Mentimeter

To Disclose or Not to Disclose – That is the Question

ARIAS Spring Conference
Amelia Island, Florida

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May 13, 2022

ARIAS U.S.

Road Map

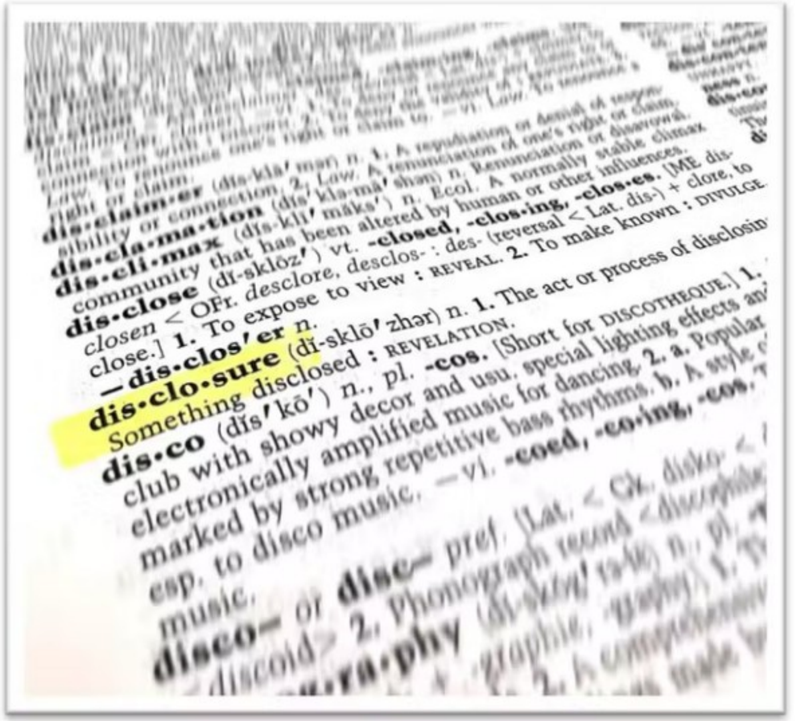

Overview of Disclosure Standards
High-Level Discussion of Selected Arbitrator Disclosure Cases
Practical Tips Tied to Key Disclosure Issues
Audience Participation Segment
Provocative Issues for Future Consideration

Overview of Disclosure Standards

- Narrow grounds for vacating an arbitration award under the Federal Arbitration Act include "evident partiality or corruption in the arbitrators"
  - 9 U.S.C. § 10(a)(2)

- The focus today is on ways to promote the twin goals of disclosure:
  - Ensuring a fair proceeding
  - Informing post-arbitration proceedings

- Related issues that are not our focus today, except tangentially:
  - How do disclosure issues impact the "evident partiality" standard under the FAA?
  - How to distinguish between situations where relationships exist that would require a candidate to refuse to serve and situations where disclosure of relationships must or should be made, following which, the candidate may serve?



Overview of Disclosure Standards -- ARIAS

Issues to Consider:

- Is there a duty to investigate?
  - "diligent effort" to identify information
- Objective Standard
  - "… others could **reasonably** believe would be **likely** to affect the candidate's judgment"

