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Institutional Guidelines for Arbitrator Disclosure v. Evident Partiality

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Arbitral institutions strive to provide the parties they serve with a fair and impartial dispute resolution process that results in an unassailable final award. Since "evident partiality" in the arbitrators is one of the limited means to attack an award, the selection of unbiased arbitrators is fundamental to that goal, and most arbitral institutions have some requirement or guidance arbitrator disclosures. Recently, the International Chamber of Commerce's International Court of Arbitration (the "ICC") produced issued guidelines outlining circumstances arbitrators should consider in making disclosures.

While disclosure requirements manifest the intent to provide a fair and impartial process, they are of little use to a party that finds itself in that rare circumstance where an award has been entered and it is believed that there is "evident partiality". Institutional guidelines do not alter the U.S. Federal Arbitration Act's ("FAA")[i] test for "evident partiality."

The test for "evident partiality" is elusive and disputed, which may explain why some arbitral institutions have felt the need to develop detailed disclosure guidelines. The disunity regarding "evident partiality" is rooted in *Commonwealth Coatings Corp. v. Continental Casualty Co.*[ii] The Court's opinion was delivered by Justice Black with three justices dissenting. Justice White (joined by Justice Marshall) concurred stating he was "glad to join my Brother Black's opinion" but desired "to make . . . additional comments."[iii] Reconciling Justice Black and Justice White's opinions, however, has proven difficult. Indeed, courts even disagree on whether Justice Black wrote for a majority or a plurality of the Court.[iv]

In Justice Black's view arbitrators "must avoid even the appearance of bias.[v] Justice White wrote that 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."[vi] The contrast between the two opinions is drawn in sharpest focus when considering their respective analogies to judicial ethics. Justice Black wrote that since judicial disqualification "is a constitutional principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of 'evident partiality' or the use of 'undue means.'"[vii] For his part, Justice White started his concurrence stating "[t]he 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."[viii] Considering the stark contrast between Justice Black and Justice White's opinions, it is no wonder that U.S. courts have struggled with the "evident partiality" standard.

Keen to insulate arbitral awards from "evident partiality," arbitral institutions have fashioned their own disclosure requirements. The current version of The Code of Ethics for Arbitrators in Commercial Disputes[ix] (the "Code") sets forth "generally accepted standards for ethical conduct for the guidance of arbitrators and parties in commercial disputes."[x] Canon II of the Code requires arbitrators to 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 relationship which might reasonably affect impartiality or lack of independence in the eyes of any of the parties;
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.[xi]

However, by its own terms, the Code "does not establish new or additional grounds for judicial review of arbitration awards."[xii]

For its part, The ICC recently issued its "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration"[xiii] (the "Note"). The Note calls on arbitrators to assess what circumstance, if any, might call into question his or her independence or give rise to reasonable doubts as to his or her impartiality paying attention to:

- whether the arbitrator or prospective arbitrator or his or her law firm:
  - has represented one of the parties or one of its affiliates,
  - acts or has acted against one of the parties or one of its affiliates,
  - has a business relationship with one of the parties or one of its affiliates,
  - has a personal interest of any nature in the outcome of the dispute,
  - acts or has acted for one of the parties its affiliates as director, board member, officer or otherwise, and
  - is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality,
- whether the arbitrator or prospective arbitrator:
  - has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm,
  - acts or has acted as arbitrator in a case involving one of the parities or one of its affiliates,
  - acts or has acted as arbitrator in a related case, and
  - has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm.[xiv]

Significant effort has gone into development of these guidelines, but in a post-award environment they are of little use. The fact that an arbitral institution goes beyond the statutory standards in drafting its own code of ethics does not lower the threshold for judicial intervention.[xv]

As explained by the Seventh Circuit in *Merit Ins. Co. v. Leatherby Ins. Co.*:

> [e]ven if the failure to disclose was a material violation of the ethical standards applicable to arbitration proceedings, it does not follow that the arbitration award may be nullified judicially. Although we have great respect for the Commercial Arbitration Rules and the Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award's validity under section 10 of the United States Arbitration Act . . . The arbitration rules and code do not have the force of law.[xvi]

Relying on *Merit Ins. Co. v. Leatherby Inc. Co.*, the Fourth Circuit likewise found arbitral rules have no role in determining "evident partiality".[xvii] The Second[xviii] and Eighth Circuits[xix] have likewise determined that institutional guidelines do not alter the standard by which courts judged arbitral awards. The *en banc* Fifth Circuit was succinct when considering the issue: "Whether [the arbitrator's] nondisclosure ran afoul of the AAA rules, however, is not before us and plays no role in applying the federal standard embodied in the FAA."[xx]

Against this tide of respectful disregard for institutional guidelines is the Ninth Circuit which allows some reliance on arbitral rules to augment the analysis of "evident partiality". In the Ninth Circuit, an arbitrator's lack of knowledge of the presence of a conflict does not excuse non-disclosure "where the arbitrator had a duty to investigate."[xxi] While there is no general duty for an arbitrator to investigate for conflicts,[xxii] the Ninth

Circuit has found a duty in certain institutional rules, and has relied on those rules to augment its analysis of "evident partiality."

