Challenges Based on Arbitrator Bias in US Arbitration

by *Practical Law Arbitration*

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Parties to an arbitration in the US may challenge an arbitrator or award based on arbitrator bias. Various US arbitration statutes require arbitrator neutrality by permitting parties to challenge an award based on arbitrator bias. The rules of most arbitral institutions also require arbitrators to be impartial and permit parties to challenge an arbitrator's appointment or continued service based on bias. This Practice Note describes the options for parties to challenge arbitral proceedings and awards based on arbitrator bias in arbitrations that US arbitral institutions administer.

Scope of This Note

The integrity of the arbitral process depends in part on arbitrator impartiality, unless the parties agree to have nonneutral arbitrators. Parties that agree to resolve their dispute in arbitration before a neutral arbitral panel expect the arbitrators to be neutral and impartial. Evident partiality exists when there is proof that is likely to cause an objective, disinterested observer fully informed of the relevant facts relating to the arbitrator's conduct or alleged conflicts to have a serious doubt regarding the fundamental fairness of the arbitral proceedings (see Restatement (Third) U.S. Law of Int'l Comm. Arb. § 4-20 TD No 2 (2012)). Arbitrators must be independent of the parties and a have a duty to conduct a reasonable investigation into potential nontrivial conflicts (see *Raymond James and Assocs. v. Terran Orbital Corp.*, 839 F. App'x 171, 172 (9th Cir. 2021); *Applied Indus. Materials Corp. v Ovalar Makine Ticaret Sanayi, A.S.*, 492 F.3d 132, 138 (2d Cir. 2007)).

The rules of the leading US arbitral institutions also require arbitrators to be neutral, unrelated to the parties, and free of any interest in the outcome of the dispute (see Institutional Rules on Arbitrator Impartiality).

This Practice Note explains the ways a party may raise a challenge based on arbitrator bias in an arbitration before a US arbitral institution, such as the **American Arbitration Association** (AAA), **JAMS**, the **International Institute for Conflict Prevention and Resolution** (CPR), and the **Financial Industry Regulatory Authority** (FINRA). It explains how a party challenges the appointment or continued service of an arbitrator and the enforcement of an arbitral award. It also describes the timing of a challenge before, during, or after the proceedings, and the factors for determining whether to raise the challenge in court or before the arbitral institution.

For information on challenging an arbitrator in international arbitration, see Practice Note, Challenges to arbitrators.

US Arbitration Law and Institutional Rules on Arbitrator Impartiality

Arbitration statutes in the US require arbitrators to be impartial by permitting parties to challenge an arbitration award based on the partiality of an arbitrator appointed as a neutral (see Challenges After the Arbitrator Issues the Award). The statutes generally do not provide for courts to intervene to remove an arbitrator before or during the arbitral proceedings. Instead, most statutes only provide for a party to challenge an arbitral award in court after the arbitral proceedings conclude. (See *AVIC Int'l USA, Inc. v. Tang Energy Grp., Ltd.*, 614 F. App'x 218 (5th Cir. 2015); *John Hancock Life Ins. Co. (U.S.A.) v. Emp'rs Reassurance Corp.*, 2016 WL 3460316, at *3 (D. Mass. June 21, 2016).)

The rules of the various arbitral institutions require neutral arbitrators to be impartial and permit a party to challenge an arbitrator for bias by raising the challenge with the arbitral institution whenever a party learns of arbitrator partiality (see Challenges to an Arbitrator Before or at the Time of Appointment and Challenges During the Arbitral Proceedings).

Federal Arbitration Act

The **Federal Arbitration Act** (FAA) is the federal statute governing arbitration in the US. The FAA directly addresses arbitrator bias in the provisions regarding enforcement of the arbitrator's award. Under the FAA, a court may vacate an award if it finds that an arbitrator displayed evident partiality (9 U.S.C. § 10(a)(2); see Challenges to the Award for Bias Under the FAA).

The FAA does not provide a mechanism for a party to challenge the appointment or continued service of an arbitrator in court. Courts defer to the decisions by the arbitral institutions regarding the appointment and continued service of arbitrators (see *UBS Fin. Servs. Inc. v. Padussis*, 842 F.3d 336, 340-41 (4th Cir. 2016)).

