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Setting the Standard for "Neutral" Arbitrators: The Risk of Evident Partiality and the Impact of Monster Energy v. City Beverages

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SETTING THE STANDARD FOR "NEUTRAL" ARBITRATORS: THE RISK OF EVIDENT PARTIALITY AND THE IMPACT OF *MONSTER ENERGY V. CITY BEVERAGES*

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The use of Alternative Dispute Resolution (ADR), and particularly arbitration, has grown in tandem with the delays and costs of litigating in overburdened state and federal court systems, but that rise in popularity has not come without a cost. Although arbitration may often be a preferable alternative to a full-blown court trial, the inconsistency and insufficiency of existing disclosure requirements for arbitrators in many states limits the ability of parties to make an informed evaluation as to the risk or existence of potential bias. The recent Monster Energy *case out of the United States Court of Appeals for the Ninth Circuit has begun to change the landscape for disclosure requirements for arbitrators under the Federal Arbitration Act, but unless state legislatures agree to implement disclosure requirements for arbitrators that allow the parties to accurately evaluate the risk of partiality themselves, ADR will not reach its potential as a more accessible and equally fair alternative to the court system. The Federal Arbitration Act and several state statutes impose disclosure requirements on arbitrators, but the issue of "evident partiality" arising from the potential economic motivations of arbitrators has rarely been examined by the courts. The Ninth Circuit's ruling has put the spotlight on the need for arbitrators to disclose any potential financial interest or stake they may have in the outcome of an action.*

While the issue had not received much attention prior to Monster Energy*, there has been growing concern in the legal community over the*

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potential abuse and partiality permitted under the current disclosure requirements for arbitrators, particularly in light of the surge in arbitration clauses, and the disparate economic influence wielded by "repeat players" in the arbitration system. Given the private nature of ADR providers, it is to be expected that the rules applicable to arbitrators differ from Article III judges. However, as discussed in Monster Energy *and Justice White's concurring opinion in* Commonwealth Coatings*, parties to an arbitration should be made aware of all of the arbitrator's non-trivial business dealings that may hinder the fairness of the process, including whether there are any financial incentives that might cause a reasonable party concern that an arbitrator could favor one party over another. Arbitration will continue to grow in popularity, highlighting the need to establish strict and unambiguous disclosure requirements to enable all participants in arbitration to evaluate the economic interests of potential arbitrators, and to minimize the risks of bias in such proceedings.*

TABLE OF CONTENTS

I. INTRODUCTION

Legal disputes are a familiar concept to many Americans, but the variety of methods employed to solve them is evolving, requiring a closer look at how these alternative methods may impact the integrity of the dispute resolution system. Despite what popular television shows and movies may suggest, real life litigation rarely takes place inside a courtroom. The vast majority of legal disputes are resolved without a trial.[1] A growing number of these disputes are being settled outside of the court system entirely, in the form of alternative dispute resolution (ADR).[2] There are several types of ADR, but they all generally involve bringing in a neutral third party to help bring about a resolution with less time and resources expended at trial.[3]

As legal disputes trend away from the court system and towards arbitration and other forms of ADR,[4] the role and potential bias of the third party involved in the dispute resolution must be considered. In many jurisdictions, it has not been clear whether an arbitrator is subject to the same or similar rules of disclosure and recusal as trial judges, creating a growing need for clarity as to how the courts ought to approach the issue and what types and level of disclosure parties should expect from potential arbitrators. One of the most pertinent issues affecting potential arbitrators is Repeat Player Bias, which refers to the symbiotic relationship between an arbitrator and a repeat customer of their services, leading to the potential for an arbitrator to favor this repeat player for business purposes at the expense of the other party to the dispute.[5] In *Monster Energy Company v. City Beverages*,[6] the Ninth Circuit provided meaningful guidance as to the nexus between the generalized disclosure requirements for arbitrators and the particular impact of Repeat Player Bias.[7] The court vacated an arbitration award because the arbitrator had failed to disclose that he had a "substantial"

1. *Government survey shows 97 percent of civil cases settled*, PHX. BUS. J. (May 27, 2004), https://www.bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html (citing a U.S. Justice Department study of state courts) ("About 97 percent of civil cases are settled or dismissed without a trial.").

