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Standards of Arbitrator Impartiality: How Impartial Must They Be?

*Lifecare International, Inc. v. CD Medical, Inc.*¹

I. INTRODUCTION

The arbitrator is the decisive element in any arbitration. His ability, expertise, fairness and impartiality are the basis of an arbitration process. . . . Not only does an efficient and responsible arbitrator conduct the proceeding with integrity, [but] he also contributes to the improvement of business relations and of practices and customs in the specific trade.²

One of the most crucial aspects of the arbitrator's role is neutrality. For arbitration proceedings to achieve a fair resolution of disputes, the arbitrator must make his decision without bias. All jurisdictions allow vacation of arbitration awards where there is "evident partiality" on the part of an arbitrator appointed as neutral. The application of this "evident partiality" test, however, has yielded widely varying results. Moreover, most state and federal courts apply a lower standard of impartiality to arbitrators than they apply to judges. The reason for this lower standard is that the parties consented to a less than perfect tribunal when they consented to an arbitration.

II. FACTS AND HOLDING

In *Lifecare International*, CD Medical, Inc., manufactured dialysis machines and related disposable components.³ These products were marketed within the United States by CD Medical, Inc., and outside the United States by several wholly-owned subsidiaries, including CD Medical, B.V.⁴ CD Medical, B.V., then marketed these products through its wholly-owned subsidiaries and independent contractors.⁵ One such independent contractor was Lifecare International, Inc.⁶

1. 68 F.3d 429 (11th Cir. 1995).

2. GABRIEL WILNER, DOMKE ON COMMERCIAL ARBITRATION 67 (1993).

3. *Lifecare Int'l*, 68 F.3d at 431.

4. *Id.*

5. *Id.*

6. *Id.*

In 1990, Lifecare filed suit in the United States District Court for the Southern District of Florida against CD Medical, Inc., and CD Medical, B.V., (collectively, "CD Medical"), for breach of contract, fraud, and tortious interference.⁷ Over Lifecare's objection, the district court granted CD Medical's motion to compel arbitration pursuant to a 1984 agreement between the parties and the Federal Arbitration Act ("FAA").⁸ In June, 1992, Lifecare demanded arbitration, claiming that CD Medical had breached three separate agreements to return the country of Algeria to Lifecare's territory and had tortiously interfered with Lifecare's relationship with the Algerian government.⁹ Lifecare requested damages for lost profits from sales it would have made in Algeria, prejudgment interest, and punitive damages.¹⁰

In February, 1993, a panel of three arbitrators heard the liability portion of the proceedings.¹¹ Arbitrator Stein ("Stein"), an attorney appointed as the neutral member of the tripartite panel,¹² was heard describing what he considered "unprofessional" conduct on the part of opposing counsel.¹³ Stein stated that despite his need to travel abroad, the opposing attorney had refused to reschedule a summary judgment hearing.¹⁴ In Stein's opinion this behavior required disciplinary action.¹⁵

In April, 1993, the panel notified the parties that they would rule for Lifecare on the issue of liability.¹⁶ One of CD Medical's attorneys, a counselor from White & Case, later discovered that Stein had been speaking about another White & Case attorney.¹⁷ As a result, CD Medical attempted to disqualify Stein, but its motion was denied by the American Arbitration Association ("AAA").¹⁸

Following the November and December 1993 hearings on the amount of damages, the panel rendered a 2-1 decision awarding Lifecare a total of \$15,620,938.43¹⁹ in damages, interest, fees, and expenses.²⁰ Neither of the

7. *Id.*

8. *Id.* at 431-32.

9. *Id.* at 432.

10. *Id.*

11. *Id.*

12. Tripartite arbitration panels typically include two members appointed by the parties to act somewhat as partisans, while the third arbitrator must be neutral. 4 AM. JUR. 2d *Alternative Dispute Resolution* § 156 (1995).

13. *Lifecare Int'l*, 68 F.3d at 432.

14. *Id.*

15. *Id.* In fact, this conduct had inspired Arbitrator Stein to write a letter to the offending attorney which noted his surprise that "a firm of White & Case's stature would condone [that] type of behavior." *Id.* at 432 n.3.

16. *Id.* at 432.

