ARBITRATOR DISCLOSURE:
STANDARDS AND GROWING CHALLENGES

> "Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion." — Samuel Gompers, American labor leader

A. INTRODUCTION

There is no question that arbitration is here to stay, with major arbitration providers reporting double-digit increases in the number of matters arbitrated year after year. However, with the increase in matters being arbitrated there has also been an increase in the number of disputes arising out of the conduct of the arbitration, especially disputes regarding whether the arbitrator improperly failed to disclose some fact about himself or his background that would have, or arguably should have, resulted in his disqualification. There are probably several reasons for the increasing number of disclosure disputes.

One of these reasons has been alluded to above: Given the increase in the number of arbitrations, one would expect an increase in the number of disputes relating to the conduct of the arbitral proceeding. Additionally, the nature of arbitration means that disputes over the arbitrator's disqualification are more likely than would be the case in litigation. Courts are the realm of the generalist, with the local judge handling every case filed in his court. In contrast, the arbitration is the realm of the specialist, and one of its primary advantages is that the parties have their dispute heard by a person picked for his expertise and experience. However, because the arbitrator's expertise is usually based on his work in the field, this increases the chances that he will be asked to handle a matter

involving a party or a lawyer he knows or with whom he has worked in the past. Finally, the fact that an arbitrator's award may be reviewed substantively only on narrow grounds may also increase the incentive to try to create a disclosure issue, even where none exists. While a disappointed litigant may have the court's decision reviewed on appeal on many possible grounds, the limited number of grounds on which an arbitrator's decision may be overturned means that a disappointed party to an arbitration has an incentive to try to find some ground to assail the award.[1]

Interestingly, and despite the obvious importance of prearbitration disclosure and disqualification to the integrity of the arbitration process, neither the Federal Arbitration Act nor the original version of the Uniform Arbitration Act (adopted in many states) sets forth any guidelines for prearbitration disclosure, concentrating instead on when an award that has been made can be set aside. James L. Knoll, *Disqualification of Arbitrators: What Does an Arbitrator Need to Disclose?*, 32 Brief 12, 13 (Winter 2003). However, if

[1]An extreme example of this is found in a recent Georgia case. The arbitrator disclosed before the arbitration that his law firm represented subsidiaries of one of the parties in a large number of cases, past and present. *Power Servs. Assoc., Inc. v. UNC Metcalf Servicing, Inc.*, 338 F. Supp. 2d 1375, 1377 (N.D. Ga. 2004). The parties went ahead with the arbitration, and the arbitrator returned an award. *Id.* at 1377-78. Subsequently, the party that lost discovered (through a Google search) that the arbitrator had represented the parent of its opponent in an antitrust suit filed in 1964. *Id.* at 1378. The court found that the arbitrator's failure to disclose this representation from 40 years earlier did not support the invalidation of the award. *Id.* at 1378-81.

arbitration is to remain a fair and equal contest, and not become (as Gompers was worried that it might) a feast for lions, adequate disclosures must be made at the earliest possible time. The purpose of this article is to compare and contrast some of the different regimes governing the disclosure of information by arbitrators used in different jurisdictions.[2]

B. DIFFERENT DISCLOSURE REGIMES

1. The American Arbitration Association

The first disclosure regime we will consider is the one used by the American Arbitration Association ("AAA"), which is, at the same time, the easiest to understand and the most difficult to administer. Under the AAA's ethical rules, an arbitrator is obligated to disclose "any interest or relationship likely to affect impartiality or which may create an appearance of partiality." AAA Code of Ethics for Arbitrators in Commercial Disputes (hereinafter "Code of Ethics"), Canon II. The AAA's matter-specific arbitration rules contain similarly general disclosure provisions. *See, e.g.*, Construction Industry Arbitration Rules, Regular Track Procedures, R-17(a) (arbitrator shall disclose to the AAA "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence"); National Rules for Resolution of Employment Disputes, Rule 11(b) (requiring arbitrator to disclose "all information that

[2] A discussion of the procedural aspects of the disqualification of arbitrators based on contents of their disclosures is generally beyond the scope of this article.

might be relevant to the standards of neutrality").[3] The Code of Ethics provides some guidance about matters that might reasonably be seen to affect the arbitrator's partiality, such as the existence of a financial or personal interest in the litigation, Code of Ethics, Canon II(A)(1), or past dealings between the arbitrator and a party, Code of Ethics, Canon II(A)(2), but the general language means that arbitrators are for the most part left to their own devices in deciding what to disclose, although the Code of Ethics does specify that "[a]ny doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure." Code of Ethics, Canon II(D).[4]

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[3] The AAA has over 50 distinct codes and sets of rules governing different kinds of arbitrations and mediations, all of which have disclosures rules that differ in their particulars. The quoted disclosure rules are representative, and are found in two of the most commonly used sets of arbitration rules.

