TULANE MARITIME LAW JOURNAL ONLINE

VOLUME 43 MAY 2019

Disputes, Duties, and Disclosures: D.C. Circuit Holds that There Is No Duty to Disclose When the Arbitrator's Interest in a Party Is Only "Trivial"—*Republic of Argentina v. AWG Group Ltd.*

I. INTRODUCTION

As high stakes international commercial arbitrations become more common, the losing parties are coming up with creative ways to undo bad results. This Note is about an attempt to reverse a $20 million arbitration award after twelve years of arbitration proceedings. It all began when, in 2003, Professor Gabrielle Kaufmann-Kohler (Kaufmann) was appointed as an arbitrator by Aqua Argentinas S.A. (AASA) to a three-person panel in the arbitration proceedings between the company and Argentina. The arbitration arose from a dispute over a contract for investment and operation of Argentina's water services.[1] In 2006, Kaufmann was appointed to serve on the board of directors of an international financial company, UBS AG (UBS).[2] At the time of the appointment, UBS managed trillions of dollars in investments in different companies, including over $2 billion in two of the AASA companies, Suez and Vivendi.[3] In November 2007, Argentina sought Professor Kaufmann-Kohler's recusal from the panel because of her relationship with UBS, and that was the first time the arbitrator learned that UBS had investments in Suez and Vivendi.[4] The other members of the panel rejected Argentina's challenge concluding that UBS's investments in Suez and Vivendi were

1. Republic of Arg. v. AWG Grp. Ltd., 894 F.3d 327, 331 (D.C. Cir. 2018). AASA was a consortium of seven companies. In 2003, the non-Argentine members of AASA began arbitration proceedings at the International Centre for Settlement of Investment Disputes in Washington, D.C. *See id.* at 331, 333.

2. Kaufmann was paid for her services on the board of directors of UBS AG in part with stock and in part with cash salary. *See id.* at 333.

3. *Id.*

4. *Id.* at 333-34.

too trivial and did not affect Professor Kaufmann-Kohler's partiality.[5] In April 2015, a unanimous panel of arbitrators held that Argentina had breached its contract with AASA and awarded the claimants the profits they would have made had Argentina honored the contract.[6]

Argentina brought a suit in the United States District Court for the District of Columbia under the Federal Arbitration Act (FAA) seeking to vacate the arbitration award. Among the grounds advanced by Argentina was that one of the members of the panel had shown "evident partiality" and was therefore biased in favor of the non-Argentine consortium members.[7] The district court rejected the plaintiff's arguments and granted AWG's[8] cross-petition to enforce the panel's $20 million arbitration award against Argentina.[9] On appeal, the United States Court of Appeals for the District of Columbia *held* that an arbitrator does not have a duty to disclose a "trivial" interest in a party and, therefore, such undisclosed "trivial" interest cannot create "evident partiality." *Republic of Argentina v. AWG Ltd.,* 894 F.3d 327, 335 (D.C. Cir. 2018).

II. HISTORICAL BACKGROUND

Arbitration is a method of privately resolving disputes between parties, where the parties agree in a contract to bring their future claims to a neutral private arbitrator rather than to file a suit in a public court.[10] One of the most important reasons people choose arbitration over litigation is that judges sometimes lack the specialized knowledge to resolve certain kind of disputes fairly and efficiently.[11] Specifically, in international maritime contracts, "the advantages of arbitration, in contrast to litigation in the courts, are that the parties may choose the arbitral forum and applicable procedure; the dispute is decided by experts in maritime law;