Most courts subscribe to the view that courts should abstain from intervening in arbitral proceedings before the arbitrator issues the award, because Congress intended the FAA to facilitate expedited dispositions of disputes (see, for example, *Marc Rich & Co., A.G. v. Transmarine Seaways Corp.*, 443 F. Supp. 386, 388 (S.D.N.Y. 1978); *Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 936 (N.D. Cal. 2003) ("Rather than enhancing the arbitral process by court enforcement of interim relief designed to ensure any eventual award will be meaningful, allowing a disqualification during the arbitration could spawn endless applications to the courts and indefinite delay")).

In *In re Sussex*, the US Court of Appeals for the Ninth Circuit took the rare step of granting a writ of **mandamus** and vacated the district court's decision to remove an arbitrator for conflict of interest (781 F.3d 1065 (9th Cir. 2015)). The Ninth

Circuit reasoned that court intervention mid-arbitration should occur only in extreme cases and that the case below was "emphatically" not an extreme case (see Legal Update, District Court Erred by Intervening Mid-Arbitration: Ninth Circuit).

In *AVIC International USA, Inc. v. Tang Energy Group, Ltd.*, the court declined to stay arbitration, holding that courts may not rule on arbitrator challenges until after the final award (614 F. App'x 218 (5th Cir. 2015); see also *John Hancock Life Ins. Co. (U.S.A.) v. Emp'rs Reassurance Corp.*, 2016 WL 3460316, at *3 (D. Mass. June 21, 2016)).

State Statutes

Some state laws allow courts to remove an arbitrator during arbitration proceedings due to bias or a conflict of interest. For example, the Texas Arbitration Act requires arbitrators to make conflicts disclosures before appointment. If the arbitral institution rejects a party's challenge to the arbitrator, the party may ask the Texas district court to decide the challenge. (Tex. Civ. Prac. & Rem. Code Ann. § 172.103.)

In New Jersey and Wisconsin, courts may disqualify an arbitrator for evident partiality at any time based on the states' arbitration statutes permitting *vacatur* of an award on this ground (see *Barcon Assoc. Inc. v. Tri-Cty. Asphalt Corp.*, 430 A.2d 214, 218-19 (N.J. 1981); *Borst v. Allstate Ins. Co.*, 717 N.W.2d 42, 48-49 (Wis. 2006)).

Where state law is silent on the issue of arbitrator removal, some state courts have used their equitable powers to disqualify an arbitrator for bias and suspend the arbitration proceedings until the parties appoint a new arbitrator (see, for example, *Bronx-Lebanon Hosp. Ctr. v. Signature Med. Mgmt. Grp., L.L.C.*, 775 N.Y.S.2d 279, 280 (2d Dep't 2004); *Belanger v. State Mut. Auto Ins. Co.*, 426 N.Y.S.2d 140, 141 (3d Dep't 1980); *State ex rel. Telecom Mgmt. v. O'Malley*, 965 S.W.2d 215, 230 (Mo. Ct. App. 1998)).

Like the FAA, state arbitration statutes also generally require arbitrator neutrality by permitting parties to challenge the enforcement of an arbitration award based on arbitrator bias (see Challenges to the Award for Bias Under State Law).

Institutional Rules on Arbitrator Impartiality

The rules of the leading US arbitral institutions require arbitrators to be:

- Neutral.
- Unbiased.
- Free of any personal or financial interest in:
    - the dispute;
    - the parties; or
    - any counsel for the parties.

For general information on arbitration under the rules of the various US arbitral institutions, see:

- AAA Arbitration Toolkit.
- JAMS Arbitration Toolkit.
- CPR Arbitration Toolkit.
- FINRA Arbitration Toolkit.

AAA

The AAA maintains a roster of thousands of experienced arbitrators to preside over a variety of arbitrations, including commercial, accounting, construction, and employment disputes. The AAA requires all its arbitrators to be impartial and independent under:

- Rule R-18 of the Commercial Arbitration Rules and Mediation Procedures (AAA Commercial Rules).
- Rule 18 of the AAA Consumer Arbitration Rules.
- Rule 20 of the AAA Construction Industry Arbitration Rules and Mediation Procedures.
- Rule 21 of the AAA Accounting and Related Services Arbitration Rules and Mediation Procedures.
- Rule 16 of the AAA Employment Arbitration Rules and Mediation Procedures.
- The Code of Ethics for Arbitrators in Commercial Disputes, unless the parties expressly agree that the party-appointed arbitrators may be nonneutral (Canon X, Code of Ethics). The Code of Ethics was prepared by a joint committee of the AAA and the American Bar Association.