[4] From personal experience, the author knows that the AAA requires disclosure in ways not specifically called for by any ethical canon or rule. In cases where a particular arbitrator is being considered, he will be sent a Notice of Appointment containing 14 questions intended to elicit the disclosure of information that will have a material effect on the arbitrator's objectivity and impartiality, e.g., question #1, "Do you or your law firm presently represent any person in a proceeding involving any party to the arbitration?" A "yes" answer to any of these questions requires further written explanation. If a response raises serious questions about disqualification, the AAA will disqualify the arbitrator, while more discretionary issues are submitted to the parties.

2. The Revised Uniform Arbitration Act

In addition to not defining the scope of disclosure that is required, the AAA's Code of Ethics does not have the force of law. Code of Ethics, Preamble. To address this problem, and to give a statutory basis for the requirement that certain disclosures be made by an arbitrator before the arbitration begins, the Commissioners on Uniform State Laws have stepped in and, in 2000, enacted the Revised Uniform Arbitration Act (2000) ("RUAA"). The RUAA, which to date has been adopted only by 10 states,[5] provides generally that arbitrators are required to disclose "known facts that a reasonable person would consider likely to affect the impartiality of an arbitrator," including whether the arbitrator has "a financial or personal interest" in the arbitration or if he has an "existing or past relationship" with any of the parties, counsel, witnesses, or other arbitrators. RUAA § 12(a). In many respects, the RUAA's provisions look a lot like the provisions found in the AAA's Code of Ethics, but ultimately, the disclosure requirements of the RUAA are even more vague than are the Code of Ethics' requirements. While the Code of Ethics specifies that arbitrators are to disclose if they have knowledge of the facts of the case and/or any matter that the contract between the parties or the governing rules

[5] Alaska (Alaska Stat.§§ 09.43.300 et seq.), Colorado (Colo. Rev. Stat. Ann. §§ 13-22-201 et seq.), Hawaii (Haw. Rev. Stat. §§ 658A-1 et seq.), Nevada (Nev. Rev. Stat. §§ 8.206 et seq.), New Jersey (N.J. Stat. Ann. §§ 2A:23B-1 et seq.), New Mexico (N.M. Stat. Ann. §§ 44-7A-1 et seq.), North Carolina (N.C. Gen. Stat. §§ 1-569.1 et seq.), North Dakota (N.D. Cent. Code §§ 32-29-3.01 et seq.), Oregon (Or. Rev. Stat. §§ 36.600 et seq.) and Utah (Utah Code Ann. §§ 78-31a-101 et seq.).

require to be disclosed, Code of Ethics, Canon II(A)(3), (A)(4), while the RUAA does not specifically mention either of these things, and so although it has the force of law that presumably can be enforced by a court, it does not provide arbitrators with much in the way of specific guidance regarding what should be disclosed.

3. California

Going in completely the other direction from the AAA and the RUAA is California, which has enacted a series of statutes and rules governing the disclosures that arbitrators are required to make to the parties before an arbitration begins. The California Legislature has evidently decided that more disclosure is preferable to a general rule that boils down to an admonition to "disclose what is relevant," and has enacted legislation that requires arbitrators to disclose a great deal of specific information. Cal. Civ. Proc. Code § 1281.9(a)(3)-(6). In addition, the Legislature also requires arbitrators to disclose all the information set forth in the rules governing arbitrators adopted by California's Judicial Council, Cal. Civ. Proc. Code § 1281.9(a)(2) (which are described as establishing the "minimum standards of conduct for neutral arbitrators," Cal. R. Ct., App. Div. 6, Std. 1(a)), which in turn specify a further 14 specific categories of information (many of which have multiple subcategories) that must be disclosed, Cal. R. Ct., App. Div. 6, Std. 7(d)(1)-(14), on top of more information if the arbitration involves a

consumer matter. Cal. R. Ct., App. Div. 6, Std. 8(b).[6] Finally, arbitrators are required to disclose any information that would, by statute, result in the disqualification of a judge, Cal. Civ. Proc. Code § 1281.9(a)(1), which adds 13 additional reasons for which the arbitrator may be disqualified, some of which overlap the specific provisions of the statutes governing arbitrators, *compare* Cal. Civ. Proc. Code § 170.1(a)(4) (requiring judges to be disqualified if they are within a third-degree family relationship with a party), *with* Cal. R. Ct., App. Div. 6, Std. 7(d)(1) (requiring arbitrators to disclose a family relationship with a party), and some of which do not. Cal. Civ. Proc. Code § 170.1(a)(7) (unique requirement that judge be disqualified if some physical impairment renders him "unable to properly perceive evidence" or "unable to properly conduct the proceeding"); Cal. R. Ct., App. Div. 6, Std. 7(d)(13) (unique requirement that an arbitrator disclose membership in any organization that "practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation"). These rules are binding and cannot be waived in favor of some other disclosure regime. *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 18 Cal. Rptr. 3d 142, 148-50 (Ct. App. 2004) (parties could not waive application of California law in favor of disclosure rules set forth in AAA rules governing construction arbitration).