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5. *Id.* at 334.
6. *Id.* at 331.
7. *Id.*
8. AWG was a British corporation that was a member of AASA. *See id.*
9. *Id.* at 332.
10. Allison Anderson, *Labor and Commercial Arbitration: The Court's Misguided Merger,* 54 B.C. L. REV. 1237, 1239 (2013). There are two main areas of arbitration, namely, commercial and labor arbitration. Labor arbitration refers to arbitration in unionized workplaces, while commercial arbitration law covers agreements between merchants, consumers, management, and nonunionized employees. The statute governing commercial arbitration is the FAA, which incorporates the United Nations Convention on the Recognition and Enforcement of Foreign Awards (New York Convention). Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (entered into force June 7, 1959).
11. See Michael A. van Gelder, *Maritime Arbitration: Quo Vadis? Have Delays and Costs Caused Us to Lose the Way?,* 12 J. INT'L ARB. 79 (1995).

and the resolution of the dispute is generally . . . less burdensome."[12] Furthermore, the maritime industry is both highly technical and heavily informed by industry custom. Many older arbitration clauses, and some still in use today, require the arbitrators to be "commercial men," meaning they "are or have been actively engaged in the shipping business."[13] The flipside of this is that arbitrators with specialized knowledge are more likely to be deeply embedded in the industry, creating the potential for conflict of interest. As the arbitrator is ordinarily authorized to issue binding decisions, choosing an impartial *and* suitable person to serve as an arbitrator is considered "crucial" for fair and efficient arbitration proceedings.[14]

The Supreme Court of the United States emphasized in *Dean Witter Reynolds, Inc. v. Byrd* that courts are willing to enforce arbitration awards because Congress has directed courts to do so and enforcement respects parties' decisions to use alternative dispute resolution.[15] For example, in *First Opinions of Chicago, Inc. v. Kaplan,* the Supreme Court held that where a party has agreed to arbitration, they relinquish their right to a court's decision based on the merits.[16] Thus, the court will set aside an arbitration award only "in very unusual circumstances."[17]

Section 10 of the FAA authorizes non-merit judicial review of the arbitration award and allows for vacation of an arbitration award, among other reasons, where there is "evident partiality" by the arbitrator.[18] The Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co. a*ddressed the "evident partiality" standard and the duty to disclose.[19] This case involved an arbitrator, who over a period of four to five years received about $12,000 from one of the parties for legal services, including work on the projects involved in the arbitration before him.[20] The Court

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12. *See* 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW §§ 21-15 (5th ed. 2011).

13. *See* Robert Force & Anthony J Mavronicolas, *Two Models of Maritime Dispute Resolution: Litigation and Arbitration,* 65 TUL. L. REV. 1461, 1465-66, 1497 (1991).

14. *See* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 38 (2014); Carlos Esplugues Mota, The Role of Arbitrators in International Maritime Arbitration (Aug. 2009) (unpublished manuscript), https://www.researchgate.net/publication/228215596_The_Role_of_Arbitrators_in_International_Maritime_Arbitration/.

15. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985); *see also* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 36 (1987) (establishing a general proposition that courts have limited power to review arbitration awards).

16. 514 U.S. 938, 942 (1995).

17. *Id.*

18. FAA, 9 U.S.C. § 10(a)(2) (2012).

19. 393 U.S. 145 (1968).

20. *Id.* at 146.

vacated the award for the arbitrator's "evident partiality."[21] The Court held that all neutral and party-appointed arbitrators must be unbiased and interpreted "evident partiality" as conduct by the arbitrator favoring one party over the other.[22] Furthermore, Justice White noted that an arbitrator has a duty to disclose facts tending to show an interest or relationship with a party. Failure to disclose such a relationship could be a factor in the court's decision to vacate an arbitration award.[23]

In *Commonwealth,* Justice Black, writing for the Court, interpreted the FAA as imposing a strict standard for disclosure on arbitrators.[24] To support his decision, Justice Black reasoned 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."[25] Thus, Justice Black held that arbitrators are required to disclose "any dealings that might create an impression of possible bias."[26] In his concurrence, Justice White insisted that the arbitrators should not be held to the same standard as federal judges, "or indeed of any judges."[27] Justice White noted that the arbitrators should not be automatically disqualified by a business relationship with the parties before them if the relationship is "trivial," even if they failed to disclose their interest.[28] Justice White's concurrence recognized that arbitrators are often part of the business world and not the judiciary.[29] Justice White, however, did not give any guidelines when the relationship is only "trivial" and when the arbitrators should be disqualified due to their interest in a party; thus, the lower courts have to decide.