17. *Id.*

18. *Id.*

19. *Id.* The award included "\$10,102,674 in lost profits, \$5,394,203.90 in prejudgment interest, \$13,527.47 in administrative fees and costs, \$71,485.06 in arbitrators' fees and expenses, and \$39,048 in expert witness fees." *Id.*

20. *Id.*

majority arbitrators, one of whom was Stein, wrote an opinion describing their reasoning on the issues of liability or damages.²¹

CD Medical then discovered prior contacts between CD Medical and the law firm of Greenberg Traurig Hoffman Lipoff Rose & Quentel, P.A. ("Greenberg") in which Stein was "of counsel."²² These contacts were not disclosed by Stein.²³ CD Medical had approached Greenberg in 1988 and in 1990.²⁴ Both times CD Medical approached Greenberg with situations regarding Lifecare.²⁵ In 1988, CD Medical had asked Greenberg to review an amendment to one of the agreements between CD Medical and Lifecare.²⁶ In 1990, CD Medical interviewed Greenberg concerning representation in the instant dispute.²⁷ At neither time was Stein associated with Greenberg.²⁸ Stein did, however, become "of counsel" to Greenberg in 1992--just a few months before he was selected as a member of the arbitration panel at issue here.²⁹

Thereafter, both parties filed motions in the district court: Lifecare moving to confirm the award and CD Medical moving to vacate the award.³⁰ CD Medical contended that Stein was biased because he had failed to disclose his prior disagreement with a White & Case attorney and the two prior contacts between CD Medical and Greenberg.³¹ CD Medical also argued that the award was arbitrary and capricious, constituting further grounds to vacate.³² In April 1994, the district court granted Lifecare's motion to confirm the award and simultaneously denied CD Medical's motion to vacate.³³ CD Medical appealed these decisions.³⁴

The Eleventh Circuit Court of Appeals affirmed the district court's decision, holding that Stein's undisclosed dispute did not give rise to a "reasonable impression of partiality," and, therefore, did not justify vacating the award.³⁵ The court also held that the award was not "arbitrary and capricious" despite the fact that it was based on an agreement that was not reduced to writing.³⁶

21. *Id.* The dissenting arbitrator wrote an opinion regarding CD Medical's liability only. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 432-33. Final judgment was entered on June 14, 1994. *Id.* at 433.

34. *Id.* at 433.

35. *Id.* at 434-35.

36. *Id.* at 436.

III. LEGAL HISTORY

A. Background: The Birth of the FAA and UAA

Arbitration "dates back to the earliest days of which we have historical knowledge."³⁷ Traditionally, though, courts had a hostile attitude toward arbitration, considering the process inferior to litigation.³⁸ One reason for this hostility was that if the disputes were arbitrated, the court would lose the fees it would have collected if that case were litigated.³⁹ While courts would enforce awards granted in arbitration agreed to after the dispute arose their hostile attitude toward arbitration led them to refuse to specifically enforce agreements to arbitrate future disputes.⁴⁰

This judicial hostility toward arbitration stemmed primarily from concerns that the arbitration process could not give the parties the same quality of justice as the judicial process.⁴¹ Arbitration, however, has many redeeming virtues. Generally, it is speedier, less expensive, lightens overloaded court dockets, and often provides trade-specific arbiters.⁴²

Gradually, these virtues were recognized.⁴³ In 1920, New York enacted the first statute enforcing agreements to arbitrate future disputes.⁴⁴ In 1925, Congress overruled these years of judicial hostility towards arbitration with the passage of the Federal Arbitration Act ("FAA") which declared a "national policy favoring arbitration."⁴⁵ The United States Supreme Court in *Southland Corp. v. Keating* held that the FAA, which broadly requires arbitration of claims, applies

37. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926).

38. Deseriee A. Kennedy, *Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 GEO. J. LEGAL ETHICS 749, 755 (1995).

39. Alison Brooke Overby, Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1139 (1986). For further explanation of the history of and reasoning for this hostility, see *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-84 (2d Cir. 1942).

40. *Kulukundis*, 126 F.2d at 982-84.

41. Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 254-55 (1987). Kanowitz notes the specific grounds given for this belief, quoting the Supreme Court in *McDonald v. City of*

West Branch, 466 U.S. 284, 291 (1984) which quoted *Alexander v. Gardner-Denver Co.*, 415 U.S. 37, 57-58: "The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." *Id.* at 255.

42. *Kanowitz*, supra note 41, at 255.

43. See *Overby*, supra note 39, at 1139.

44. 1920 N.Y. Laws 803 (current version at N.Y. Civ. Prac. L. & R. §§ 7501-7514 (McKinney 1980)).

45. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

in both federal and state courts.⁴⁶ This removed the states' ability to undermine the enforcement of agreements to arbitrate future disputes.⁴⁷

States are, however, free to enact their own arbitration statutes to govern procedures for enforcing arbitration agreements.⁴⁸ Several states have done so.⁴⁹ In 1955, the current Uniform Arbitration Act ("UAA") was promulgated. Since then, 34 states and the District of Columbia have adopted the UAA.⁵⁰ All but two⁵¹ of the remaining states have enacted their own statutes enforcing agreements to arbitrate future disputes.⁵² Thus, in most state and federal courts today, agreements to arbitrate future disputes are valid, irrevocable, and enforceable.⁵³

46. *Id.* at 12-15.