ARIAS•U.S. Code of Conduct – Canon IV **January 1, 2019**

DISCLOSURE: Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

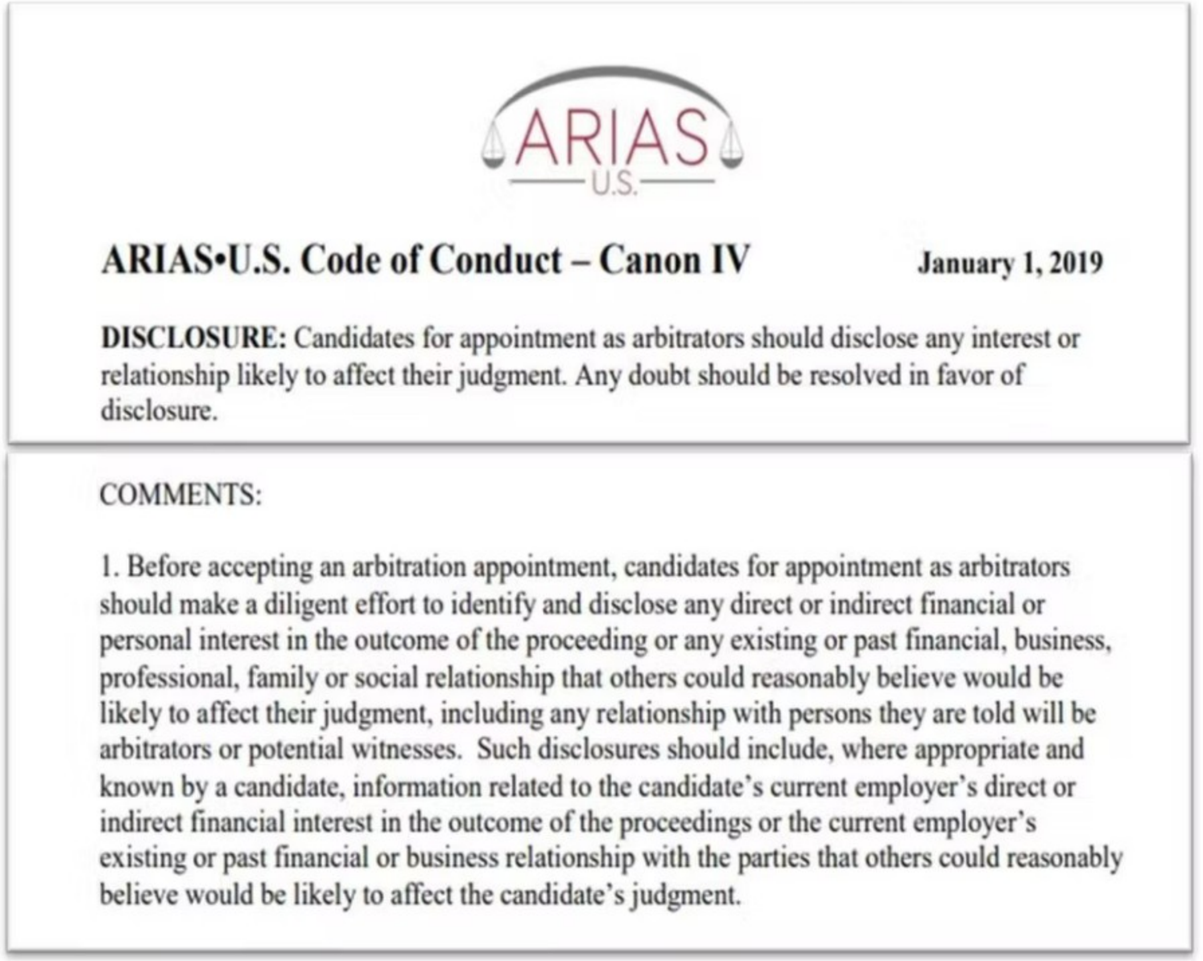
COMMENTS:

1. Before accepting an arbitration appointment, candidates for appointment as arbitrators should make a diligent effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be arbitrators or potential witnesses. Such disclosures should include, where appropriate and known by a candidate, information related to the candidate's current employer's direct or indirect financial interest in the outcome of the proceedings or the current employer's existing or past financial or business relationship with the parties that others could reasonably believe would be likely to affect the candidate's judgment.

Overview of Disclosure Standards -- ARIAS

Scope of Disclosure:

- Direct or indirect financial or personal interests in the outcome of the arbitration
- Candidate's current employer's direct or indirect financial interest in the outcome of the arbitration
- Existing or past financial, business, professional, family, or social relationships
- Relationships with arbitrators, parties, potential witnesses, and third-party administrators/managers



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Overview of Disclosure Standards -- ARIAS

Scope of Disclosure:

- Relevant Positions in Publications or Expert Testimony
- Prior Appointments By Parties, Counsel, or Third-Party Administrators/Managers
- Past or Present Involvement with the Contracts or Claims at Issue

