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The American Arbitration Association's Administrative Review Council

Arbitrator Disqualification Requests—An Overview of Issues, Outcomes and Illustrative Cases

By Eric Tuchmann, Sasha Carbone, Tracey Frisch, Simon Kyriakides

A key expectation for parties, arbitrators, and the American Arbitration Association (“AAA”) itself is that all appointed arbitrators will manage and decide cases with complete independence and impartiality. Independence and impartiality are requirements reflected in the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes¹ as well as the AAA’s rules. To further these requirements, the AAA’s rules and procedures provide an extensive process to prompt arbitrator disclosures of circumstances that may give rise to doubts about the arbitrator’s impartiality or independence, and to allow parties to object to an arbitrator’s appointment or continued service.²

To resolve objections to arbitrators’ appointments in large complex cases, the AAA created the Administrative Review Council (ARC) in 2013 to promote greater consistency and improved decision-making with regard to party requests to disqualify arbitrators in large, complex cases. More detailed information about the guidelines, procedures, composition of ARC and the standards that guide ARC’s decision-making process are publicly available on the AAA’s website.³

“From this ARC data, claimants and respondents file arbitrator disqualification requests in close to equal numbers, and those requests are granted (45 percent) slightly less frequently than requests that are denied (55 percent).”

The purpose of this article is to provide parties, and others who may be interested, additional details: about the types of disclosures that are made by arbitrators; the most common categories of disclosures and relationships that give rise to arbitrator challenges in cases decided by ARC; and the results of the challenges. In addition, a number of illustrative arbitrator removal requests are included.

Arbitrator Challenges Decided by the Administrative Review Council

The sample of cases that were reviewed in connection with this summary consisted of all arbitrator disqualifi-

cation requests decided by ARC from January 1 through September 30, 2016, and largely consist of large complex cases in domestic commercial and construction arbitrations. Materials reviewed consisted of party submissions to ARC in connection with challenges, including all relevant arbitrator oaths containing disclosure checklists, any other communications or documentation related to an arbitrator’s disclosure, supplemental disclosure, and allegations of any failure to disclose relevant information. Once an arbitrator makes any disclosure, if a party alleges that an arbitrator failed to make a disclosure, or a party alleges an arbitrator should be disqualified for any other reason allowed in the applicable AAA rules, the AAA requires that all parties to the arbitration are provided with copies of those communications and that they are provided with the opportunity to comment on the issues presented. All such party and arbitrator communications were also reviewed.

Accordingly, the following profile of arbitrator removal requests emerged from the sample of cases that were reviewed:

Total Number of Arbitrator Disqualification Requests for All Cases Submitted to ARC:			86
<i>(In some cases, multiple disqualification requests were made.)</i>			
Claimant(s) Requests for Arbitrator Disqualification:			44
Respondent(s) Requests for Arbitrator Disqualification:			41
Third Party (sought to be joined as a party) Requests for Disqualification			1
	Number	Percent	
Disqualification Requests Granted	39		45%
Disqualification Requests Denied	47		55%
Number of Cases Containing Disqualification Requests Submitted to ARC:			65
<i>In some cases with three arbitrator tribunals, disqualification requests were submitted for one or more arbitrators as follows:</i>			
Requests to Disqualify One Arbitrator:			47
Requests to Disqualify Two of Three Arbitrators:			15
Requests to Disqualify Three Arbitrators:			3
Disqualification(s) Requested by Claimant:			30
Disqualification(s) Requested by Respondent:			27
Disqualification(s) Requested by Both Claimant and Respondent:			8
Categories of Arbitrator Disclosures/Non Disclosures Cited in Disqualification Requests (Arbitrator challenges frequently assert more than one reason to support disqualification.)			
	Number	Percent	
Relationships with Lawyers/Law Firms in the Arbitration	37		35%
Relationships with Parties to the Arbitration	30		28%
Relationships with Experts or Witnesses	10		9%
Arbitrator Qualifications	8		8%
Life Experience/Personal Background Related to the Arbitration	4		4%
Other (e.g., relationship between arbitrators)	17		16%

From this ARC data, claimants and respondents file arbitrator disqualification requests in close to equal numbers, and those requests are granted (45 percent) slightly less frequently than requests that are denied (55 percent).

Also notable was that in more than 25 percent of the cases, an objecting party sought the disqualification of two or three arbitrators in cases to be heard before three-arbitrator tribunals, and parties frequently asserted multiple reasons for disqualification. The most common reasons for arbitrator disqualification requests result from the arbitrator's relationships with lawyers or law firms involved in the arbitration (asserted in 35 percent of disqualification requests) and arbitrator's relationships with parties to the arbitrations (asserted in 28 percent of disqualification requests).