47. Daniel Karon, Note, *Kicking Our Gift Horse in the Mouth - Arbitration and Arbitrator Bias: Its Sources, Symptoms, and Solutions*, 7 OHIO ST. J. ON DISP. RESOL. 315, 322 (1992). See also Overby, *supra* note 39, at 1142 nn.43-44 (discussing cruciality to the case of the FAA's applicability). *Southland's*

holding that the FAA applies in both federal and state courts though the FAA does not confer on arbitration agreements independent federal question jurisdiction may lead to results contrary to state laws requiring jurisdiction of only certain claims. *Id.* at 1142 n.44.

48. Overby, *supra* note 39, at 1142.

49. Uniform Arbitration Act, Historical Notes, 7 ULA 1 (1955) (noting that the 1925 version of the Uniform Arbitration Act was adopted in Nevada, North Carolina, Pennsylvania, Utah, Wisconsin, and Wyoming).

50. See ALASKA STAT. § 09.43.010 to 09.43.180 (1994); ARIZ. REV. STAT. ANN. § 12-1501 to 12-1518 (1994); ARK. CODE ANN. § 16-108-201 to 16-108-224 (Michie 1987); COLO. REV. STAT. § 13-22-201 to 13-22-223 (1987); DEL. CODE ANN. tit. 10, § 5701 to 5725 (1974); D.C. CODE ANN. § 16-4301 to 16-4319 (1981); FLA. STAT. ANN. § 682.01 to 682.22 (West 1990); IDAHO CODE § 7-901 to 7-922 (1990); ILL. ANN. STAT. ch. 710, para. 5/1 to 5/23 (Smith-Hurd 1992); IND. CODE § 34-4-2-1 to 34-4-2-22 (1986); IOWA CODE § 679A.1 to 679A.19 (1987); KAN. STAT. ANN. § 5-401 to 5-422 (1991); KY. REV. STAT. ANN. § 417.045 to 417.240 (Michie/Bobbs-Merrill 1992); ME. REV. STAT. ANN. tit. 14, § 5927 to 5949 (West 1980); MD. CODE ANN., CTS. & JUD. PROC. § 3-201 to 3-234 (1995); MASS. GEN. LAWS ANN. ch. 251, § 1 to 19 (West 1986); MICH. COMP. LAWS § 600.5001 to 600.5035 (1987); MINN. STAT. § 572.08 to 572.30 (1988); MO. REV. STAT. § 435.350 to 435.470 (1994); MONT. CODE ANN. § 27-5-111 to 27-5-324 (1993); NEB. REV. STAT. § 25-2601 to 25-2622 (1989); NEV. REV. STAT. § 38.015 to 38.205 (1991); N.M. STAT. ANN. § 44-7-1 to 44-7-22 (Michie 1978); N.C. GEN. STAT. § 1-567.1 to 1-567.20 (1983); N.D. CENT. CODE § 32-29-2-01 to 32-29-2-20 (Supp. 1995); OKLA. STAT. tit. 15, § 801 to 818 (1993); 42 PA. CONS. STAT. ANN. § 7301 to 7320 (1982); S.C. CODE ANN. § 15-48-10 to 15-48-240 (Law. Co-op. Supp. 1995); S.D. CODIFIED LAWS ANN. § 21-25A-1 to 21-25A-38 (1987); TENN. CODE ANN. § 29-5-301 to 29-5-320 (Supp. 1995); TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 to 171.020 (West 1996); UTAH CODE ANN. § 78-31a-1 to 78-31a-18 (1992); VT. STAT. ANN. tit. 12, § 5651 to 5681 (Supp. 1995); VA. CODE ANN. § 8.01-581.01 to 8.01-581.016 (Michie 1992); WYO. STAT. § 1-36-101 to 1-36-119 (1986).

51. Two states only enforce arbitration agreements regarding existing disputes. See ALA. CODE § 6-6-1 (1993); W.VA. CODE § 55-10-1 (1994).

52. See CAL. CIV. PROC. CODE § 1281 (West 1982); CONN. GEN. STAT. § 52-408 (1991); GA. CODE ANN. § 9-9-1 (1982); HAW. REV. STAT. § 658-1 (1993); LA. REV. STAT. ANN. § 9:4201 (West 1991); MISS. CODE ANN. § 11-15-1 (1972); N.H. REV. STAT. ANN. § 542:1 (1974); N.J. STAT. ANN. § 2A:24-1 (West 1987); N.Y. CIV. PRAC. L. & R. § 7501 (McKinney 1980); OHIO REV. CODE ANN. § 2711.01 (Page's 1992); OR. REV. STAT. § 36.305 (1995); R.I. GEN. LAWS § 10-3-2 (Supp. 1995); WASH. REV. CODE § 7.04.010 (West 1992); WIS. STAT. ANN. § 788.01 (West 1995).