However, the parties may agree in writing that party-appointed arbitrators may be "nonneutral," in which case there is no requirement for impartiality or independence and there can be no challenge for partiality or lack of independence (AAA Commercial Rule 18 (b)).

For more information on AAA commercial arbitration, see Practice Note, AAA Arbitration (Commercial Rules): A Step-By-Step Guide.

JAMS

JAMS maintains a roster of neutrals consisting of many former judges. Under the JAMS Arbitrators Ethics Guidelines, JAMS arbitrators must disclose any known or apparent conflicts of interest. This disclosure obligation begins as soon as the arbitrator learns of the arbitrator's potential selection by the parties and continues throughout the arbitration. Unless the

parties agree that party-appointed arbitrators on a three-person panel may be nonneutral, JAMS requires its neutrals to be impartial and independent under:

- Rule 7 of the JAMS Comprehensive Arbitration Rules and Procedures (JAMS Rules).
- Rule 7 of the JAMS Engineering and Construction Arbitration Rules and Procedures and the JAMS Engineering and Construction Arbitration Rules and Procedures for Expedited Arbitration.
- Rule 7 of the JAMS Employment Arbitration Rules and Procedures.

For more information on arbitration before JAMS, see Practice Note, JAMS Arbitration: A Step-by-Step Guide.

CPR

CPR maintains a roster of neutrals with expertise in a variety of industries, including commercial, banking and financial services, franchise, and employment matters. The CPR Challenge Protocol sets out a procedure for any party to challenge an arbitrator in a CPR-administered arbitration. CPR requires its neutrals to be impartial and independent under:

- Rule 7 of the CPR Administered Arbitration Rules (CPR Rules).
- Rule 7.1 of the CPR Rules for Administered Arbitration of International Disputes.
- Article 9.4 of the CPR Employment Dispute Arbitration Procedure.
- The CPR Code of Ethics for Arbitrators in Commercial Disputes.

For more information on arbitration in the US under the CPR administered rules, see Practice Note, Administered US Domestic Arbitration With the CPR Institute; A Step-by-Step Guide.

FINRA

FINRA maintains two rosters of neutrals, public arbitrators, and industry arbitrators, to preside over FINRA customer and industry cases. All FINRA arbitrators must be impartial and independent under:

- Rule 12405 of the FINRA Code of Arbitration Procedure for Customer Disputes (FINRA Customer Code).
- Rule 13408 of the FINRA Code of Arbitration Procedure for Industry Disputes (FINRA Industry Code).

For information on FINRA customer arbitration, see Practice Note, FINRA Customer Arbitration: A Step-by-Step Guide. For information about FINRA industry arbitration, see Practice Note, FINRA Industry Arbitration: A Step-by-Step Guide.

Timing of the Challenge

A party may challenge an arbitrator for lack of impartiality at any time in the arbitral process, but should make the challenge as soon as the party knows of the grounds to assert the challenge. A party with knowledge of facts possibly indicating arbitrator bias or partiality cannot remain silent and later object to the award on that ground (see *LGC Holdings, Inc. v. Julius Klein Diamonds, LLC*, 238 F.Supp.3d 452, 467-68 (S.D.N.Y. 2017) (quoting *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Serv., Inc.*, 139 F.3d 980, 982 (2d Cir. 1998)); *Cook Indus., Inc. v. C. Itoh & Co. (Am.) Inc.*, 449 F.2d 106, 107-08 (2d Cir. 1971) (party "cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first. His silence constitutes a waiver of the objection.")).

The timeliness of an objection depends on:

- When the complaining party first learns or should have learned of the basis of the objection.
- What has occurred in the interval between the time the complaining party learned the relevant information and the time the party asserted its objection.

(See *AAOT*, 139 F.3d at 982.)

Depending on the point in the proceedings, the party raises an arbitrator bias challenge with either the arbitral institution or a court.

Challenges to an Arbitrator Before or at the Time of Appointment

When the parties agree to use an arbitrator from an institution's panel of neutrals, as opposed to party-appointed arbitrators, the arbitral institutions help the parties select the arbitrator by providing a list of proposed arbitrators from which the parties choose. The arbitral institutions permit parties to object to a proposed arbitrator before or at the time of the arbitrator's appointment.