ARIAS•U.S. Code of Conduct – Canon IV **January 1, 2019**

DISCLOSURE: Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

COMMENTS:

2. A candidate for appointment as arbitrator shall also disclose:

a) relevant positions taken in published works or in expert testimony;

b) the extent of previous appointments as an arbitrator by either party, either party's counsel or either party's third party administrator or manager; while it may be true in some circumstances that only the party technically appoints the arbitrator, the purpose of this rule is to require disclosure of the relationships between the candidate and the parties as well as the candidate and either parties' counsel or third party administrator or manager; such relationships that must be disclosed include appointments as an arbitrator where the party's counsel and/or the party's third party administrator or manager acted as counsel or third party administrator or manager for a party making the appointment; and

c) any past or present involvement with the contracts or claims at issue.

Overview of Disclosure Standards -- ARIAS

Restrictions on Disclosure:

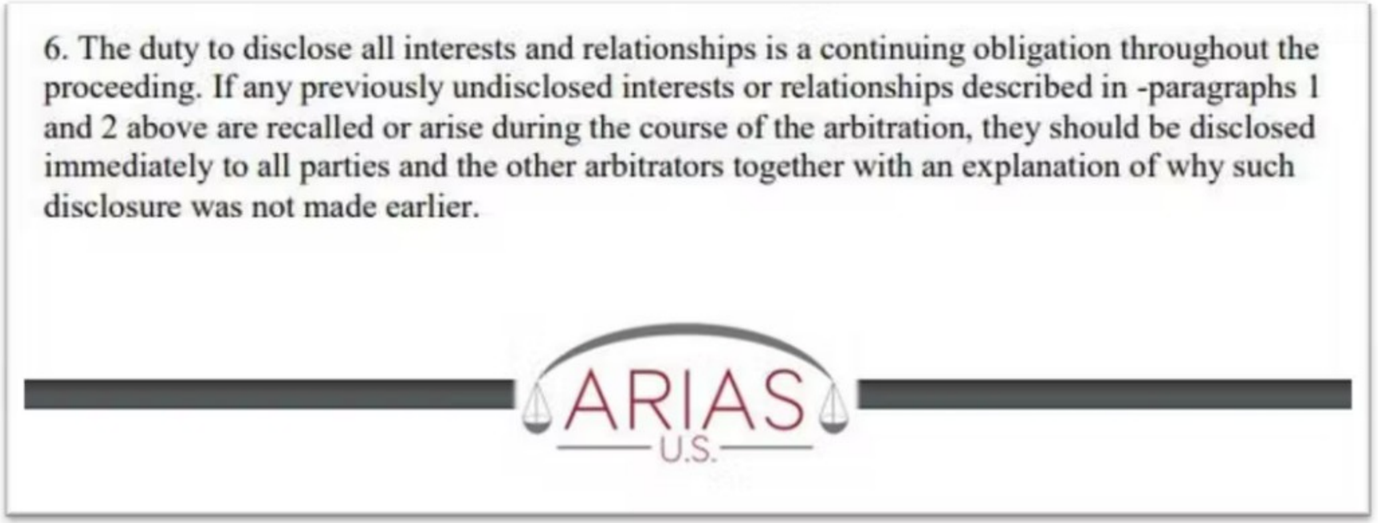
- Conflict with Confidentiality Restrictions

4. It is conceivable that the conflict between the duty to disclose and some other obligation, such as a commitment to keep certain information confidential, may be irreconcilable. When an arbitrator is unable to meet the ethical obligations of disclosure because of other conflicting obligations, the arbitrator should withdraw from participating in the arbitration, or, alternatively, obtain the informed consent of both parties before accepting the assignment.

Overview of Disclosure Standards -- ARIAS

Duty to Update:

- Continuing Duty to Update Disclosures



Overview of Disclosure Standards -- ARIAS

ARIAS Canons I and IV:

- Interplay Between Disclosure Obligations and the Duty to Uphold Integrity of the Arbitration Process

ARIAS•U.S. Code of Conduct – Canon I **January 1, 2019**

INTEGRITY: Arbitrators should uphold the integrity of the arbitration process and conduct the proceedings diligently.