53. Overby, *supra* note 39, at 1139-41.

B. The Impartiality Standard

Just decisions necessitate an objective factfinder. The Supreme Court has interpreted the Due Process Clause of the Constitution's 5th Amendment⁵⁴ as requiring a "neutral and detached judge."⁵⁵ To this end, statutory provisions in every jurisdiction provide for the disqualification of biased judges.⁵⁶

In keeping with this constitutional mandate, the arbitration acts of all the states provide that partiality of arbitrators can provide grounds sufficient to justify vacating an arbitration award.⁵⁷ These state provisions for the vacation of arbitration awards are essentially modeled on either the United States Arbitration Act, the Uniform Arbitration Act of 1955, or the New York Arbitration Act ("NYAA").⁵⁸

1. Differences in Statutory Language

The FAA allows vacation of the arbitration awards "[w]here there was evident partiality or corruption in the arbitrators, or either of them."⁵⁹ The U.S. Supreme Court, in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, held that because the statute was silent on the subject of actual injury, it does not require actual prejudice to the parties.⁶⁰ Instead, all (neutral and party-appointed) arbitrators "not only must be unbiased but also must avoid even the appearance of bias."⁶¹

In contrast, the NYAA and the UAA both include some form of prejudice as a prerequisite to vacating an arbitration award. The NYAA allows vacation when the complaining party's rights "were prejudiced . . . by the partiality of an arbitrator appointed as a neutral."⁶² Similarly, the UAA provides that a court may vacate an award where "[t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party."⁶³ Jurisdictions following this pattern often vacate only where the evident partiality by an arbitrator appointed as neutral was such that "the arbitration proceedings were fundamentally unfair."⁶⁴

54. U.S. CONST. amend. V ("No person shall be ... deprived of life, liberty, or property, without due process of law").

55. *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972).

56. *See, e.g.*, 28 U.S.C. §§ 47, 144, 455 (1994).

57. 4 AM. JUR. POF 2d § 1 (1975).

58. *Id.*

59. 9 U.S.C. § 10(a)(2) (1994).

60. 393 U.S. 145, 147 (1968). Note also that the FAA allows vacation where any of the arbitrators were evidently partial,

including not only neutral, but party-appointed arbitrators as well. *Id.* at 147 n.1 (Citing 9 USC § 10).

61. *Id.* at 150.

62. N.Y. CIV. PRAC. L. & R. § 7511(b)(1)(ii) (McKinney 1980).

63. U.A.A. § 12(a)(2) (1955).

64. *Graceman v. Goldstein*, 613 A.2d 1049, 1055 (Md. Ct. App. 1992).

2. Differences in Judicial Interpretation

The courts have not consistently interpreted these statutes. Many courts in jurisdictions with arbitration statutes following either the NYAA or UAA vacate arbitration awards without proof of actual prejudice of the party's rights. In Florida, a jurisdiction which adopted the UAA, for example, courts have adopted the strictest standard, requiring arbitration panels to "avoid even the appearance of partiality."⁶⁵ Thus, in *International Ins. Co. v. Schrage*, the Florida court explained "it need not be shown that bias influenced [the arbitrator's] judgment, but only that there was a circumstance tending to bias that judgment."⁶⁶

Likewise, lower federal courts' jurisdictions with statutes following the FAA often require proof not only of improper conduct by arbitrators, but also that the "improper conduct affected the award that was ultimately decided upon."⁶⁷ Courts of all jurisdictions quote the popular statement that in order to vacate, the partiality must be "direct, definite, and capable of demonstration rather than remote, uncertain, or speculative."⁶⁸ Because this directive provides little guidance, the courts refer to many sources for help in defining "evident partiality," including case law of other jurisdictions, commentators, and the AAA Rules and Code of Ethics for Arbitrators.⁶⁹

The conflict of authority as to whether party-appointed arbitrators will be held to the same standards as those appointed as neutrals is clearly based on the statutes. The resolution of this actual prejudice conflict, however, appears to rely less on statutory interpretation than individual analysis on a case-by-case basis.⁷⁰

65. *International Ins. Co. v. Schrage*, 593 So. 2d 1196, 1197 (Fla. Dist. Ct. App. 1992).