The circuit courts have been split in how to apply the *Commonwealth* principles when establishing "evident partiality" and the arbitrator's duty to disclose an interest in a party, some choosing to adopt the strict rules articulated by Justice Black, others following Justice White's more lenient approach, and others choosing to take a middle of the road approach.

Justice Black's approach can be seen in *Schmitz v. Zilveti.*[30] There, the United States Court of Appeals for the Ninth Circuit adopted a

21. *Id.* at 148.
22. *Id.* at 149.
23. *Id.* at 150 (White, J., concurring).
24. *Id.* at 149 (majority opinion).
25. *Id.*
26. *Id.*
27. *Id.* at 150 (White, J., concurring).
28. *Id.*
29. *Id.*
30. 20 F.3d 1043 (9th Cir. 1994).

"reasonable impression of partiality" standard when there is nondisclosure of a potential conflict, considering it to be the most accurate application of *Commonwealth.*[31] The court distinguished cases involving actual bias from cases involving an arbitrator's nondisclosure of potential conflicts.[32] The court noted that the policy of § 10(a)(2) of the FAA instructs the parties to choose their arbitrators intelligently.[33] Therefore, the court reasoned the parties are entitled to know facts showing potential partiality of the arbitrators in order to make an informed choice.[34] The court went on to note that a failure to investigate a potential conflict could result in a failure to disclose that may give rise to a "reasonable impression of partiality."[35] Thus, an arbitrator's constructive knowledge of a conflict could lead to a "reasonable impression" of bias satisfying the "evident partiality" standard.[36]

An example of the middle of the road approach can be seen in *Morelite Construction Corp. v. Monumental Life Insurance Co.*[37] In *Morelite,* the United States Court of Appeals for the Second Circuit noted that *Commonwealth* did not resolve the issue of what constitutes evident partiality under § 10 of the FAA and the courts are left with "little guidance."[38] The court found Justice Black's standard irreconcilable with Justice White's concurrence.[39] Justice Black's "appearance of bias" standard was too demanding because arbitration often involves a "trade-off" between arbitrator's impartiality and expertise in the business world.[40] The Second Circuit acknowledged that arbitration is voluntary and the parties agreed to it as a dispute resolution method and held that mere appearance of bias on the part of the arbitrator is not enough to establish "evident partiality" and to give grounds for vacating an arbitration award.[41] The opinion notes that "to do otherwise would be to render this efficient means of dispute resolution ineffective in many commercial

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31. *Id.* at 1046.
32. *Id.* at 1047.
33. *Id.*; *see* FAA, 9 U.S.C. § 10(a)(2) (2012).
34. *Schmitz,* 20 F.3d at 1047.
35. *Id.* at 1047-48.
36. *Id. But see* Gianelli Money Purchase Plan & Tr. v. ADM Inv. Sers., Inc., 146 F.3d 1309 (11th Cir. 1998) (applying Justice Black's "reasonable impression of bias" standard expressly rejected the constructive knowledge notion articulated by the Ninth Circuit.).
37. 748 F.2d 79, 82-83 (2d Cir. 1984).
38. *Id.* at 83.
39. *Id.* at 82-83.
40. *Id.*
41. *Id.* at 84; *see also* Positive Software Sols. v. New Ventury Mortg. Corp., 476 F.3d 278 (5th Cir. 2007) (holding that "evident partiality" as used in § 10(a)(2) means something more than a "mere appearance of bias").

settings."[42] The Second Circuit observed that Justice White's proof of "actual bias" standard would be too high, which the parties might find impossible to prove, and adopted a middle ground standard holding that: "evident partiality . . . will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[43]