Striking a Proposed Arbitrator

All of the US-based arbitral institutions follow the same general procedure for appointing an arbitrator. Except when parties agree to use party-appointed arbitrators, the institution provides the parties with a list of several proposed arbitrators. The parties may strike any objectionable names from the list and the institution selects an arbitrator from the remaining names. (See Practice Notes, AAA Arbitration (Commercial Rules): A Step-by-Step Guide: Appointment of the Arbitrator, JAMS Arbitration: A Step-by-Step Guide: Appointing the Arbitrator, and Administered US Domestic Arbitration with the CPR Institute: A Step-by-Step Guide: Appointment of the Tribunal.) FINRA also provides background information and the work history of the proposed arbitrators (see Practice Notes, FINRA Customer Arbitration: A Step-by-Step Guide: Appointing the Panel and FINRA Industry Arbitration: A Step-by-Step Guide: Appointing the Panel).

The parties should conduct due diligence on the proposed arbitrators to make an informed decision about whether to select or strike the arbitrator. The diligence should involve reviewing any information the institution provides and conducting research on the arbitrator. The research should include, at a minimum:

- Reviewing:
  - any publicly-available awards the arbitrator has issued;
  - any decisions confirming, vacating, or modifying an award by the arbitrator;
  - any decisions the arbitrator rendered if the arbitrator is a former judge; and
  - any publications by the arbitrator.

- Interviewing, if possible:
  - counsel who previously appeared before the arbitrator in arbitrations or court proceedings; and
  - counsel and other arbitrators who previously worked with the arbitrator.

The parties may challenge an arbitrator before the arbitrator's appointment by striking the arbitrator's name from the list of proposed arbitrators (AAA Commercial Rule 12; JAMS Rule 15; CPR Rule 5.1; FINRA Customer Rules 12402, 12403, and 12405; FINRA Industry Rules 13403 and 13408; see also Practice Notes, AAA Arbitration (Commercial Rules): A Step-by-Step Guide: Appointment from the National Roster and JAMS Arbitration: A Step-by-Step Guide: Appointing the Arbitrator.)

A challenge at this point in the process does not require the challenging party to explain the basis of the challenge. Instead, a party that objects to a specific arbitrator simply strikes that arbitrator's name from the list of proposed arbitrators.

Challenges at the Time of Appointment

The various arbitral institutions require their arbitrators to run a conflicts check and make disclosures at the time of appointment. Specifically, the AAA, JAMS, and CPR rules require a prospective arbitrator to disclose at the time of appointment any circumstance likely to give rise to justifiable doubt about the arbitrator’s impartiality or independence, including any:

- Bias or financial or personal interest in the arbitration.
- Past or present relationship with any party or counsel.

(AAA Commercial Rule 17(a); JAMS Rule 15(h); CPR Rule 7.3.)

In a CPR arbitration, a party may object to an arbitrator for bias within ten days after receiving the arbitrator's disclosures at the time of appointment. A party objects by sending a written objection to CPR, with a copy to the other party. The other party may respond to the objection and CPR then decides the objection or refers it to a challenge review committee under the CPR Challenge Protocol. If no party objects or CPR overrules the objection, CPR appoints the candidate. (CPR Rule 5.2(b).)

The FINRA Rules require a prospective arbitrator to disclose any circumstances that may preclude the arbitrator from rendering an objective and impartial determination in the proceeding, including any:

- Direct or indirect financial or personal interest in the outcome of the arbitration.
- Past or present financial, business, professional, family, social, or other relationship any party or its counsel has with the arbitrator, any member of the arbitrator's family, or any employer or business associate of the arbitrator.
- Past service the arbitrator performed as mediator in the dispute.

(FINRA Customer Rule 12405; FINRA Industry Rule 13408.)

A party detecting a basis to challenge an arbitrator at the time of the arbitrator's appointment should raise the challenge with the arbitral institution.

Parties that detect a potential ground for challenging an arbitrator may be tempted to remain silent and withhold their objection unless and until the party becomes dissatisfied with the arbitrator. This tactic is unwise. Most institutional rules require parties to raise any known challenge to a proposed arbitrator before the arbitrator's appointment. The AAA and JAMS rules deem a party's failure to strike a proposed arbitrator's name to constitute acceptance of the arbitrator and waiver of objection (AAA Commercial Rules 17(a) and 41; JAMS Rule 15(e)). CPR prohibits a party from challenging an arbitrator after the arbitrator's appointment if the party knew of the asserted grounds for the challenge before the arbitrator's appointment (CPR Rule 7.5).