2. Bradley A. Kletscher, *Alternative Dispute Resolution ("ADR") Trends: The Growth and Prevalence of ADR in Litigation*, BARNA, GUZY & STEFFEN LTD. BLOG (Dec. 13, 2009), https://www.bgs.com/blog/2009/12/13/alternative-dispute-resolution-adr-trends-the-growth-and-prevalence-of-adr-in-litigation/ [hereinafter *ADR Trends*].

3. *See id.*

4. *Id.*

5. *See generally* Drew J. Hushka, *How Nice to See You Again: The Repetitive Use of Arbitrators and the Risk of Evident Partiality*, 5 Y.B. ARB. & MEDIATION 325 (2013), http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1099&context=arbitrationlawreview.

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

7. *See id.*

ownership interest in the ADR provider in that case, and that provider had "nontrivial" past business dealings with one of the litigants (Monster Energy).[8]

This Article aims to highlight the Ninth Circuit's holding in *Monster Energy*, and to discuss its significance to the legal profession and potential litigants. In Part II, this Article will give a brief overview of the growth of arbitration in the United States, the general disclosure and conflict rules applicable to arbitrators, and the factual background of *Monster Energy*. Parts III and IV will discuss the issue of Repeat Player Bias and analyze the Ninth Circuit's rationale in the case. Part V will suggest that a strict standard for required disclosures of arbitrators, similar to the Ninth Circuit's in *Monster Energy*, should be applied universally and unambiguously through state law and court rulings to ensure fairness in arbitration proceedings and to give parties the tools necessary to provide adequately informed consent to the resolution of their disputes outside of the court system. While this Article addresses ADR generally, emphasis will be placed on arbitration in civil cases for the sake of simplicity and relevance to the *Monster Energy* case.

II. BACKGROUND

A. What is Alternative Dispute Resolution?

ADR is generally defined as any attempt to resolve a legal dispute outside of court.[9] While accurate, this definition fails to paint a clear picture of what that process actually looks like. Technically, even a one-off offer to settle could be considered a form of ADR given that it is a form of negotiation aimed at resolving the dispute. As a direct alternative to trial, ADR is generally voluntary for all parties involved and a neutral third party will be brought in to promote impartiality.[10]

ADR exists in many forms, each with its own process and nuance. Two of the most common types of ADR are mediation and arbitration.[11] This Article will focus on arbitration because it is one of the few forms of ADR in which the third-party neutral may have the power to render a binding adjudication of the parties' dispute, so that the risks of potential bias, and the parties' resulting interests in procuring full and accurate disclosures, are most acute.

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8. *See id.* at 1132, 1135-36.

9. *What is ALTERNATIVE DISPUTE RESOLUTION?*, L. DICTIONARY, https://thelawdictionary.org/alternative-dispute-resolution/ (last visited Apr. 14, 2021).

10. *Id.*

11. *ADR Types & Benefits*, CAL. CTS., https://www.courts.ca.gov/3074.htm (last visited Apr. 26, 2021).

Although both mediation and arbitration involve a third-party neutral to assist with the dispute, they differ in the specific role and function of the third-party neutral.[12] Where a mediator will simply facilitate discussion between the parties, an arbitrator or a panel of multiple arbitrators will ultimately decide the outcome of the dispute.[13] In this sense, arbitration proceedings operate similarly to trial. The arbitrator(s) hear arguments from both sides, and the parties may submit evidence for the arbitrator to consider.[14] While there are some similarities to trial, the arbitration process differs by operating less formally and by loosening the rules of evidence for the sake of efficiency.[15] In addition, the effect of the arbitrator's decision may operate differently from a judge or jury's decision at trial.[16]

An arbitration proceeding can be "binding" or "nonbinding."[17] In the typical binding arbitration, the parties agree to accept the arbitrator's decision as final,[18] and the right to appeal the substance of that decision is extremely limited.[19] In other types of arbitrations, the parties may agree that the arbitrator's decision is not binding.[20] In those matters, either party may reject the decision and proceed to trial.[21] Binding arbitration is best for those who wish to avoid the formality, time, and cost of trial.[22] For both types of arbitration, litigants are given the opportunity to select a decision maker who possesses more specialized knowledge in a particular area of the law or other subject matter that makes them a better fit to adjudicate the dispute.[23]