66. *Id.* at 1196 (Citing *Gaines Construction Co. v. Coral City Utilities, Inc.*, 164 So.2d 270, 272 (Fla. 3d DEA 1964)). See also *Pirsig v. Pleasant Mound Mut. Fire Ins. Co.* 512 N.W.2d 342, 343 (Minn. Ct. App. 1994) ("The party challenging the award on the grounds that 'there was evident partiality by the neutral arbitrator' must establish facts that create a reasonable impression of partiality.").

67. *Aetna Casualty & Sur. Co. v. Grabbert*, 590 A.2d 88, 93 (R.I. 1991). See also *Betz v. Pankow*, 38 Cal. Rptr. 2d 107, 110 (Cal. Ct. App. 1995) ("An award must be vacated if. . . the rights of a party were substantially prejudiced by the misconduct or bias of a neutral arbitrator."); *Hill v. Cloud*, 648 So. 2d 1383, 1388 (La. Ct. App. 1995) ("To constitute evident partiality, it must clearly appear that the arbitrator was biased, prejudiced, or personally interested in the dispute." (citing *Firmin v. Garber*, 353 So. 2d 975 (La. 1977); *National Tea Co. v. Richmond*, 548 So. 2d 930 (La. 1989)); *Herrin v. Milton M. Stewart, Inc.*, 558 So. 2d 863, 865 (Miss. 1990) ("To vacate an award on the grounds of 'evident partiality,' a reviewing court must find some personal interest on the part of the arbitrator.").

68. See *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993); *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992); *Lancaster v. West*, 891 S.W.2d 357, 361 (Ark. 1995); *John E. Reid and Assocs., Inc. v. Wicklander-Zulawski and Assocs.*, 627 N.E.2d 348, 353 (Ill. App. Ct. 1993), *cert. denied*, 633 N.E.2d 5 (Ill. 1994); *Gordon Sel-Way, Inc. v. Spence Bros., Inc.*, 440 N.W.2d 907, 910 (Mich. Ct. App. 1989).

69. See, e.g., *John E. Reid*, 627 N.E.2d at 348 (referring both to the Rules of the AAA, the Code of Ethics for Arbitrators and case law from other jurisdictions).

70. *Beck Suppliers, Inc. v. Dean Witter Reynolds, Inc.*, 558 N.E.2d 1187, 1192 (Ohio Ct. App. 1988).

The issue of vacation of arbitration awards for evident partiality of an arbitrator is therefore a fact-intensive inquiry. While a precise set of facts which will lead to vacation of an arbitration award has proven elusive, a number of factual situations can be pinpointed in which bias has been found to exist.⁷¹

Many jurisdictions restrict vacation of awards to situations where the arbitrator either had an interest in the outcome of the arbitration or had a relationship with one of the parties.⁷² Often arbitrators are required to disclose facts tending to show such an interest or relationship.⁷³ Failure to disclose such facts can become a persuasive, though not controlling, factor in a court's consideration of a vacation request.⁷⁴

Seeking clearly defined guidelines for arbitrator conduct, federal courts have floundered in the wake of *Commonwealth Coatings Corp. v. Continental Casualty Co.*⁷⁵ *Commonwealth* is the only Supreme Court decision addressing the issue of arbitrator vacating, where a majority of the court was able to agree only on the result. Justice Black's opinion defines a very strict ethical standard for arbitrators, which is comparable to the ethical standard for judges.⁷⁶ Justice White's concurring opinion, however, insisted that the Court did not decide "that arbitrators are to be held to the standards of judicial decorum of Article III judges."⁷⁷ Because Justice White's vote was essential for a majority, most federal courts have considered his opinion as the more authoritative.⁷⁸ Justice White, though, does not expressly define the standard that should govern arbitrator conduct. His opinion only makes it clear that arbitrators are required to disclose business relationships with a party and that arbitrators will be governed by a standard less than the standard governing judges.⁷⁹ With these minimal guidelines for guidance, the lower courts must outline the complete standard on their own.⁸⁰

71. Karon, *supra* note 47, at 327-32. These situations include a prior or current business or personal relationship of the arbitrator with a party, financial interest of the arbitrator in the dispute's resolution, and conduct of the arbitrator advocating one of the parties. *Id.*

72. *See, e.g., Cellular Radio Corp. v. OKI Am., Inc.*, 664 A.2d 357, 360 (D.C. 1995); *Foley Co. v. Grindsted Prods., Inc.*, 662 P.2d 1254, 1259 (Kan. 1983); *Herrin*, 558 So. 2d at 865.

73. The AAA Rules for commercial arbitration require disclosure of "any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias." COMMERCIAL ARBITRATION RULES Rule 1.

74. 4 AM. JUR. POF 2d § 2 (1975).

75. 393 U.S. 145 (1968).

76. *Id.* at 148-49.

77. *Id.* at 150.