ARIAS•U.S. Code of Conduct – Canon IV **January 1, 2019**

DISCLOSURE: Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

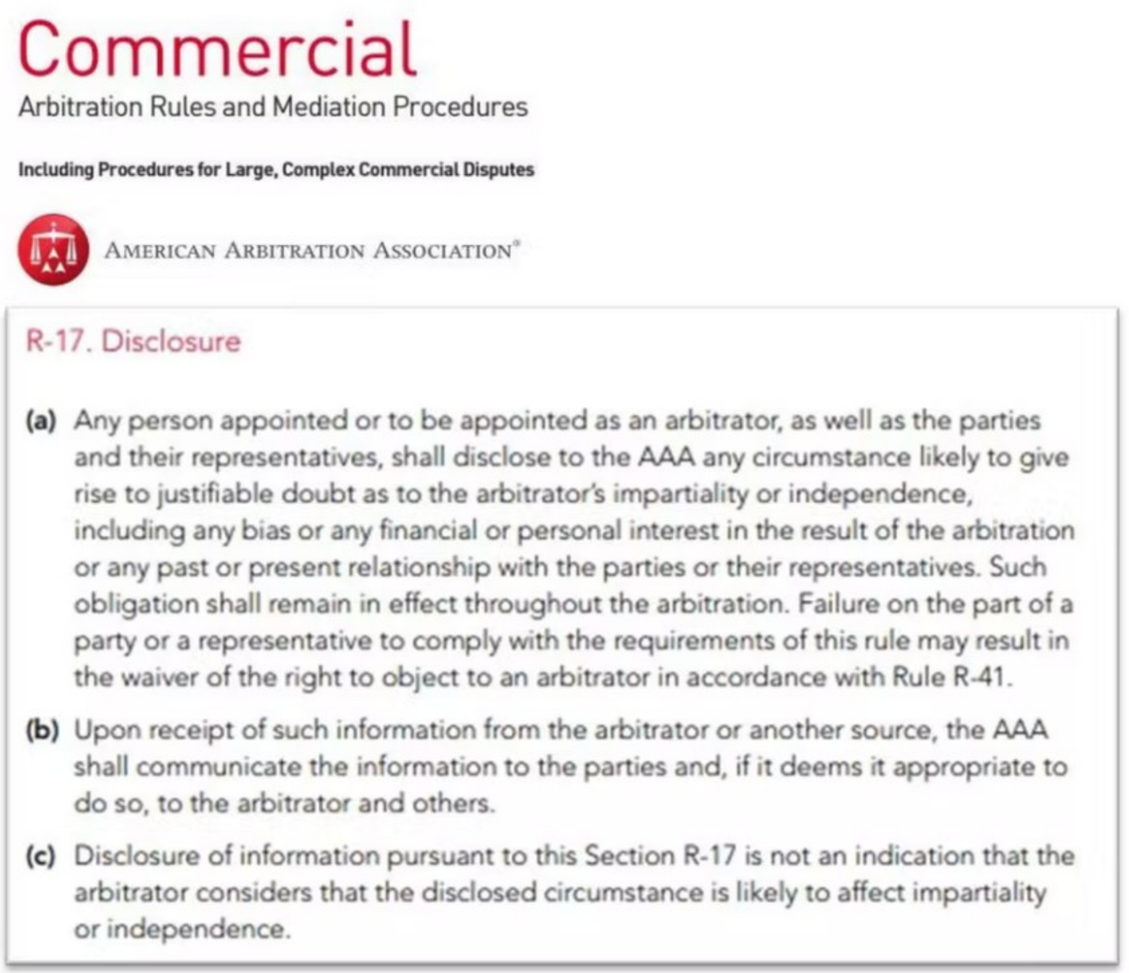
Overview of Disclosure Standards -- AAA

Mandatory Disclosure of "any circumstance **likely** to give rise to justifiable doubt" as to **impartiality or independence**, including:

- Bias
- Financial or personal interest in the outcome
- Past or present relationship with the parties or their representatives

Disclosure obligations extend not only to arbitrators, but also to parties and their representatives

- Waiver of right to object to arbitrator's service



Commercial

Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes

American Arbitration Association®

R-17. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

Overview of Disclosure Standards -- JAMS

- No specific parameters for disclosure
- Disclosures “shall be made as required by law or within ten calendar days of appointment”
- Continuing obligation to update
- If new information becomes available, challenge may be made at any time during the proceeding

(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.