Other forms of ADR, such as neutral evaluation and settlement conferences, each contain their own benefits and drawbacks when compared to their counterparts,[24] but arbitration best exemplifies the alluring features of ADR, and has generated a significant amount of trust and practice of ADR nationwide.[25]

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12. *Id.*
13. *ADR Types & Benefits*, *supra* note 11.
14. *Id.*
15. *See id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *ADR Types & Benefits*, *supra* note 11.
20. *Id.*
21. *Id.*
22. *See id.*
23. Linda L. Beyea, *Select the Right Arbitrator for Your Case*, AAA-ICDR® BLOG (Dec. 10, 2019), https://adr.org/blog/select-the-right-arbitrator-for-your-case.
24. *See id.*
25. *See generally Mediation vs. Arbitration vs. Litigation: What's the Difference?*, FIND L., https://www.findlaw.com/adr/mediation/mediation-vs-arbitration-vs-litigation-whats-the-difference.html (last updated Nov. 12, 2019).

1. Prevalence

The growth of ADR is likely the culmination of many contributing factors, but its appeal stems largely from its lower cost, less daunting procedures compared to its trial counterpart, the parties' freedom to choose the arbitrator(s) and create their own schedule, and the desire to avoid a jury panel and class actions. Although ADR in its basic form is not a new concept, its mainstream use began in response to the litigation explosion of the past few decades.[26]

In an attempt to address growing caseloads and a lack of resources, courts began to promote ADR to lessen the burden placed on them.[27] Consequently, ADR is often viewed as a more efficient alternative for the parties involved, while reducing case overload for courts thanks to ADR proliferation.[28] Even the United States Courts' website encourages the use of ADR, asserting that it saves both parties unnecessary expense and delay.[29]

One of the key features of ADR is that it may be used in conjunction with litigation.[30] Not only is this potentially advantageous for parties to a dispute, it is also in the interest of the courts to have prospective litigants attempt to resolve their dispute before calling upon the often limited resources of the court system to resolve it.[31] In response, some courts, bar associations, and state legislatures have begun providing ADR resources or requirements to promote the use of ADR before commencing trial.[32]

For example, the Santa Clara County Superior Court website contains an "ADR Resources" page that includes: a list of local ADR providers, a phone number and email address to inform and prepare parties for ADR, contact information for free mediation services in some types of disputes, and additional links to other resources.[33] Not only is

26. *ADR Trends*, *supra* note 2.

27. *Id.*

28. *See id.*

29. *Civil Cases*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/types-cases/civil-cases (last visited Apr. 26, 2021) ("To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute. The courts encourage the use of mediation, arbitration, and other forms of alternative dispute resolution, designed to produce a resolution of a dispute without the need for trial or other court proceedings.").

30. *Mediation vs. Arbitration vs. Litigation*, *supra* note 25.

31. *See* Miranda Blue, *In Overcrowded Courts, Justice Delayed*, PEOPLE FOR AM. WAY (Jan. 31, 2011), https://www.pfaw.org/blog-posts/in-overcrowded-courts-justice-delayed/.

32. *See, e.g.*, *Mediation vs. Arbitration vs. Litigation*, *supra* note 25; *see also ADR Resources*, SUPERIOR CT. CAL. COUNTY SANTA CLARA, https://www.scscourt.org/self_help/civil/adr/adr_resources.shtml (last visited Apr. 26, 2021) [hereinafter Santa Clara County ADR Resources].

33. Santa Clara County ADR Resources, *supra* note 32.

it commonplace to find a plethora of ADR resources online that make the process easier for potential litigants, some jurisdictions require or strongly encourage participation in ADR before allowing a case to be heard at trial.[34] Florida requires parties in a wide variety of legal disputes to attempt to reach a resolution through mediation or arbitration before they can begin trial.[35] With the numerous benefits arbitration provides for litigants and the legal system, it will likely continue growing.