The Second Circuit received another opportunity to address the issues of "evident partiality" and duty to disclose in *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*[44] There, the arbitrator knew that a potential conflict of interest existed between his corporation and one of the parties. Rather than investigating the potential conflict, or disclosing it to the parties, he had created a "Chinese Wall" to insulate himself from learning more about the relationship.[45] The Second Circuit noted that "the arbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists" and if the arbitrator thinks that a "nontrivial conflict might exist," he either must conduct an investigation in the potential conflict or disclose to the parties why he thinks there could be a conflict.[46] The court went on to note that "[t]he mere failure to investigate is not, by itself, sufficient to vacate an arbitration award."[47] Instead, duty to investigate arises "when an arbitrator knows of a potential conflict" of interest.[48]

Finally, in *Al Harbi v. Citibank, N.A.*, the United States Court of Appeals for the D.C. Circuit chose to apply Justice White's approach and held that the burden to prove that the process was unfair fell on the challenger and is an "onerous" burden to meet.[49] The challenger can satisfy its burden simply by presenting "specific facts that indicate

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42. *Morelite,* 748 F.2d at 82.

43. *Id.; see also* Dow Corning Corp. v. Safety Nat'l Cas. Corp., 335 F.3d 742, 750 (8th Cir. 2003) (applying the reasonable person standard and holding that evident partiality is present where the nondisclosure at issue "objectively demonstrate[s] such a degree of partiality that a reasonable person would assume that the arbitrator had improper motives"); Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993) (holding that for a court to vacate an arbitration award, the challenger must show that a reasonable person would conclude that an arbitrator was partial to one of the parties). The court in *Peoples Security* went on to note that the challenger must establish specific facts showing improper motive by the arbitrator and the "alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain or speculative." *Peoples Sec.,* 991 F.2d at 146.

44. 492 F.3d 135 (2d Cir. 2007).

45. *Id.* at 136.

46. *Id.* at 137-38.

47. *Id.* at 138.

48. *Id.*

49. 85 F.3d 680, 683 (D.C. Cir. 1996).

improper motives on part of the arbitrator."[50] In this case, the challenger, Al-Harbi, argued that there was "evident partiality" because Feinberg's (one of the members on the panel) former law firm had represented his opponent on issues unrelated to the present dispute and did not disclose that information during the arbitration proceedings.[51] The court found that Feinberg had no knowledge of that representation at the time of the arbitration. The D.C. Circuit disagreed with Al-Harbi's contentions that an arbitrator has a duty of investigation and found no "evident partiality."[52]

III. COURT'S DECISION

In the noted case, the D.C. Circuit was duly bound to follow its precedent in *Al-Harbi* and does so in a way consistent with Justice White's *Commonwealth* standard in the displayed reluctance to interfere with arbitration awards. The court held that (1) under the "evident partiality" standard of the FAA, and the Supreme Court's decision in *Commonwealth,* an arbitrator has a duty to disclose an interest only when he or she has a substantial interest in a firm that has done more than a trivial business with a party; (2) even though the arbitrator sat on the board of directors for a company with investments in the party, her interest was only "trivial," and therefore, she did not have a duty to disclose; and (3) the arbitration panel did not exceed its authority in reaching its decision.[53]

Judge Griffith, writing for the court, begins his analysis by determining that the courts' review of arbitration awards under the FAA is limited in scope. The courts in general, will enforce an arbitration award unless the challenger satisfies the "onerous" burden of proving that the award resulted from an unfair process, which "deviated significantly from the Act's standards of fair adjudication."[54] Judge Griffith continues by setting the groundwork for his analysis of the impartiality of the arbitrator. The court observes that § 10 (a)(2) of the FAA allows the court to vacate an arbitration award "where there was an evident partiality . . . in the arbitrators."[55]

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50. *Id.* (quoting Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993)).