Rule 15

Overview of Disclosure Standards -- NY State Court

Commercial Division – New York County / Manhattan

- Should disclose all "potential conflicts of interest that could reasonably be seen as raising a question about impartiality"
- Should review "past or present professional and other relationships" including relationships with attorneys for parties and parents, subsidiaries, and affiliates of corporate parties
- Should avoid conflicts of interest during and even after the proceeding
- Should decline appointment if conflict of interest "would cast serious doubt on the integrity of the process"

Ethical Standards for Arbitrators & Neutral Evaluators

STANDARD II

CONFLICTS OF INTEREST

An arbitrator or neutral evaluator should decline any appointment if acceptance would create a conflict of interest. An arbitrator or neutral evaluator who determines to accept an appointment should disclose all potential conflicts of interest. After such disclosure, the neutral may accept the appointment if all parties so request. The arbitrator or neutral evaluator should avoid conflicts of interest during and even after the ADR proceeding.

An arbitrator or neutral evaluator offered an appointment in a case should comply with the ADR Rules regarding conflicts of interest. An arbitrator or neutral evaluator should review his/her past or present professional and other relationships, including those with attorneys for parties and parents, subsidiaries, and affiliates of corporate parties, and should decline the appointment if that review reveals the existence of a conflict of interest. An arbitrator or neutral evaluator who contemplates accepting an appointment should disclose to counsel for all parties all potential conflicts of interest that could reasonably be seen as raising a question about impartiality. If in doubt, the neutral should err on the side of disclosure. If all parties agree to accept that arbitrator or evaluator after such disclosure, the neutral may proceed. If, however, the conflict of interest would cast serious doubt on the integrity of the process or the Programs, the neutral should decline the appointment.

An arbitrator or neutral evaluator should avoid conflicts of interest during and even after the ADR proceeding. Before or during the ADR proceeding, the arbitrator or evaluator should not discuss with any party future retention in any capacity.

Overview of Disclosure Standards -- FINRA

- Pre-disclosure notification of nature of dispute and identity of parties
- Duty to investigate through "reasonable effort"
- Duty to disclose circumstances that might preclude arbitrator from rendering an "objective and impartial determination"
- Continuing duty to disclose
- Specific examples of potential conflicts provided in the rules

FINRA

Rules 12405 (Customer Disputes) and 13408 (Industry Disputes)

(a) Before appointing any arbitrators to a panel, the Director will notify the arbitrators of the nature of the dispute and the identity of the parties. Each potential arbitrator must make a reasonable effort to learn of, and must disclose to the Director, any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, including:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances with any party, any party's representative, or anyone who the arbitrator is told may be a witness in the proceeding, that are likely to affect impartiality or might reasonably create an appearance of partiality or bias;

(3) Any such relationship or circumstances involving members of the arbitrator's family or the arbitrator's current employers, partners, or business associates; and

(4) Any existing or past service as a mediator for any of the parties in the case for which the arbitrator has been selected.

Overview of Judicial Precedent on Disclosure Issues

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ROLE OF DISCLOSURE IN PREVENTING A FINDING OF EVIDENT PARTIALITY

Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968)

Justice Black

- Appearance of bias standard
- Arbitrators must disclose any dealings that might "create an impression of possible bias"

Justice White

- Concurring opinion
- "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 … but the relationship is trivial"

- Plurality opinion
- Vacated arbitration award where umpire did not disclose that he had consulted for the respondent on the construction project at issue in the arbitration
- Avoidance of appearance of bias v. disclosure as a cure for evident partiality

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Overview of Judicial Precedent on Disclosure Issues