2. Making Sense of the Numbers

All signs indicate that there is a strong likelihood ADR will, at the very least, remain an effective and more accessible alternative to litigation. But just how common is ADR? Statistics are frequently thrown around regarding the percentage of cases that settle or go to trial, but it can be difficult to generate precise numbers. A common misconception is that about ninety-five percent of cases settle, but, despite the significant variation among research methods, a more accurate estimate is that about two-thirds of civil cases settle.[36] The remarkably high rate does not come from settlement rates but is instead based on the number of cases that go to trial in the first place.[37]

Some of the more telling statistics are those involving case filings. While reliable statistics concerning the number of cases that settle are hard to come by,[38] the number of case filings in the U.S. is well documented.[39] The number of cases filed in state trial courts increased steadily into the mid-2000s.[40] Following the 2008 economic crisis, average case filings increased at a more rapid pace.[41] However, this trend was short-lived, declining at an average of three point five percent for the next several years.[42] The number of case filings between 2014

34. *See, e.g.*, *Mediation vs. Arbitration vs. Litigation*, *supra* note 25.

35. F.S.A. § 718.1255 (West 2020).

36. *See* Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* 6 CORNELL L. FAC. PUBLICATIONS 111, 112, 115 (2009).

37. John Barkai et al., *A Profile of Settlement*, 42 AM. JUDGES ASS'N CT. REV. 34, 34 (2006), https://aja.ncsc.dni.us/courtrv/cr42-3and4/CR42-3BarkaiKentMartin.pdf ("Many commentators start with an accurate picture of low, single-digit trial rates (typically 2%-3%), but then they inappropriately assume the inverse—namely, that all the remaining cases are settled.").

38. *Id.*

39. *Id.*; *see, e.g.*, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS (2015), https://www.courtstatistics.org/__data/assets/pdf_file/0028/29818/2015-EWSC.pdf [hereinafter EXAMINING THE WORK OF STATE COURTS].

40. EXAMINING THE WORK OF STATE COURTS, *supra* note 39, at 4.

41. *Id.*

42. *Id.*

and 2019 were much more erratic, but the population-adjusted numbers still appear to be going down.[43]

Some argue that one of the main driving forces behind the growth of ADR stems from the pervasiveness of mandatory arbitration clauses.[44] An arbitration clause is defined as "[a] clause inserted in a contract providing for compulsory arbitration in case of dispute as to [rights] or liabilities under it."[45] In essence, an arbitration clause requires the parties to a contract containing the clause to participate in arbitration should any legal dispute arise out of the terms of the contract.[46] While arbitration clauses cannot constitute waiver of a court's jurisdiction entirely, they nonetheless may significantly limit one's ability to resolve the dispute at trial.[47] One of the primary uses of arbitration clauses is insertion into employment contracts.[48] Employers may be inclined to include arbitration clauses in their employment contracts in recognition of, and in response to, the ability to control their employment disputes in an environment that gives them a better chance of obtaining a favorable outcome.[49] For example, California has one of the highest rates of arbitration clauses in employment contracts and also has an employee-protective legal structure.[50]

Given that many arbitration clauses in employment contracts involve opting out of the state court system, the inference is that one of the primary motivations in including arbitration clauses in employment contracts is to nullify many of the legal protections employees would otherwise have, including the right to a jury trial.[51] This practice by

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43. *See* U.S. COURTS, UNITED STATES DISTRICT COURTS – NATIONAL JUDICIAL CASELOAD PROFILE, https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2019.pdf (last visited Apr. 26, 2021); *see also National Population Totals and Components of Change: 2010-2019*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html (last visited Apr. 26, 2021).

44. *See generally* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/files/pdf/144131.pdf; *see also* Daniel T. Pascucci, *Dissecting Common Basic Arbitration Clauses – You Can Build a Better One*, MINTZ (Mar. 6, 2018), https://www.mintz.com/insights-center/viewpoints/2196/2018-03-dissecting-common-basic-arbitration-clauses-you-can-build.

45. *What is ARBITRATION CLAUSE?*, L. DICTIONARY, https://thelawdictionary.org/arbitration-clause/ (last visited Apr. 26, 2021).

46. *See* Colvin, *supra* note 44, at 1.