The sweep of these disclosure rules is considerable, especially because many of them require listing all kinds of information regarding prior proceedings in which the

[6]A good overview of these rules is found in Keisha I. Patrick, *A New Era of Disclosure: California Judicial Council Enacts Arbitrator Ethics Standards*, J. Disp. Res. 271 (2003).

arbitrator participated with one or more of the parties or their lawyers. Cal. Civ. Proc. Code § 1281.9(a)(3), (4); Cal. R. Ct., App. Div. 6, Std. 7(d)(4), (5). Additionally, the disclosure requirements are onerous because they apply broadly to almost any kind of person who could be characterized as an "arbitrator." *Michael v. Aetna Life & Cas. Ins. Co.*, 106 Cal. Rptr. 2d 240, 245-46 (Ct. App. 2001) (statute applies to insurance appraisers). *But see Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1132 (9th Cir. 2005) (NASD rules, enacted pursuant to federal law, preempt California's state disclosure rules). Failure to make a disclosure required under any of these provisions could support a finding that the arbitrator's award was the product of "corruption," and is therefore subject to being set aside. *Compare Michael*, 106 Cal. Rptr. 2d at 248 (failure to disclose may constitute corruption; ultimately holding that no disclosure was required, and so award was confirmed), *with Azteca Constr.*, 18 Cal. Rptr. 3d at 151-52 (vacating award because disclosure permitted party to disqualify arbitrator).

C. ANALYSIS

Each of the regimes set forth above has advantages and disadvantages. For example, the AAA's regime has the virtue of being self-policing, and the lack of definite rules governing what should and should not be disclosed ought not to result in any lesser measure of disclosure, at least by the honest and careful arbitrator. Indeed, the very basis of the AAA's broad "disclose what is important" rules is the assumption that arbitrators have the character and integrity necessary to conscientiously make necessary disclosures, even if doing so could result in their not being hired. However, this same lack of

specificity can also give rise to problems; for example, should the arbitrator disclose that he knows one of the party's lawyers? What if he only knows him because they were on the same side of a case 20 years ago? What if they go to the same church? What if they went to the same church 20 years ago? What if their children went to the same church 20 years ago? Clearly, the question of where to draw the line between disclosure and nondisclosure can be a difficult one, particularly where one of the parties might later have the incentive to go and find information that it will then claim should have been disclosed and should have resulted in the disqualification of the arbitrator.[7]

California has gone in the opposite direction, calling for the most specific and comprehensive up-front disclosure of any jurisdiction. Again, there are advantages to such a regime: If an arbitrator discloses everything on the list, all of the parties to the arbitration can feel confident that they have a competent but truly impartial arbitrator. However, as is the case with any list that is trying to be comprehensive, the California disclosure rules recognize that it is impossible to anticipate every set of facts that might lead one to question the arbitrator's partiality. Accordingly, in addition to all of the very specific disclosures that are required, California has inserted several catch-all provisions similar to the disclosure requirements imposed by the AAA, i.e., requiring an arbitrator to disclose anything else that might make someone suspect his partiality, even if it is not otherwise listed. Cal. Civ. Proc. Code § 170.1(a)(6)(A)(ii), (iii); Cal. R. Ct., App. Div. 6, Std. 7(d)(14) . In light of this, one may ask whether California's detailed disclosure rules

[7]In this era, which lays a heavy emphasis on disclosure, the author's approach has been "disclose until it hurts."

are really an improvement or even the "safe harbor" they attempt to be: They certainly require more paperwork in every case, but it is not clear that they are materially likely to result in the disclosure of more relevant information, at least to the extent that matters that arbitrators in California are required to disclose are the same kind of matters that an honest and careful arbitrator would disclose under any set of disclosure rules.

Finally, the RUAA takes something of a middle ground: the disclosure provisions of the RUAA are not self-policing in the way the AAA's ethical rules governing disclosure are, having the force of law. The fact that the RUAA requires certain disclosures be made implies that this legal obligation can be enforced by the courts of the state where the arbitration, but the lack of specificity about what is to be disclosed means that we will have to wait and see how courts that are asked to enforce its disclosure provisions decide when a reasonable person would (for example) find that some matter would "likely to affect the impartiality of an arbitrator."[8] In addition to the current lack of certain about what legal obligations the RUAA will impose, another downside of the RUAA is it creates a new opportunity for gamesmanship—some parties may turn every arbitration into a trip to the courthouse to litigate the scope of the arbitrator's disclosure obligations, frustrating one of the fundamental advantages of arbitration, the lack of court involvement. Finally, until the RUAA is adopted by all or most of the jurisdictions in the country, questions regarding the scope of disclosures may depend on the jurisdiction

[8] Interestingly, such cases that may, in turn, help illuminate what degree of disclosure is required under the AAA's similarly-worded disclosure regime.

where the arbitration is pending, a situation that can result in further confusion regarding an arbitrator's obligation to disclose.

D. CONCLUSION

So where are we headed? The enactment of California's rules and the RUAA over the past five years suggests that we are moving towards a regime of more specific mandatory disclosure rules for arbitrators, which will take more time, paperwork, and money. Whether this ultimately enhances the integrity of arbitration or just creates another hoop for arbitrators — and another procedural arrow in the quiver of the dissatisfied litigant — remains to be seen.