DUTY TO INVESTIGATE FACTS THAT COULD LEAD TO A FINDING OF EVIDENT PARTIALITY

Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.,
492 F.3d 132 (2d Cir. 2007)

- Award vacated as a result of arbitrator's failure to investigate a known business relationship between a subsidiary of his company and a party to the arbitration
- Disclosure to the parties that the arbitrator had walled himself off from learning more about the relationship did not cure the evident partiality
- Failure to disclose a **material relationship** constitutes evident partiality as does a failure to investigate when an arbitrator has **reason to believe a nontrivial conflict of interest** might exist
- Measured by an objective test

Overview of Judicial Precedent on Disclosure Issues

SCOPE OF DISCLOSURES MAY BE IMPACTED IF ARBITRATION CONCERNS SPECIALIZED FIELDS

Ario v. Cologne Reins. (Barbados), Ltd., 2009 U.S. Dist. LEXIS 106133 (M.D. Pa. 2009)

- Concurrent and overlapping service on multiple reinsurance arbitration panels does not constitute evident partiality
- "Reinsurance is a field sufficiently specialized that those with expertise can be expected to serve on multiple panels"
- Vacatur not appropriate even though subsequent appointments were not disclosed until after interim award was issued

Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640 (6th Cir. 2005)

- Rejected reinsurer's argument that non-disclosure in and of itself warrants vacatur
- As applied to party-appointed arbitrators, evident partiality must be measured against an objective standard
- Would a reasonable person conclude that the arbitrator was partial to one party?

Overview of Judicial Precedent on Disclosure Issues

PARTIAL DISCLOSURES MAY BE INADEQUATE

Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (9th Cir. 2019)

- Arbitration involving Monster Beverage's termination of exclusive distribution territory agreement conducted by JAMS arbitration
- Award in favor of Monster vacated
- Despite disclosure of arbitrator's "economic interest" in JAMS, arbitrator did not disclose that he had an "ownership interest"
- Arbitrator also failed to disclose "substantial business relationship with Monster" arising out of 97 JAMS arbitrations involving Monster over the last five years
- Undisclosed facts "create an impression of bias" which justifies vacatur

Overview of Judicial Precedent on Disclosure Issues

TIMING AND REMOTENESS MAY IMPACT SCOPE OF DISCLOSURES

Certain Underwriters v. Florida, 892 F.3d 501 (2nd Cir. 2018)

- Vacating reinsurance arbitration award because party-appointed arbitrator failed to disclose ongoing, material connection to appointing party
- Undisclosed facts included:
  - Shared office space with party
  - Former officer of party provided consulting services to party-appointed's company
  - Party-appointed's company hired a former employee of the party just after organizational meeting; that individual testified at the hearing

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

- Vacatur not warranted where reinsurer's party-appointed arbitrator did not initially (or fully) disclose that he acted as counsel for its parent in an unrelated reinsurance arbitration that concluded four years before
- Recognized that close relationships in the reinsurance community are the norm and parties to arbitration clauses "may think the expertise-impartiality tradeoff worthwhile" when it comes to party-appointed panelists

Transit Cas. Co. v. Trenwick Reins. Co., 659 F. Supp. 1346 (S.D.N.Y. 1987)

- Refused to find fault in umpire's failure to disclose small stock investment in a company that held a minor equity interest in the reinsurer that prevailed in arbitration

Overview of Judicial Precedent on Disclosure Issues

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UK COURTS ARE ARGUABLY MORE LENIENT ON ARBITRATOR NON-DISCLOSURES

Halliburton v. Chubb [2020] UKSC 48

- Well-known QC served as third arbitrator in arbitration under Bermuda Form policy involving Deepwater Horizon rig explosion
- Insured sought removal of arbitrator based entirely on alleged "appearance of bias" because:
  - Accepted party-appointment from the insurer in two other Deepwater Horizon arbitrations after the Halliburton arbitration began but did not disclose those appointments to Halliburton because "it had not occurred to him" that outside counsel and in-house claims representative were the same in all of the arbitrations
  - Had disclosed the Halliburton appointments in subsequent arbitrations

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Overview of Judicial Precedent on Disclosure Issues