47. *What is ARBITRATION CLAUSE?*, *supra* note 45.

48. *See* Colvin, *supra* note 44, at 1.

49. *Id.*

50. *Id.* at 7.

51. *See id.* at 12 ("Rather than having their rights adjudicated through the public courts and decided by juries of their peers, more often now American workers have to bring claims . . . through arbitral forums designated by agreements that their own employers drafted and required them to agree to as a condition of employment.").

employers has received criticism for its unfair treatment of employees due to the complexity and prevalence of arbitration clauses in the employment contracts of large-scale employers, limiting people's ability to avoid and understand them.[52] Employers might counter by arguing that they include arbitration clauses in their employment contracts for promoting efficiency and decreasing the costs for all parties involved, to the disadvantage of no one.[53] Regardless of the reason, the frequent inclusion of arbitration clauses in employment contracts has attracted a greater amount of attention to ADR, and followed with implementation of several restrictions regarding their use with the possibility of additional restrictions in the future.[54] The pervasiveness of mandatory arbitration clauses is a separate major source of debate within the legal community that deserves its own discussion, but is nonetheless worth introducing here to provide a better understanding of how ADR directly impacts litigation in the United States.[55]

In any event, there is no question that arbitration is more prevalent now than before, and that trend does not appear to be changing anytime soon.[56] However, as the popularity of arbitration grows, so too does the risk of abuse and prejudice.[57]

B. Evolution of Arbitration

Having discussed ADR with a focus on arbitration, its forms, and its prevalence, the next step is to consider the arbitrators themselves: who are they? Where do they come from? What rules govern their selection?

1. Who Are the Main Service Providers?

The demand for legal experts to resolve disputes through ADR has led to the formation of numerous ADR service providers.[58] There is a

52. *See generally id.*

53. *See* Pascucci, *supra* note 44.

54. *See* Colvin, *supra* note 44, at 12.

55. In-depth discussion of arbitration clauses is beyond the scope of this Article.

56. *Alternative Dispute Resolution*, CORNELL L. SCH., https://www.law.cornell.edu/wex/alternative_dispute_resolution (last updated June 8, 2017) ("As burgeoning court queues, rising costs of litigation, and time delays continue to plague litigants, more states have begun experimenting with ADR programs.").

57. *See generally* Barbara Kate Repa, *Arbitration Pros and Cons*, NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html (last visited Apr. 26, 2021).

58. *See, e.g.*, JAMS, jamsadr.com (last visited Apr. 26, 2021); AM. ARB. ASS'N, adr.org (last visited Apr. 26, 2021); CPR, https://www.cpradr.org (last visited Apr. 26, 2021).

rapidly growing list of ADR service providers,[59] but the three most commonly used service providers in the country are the American Arbitration Association (AAA), the International Institute for Conflict Prevention & Resolution (CPR), and JAMS.[60] Of these three organizations, two are non-profit.[61] AAA and CPR each operate as non-profit organizations, which makes JAMS unique among its competitors by operating as a for-profit business.[62] Collectively, these organizations have handled thousands of cases and employ hundreds of full-time third-party neutrals.[63] Despite the significant collective market share of the three largest organizations, there is enough demand for ADR neutrals in the market to support many other service providers as well.[64] Still, in comparison to the three, other providers are typically much smaller and are less equipped to handle the volume and variety of ADR services than the three aforementioned ones.[65] As a result, the big three are the preferred providers for many of the nation's largest businesses.[66]

2. Rules Applicable to Arbitrators

The rules and procedures of arbitration may differ from trial, and at times are far looser, but arbitration is nonetheless subject to its own restrictions.[67] One of the notable differences is that anyone can be an arbitrator, with or without a law degree or legal expertise, which is a stark departure from the requirements of judgeship.[68] While this is generally the case, there are situations in which an arbitrator must meet specific subject matter qualifications that do not apply to judges.[69]

For example, in the context of mandatory arbitration clauses, the clause may stipulate that an arbitrator must come from a particular pool

59. *See Dispute Resolution Rosters List*, A.B.A., https://www.americanbar.org/groups/dispute_resolution/resources/DR_Rosters_List/ (last visited Apr. 26, 2021).