51. *Id.*

52. *Id.* at 682.

53. Republic of Arg. v. AWG Grp. Ltd., 894 F.3d 327, 335 (D.C. Cir. 2018).

54. *Id.* at 332-33; *see also* Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 568 (2013) ("[U]nder the [Act], courts may vacate an arbitrator's decision 'only in very unusual circumstances.'" (quoting First Opinions of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995))).

55. *Id.* at 327, 333 (quoting FAA, 9 U.S.C. § 10(a)(2) (2012)).

First, the court considers whether Kaufmann had a duty to disclose her service on the board of UBS.[56] The court notes that the FAA's "evident partiality" standard imposes duties on arbitrators with "significant interest" in the parties.[57] The court's reasoning follows Justice White's concurrence in *Commonwealth:* "Arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial."[58] The court acknowledges the rationale behind the rule advanced by Justice White—if the arbitrators have firsthand experience in the business, they will be better in resolving disputes that arise in that business. Furthermore, the court notes that the FAA does not create a broad disclosure rule that would drive away "the best informed and most capable potential arbitrators."[59] The D.C. Circuit agrees with this rationale and chooses to follow Justice White's approach over the rigid rule advanced by Justice Black who proposed that the arbitrator has a duty to disclose "any dealings that might create an impression of possible bias."[60] The D.C. Circuit held that an arbitrator has a duty to disclose an interest only when she has a "substantial interest" in a company that has done "more than trivial" business with a party.[61]

Second, the D.C. Circuit rejects Argentina's argument that Kaufmann was biased and impartial because "there is no duty to disclose a trivial interest under *Commonwealth* even if the arbitrator had full knowledge of his connection to the party."[62] In its analysis, the court refers to their own decision in *Al-Harbi* where they applied Justice White's rule and upheld an arbitration award despite one of the arbitrator's undisclosed relationship with a party.[63] Judge Griffith notes that the first thing the court should consider is whether the arbitrator's interest in a party is significant and that "it falls to Argentina to show that the degree [of interest that Kaufmann had in Suez and Vivendi] was significant."[64] Here, Kaufmann's interest in Suez and Vivendi was trivial and could not lead to

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56. *Id.* at 334.
57. *Id.*
58. *Id.* (quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968)).
59. *Id.* (quoting *Commonwealth Coatings,* 393 U.S. at 150 (White, J., concurring)).
60. *Id.* (quoting *Commonwealth Coatings,* 393 U.S. at 148 (majority opinion)).
61. *Id.*
62. *Id.*
63. *Id.* at 335 (citing Al Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir. 1996)).
64. *Id.*

"evident partiality" no matter whether she was aware of her involvement with the parties or not.[65] The court concludes that Argentina had not established "specific facts that indicate[d] improper motives on the part of [the] arbitrator."[66]

The court observes that the test for "evident partiality" articulated in *Commonwealth* has two parts: first, Argentina must show that Kauffman had a substantial interest in UBS; and second, Argentina must demonstrate that UBS "had done more than trivial business with" Suez or Vivendi.[67] The court accepts Argentina's contention that Kaufmann's position as a director on the board of UBS gave her a substantial interest in UBS. However, the court is not convinced that the second prong of the test is satisfied (i.e., that UBS had done more than trivial business with Suez and Vivendi).[68] The court acknowledges that the $2 billion investment UBS had in Suez and Vivendi was a significant sum. However, looking at UBS's business as a whole, the court notes that the investments in Suez and Vivendi made up less than 0.06% of the $3.6 trillion UBS had in invested assets. The court further notes that UBS did not have any management responsibilities towards Suez and Vivendi, but only passive investments. The court concludes that Argentina did not show that "UBS cared about staying in the good graces of Suez and Vivendi."[69] Argentina failed to demonstrate that UBS had done "more than trivial" business with Suez and Vivendi, and thus, the second prong of the test was not satisfied. The court holds that Kaufman had no duty to disclose her interest in UBS.