A party that does not receive a copy of an arbitrator's disclosure should request it from the arbitral institution, the arbitrator, or the other party, or risk waiver of any later objection based on the disclosed conflicts (see *Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 30 (2d Cir. 2004) (fact that party that did not receive from AAA a copy of arbitrator's disclosure showing arbitrator had previously worked as expert witness for other party in an unrelated case not a ground for vacatur of arbitration award; party knew that arbitrators had made disclosures and could have requested a copy when AAA failed to provide it)).

At least one court has also suggested that if an arbitrator's disclosure puts a party on notice of a potential conflict, the party may have a duty to reasonably investigate it and raise an objection or risk waiver of the objection (see *Dealer Comp. Servs., Inc. v. Michael Motor Co.*, 485 F. App'x 724, 728 (5th Cir. 2012)).

Challenges During the Arbitral Proceedings

The rules of the various arbitral institutions require parties and arbitrators to continue making disclosures throughout the arbitration as they learn new information that warrants disclosure. For example, when the parties disclose certain important evidence or key witnesses, an arbitrator or a party may realize that the arbitrator has a relationship or interest in a previously undisclosed witness or entity affiliated with a party. The rules require the arbitrator or party that detects the potential conflict to make an immediate disclosure.

A party that goes to court to challenge the continued service of an arbitrator before the arbitrator issues the final award does so at its peril. In *Adam Technologies International S.A. de C.V. v. Sutherland Global Services, Inc.*, the court held that it had no statutory authority to consider a challenge to the arbitrators after the arbitration process had started but before issuance of the arbitral award (729 F.3d 443, 452 (5th Cir. 2013)). After the award, the party bringing the challenge sought to vacate the award under the FAA on the ground that the tribunal was improperly constituted. The court refused to consider that

challenge, holding that it was subject to issue preclusion due to the pre-award challenge (*Sutherland Global Servs., Inc. v. Adam Techs. Int'l SA de C.V.*, 639 F. App'x 697, 700 (2d Cir. 2016)).

If a party learns new information that casts doubt on an arbitrator's impartiality, the party may raise a challenge to the arbitrator's continued service at any point during the arbitration based on information the party did not know before the arbitrator's appointment.

AAA

In an AAA arbitration, either:

- A party may object to the continued service of an arbitrator due to bias.
- The AAA may on its own initiative determine whether an arbitrator should be disqualified due to bias.

The AAA's Administrative Review Council conclusively rules on a party's request to disqualify an arbitrator. (AAA Commercial Rule 18(c).)

At least one court has held that, where the parties agree to arbitrate under the AAA rules, the AAA's denial of a party's request to disqualify wing arbitrators for perceived bias is not subject to judicial review during the arbitration but the party may raise the issue later as a basis for challenging the eventual award (*Huntsman Intern., LLC v. Albemarle Corp.*, 2021 WL 1253822, at *3 (Sup. Ct. N.Y. Co. Apr. 5, 2021) (construing AAA Construction Rule 20(b)).

JAMS

In a JAMS arbitration, a party may challenge an arbitrator's continued service at any time during the arbitration proceedings based on information that was unavailable at the time of the arbitrator's appointment (JAMS Rule 15(i)). A party must submit a challenge in writing and serve it on the other party, which may respond within seven days. JAMS makes the final determination. (JAMS Rule 15(i).)

CPR

After the arbitrator's appointment in a CPR arbitration, a party may only challenge an arbitrator's continued service:

- Based on information the party learns after the arbitrator's appointment.
- If the party submits the challenge in writing to CPR within 15 days after the party learns the grounds for the challenge.

(CPR Rule 7.6.)

CPR refers the challenge to a Challenge Review Committee under the CPR Challenge Protocol. The Challenge Review Committee's decision is final. (CPR Rule 7.6.)

FINRA

In a FINRA arbitration, FINRA may remove an arbitrator for conflict of interest or bias on request of any party or on FINRA's own initiative at any time before the first hearing begins. FINRA grants a party's request to remove an arbitrator if the arbitrator's interest or bias is definite and capable of being reasonably demonstrated, rather than remote or speculative. (FINRA Customer R. 12407(a); FINRA Industry R. 13410(a).)