In *Schmitz v. Zilveti* and again in *New Regency Productions v. Nippon Herald Films* the Ninth Circuit considered an arbitrator's duty to investigate potential conflicts. *Schmitz* reasoned that an "arbitrator may have a duty to investigate independent of its *Commonwealth Coatings* duty to disclose. A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality under *Commonwealth Coatings*."[xxiii] *Schmitz* relied on the NASD rules and *New Regency* American Film Marketing Association rules as imposing such a duty. *Schmitz* found that the arbitrator's failure to fulfill that duty in conjunction with the lawyer arbitrator's constructive knowledge of the conflict resulted in a reasonable impression of partiality under *Commonwealth Coatings.*[xxiv]

Whether the Ninth Circuit's use of institutional guidelines as part of its "evident partiality" analysis survives *Hall St. Assoc., L.L.C. v. Mattel, Inc.* is unclear.[xxv]

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[i] 9 U.S.C. § 1 et. seq.
[ii] 393 U.S. 145 (1968).
[iii] *Commonwealth Coatings Corp.*, 393 U.S. at 150 (White, J. concurring).
[iv] *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) ("*Commonwealth Coatings* is not a plurality"); *ANR Coal Co., Inc. v. Cogentrix of North Carolina*, 173 F.3d 493 n.3 (4th Cir. 1999) ("Because the vote of either Justice White or Justice Marshall was necessary to create a majority, courts have given this concurrence particular weight."); *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281-282 (5th Cir. 2007) (*Commonwealth Coatings* is a "plurality-plus" decision with the concurrence being the Court's "effective *ratio decidendi*)"; *Applied Indus. Materials Corp. v. Ovalar Makino Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 136-137 (2nd Cir. 2007) (Justice Black wrote for "a plurality" of a "fractured Court" and "did not speak for a majority of the Court").
[v] *Commonwealth Coatings Corp.*, 393 U.S. at 150.
[vi] *Commonwealth Coatings Corp.*, 393 U.S. at 150 (White, J. concurring).
[vii] *Commonwealth Coatings Corp.*, 3393 U.S. at 148.
[viii] *Commonwealth Coatings Corp.*, 393 U.S. at 150 (White, J. concurring).
[ix] American Arbitration Association and America Bar Association Task Force, "The Code of Ethics for Arbitrators in Commercial Disputes" (Mar. 1, 2004).
[x] Code, Preamble.
[xi] Code, Canon II (A)(1)-(4).
[xii] Code, Notes of Construction.
[xiii] International Court of Arbitration of the International Chamber of Commerce's "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration" (July 13, 2106).
[xiv] Note, art. (III)(A)(20).
[xv] *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983), *mandate amended* 728 F.3d 943 (7th Cir. 1984).
[xvi] *Merit Inc. Co.*, 714 F.2d at 680-81.
[xvii] *ANR Coal Co.*, 173 F.3d at 499.
[xviii] *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 76-77 (2nd Cir. 2012) (we do not think it appropriate to vacate an award solely because an arbitrator fails to consistently live up to his or her announced standards for disclosure).
[xix] *Montez v. Prudential Securities*, 260 F.3d 980, 984 (8th Cir. 2001) (a federal court cannot vacate an arbitration award based on a failure to disclose merely because an arbitrator failed to comply with NASD rules.); compare *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 160 (8th Cir. 1995) ("Our view is especially fair because it realizes the terms of the parties' arbitration agreement in this case. Section 23 of the NASD arbitration rules, which the parties agreed would govern the arbitration proceedings, requires arbitrators to disclose, among other things, any existing or past financial, business, or professional relationships that 'might reasonably create an appearance of partiality or bias'.").
[xx] *Positive Software Solutions v. New Century Mortg.*, 476 F.3d 278, 285 n. 5 (5th Cir. 2007) (en banc).
[xxi] *New Regency Productions, Inc. v. Nippon Herald Films, Inc.,* 501 F.3d 1101, 1107 (9th Cir. 2007).
[xxii] See e.g. *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994); *New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007).

[xxiii] *Schmitz*, 20 F.3d at 1048.
[xxiv] *Schmitz*, 20 F.3d at 1043.
[xxv] *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (textual features of the FAA are at odds with enforcing the parties' agreement to expand judicial review following an arbitration).