiable doubts,¹⁴⁰ and illustrates various situations depending on the severity of possible conflicts involved divided into different categories.¹⁴¹ The Red (Non-Waivable) list illustrates the situations that will incur the conflicts.¹⁴² The Red (Waivable) list illustrates the situations that are “serious but not as severe,” thus it could be waived by parties’ express consent.¹⁴³ The Orange list illustrates the situations that may give rise to doubts for arbitrator’s partiality depending on the factual circumstances.¹⁴⁴ The Green list illustrates the situations where no actual or no appearance of partiality exists.¹⁴⁵ The IBA Guidelines gives a clearer guidelines to arbitrators on what to disclose, and at the same time expose a greater duty for arbitrators to disclose possible conflicts depending on the factual situations listed in the IBA guidelines.¹⁴⁶ With the extensive illustrations listed in the IBA Guidelines, parties could objectively assess the impartiality of the arbitrator.¹⁴⁷ The IBA Guidelines give quantitative categories to determine the standards of impartiality, different from other

¹³⁸ See Rogers, *supra* note 95, at 83.

¹³⁹ See International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitrators*, (2014).

¹⁴⁰ *Id.* at Part I: General Standards Regarding Impartiality, Independence and Disclosure (“The wording ‘impartiality or independence’ derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, . . . is to be applied objectively (a ‘reasonable third person test’)”).

¹⁴¹ *Id.* at Part II: Practical Application of the General Standards.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See *IBA Guidelines on Conflicts of Interest in International Arbitrator, Part II.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; see also Park, *supra* note 49, at 676.

national and international sources.¹⁴⁸ Although, the IBA Guidelines are a soft law, which lack binding effects, arbitrators and other arbitration institutions have used it as a relevant authority.¹⁴⁹

Realistic approaches seem to be that parties could make a reference to the IBA guidelines in their arbitration agreement, or institutions could do so similar to the ACICA.¹⁵⁰ By incorporating the IBA guidelines to the arbitration agreements or institutional rules, an arbitrator's impartiality issue can be governed by whether the arbitrator fulfilled his or her duty to disclose in accordance with the IBA guidelines. Because the IBA guidelines provide various factual illustrations, it will be easier to assess arbitrator's impartiality. Under this framework, the courts can conduct a more efficient and objective review. For instances rather than focusing factual intensive review, if the arbitrator failed to disclose potential conflicts listed in the Red list of the IBA guidelines, the court can automatically consider that the arbitrator lacks impartiality. By contrast, if the arbitrator failed to disclose something listed in the Green list of the IBA guidelines, the court can find that the failure to disclose does not affect the arbitrator's impartiality. Only in case of the Orange list, the court will use its standard to assess arbitrator's impartiality.

V. CONCLUSION: POSSIBLE SOLUTIONS?

An arbitrator's impartiality often becomes a matter of disclosure. In a departure from *Commonwealth Coatings*, the U.S. courts have developed various standards to review an arbitrator's impartiality. However, these various standards such as the "reasonable person standard," the "reasonable impression of bias" standard, and the "appearance of bias" standard, have given little guidance to the arbitrator, to the parties and to the courts. The practical criticism regarding the current U.S. courts approach is that, to address arbitrator's impartiality, the courts have to conduct factual intensive reviews case by case. This is because the current U.S. standards require more than a mere appearance of bias. This practical difference also exists in other jurisdictions such as England and France, adopting the "actual bias," and "reasonable doubt" standards.

One possible solution could be an arbitration institutions' self-regulating system. Institutional efforts to self-regulate registered arbitrators could eventually lead similar to American Bar Associations' self-regulating system.¹⁵¹ However, this approach has a

¹⁴⁸ See Rogers, *supra* note 95, at 84.

¹⁴⁹ See Park, *supra* note 49, at 676; see also Rogers, *supra* note 95, at 94; Australian Centre for International Commercial Arbitration (ACICA), *ACICA Arbitration Rules Art. 11.4* (2016), <https://acica.org.au/wp-content/uploads/Rules/2016/ACICA-Arbitration-Rules-2016.pdf>, ("[T]he Arbitral Tribunal and the parties may have regard to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration in the version current at the commencement of the arbitration.")

¹⁵⁰ See *ACICA Arbitration Rules Art. 11.4*.

¹⁵¹ See American Bar Association, *Model Rules of Professional Conduct* (8th ed. 2015), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. The American Bar Association

practical limitation because most institutions do not publicize the sanctions. Due to the lack of public records regarding arbitrator sanctions, parties in the future arbitral proceedings will not have a record regarding arbitrator's sanctions, and therefore lacking practical deterrence to appoint that particular arbitrator.

Similar to the ICSID *ad hoc* committee, an arbitration appeal procedure could be an interesting solution. Unlike a court's reviewing process, it is time-efficient, preserves confidentiality, and comports with the purpose of arbitration. However, this approach has greater uncertainty for implementation. It will require each institution to introduce an *ad hoc* committee. In addition, even after the *ad hoc* committee decided an arbitrator's impartiality issue, if the parties still choose to challenge final awards in the national court, it may invite intentional delay of arbitral proceedings by unsatisfied parties.

Realistic approaches seem to be that parties could make a reference to the IBA guidelines in their arbitration agreement, or in institutions' ethical code. By incorporating the IBA guidelines, the courts can assess an arbitrator's impartiality by considering whether arbitrator fulfilled their duty to disclosure in accordance with the IBA guidelines. Under this framework, the courts can conduct more efficient and objective review.

regulates attorney's ethics based on the ABA Model Code of Professional Conduct. In addition, each state has adopted a state code of ethics resembling the ABA Model Code of Professional Conduct.