Disqualification Request Descriptions and Examples

The following are examples of the types of arbitrator disqualification requests that arose in large, complex cases that were considered by the AAA's Administrative Review Council. These examples were selected because they are representative of the five main categories of challenges that are brought before the Administrative Review Council: relationships with lawyers/law firms in the arbitration; relationships with parties to the arbitration; relationships with experts or witnesses; arbitrator qualifications; and life experiences/backgrounds related to the arbitration. Although these summaries are illustrative of matters that were considered by ARC, the facts and other characteristics of the case examples have been modified significantly to protect confidentiality. In addition, each determination was made on a case-by-case basis after considering the information and arguments presented to it in writing by the parties themselves. As a result, while the summaries are intended to be illustrative, actual outcomes in cases considered by ARC could be different from those described here for any number of reasons. Accordingly, these summaries are not any kind of precedential authority in any cases administered by the AAA or considered by ARC.

Disclosure Issue: Relationships With Lawyers/Law Firms in the Arbitration

Scenario 1

Respondent objected to Claimant's neutral party-appointed arbitrator on the grounds that the arbitrator served as an attorney for Claimant's law firm. The arbitrator's disclosure did not disclose the nature or the length of their attorney/client relationship. In addition, the arbitrator's son had previously been employed as an associate at Respondent's law firm for almost six years. Claimant opposed the challenge on the grounds that the arbitrator's familial relationship should not be grounds for removal because the arbitrator's son never worked on matters related to Respondent. With respect to the arbitrator's relationship with Claimant's law firm, the

Claimant argued that the arbitrator's representation took place decades ago, was not analogous to the arbitration, and therefore did not warrant disqualification.

ARC disqualified the arbitrator.

Scenario 2

Respondent objected on the basis of the arbitrator's disclosure involving prior retentions of the arbitrator and the arbitrator's firm by Claimant's counsel within the past few years. The first incident involved retention by Claimant's counsel to represent a company during a period when Claimant's counsel served as General Counsel of that company. The lawsuit was pending, but Claimant's counsel was no longer with the company. The second involved retention of the arbitrator and the arbitrator's firm to represent another entity from the same industry as the parties to the arbitration.

"The Claimant objected to the appointment of the Respondent's party-appointed arbitrator based on the previous representation of the Respondent and the relationship with the other arbitrator."

Claimant responded that the arbitrator had accurately disclosed the prior matters, and provided added information, specifically that when the arbitrator was retained by Claimant's counsel to represent the entity at which the arbitrator was General Counsel, the matter was handled by an associate from the arbitrator's firm, and that there was no interaction between Claimant's counsel and arbitrator during the representation. As to the retention by Claimant's counsel of the arbitrator and the arbitrator's firm, the Claimant argued that it involved a one-time retention in 2014 that lasted 2½ months, and the arbitrator's participation was limited to a brief phone conference. Claimant viewed these as minimal contacts that did not warrant removal.

ARC disqualified the arbitrator.

Scenario 3

Respondent objected to Claimant's second neutral party-appointed arbitrator on the grounds that Claimant's counsel previously worked for the arbitrator as a law clerk for a year, and the arbitrator was currently serving as an expert in a case involving Claimant's counsel in an ongoing matter. The arbitrator's disclosure did not initially indicate the nature of the matter or any other details involving service as an expert. The arbitrator provided additional detail after the AAA requested further information. Claimant opposed the objection on the grounds that Claimant's counsel's service as law clerk was remote in time since it occurred 10 years previously,

and was only for a one-year period. With respect to service as an expert, the Claimant argued that the arbitrator was retained by an unrelated law firm for that engagement and received no compensation from Claimant's law firm or otherwise had any substantive contact with the law firm on that matter.

ARC disqualified the arbitrator.

Disclosure Issue: Relationships With Parties to the Arbitration

Scenario 4

This was an objection by Claimant to Respondent's neutral party-appointed arbitrator. Claimant argued that the arbitrator's long-standing friendship with the Respondent CEO's spouse was grounds for removal. In addition, the arbitrator and the CEO's spouse also served as co-counsel in several cases. Based upon these personal and professional ties, the Claimant argued that the arbitrator should be disqualified. The Respondent opposed Claimant's challenge on the basis that the CEO's spouse is a third party with no direct relationship to the matter. In addition to its objection based upon a party relationship, Claimant objected to the arbitrator on the grounds that the arbitrator had a professional relationship with Respondent's counsel or the firms for which they work based upon the arbitrator's disclosure of involvement in a lawsuit more than 10 years ago in which Respondent's counsel represented one of the parties.

ARC disqualified the arbitrator.