78. *See, e.g., International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551 (2d Cir. 1981); *United States Wrestling Fed'n v. Wrestling Div. of AAU, Inc.*, 605 F.2d 313, 319 (7th Cir. 1979); *Toyota of Berkeley v. Auto. Salesmen's Union, Local 1095, United Food & Commercial Workers Union*, 834 F.2d 751, 755 (9th Cir. 1987), *cert. denied*, 486 U.S. 1043 (1987); *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982), *cert. denied*, 459 U.S. 838 (1982).

79. *Commonwealth*, 393 U.S. at 150-51.

80. *See Id.*

IV. INSTANT DECISION

In *Lifecare*, the Eleventh Circuit Court of Appeals began its analysis by determining that the FAA strictly limits the proper scope of judicial review of arbitration awards.⁸¹ The court observed that only one of the four possible grounds for vacating an arbitration award provided by the FAA applied to the instant dispute: 9 U.S.C. § 10(a)(2), which allows vacation of the award "[w]here there is evident partiality or corruption in the arbitrators, or either of them."⁸²

Setting the groundwork for its analysis of "evident partiality" in this case, the court stated that the complaining party must prove that the facts undisclosed by Arbitrator Stein create a "reasonable impression of partiality."⁸³ The court noted that there is a "reasonable impression of partiality" when the partiality is "direct, definite and capable of demonstration rather than remote, uncertain and speculative."⁸⁴ Based on this proviso, the court concluded that the "mere appearance of bias" would not be sufficient to vacate the award.⁸⁵

To determine if there is a "reasonable impression of partiality," the court first considered CD Medical's argument that the undisclosed scheduling dispute with a White & Case attorney created a reasonable impression of partiality.⁸⁶ The court concluded that since it occurred more than eighteen months prior to the arbitration hearing and since it did not involve a party, but an attorney of the same firm representing a party, the scheduling dispute was insufficient to create a reasonable impression of partiality.⁸⁷ Although the court believed the disagreement should have been disclosed, the court felt the event should be considered "in perspective."⁸⁸ In light of real world attorney behavior, the court determined that such disputes occur "all the time."⁸⁹

After the court defined the reasoning process necessary to reach the conclusion advocated by CD Medical, the court decided that this line of reasoning placed Arbitrator Stein's partiality in the realm of "remote, uncertain, and speculative" as opposed to "direct, definite, and capable of demonstration."⁹⁰

81. *Lifecare Int'l*, 68 F.3d at 433 (citing 9 U.S.C. §§ 1-16).

82. *Id.* (citing 9 U.S.C. § 10(a)(2)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 434.

87. *Id.*

88. *Id.*

89. *Id.* The court noted that the dispute between Arbitrator Stein and the White & Case attorney may have been "more than typical." *Id.* The court was unmoved, however, saying that "we cannot conclude that Stein's failure to disclose the incident created a reasonable impression of impartiality." *Id.*

90. *Id.* The court stated that CD Medical's claim required the court "to conclude that because Arbitrator Stein was involved in a dispute with an attorney: (1) whatever animosity or anger he harbored toward that attorney remained 18 months later; (2) the animosity was transferred to the entire firm; and (3) the animosity was ultimately transferred to the White & Case client, CD Medical." *Id.*

Therefore, the court determined that such an incident did not rise to the level of creating a reasonable impression of partiality.⁹¹ In support of this conclusion, the court cited *Int'l Produce, Inc. v. A/S Rosshavet*, a Second Circuit case, stating that an arbitrator's feelings regarding one attorney are not necessarily transferred to other attorneys of the same firm.⁹²

The court of appeals next considered CD Medical's second argument. CD Medical argued that their two contacts with Greenberg, which Stein later joined as "of counsel," "evidence bias" on the part of Stein.⁹³ The court rejected this contention by pointing out that Stein was not affiliated with Greenberg at the time of the contacts and that no evidence was produced to show that he was even aware of the contacts.⁹⁴ The court stressed that its decision did not condone Stein's behavior in neglecting to inquire into Greenberg's prior contacts.⁹⁵ It concluded, however, that CD Medical's second argument of partiality, like the first, was merely speculative "as opposed to bias or partiality that is direct, definite, and capable of demonstration."⁹⁶

Summarizing the issue of "evident partiality," the court observed that because few black letter rules of law governing the question exist, determining whether there is "evident partiality" must be resolved through an indepth inquiry into the facts.⁹⁷ The court also recognized that Arbitrator Stein's nondisclosure violated the AAA's Code of Ethics, but concluded that it could not create a reasonable impression of partiality.⁹⁸

Finally, the court considered CD Medical's claim that the award was arbitrary and capricious.⁹⁹ The court noted the standard set forth by the Eleventh Circuit which allows the vacation of arbitration awards that are arbitrary and capricious if there is no ground in the facts of the case for the arbitrators' decision.¹⁰⁰ The court recognized that this standard is difficult to meet.¹⁰¹ When applying this standard, the court found that because "there clearly exists a ground for the Panel's decision," it could not find the award arbitrary and capricious.¹⁰² The court held that the lower court's confirmation of the arbitration award in Lifecare's favor was not erroneous and affirmed the order.¹⁰³

91. *Id.*

92. *Id.* (citing *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551 n.3 (2d Cir. 1981)).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 434-35.