Third, the court disposes with Argentina's second contention that the arbitrators exceeded their authority by rejecting Argentina's necessity defense and by awarding the parties compensation based on the fictional profits they would have made had Argentina honored the contact. The court notes that the bar set in the FAA is a high one: courts could vacate an arbitration award "if the arbitrators exceeded their powers" under the arbitration agreement.[70] Argentina argues that the panel was required to give extended explanations for its decision. The court disagrees with this argument because had the panel been required to explain in detail every response to each party's contentions, this would undermine the speed of

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65. *Id.*

66. *Id.* (quoting Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993)).

67. *Id.* at 335-36.

68. *Id.*

69. *Id.* at 336.

70. *Id.* (quoting FAA, 9 U.S.C. § 10(a)(4) (2012)).

the arbitration proceedings.[71] Judge Griffith writes that Argentina did not present evidence to show that the panel rejected the defense based on its policy preferences instead of the criteria set out in the agreement.[72] Finally, the court considers whether the panel exceeded its authority when calculating the damages Argentina owed AASA. The court holds that nothing in the arbitration agreement prohibited the panel from assuming that the contract would have lasted till its date in 2023 and awarding AASA the estimated profits.[73] The D.C. Circuit notes that "the courts are not authorized to consider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract."[74]

IV. ANALYSIS

The D.C. Circuit in the noted case was obligated to follow its precedent in *Al-Harbi* and it does so by relying on Justice White's concurrence in *Commonwealth*, because his rule is narrower than the rule espoused by Justice Black.[75] As the D.C. Circuit observes, if a "trivial" interest could be a ground for disqualification, there would be a high risk of "evident partiality" challenges because the parties could try manipulating the arbitration by choosing arbitrators associated with financial companies with broad investments.[76] Furthermore, parties choose arbitration in part because the arbitrators are business people with expertise in the industry. It is possible that such a limited number of specialists may have some distant interest in one of the parties; interest of which the arbitrator might not even be aware. The holding in the noted case follows a pragmatic approach consistent with the modern-day business realities. In doing so, the D.C. Circuit rejects the approach of Justice Black and the Ninth Circuit in *Schmitz.* As Judge Griffith writes in the noted case, Justice White's rule in *Commonwealth* struck a balance between experience and neutrality.[77]

The D.C. Circuit was correct. Adopting a strict approach in imposing a duty to investigate upon the arbitrator and applying Justice Black's standard that imposes a duty to disclose any appearance of bias will not be

71. *Id.* at 338.
72. *Id.*
73. *Id.*
74. *Id.* at 338-39 (quoting United Paperworkers Int'l Union, AFL-CIO v. Misko, Inc., 484 U.S. 29, 36 (1987)).
75. *Id.* at 334.
76. *Id.* at 337.
77. *Id.*

efficient in maritime arbitration. It may increase the cost of arbitration and the time involved to hold the arbitration, while creating difficulties in finding qualified arbitrators. In the maritime world, there are a limited number of professionals eligible to serve as arbitrators. There is a longstanding tradition that the persons chosen to arbitrate maritime disputes be professionals who are aware of the specifics of the shipping industry.[78] Thus, parties select arbitrators who have a specific professional background.

> The search for suitable arbitrators narrows down to three categories of candidates: a) individuals who have operated in the maritime field as ship owners, agents, shippers or insurers; b) maritime business counsels, judges and lawyers with significant experience, professors of maritime and admiralty law; and c) experts such as naval commanders, architects and engineers.[79]

The longstanding tradition in maritime arbitration that arbitrators have expertise in the shipping industry combined with the small number of qualified arbitrators "determine[s] the inevitable existence of links and common interest among the different actors in this sector, and, therefore, with those who will be chosen as prospective arbitrators."[80] Quite often the maritime arbitrators may know the people related to the highly specialized and very closed world of maritime industry.[81] Therefore, in maritime arbitration, it is quite possible for the arbitrator to have an interest in a party and the D.C. Circuit's generous interpretation as to what constitutes "evident partiality" serves the maritime industry well.