Scenario 5

The Arbitrator provided a disclosure that the arbitrator represented a general contracting firm in a construction project in which Claimant was a subcontractor, and that Claimant gave the arbitrator's client a discount because Claimant could not obtain a work bond.

Respondent challenged the arbitrator, alleging that the arbitrator's client had been directly impacted by an element of damages which Claimant attributed to Respondent—specifically Claimant's lack of bonding capacity, and that a finding in Claimant's favor could theoretically benefit the arbitrator's client by restoring the bonding capacity.

Claimant conceded the discount received was part of the damages in the instant arbitration, but asserted that the disclosure was not substantial and involved a single and minimal connection and was not a basis to remove the arbitrator.

ARC disqualified the arbitrator.

Scenario 6

Claimant objected to Respondent's party-appointed neutral arbitrator based on the arbitrator's past professional and social relationship with Respondent. Approxi-

mately 10 to 15 years prior to the arbitration, the arbitrator was General Counsel of a parent company with many different subsidiaries. At the same time, Respondent worked for several of the subsidiaries. While working at the parent company, the arbitrator also socialized with Respondent.

ARC disqualified the arbitrator.

Scenario 7

In the notice of appointment, the Respondent's party-appointed arbitrator disclosed representation of the Respondent's business in a litigation decades prior to the arbitration. The arbitrator also disclosed a relationship to another member of the panel—previous selection of another member of the three-arbitrator tribunal to serve as a mediator, and social connections—attending sporting events with one of the other arbitrators within the past two years. The arbitration agreement was silent regarding the neutrality of the party-appointed arbitrators, and accordingly the provisions of the AAA's Commercial Arbitration Rules requiring that arbitrators act in an impartial and independent manner applied equally to all arbitrators, including party-appointed arbitrators.

The Claimant objected to the appointment of the Respondent's party-appointed arbitrator based on the previous representation of the Respondent and the relationship with the other arbitrator.

The Respondent opposed the disqualification of the arbitrator and argued that the standard for arbitrator disqualification had not been met based on a prior representation, which they stated had taken place more than 35 years earlier. Further, Respondent argued that whatever business or social relationship might be reflected among two arbitrators through the attendance at sporting events or the retention of one by the other in an unrelated and concluded matter was not a basis to disqualify an arbitrator.

ARC reaffirmed the arbitrator.

Disclosure Issue: Relationships With Experts or Witnesses

Scenario 8

The challenged arbitrator was appointed as a replacement arbitrator on the panel when one of the arbitrators resigned. One of the Respondents objected on the grounds that the arbitrator had an attorney/client relationship and professional relationship with the Claimant's testifying expert.

The Respondent argued that the arbitrator's representation of the expert created a conflict of interest due to the attorney client fiduciary relationship. Through that relationship, the Respondent argued, the arbitrator had learned facts about the expert that are confidential and not subject to cross examination. The Respondent con-

cluded that the arbitrator would be forced to weigh the credibility of the former client (the expert), which would create an unavoidable specter of partiality. Respondent also based its objection on the arbitrator's disclosure of having retained the services of the expert, which the Respondent argued created an inherent bias in favor of the expert.

The Claimant responded to the challenge by arguing that nothing in the arbitrator's disclosures indicated any direct, continuing, substantial or recent contact with the expert that would warrant disqualification.

ARC disqualified the arbitrator.

Scenario 9

In this multi-party arbitration, all parties mutually agreed to the appointment of an arbitrator without the involvement of the AAA. The subject matter of the arbitration was highly technical, and the arbitrator had been selected based on background, expertise and experience. In the disclosure checklist, the arbitrator made extensive disclosures, including those relating to service as counsel in numerous cases where law firms in the arbitration served as opposing counsel, and of serving as counsel in unrelated arbitrations and mediations where some attorneys in the present arbitration were appointed as an arbitrator or mediator. Finally, the arbitrator disclosed that an ex-spouse's nephew had been designated as an expert witness by one of the parties to the arbitration. In addition, the same expert witness had been retained in several matters by the arbitrator's law firm over the prior ten years.

After receiving the arbitrator's disclosures, one of the Respondents objected to the arbitrator's appointment. However, despite the significant number of prior professional relationships between the arbitrator and many of the attorneys in the arbitration, the sole basis for the Respondent's objection was the nephew of the arbitrator's ex-spouse serving as an expert witness in the arbitration. The Respondent argued that the relationship between the arbitrator and the expert witness, whether good or bad, provided a serious question about the appearance of impartiality and independence that would be very difficult to evaluate. The other Respondents joined in the objection to the arbitrator's appointment. A number of the Claimants argued that the arbitrator's personal relationship with the expert witness was not a basis for the arbitrator's disqualification.

ARC disqualified the arbitrator.