97. *Id.* at 435.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 437.

V. COMMENT

A. *Lifecare as a Result of Precedent*

Federal precedent provides a split of authority on ethical standards for arbitrators. Following the separate opinions in of Justices Black and White in *Commonwealth*,¹⁰⁴ the federal circuits have decided cases under conflicting ethical standards.¹⁰⁵ This conflict of authority not only reflects the inevitable conflict between two competing policies, but also overriding both policies is the essential desire of the justice system to achieve the just, speedy, and inexpensive resolution of disputes.

The first policy is that established by Congress. This policy strongly favors the resolution of disputes through arbitration¹⁰⁶ because it provides dispute resolution quicker and cheaper than litigation.¹⁰⁷ The overriding desire for justice, however, produces a policy requiring nearly impeccable ethical standards of the decision-maker.¹⁰⁸ Such high standards can require disqualification of decision-makers and vacation of decisions, thereby slowing down the process and increasing the expense of the dispute resolution process.¹⁰⁹

Lifecare's "reasonable impression of partiality" reflects a middle ground between these two policies.¹¹⁰ While the approach does not require actual prejudice, it does insist that any appearance of partiality be "reasonable" in order to vacate an arbitration award.¹¹¹

B. *Lifecare in Action*

The most commonly cited justification for a lower ethical standard for arbitrators than that required for judges is the voluntary nature of commercial arbitration.¹¹² Courts and commentators alike rely on the idea that parties are

104. See *supra* notes 75-79 and accompanying text.

105. See, e.g., *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983) (requiring evidence of actual or probable partiality); *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) (reasonable impression of partiality may exist without actual knowledge by arbitrator of facts creating impression).

106. See *supra* note 45 and accompanying text.

107. *Kanowitz*, *supra* note 41, at 255.

108. See Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 663 (1985).

109. *Id.* at 664.

110. *Lifecare Int'l*, 68 F.3d at 433. This approach has been used by the 4th Circuit as well. See, e.g., *Consolidated Coal Co. v. Local 1643, United Mine Workers*, 48 F.3d 125 (4th Cir. 1995). The Fourth Circuit noted that the "reasonable person standard requires a showing of something more than the 'appearance of bias,' but not the 'insurmountable' standard of 'proof of actual bias.'" *Id.* at 129 (quoting *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)).

111. *Lifecare Int'l*, 68 F.3d at 433.

112. See *Merit Ins. Co.*, 714 F.2d at 679.

not forced to arbitrate, but rather consent by contract to arbitrate disputes.¹¹³ Often the parties consent to arbitration to obtain a decision-making body with expertise in their field.¹¹⁴ Many businessmen desire such a forum so that their dispute may be considered within the context of their own commercial environment.¹¹⁵

In contrast, courts, as "coercive . . . agencies," have been led by the American fear of government oppression to emphasize impartiality over expertise.¹¹⁶ In other words, the lesser ethical standard for arbitrators is seen as the result of a tradeoff between impartiality and expertise, which parties choose when they feel it is to their benefit.¹¹⁷

This reasoning fails in two significant respects. First, while expertise in the field of the parties may be beneficial to a just resolution of their dispute, impartiality need not be sacrificed to achieve this benefit. While one or more of the arbitrators may indeed be more likely than a judge to have heard of or met the parties, it does not necessarily follow that they should not be able to maintain a professional sense of impartiality. Mere acquaintance with a party does not equal bias. Where the relationship is stronger, disclosure is required and other arbitrators should be available.

Secondly, when the parties contract to arbitrate disputes, they are not consenting to the resolution of their disputes by a partial tribunal. It is not unreasonable for parties to expect the same standard of impartiality as that which inheres in a courtroom since arbitration binds them as strictly as any court decision. Also, the Due Process Clause has been interpreted to require a "neutral and detached judge."¹¹⁸ Why then does the Constitution not require the impartiality of a tribunal whenever the tribunal's decision is supported by a court and given the same force of law? By agreeing to arbitration, parties do not usually intend to exchange justice for speed. Rather, they seek both.