After the first hearing session begins, FINRA may remove an arbitrator only based on information that the arbitrator should have disclosed and the parties did not previously know (FINRA Customer R. 12407(b); FINRA Industry R. 13410(b)). Any party also may ask a FINRA arbitrator to recuse himself for good cause. The arbitrator subject to a recusal request decides the request. (FINRA Customer R. 12406; FINRA Industry R. 13409.)

Challenges After the Arbitrator Issues the Award

After the arbitrator issues the award, the arbitration concludes and the arbitral institution no longer has jurisdiction to entertain challenges based on arbitrator bias. Parties that wish to raise a challenge based on arbitrator bias after the arbitrator issues the award do not seek the removal of the arbitrator. Instead, they seek to vacate the arbitration award in court.

Challenges to the Award for Bias Under the FAA

The FAA expressly addresses arbitrator impartiality in the provisions regarding enforcement of the arbitration award. Under the FAA, a court may vacate an arbitration award if it finds evident partiality on the part of an arbitrator (9 U.S.C. § 10(a)(2)).

Courts are divided on what constitutes evident partiality. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, the US Supreme Court set aside an award where an arbitrator failed to disclose that the arbitrator had a business relationship with one of the parties (393 U.S. 145 (1968)). Justice Black's opinion stated that arbitrators should disclose to the parties any information that "might create an impression of possible bias." Justice White concurred but reasoned that arbitrators need not disclose trivial connections to the parties and "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" (*Commonwealth Coating*, 393 U.S. at 150).

Courts disagree about whether Justice Black's opinion in *Commonwealth Coatings* was a plurality or a majority opinion (compare *Schmitz v. Zilveti*, 20 F.3d 1043, 1045 (9th Cir. 1994) with *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82 (2d Cir. 1984); and see *Belize Bank Ltd. v. Gov't of Belize*, 852 F.3d 1107, 1114 n.4 (D.C. Cir. 2017) ("Justice White's concurrence is the narrowest grounds for judgment, which means that it is the holding of the Court")). Courts have therefore applied *Commonwealth Coatings* differently. For example:

- The US Court of Appeals for the District of Columbia Circuit has applied Justice White's concurrence to hold that:
    - the challenger to an arbitral award must present specific facts indicating an arbitrator's improper motives and show that the arbitrator had a significant, nontrivial interest in or connection to a party; and

- an arbitrator need not conduct an investigation to determine the existence of a trivial connection to a party.

(See *Republic of Argentina v. AWG Group Ltd.*, 894 F.3d 327, 334-35 (D.C. Cir. 2018); *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996).)

- The US Court of Appeals for the Fifth Circuit applies a practical and holistic reading of *Commonwealth Coatings* to require *vacatur* under FAA § 10(a)(2) only if there is a significant, concrete, compromising connection between the arbitrator and a party, as opposed to a speculative impression of arbitrator bias (*Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 282-83, 286 (5th Cir. 2007); see also *Credit Suisse Sec. (USA) LLC v. Carlson*, 2020 WL 32339, at *3-4 (S.D. Tex. Jan. 2, 2020)).

- Some courts have held that an arbitrator's failure to disclose any information that may create an impression of possible bias may, but does not automatically, constitute a ground to vacate an award (see, for example, *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002)).

- Other courts have fashioned a "reasonable person" standard for determining whether an arbitrator is evidently biased (see *Morelite Const. Corp.*, 748 F.2d at 82 (stating that evident partiality "will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration"); see also *Andes Petroleum Ecuadro Ltd. v. Occidental Exploration & Prod. Co.*, 2021 WL 5303860, at *3 (S.D.N.Y. Nov. 15, 2021) (where two of three arbitrators had undisclosed concurrent service on another arbitral panel, finding no arbitrator partiality sufficient to warrant *vacatur* based on speculation that the arbitrators' concurrent service created an opportunity for misconduct); *Freeman v. Pittsburgh Glass Works LLC*, 709 F.3d 240, 252-53 (3d Cir. 2013); *Applied Indus. Materials*, 492 F.3d at 139 (applying reasonable person standard, holding that an arbitrator's knowledge of a potential conflict and failure to disclose or investigate it indicates evident partiality); *JCI Comms., Inc. v. IBEW, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003); *Ameriprise Fin. Servs., Inc. v. Brady*, 325 F. Supp. 3d 219, 225 (D. Mass. 2018)).