Disclosure Issue: Arbitrator Qualifications

Scenario 10

Both parties objected to the other's neutral party-appointed arbitrator on the basis that the arbitrator lacked the qualifications set forth in the parties' agreement. The

agreement called for the arbitrators to have ten years' experience arbitrating claims in a specific subject area. Claimant's neutral party-appointed arbitrator disclosed service as an arbitrator for over 10 years but did not attest to how much arbitration practice focused on the subject area in question. Respondent's neutral party-appointed arbitrator certified over 20 years' experience as a judge and more than ten cases in the subject area. In addition, since retiring from the judiciary, the Respondent's arbitrator arbitrated two cases involving the subject area and mediated several cases in the subject area.

ARC reaffirmed the Respondent's neutral party-appointed arbitrator and removed Claimant's neutral party-appointed arbitrator.

Disclosure Issue: Life Experience/Personal Background Related to the Arbitration

Scenario 11

Respondent's objection to the arbitrator was not based upon a disclosure but upon their discovery that the arbitrator was currently serving as Chief Legal Officer to an insurance broker. This information was not on the arbitrator's resume originally furnished to the parties, but came to Respondent's attention when they were provided with an updated resume for the arbitrator in a subsequent arbitration. Respondent asserted that as Chief Legal Officer for an insurance broker, the arbitrator would have a presumed bias in favor of insurance brokers, and the arbitration involved a dispute between a Claimant insurance brokerage and a Respondent insurance company. Claimant responded that the arbitrator's service as a Chief Legal Officer at a non-party insurance broker did not give rise to justifiable doubt regarding the arbitrator's impartiality, and that the objection was trivial. It also noted the original resume for the arbitrator demonstrated previous representation of insurance brokers and insurance companies on various legal matters and that Respondent was thus on notice from the outset.

ARC reaffirmed the arbitrator.

Disclosure Issue: Other (Arbitrator Competency)

Scenario 12

Claimant's counsel sought to disqualify the arbitrator based on Claimant's past experience using the arbitrator as counsel. Claimant's counsel argued that Claimant had retained the arbitrator as counsel in a separate matter and the arbitrator had drafted, in Claimant's counsel's estimation, a contract that was below industry standards. Therefore, Claimant's counsel objected to the arbitrator on the grounds that because the arbitrator was incompetent as an attorney, the arbitrator should be removed from serving on the current matter. Respondent did not object to the arbitrator's service.

ARC reaffirmed the arbitrator.

The purpose of the Administrative Review Council is to help to resolve critical administrative issues such as arbitrator disqualification requests in an expeditious and considered manner. As demonstrated by the ARC data, the most frequent reasons for arbitrator disqualification requests result from either relationships with lawyers or law firms representing a party or an arbitrator's relationships with parties to the arbitration. The data also show that both claimants and respondents are making these disqualification challenges to ARC, and that those requests are being granted slightly less frequently than the requests are denied.

Critical to ARC's function is careful consideration of the parties' contentions in conjunction with the Council Guidelines and Council Standards, which are made available to the parties. Therefore, it is important that both parties and arbitrators have a solid understanding of the rules governing arbitrator disclosure requirements, the relevant administrative rules on arbitrator disclosure, and the guidelines that are used to assess arbitrator disqualification requests. The more that arbitrators and parties are educated on issues of arbitrator disclosure obligations and standards, the better it is for the arbitration process. By providing data on the ARC determinations and providing the Council Guidelines and Standards to users and arbitrators, it is the AAA's goal to provide clear guidance as to the factors that AAA considers when evaluating arbitrator disqualification requests.

Endnotes

1. See The Code of Ethics for Arbitrators in Commercial Disputes, effective March 1, 2004, https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf.
2. See, e.g., Rule 18—AAA Commercial Arbitration Rules, https://www.adr.org/sites/default/files/Commercial_percent20Rules.pdf.
3. The ARC homepage on the AAA's website is available at <https://www.adr.org/arc>.

Eric Tuchmann is the General Counsel and Corporate Secretary of the American Arbitration Association, Inc. and Senior Vice President overseeing the Association's International division, the International Centre for Dispute Resolution. He can be reached at TuchmannE@adr.org.

Sasha Carbone is the Associate General Counsel and Assistant Corporate Secretary of the American Arbitration Association, Inc. She can be reached at CarboneS@adr.org

Tracey B. Frisch is Senior Counsel in the American Arbitration Association, Inc.'s legal department. She can be reached at FrischT@adr.org.

Simon Kyriakides is Senior Counsel in the American Arbitration Association, Inc.'s legal department. He can be reached at KyriakidesS@adr.org.

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Contact Kristen Wagner
Director, Pro Bono Services, NYSBA
kwagner@nysba.org | 518.487.5640

