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The Different Meanings of an Arbitrator's "Evident Partiality" Under U.S. Law

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The U.S. Federal Arbitration Act (FAA) provides that a federal district court may vacate an arbitration award, among other reasons, "where there was evident partiality or corruption in the arbitrators." 9 U.S.C. §10(a). However, as illustrated by a recently decided case in the Southern District of New York, U.S. district courts apply different standards of "evident partiality," depending on the circuit in which they are located.

In *Ometto v. ASA Bioenergy Holding A.G.*, decided this past January, the petitioners (collectively "Ometto") brought a motion to vacate two arbitration awards against them totaling almost $120 million. Ometto's motion was based on the fact that after the underlying arbitration began, the presiding arbitrator's law firm had advised clients regarding corporate transactions involving one of Ometto's opposing parties in the arbitration or an affiliate. Ometto argued that the presiding arbitrator "was rendered evidently partial" due to these conflict of interests and the arbitrator's failure to disclose them as required by the ICC rules. *Ometto v. ASA Bioenergy Holding A.G.*, 2013 WL 174259 at *2 (S.D.N.Y. 2013). Relying principally on the Ninth Circuit case *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994), Ometto argued that the presiding arbitrator, even if he had not actually been aware of the conflicts, should be charged with "constructive knowledge" of his firm's engagements. *Id*.

The district court ordered an evidentiary hearing to help it ascertain the facts with regard to the presiding arbitrator's knowledge of the conflicts; at the hearing, both the court and the parties' counsel were given the opportunity to question the arbitrator. *Ometto*, 2013 WL 174259 at *3. In its decision, the court found that there was "no material evidence refuting [the presiding arbitrator's] sworn assertion that he was, in fact, completely unaware of the conflicts … when he authored the awards." *Id.* at *4. The court further found that the arbitrator's "lack of awareness was largely the product of his own administrative carelessness in the manner he undertook a conflicts check at the advent of the arbitration." *Id.*

Whether or not Ometto would have prevailed in its arguments in the Ninth Circuit is debatable, but given the presiding arbitrator's lack of knowledge of the conflicts it was easy for the New York district court to reject the imputation of "constructive knowledge" and to find that the "evident partiality" standard had not been met under the law of the Second Circuit, under which a court "may only find evident partiality sufficient to vacate an award when a reasonable person, considering all of the circumstances, would have to conclude the arbitrator was partial to one side."

Ometto, 2013 WL 174259 at *4 (internal quotation marks omitted) (emphasis in the original). The court noted that under the Second Circuit standard "the arbitrator is quite unlike a judge, who can be disqualified in any proceeding in which his impartiality might be reasonably questioned." *Id.* (internal quotation marks omitted).

The court then contrasted the Second Circuit's standard against that of the Ninth Circuit, which only requires "an impression of possible bias," and found that "the petitioner's reliance on [Ninth Circuit caselaw] to invite this Court to impute constructive knowledge [on the presiding arbitrator] invokes precedent that is both non-binding on this Court and countermanded by the more circumspect view of 'evident partiality' adopted by this Circuit." *Id.*

The U.S. federal circuit courts are split as to which is the correct standard of "evident partiality." The Fifth, Eighth, Tenth and Eleventh circuits have adopted standards akin to that of the Ninth Circuit—that there exists a "reasonable impression" of bias. The First, Third, Fourth, Sixth and Seventh circuits have adopted standards akin to that of the Second Circuit—that a "reasonable person would have to conclude" there was bias. In an opinion issued this month, the Third Circuit, "[i]n response to the parties' confusion" reaffirmed the "would have to conclude" standard, which it had previously "embraced … in a footnote" in the 1994 case *Kaplan v. First Options*. *See Freeman v. Pittsburgh Glass Works, LLC*, 2013 WL 811884 at *8-9 (3rd Cir. 2013). The D.C. Circuit has not clearly articulated either standard, but would appear to lean toward the standard of the Second Circuit. *See Thian Lok Tio v. Washington Hosp. Center*, 753 F.Supp2d 9, 17 (2010) (a party alleging "evident partiality bears a heavy burden to establish specific facts that indicate improper motives on the part of an arbitrator.") (internal quotations omitted).