Courts have set out a list of nonexclusive factors to guide the application of the evident partiality test, including considering:

- The extent and character of the interest, pecuniary, or otherwise, of the arbitrator in the proceedings.

- The directness of the relationship between the arbitrator and the party the arbitrator is alleged to favor.

- The connection of that relationship to the arbitrator.

- The proximity in time between the arbitrator's relationship with a party and the arbitration proceeding.

(See *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 74 (2d Cir. 2012) and *Three S Del., Inc. v. Dataquick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007).)

In *U.S. Electronics Inc. v. Sirius Satellite Radio Inc.*, the New York Court of Appeals adopted the Second Circuit's "reasonable person" standard to determine whether there was evident partiality (934 N.Y.S.2d 763 (2011)). By that standard, evident partiality is found where a reasonable person must conclude that an arbitrator was partial to one of the parties to the arbitration (see Legal Update, New York Court of Appeals Refuses to Vacate Arbitral Award and Adopts Second Circuit Reasonable Person Standard When Applying Federal Arbitration Act).

In *Ruhe v. Masimo Corp.*, 36 hours before the final hearing in the arbitration, the respondent made a for-cause challenge to the continued service of the arbitrator on the ground that the arbitrator's brother had represented respondent's chief competitor in two highly contentious litigation losses to respondent (640 F. App'x 685 (9th Cir. 2016)). The arbitrator noted that the respondent "furnish[ed] no coherent explanation" regarding how the arbitrator's brother's litigation practice "would cause a person reasonably to doubt [his] impartiality in this case." Although the district court found evident partiality based on the brother's litigation against respondent (14 F. Supp. 3d 1342), the Ninth Circuit reversed and reinstated the award for the reasons expressed by the arbitrator.

At least one court has rejected a claim of evident partiality by a neutral arbitrator in a dispute involving the "tightly knit" diamond industry community, where the arbitrator had business dealings with another arbitrator and counsel for one of the parties. Rejecting the claim of bias and granting the motion to confirm, the court noted it was not surprising that the arbitrator had these relationships because the parties' agreement expressly required an arbitral panel with experience in the diamond industry. The court noted the ability to constitute a panel with particular expertise is a "principal attraction" of arbitration but it "often comes at the expense of complete impartiality." (*LGC Holdings, Inc.*, 238 F. Supp. 3d at 468.)

Another court refused to vacate an arbitration award where a FINRA arbitrator failed to disclose their past service as a mediator in a case involving one of the parties. Noting that FINRA Rule 12405 specifically requires an arbitrator to disclose, among other things, any prior service as a mediator in a case involving one of the arbitral parties, the court rejected the contention that the arbitrator's prior work in a "years old, unrelated case" could create even the appearance of bias (*Ploetz v. Morgan Stanley Smith Barney, LLC*, 894 F.3d 894, 898-99 (8th Cir. 2018); *Ameriprise Fin. Servs.*, 325 F. Supp. 3d at 226-27 (refusing to vacate employee's FINRA award against brokerage employer where arbitrator failed to disclose affiliation with a plaintiffs'-side employment firm, because the affiliation does not suggest any arbitrator predisposition to rule in favor of one party)).

The potential for an appearance of arbitrator bias may also arise where a party or its counsel is a repeat player in proceedings before an arbitral institution in which the arbitrator has an economic interest (such as JAMS, where some arbitrators are also shareholders in JAMS). Where an arbitrator is a shareholder in the arbitral institution, this fact alone does not necessarily indicate evident partiality of the arbitrator (see *EHM Prods., Inc. v. Starline Tours of Hollywood*, 1 F.4th 1164 (9th Cir. 2021)). However, if a party or its counsel regularly uses the institution's services, this situation may create the appearance of arbitrator bias in favor of the party or counsel whose repeat business the arbitrator has a vested interest in maintaining. Courts have reached different conclusions in resolving claims of bias in this situation, depending on the facts of each case For example:

- The US Court of Appeals for the Ninth Circuit vacated an award by an arbitrator who was a shareholder in the arbitral institution because:
    - the arbitral institution was designated in the winning party's form contracts to administer its cases;
    - the arbitral institution had administered 97 arbitrations for the winning party in the preceding five years; and
    - the arbitrator did not disclose their ownership interest in the institution or the institution's substantial history administering cases involving the winning party.