The Supreme Court should resolve the circuit split. The Court's decision in *Commonwealth* creates confusion as to which is the correct standard of "evident partiality" because the majority of the Justices were able to agree only on the result, but "the Justices could not agree on a single rationale."[82] The circuit courts are almost evenly split on whether the standard for "evident partiality" is that of "reasonable impression" of bias or something closer to actual bias.[83] Even courts following Justice White's concurrence apply the standard differently—some courts adopting a

78. Mota, *supra* note 14, at 8.

79. F. Marella, *Unity and Diversity in International Arbitration: The Case of Maritime Arbitration,* AM. U. INT'L. L. REV. at 1085-86 (2005).

80. Mota, *supra* note 14, at 9-10.

81. *Id.* at 9.

82. Republic of Arg. v. AWG Grp. Ltd., 894 F.3d 327, 334 (D.C. Cir. 2018).

83. *See* Schmitz v. Zilveti, 20 F.3d 1043, 1047-48 (9th Cir. 1994).

middle of the road approach.[84] Maritime arbitration could be held anywhere if the arbitration clause provides so[85]—for example, in California, where the strict approach of the Ninth Circuit that follows Justice Black's test from *Commonwealth* would apply.[86] This split may create uncertainty for the maritime industry and jurisprudence. As the United States Court of Appeals for the Eighth Circuit has noted, in U.S. case law, there is an "absence of consensus of the meaning of evident partiality" under the FAA.[87] Given the clear split among the circuit courts, it appears time for the Supreme Court to remedy its previous lack of clear guidance as to what constitutes "evident partiality" under the FAA and when an arbitrator has and does not have a duty to disclose an interest in a party. Furthermore, the Supreme Court should clarify what constitutes "trivial" interest in a party. Giving clear guidance to the circuit courts will discourage the losing party from challenging arbitration awards, prevent opportunities for forum shopping, and create certainty and uniformity.

V. CONCLUSION

The D.C. Circuit in the noted case follows Justice White's concurring opinion in *Commonwealth,* an approach that does not add a burden on arbitrators and is one that the courts can apply flexibly. This approach promotes efficiency and speed and respects the parties' decision to choose the efficiency and finality of the arbitration as a method for resolution of their disputes. The approach is also in line with the modern-day commercial realities, the Maritime Arbitration Rules,[88] and is well suited for maritime arbitration where the arbitrators are likely to have some distant interest in a party.

However, the circuit split as to what constitutes "evident partiality" and when an arbitrator has and does not have a duty to disclose an interest in a party creates uncertainty and opportunities for forum shopping. The Supreme Court should address this issue and adopt the approach of the D.C. Circuit because it will create certainty and uniformity, while

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84. *See* Gianelli Money Purchase Plan & Tr. v. ADM Inv. Sers., Inc., 146 F.3d 1309 (11th Cir. 1998).

85. "Unless otherwise provided in the arbitration clause, arbitration hearings are to be held in the City of New York." Soc'y of Mar. Arbitrators, Inc., Maritime Arbitration Rules § 7 (Mar. 14, 2018), http://www.smany.org/pdf/SMA-arbitration-rules.pdf.

86. *See Schmitz,* 20 F.3d 1043.

87. Montez v. Prudential Sec., Inc., 260 F.3d 980 (8th Cir. 2001).

88. "[D]isclosure shall include '*close* personal ties and business relations' with parties to the arbitration." Soc'y of Mar. Arbitrators, Inc., *supra* note 85, § 9.

discouraging the losing party to an arbitration from "clutching at straws in an attempt to avoid the results" of an unfavorable decision.[89]

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89. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 153 (1968) (Fortas, J., dissenting).

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