Suffice to say that in U.S. caselaw there is an "absence of consensus on the meaning of 'evident partiality'" under the FAA. *Montez v. Prudential Securities, Inc.*, 260 F.3d 980 (8th Cir. 2001). Not only are the circuit courts almost evenly split regarding whether the standard is that of "reasonable impression" of bias or something closer to actual bias, but even circuits within the same general camp apply the standard differently. For example, the notion in the Ninth Circuit caselaw relied on by Ometto that an arbitrator's "constructive knowledge" of a conflict can lead to a "reasonable impression" of bias satisfying the "evident partiality" standard has been expressly rejected by the Eleventh Circuit, which also applies a "reasonable impression" of bias test. *See Gianelli Money Purchase Plan and Trust v ADM Inv. Services, Inc.*, 146 F3d 1309 (11th Cir. 1998). The Fifth Circuit, in an *en banc* decision, opined that the Ninth Circuit *Schmitz* case was an "outlier" and found that "nondisclosure by an arbitrator" would not lead to vacatur of an award "unless it creates a concrete, not speculative impression of bias." *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283, 286 (5th Cir. 2007). The dissent in that case accused the majority of "substitut[ing] actual bias, or the reasonable impression of bias, or concrete impression of bias for the Supreme Court's ruling that dealings that might create only an impression of possible bias must be disclosed." *Positive Software Solutions*, at 287 (dissenting opinion).

The confusion in the U.S. courts about the meaning of "evident partiality" stems from the U.S. Supreme Court case *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968). In that case, the Court's 6-3 plurality decision vacated an award based on the presiding arbitrator's undisclosed business relationship with one of the parties, related to the subject matter of the arbitration. However, the Court was unable to articulate a standard for "evident partiality" that garnered the majority of votes. Justice Black's opinion of the court, which was joined by three other justices, stated that arbitral tribunals "should avoid even the appearance of bias," that arbitrators should be held to higher standards than judges since they "have completely free rein to

decide the law as well as the facts and are not subject to appellate review," and that an arbitrators should "disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth Coatings*, 395 U.S. at 149. Justice White's concurring opinion, which was joined by Justice Marshall, took a different view, finding that arbitrators are not necessarily to be held to the "standards of judicial decorum of [U.S. federal] judges, or indeed of any judges." *Id.* at 150. *See also* G. Born, *International Commercial Arbitration* 1466-1470 (2009) (discussing *Commonwealth Coatings* and its progeny). The Second Circuit and like-minded circuits have found that they should follow the tenor of Justice White's opinion since it was the narrowest ground upon which the *Commonwealth Coatings* Court ruled. *See e.g. Morelite Const. Corp. v New York City Dist. Council Carpenters Ben. Funds*, 748 F2d 79, 83 (2d Cir. 1984) (finding that in light of Justice White's opinion "much of Justice Black's opinion must be read as dicta").

Given the clear differences among the federal circuit courts—a reason for granting a petition for certiorari under U.S. Supreme Court jurisprudence—it would appear that the time is ripe for the U.S. Supreme Court to remedy its previous lack of clear guidance regarding the meaning of "evident partiality." We note that the "reasonable impression" of bias test used in the Ninth Circuit—and perhaps only the Ninth Circuit—is somewhat similar to the generally accepted standard for challenges to an arbitrator for lack of independence or impartiality in international arbitration. A recent ICSID decision, for example, found that "[a]n appearance of … bias from a reasonable and informed third person's point of view is sufficient to justify doubts about an arbitrator's independence or impartiality." *Urbaser SA v. Argentine Republic, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ICSID Case No. ARB/07/26 (12 August 2010),* ¶43. However, it should be remembered that the context of the FAA's "evident partiality" standard is that of vacatur of an arbitral award, and clearly there should be a higher standard for vacating an award once the arbitral proceedings have ended than there is for accepting a challenge to an arbitrator during the course of the proceedings. In addition, the plain meaning of the text of the FAA, and specifically the word "evident," connotes something more than just an "impression" of bias. Thus, in our opinion, the U.S. Supreme Court should clarify the meaning of "evident partiality" by adopting the standard of the Second Circuit.

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This entry was posted on Wednesday, March 20th, 2013 at 5:45 pm and is filed under Arbitration, Arbitration Awards, Arbitrators, Federal Arbitration Act (FAA), Uncategorized, United States
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