  (*Monster Energy Company v. City Beverages, LLC*, 940 F.3d 1130, 1136 (9th Cir. 2019).)

- A federal district court in Pennsylvania refused to vacate an award by an arbitrator who was a shareholder in the arbitral institution in part because the losing party waited too long to raise a bias objection. The court noted that it

saw no evidence that was powerfully suggestive of bias to support a finding of evident partiality, despite the facts that:

- the winning party's law firm routinely selected the arbitral institution to administer its cases;
- the arbitral institution had administered 233 arbitrations and mediations brought by the winning party's counsel in the preceding five years;
- the arbitrator failed to disclose her ownership interest in the institution; and
- the arbitral institution failed to disclose its substantial history administering cases involving the winning party's law firm.

(*Martin v. NTT Data, Inc.*, 2020 WL 3429423, at *8-9 (E.D. Pa. June 23, 2020); see also *Levi Strauss & Co. v Aqua Dynamic Systems, Inc.*, 473 F. Supp. 3d 1004, 1006-07 (N.D. Cal. 2020) (refusing to vacate award where arbitrators were undisclosed significant shareholders in the arbitral institution but the prevailing party did not force arbitration on the other party and its business dealings with the institution were trivial), ***aff'd*** 2022 WL 61164 (Fed. Cir. Jan. 6, 2022).)

Courts do not hold party-appointed nonneutral arbitrators to the same high standard of impartiality as neutral arbitrators (see *Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs.*, 892 F.3d 501, 508-09 (2d Cir. 2018); *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 552 (8th Cir. 2007); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 759 (11th Cir. 1993), abrogated on other grounds, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009)). Rather, some courts have instead held that the court may invalidate an arbitration award under the FAA based on evident partiality of a party-appointed arbitrator only if the court finds the arbitrator's undisclosed relationship with the appointing party either:

- Violated the disinterestedness qualification required in the parties' agreement.
- Had a prejudicial impact on the award.

(See *Certain Underwriting Members of Lloyds of London*, 892 F.3d at 510-11; *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821 (8th Cir. 2001).)

For more information on the grounds for vacating arbitration awards in federal court, see Practice Note, Enforcing Arbitration Awards in the US. For more information on the FAA generally, see Practice Note, Understanding the Federal Arbitration Act.

Challenges to the Award for Bias Under State Law

State arbitration statutes generally provide that arbitrator bias is a ground for challenging an arbitration award. For example:

- In New York, the state's arbitration statute permits vacatur of an arbitration award if the court finds partiality of an arbitrator appointed as a neutral (CPLR 7511(b)(1)(ii); see Practice Note, Enforcing Arbitration Awards in New York: Vacating and Refusing Confirmation of Awards).

- In Texas, a court may vacate an arbitration award based on evident partiality of an arbitrator appointed as a neutral (Tex. Civ. Prac. & Rem. Code Ann. § 171.088; see Practice Note, Enforcing Arbitration Awards in Texas: Vacating Awards Under the TAA).

- In California, a court may vacate an arbitration award based on the arbitrator's failure to timely disclose a ground for disqualification of which the arbitrator was aware (Cal. Code Civ. Proc. § 1286.2(6); see *Malek Media Grp. LLC v. AXQG Corp.*, 58 Cal. App. 5th 817, 828 (Cal. Ct. App. 2020) (courts must assess evident partiality from the perspective of a "well-informed, thoughtful observer" rather than a "hypersensitive or unduly sensitive" litigant)).

In those states that have adopted either the **Uniform Arbitration Act** (UAA) or the **Revised Uniform Arbitration Act** (RUAA), arbitrator partiality constitutes a ground for vacating an arbitration award (UAA § 12(a)(2); RUAA § 23(a)(2)(A)). The RUAA also requires arbitrators to disclose any past or present:

- Financial or personal interest in the outcome of the arbitration.

- Relationship with a party, counsel, or another arbitrator in the proceeding.

(RUAA § 12(a).)

For more information on the RUAA and a list of the states that have adopted it, see Practice Note, Revised Uniform Arbitration Act: Overview.

For more information on vacating arbitration awards in various states, see Enforcing or Challenging Arbitration Awards in the US Toolkit.