Arbitrators enjoy great discretion in their decision-making because they are not required to publish their decisions and reasoning.¹¹⁹ By not having to publish their decisions, arbitrators not only remain unrestrained by substantive law and procedural rules, but any impartiality on their part becomes evasive.¹²⁰ With no record on which to review the proceeding, any impropriety is nearly impossible to discover, and arbitration awards are often effectively unreviewable. Therefore, arbitration awards are even more binding than a court's decision, which is clearly reviewable by a higher court.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. See *supra* note 55 and accompanying text.

119. Kennedy, *supra* note 38, at 764-68.

120. *Id.*

While many states have followed the "reasonable impression" standard or more lenient standards,¹²¹ a few states have imposed stricter interpretations of "evident partiality." Several states insist that arbitrators must not only be unbiased, but must not even appear to be biased.¹²² The strictest standard adopted by a court, for instance, appears in Florida. In *International Ins. Co. v. Schrager*,¹²³ Florida's Fourth District Court of Appeals stated that "[a]n arbitrator is required to be no less impartial than a juror sitting in the trial of a cause. If he fails in this his usefulness as an arbitrator is destroyed."¹²⁴

With the dangers of impartiality inherent in the record-less arbitration system, the safeguard of judicial review for any appearance of bias should be protected. The compromise offered by the Eleventh Circuit Court of Appeals in *Lifecare*, however, compromises the integrity of the arbitration process. In *Lifecare*, the parties who contract to arbitrate future disputes are seen as handing over their right to be heard by a "neutral and detached" tribunal. This seldom is their intent, however. The compromise being settled on by federal courts such as the Eleventh Circuit condones injustice in a court-supported system.

Developing from a forum commonly relied on for both federal and state precedent, this compromise sets a dangerous example. Laws requiring an impartial tribunal serve an even broader function than justly resolving the dispute at hand. Such laws serve to maintain public confidence in the judicial system.¹²⁵ Arbitration proceedings are inevitably viewed as part of that judicial system. In order to encourage parties to settle disputes through arbitration and to accomplish the goals of lowering crowded court dockets and speeding up the dispute resolution process, confidence in the system must be nurtured. A standard of partiality below that required of judges, however, only serves to deter parties from seeking to resolve disputes through arbitration because the parties will lack confidence in the impartiality, and, therefore, the fairness of the arbitration process.

121. See, e.g., *Giraldi By and Through Giraldi v. Morrell*, 892 P.2d 422 (Colo. Ct. App. 1994) (requiring strict interpretation of "evident partiality as meaning 'clear...obvious, manifest...')"; *DeBaker v. Shah*, 533 N.W.2d 464, 468 (Wis. 1995) ("'[E]vident partiality' exists only when a *reasonable person* knowing the previously undisclosed information would have had 'such doubts' regarding the impartiality of the arbitrator that the person would have taken action on the information." (italics original)).

122. See, e.g., *Betz v. Pankow*, 31 Cal. App. 4th 1503, 1508 (1995); *Gordon Sel-Way, Inc. v. Spence Brothers, Inc.*, 440 N.W.2d 907, 909 (Mich. Ct. App. 1989), *rev'd on other grounds*, 475 N.W.2d 704 (Mich. 1991) (citing *Albion Public Schools v. Albion Educ. Ass'n*, 344 N.W.2d 55 (1983)); *Pirsig v. Pleasant Mound Mutual Fire Ins. Co.*, 512 N.W.2d 342, 344 (Minn. Ct. App. 1994).

123. 593 So. 2d 1196 (Fla. Dist. Ct. App. 1992).

124. *Id.* at 1196 (citing *Gaines Construction Co. v. Carol City Utilities, Inc.*, 164 So. 2d 270, 272 (Fla. 3d DCA 1964)).

125. Bloom, *supra* note 108, at 663.

VI. CONCLUSION

Judicial deference and Congressional policy provide arbitration awards having the force of law. Respect for justice, however, has not attended this force. In dealing with arbitration proceedings, courts have struggled to reconcile competing policies of justice and efficiency. Failing to do so, the courts have compromised justice in the interest of efficiency. Rather than disrupt some of the efficiency benefits of arbitration, courts have preferred to affirm awards granted by potentially biased arbitrators. This compromise promises eventual dissatisfaction with the arbitration process on behalf of the public. Unhappy with unjust results, the public may refuse to arbitrate agreements and cause all the efficiency benefits of the process to be lost.

Justice need not be abandoned in order to achieve efficiency. Surely arbitrators can safely be encouraged to act impartially without losing the benefits of speed, reduced expense, and expertise. In some cases, the delays will still remain less lengthy than those involved in the court system.

Where the causes of justice and efficiency conflict, the judicial system cannot choose efficiency over justice, or it risks offending an already alienated public.

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