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UK COURTS ARE ARGUABLY MORE LENIENT ON ARBITRATOR NON-DISCLOSURES

Halliburton v. Chubb [2020] UKSC 48 (Cont'd)

- UK Supreme Court held
  - Duty to disclose is a statutory obligation
  - Multiple appointments must be disclosed at a high-level even if they are confidential
  - Duty extends to facts that would cause a "**fair-minded** and **informed observer** to conclude that there was a **real possibility** that the arbitrator was **biased**"
- Failure to disclose overlapping appointments was a breach of the legal duty of disclosure
- Yet, no grounds existed to overturn award in the insurer's favor because:
  - Legal standards for disclosures had been unclear
  - Timing of the proceedings explained why disclosure in subsequent arbitrations was more appropriate
  - Subsequent arbitrations were resolved on the basis of preliminary points not at issue in the Halliburton arbitration
  - Arbitrator responded "in a courteous, temperate and fair way" in the face of a "grossly offensive" challenge by the insured

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Do Disclosure Obligations Differ by Panelist Capacity?

- On one hand:
  - Courts typically acknowledge that party-appointeds may come to an arbitration with predisposition
    - *Instituto de Resseguros do Brasil v. First State Ins. Co.*, 577 N.Y.S. 2d 287 (1st Dept. 1991) (a party-appointed arbitrator is "not expected to be neutral in the same sense as a judge or arbitral umpire")
  - Umpires generally viewed to be neutral
- On the other hand:
  - Does that impact the scope of disclosures or is it more an issue when evaluating what is disclosed?

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Key Disclosure Issues

- Continuing Obligation to Update Disclosures
- Impact of Contractual Qualification Provisions
- Scope
- Timing
- Mandatory Disclosures v. Best Practices
- Differing Disclosure Obligations for Umpires and Party Arbitrators
- ARIAS Umpire Questionnaire Forms

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Hypothetical #1

ARIAS Arbitrator Claire B. Impartial is asked to complete an umpire questionnaire in a new arbitration. The subject matter of the arbitration is whether there is reinsurance coverage for ice dam claims paid by the cedent/claimant. The questionnaire, per the ARIAS form, asks whether Claire has had any prior involvement in an insurance or reinsurance transaction or dispute involving any of the specific claims, policies and/or reinsurance contracts at issue in the matter. Claire has no previous involvement with the claims or contracts at issue. She was, however, umpire in two prior arbitrations based on ice dam claims involving different winter storms, different parties, and different counsel. Does she need to disclose these in her responses on the questionnaire?

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Hypothetical #1, Audience Input

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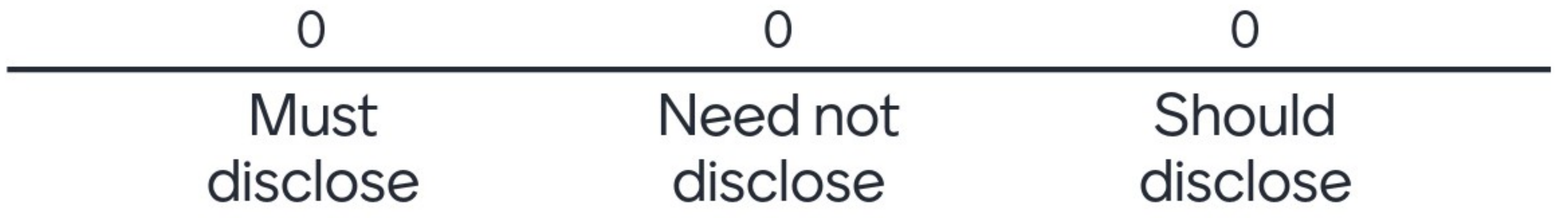

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Hypothetical #2

Umpire candidate Will Rulforu is asked to fill out an umpire questionnaire in a direct insurance arbitration where the issue is whether the Covid-19 pandemic triggers Business Interruption coverage under a property policy. Will is currently the head of claims for a reinsurer that has received two precautionary notices from insurers concerning claims of a similar nature. None of the notices involve the insured or the insurer that are the parties here. Does Will need to disclose these other involvements?

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Hypothetical #2, Audience Input

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Hypothetical #3

Umpire candidate U.R. Theone is completing an umpire questionnaire which asks "within the past 5 years do you have any business, professional, or social relationships with any of the arbitrators, employees, directors, counsel, and/or their respective law firms not otherwise disclosed. . ." Nine years ago, Ms. Theone attended the bat mitzvah of the only child of one of the lawyers for the firm representing the respondent in the arbitration. This occurred at a time when that lawyer performed a lot of work for the company and Ms. Theone was in-house counsel. Ms. Theone left the company seven years ago and she has grown apart from the lawyer. They only see each other at ARIAS Conferences and have no other contact. Does Ms. Theone need to disclose anything?

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Hypothetical 3, Audience Input

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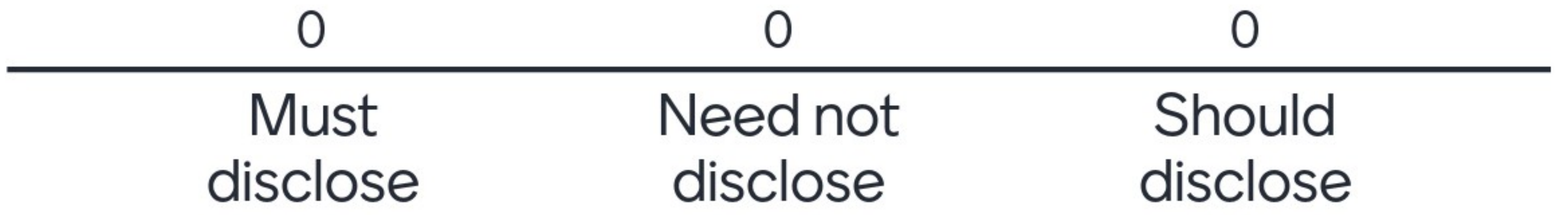

Issues for Future Consideration by ARIAS

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- Who should set parameters for disclosure?
  - Parties
  - Counsel
  - Arbitrator/Umpire Candidates
- How far back should disclosures reach?
- Do “standard” hold harmless/indemnification agreements apply in the face of alleged breaches of duty to disclose or confidentiality?
- How should we address social media connections?
- Should financial interest disclosures be extended to expressly cover retirement payments, passive investments, or similar financial benefits?


ANY
QUESTIONS

Appendices

- Susan E. Mack, *How Much Disclosure is Enough?*, ARIAS U.S. Quarterly (Q2, 2021)
  - Available at https://www.arias-us.org/publications/quarterly-archives/
- Federal Arbitration Act
  - 9 U.S.C. § 10
- ARIAS Canons I and IV
  - Available at https://www.arias-us.org/arias-us-dispute-resolution-process/code-of-conduct
- American Arbitration Association Rule 17
  - Available at https://www.adr.org/sites/default/files/CommercialRules_Web-Final.pdf
- JAMS Rule 15
  - Available at https://www.jamsadr.com/rules-comprehensive-arbitration
- New York Commercial Division, Ethical Standards for Arbitrators & Neutral Evaluators
  - Available at http://ww2.nycourts.gov/courts/comdiv/ny/ADR_ethicsforarbitrators.shtml
- FINRA Rules 12405 and 13408
  - Available at https://www.finra.org/rules-guidance/rulebooks/finra-rules

Appendices

- *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968)
- *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F. 3d 132 (2d Cir. 2007)
- *Ario v. Cologne Reins. (Barbados), Ltd.*, 2009 U.S. Dist LEXIS 106133 (M.D. Pa. 2009)
- *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640 (6th Cir. 2005)
- *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130 (9th Cir. 2019)
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- *Transit Cas. Co. v. Trenwick Reins. Co.*, 659 F. Supp. 1346 (S.D.N.Y. 1987)
- *Instituto de Resseguros do Brasil v. First State Ins. Co.*, 577 N.Y.S. 2d 287 (1st Dept. 1991)
- *Halliburton v. Chubb* [2020] UKSC 48

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