60. *See* David McLean, *US Arbitral Institutions and Their Rules*, LATHAM & WATKINS LLP, https://www.lw.com/thoughtLeadership/us-arbitral-institutions-and-their-rules (last visited Apr. 26, 2021).

61. *See* CPR, *supra* note 58; *About the AAA and ICDR*, AM. ARB. ASS'N, https://www.adr.org/about (last visited Apr. 26, 2021).

62. *See* CPR, *supra* note 58; *see About the AAA and ICDR*, *supra* note 61.

63. *See* McLean, *supra* note 60, at 1.

64. *See* JUNE R. LEHRMAN & EDITH C. SCHAFFER, CAL. TRANSACTIONS FORMS BUS. TRANSACTIONS § 14:4 (2020).

65. *See generally Dispute Resolution Rosters List*, *supra* note 59.

66. *See id.*

67. *See* Pascucci, *supra* note 44.

68. *See* Ken LaMance, *Who Can Be an Arbitrator?*, LEGALMATCH, https://www.legalmatch.com/law-library/article/choosing-an-arbitrator.html (last updated Apr. 18, 2018, 2:34 PM).

69. *Id.*

of candidates with relevant expertise relating to the nature of the dispute.[70] Non-lawyers are technically qualified to conduct certain kinds of arbitration,[71] and the parties to a dispute may prefer an arbitrator with a specific type of expertise.[72] One of the potential benefits of arbitration over trial is that an arbitrator is selected and agreed upon by both parties, allowing them to choose an arbitrator they believe is equipped to understand and adequately adjudicate their dispute.[73] Conversely, the greater level of randomness in the selection of judges that will hear a case may create a more neutral environment.[74]

In sum, the process for selecting an arbitrator is ultimately up to the parties to the dispute.[75] Rather than relying on longstanding, more fastidious rules such as those applicable to trial, the parties to an arbitration are the masters of their own proceeding and are free to manage it in any way they see fit.[76]

i. Rules of ADR Service Providers

Although the rules of arbitration are ultimately up to the parties, many ADR service providers have established their own rules applicable to all arbitrations conducted by their organization.[77] Presumably, this streamlines the process and allows prospective customers to review the details of the process before formally beginning the proceedings or selecting an ADR service provider.[78] As an illustration, the JAMS website devotes an entire homepage tab to rules and clauses for their ADR services.[79] Under JAMS' *rules and clauses* options, they provide detailed information regarding their general rules of arbitration.[80]

70. *See id.*

71. *Id.*

72. *See What is Arbitration?*, FIND L., https://adr.findlaw.com/arbitration/what-is-arbitration-.html (last updated June 20, 2016) ("Arbitrators can also be required to be experts in the field or industry involved in a dispute, whereas a judge may or may not have such expertise. On the flip side, some would suggest that this randomness and lack of selection is a plus for litigation, as judges have no reason to worry about whether they will ever be 'picked' to decide another case for the parties before them.").

73. *Id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. *See, e.g.*, *JAMS ADR Rules & Clauses*, JAMS, https://www.jamsadr.com/adr-rules-procedures/ (last visited Apr. 26, 2021); *What We Do*, AM. ARB. ASS'N, https://adr.org/arbitration (last visited Apr. 26, 2021); *Arbitration*, CPR, https://www.cpradr.org/resource-center/rules/arbitration (last visited Apr. 26, 2021).

78. *See id.*

79. *See JAMS Rules & Clauses*, JAMS, https://www.jamsadr.com/adr-rules-procedures/ (last visited Apr. 26, 2021).

80. *See id.*

JAMS' comprehensive arbitration is subject to thirty-four rules,[81] compared to the twenty-eight rules listed for their streamlined arbitration format.[82] The rules cover topics ranging from service requirements to sanctions, resembling the rules of civil procedure for the courts in many ways.[83] While many of the JAMS arbitration rules cover similar issues as rules of civil procedure, they are clearly dwarfed by both number and depth when compared to rules of civil procedure.[84] Certainly, one of the major benefits of arbitration is its simplified process,[85] and the JAMS rules seem to support that notion. However, this simplification comes at the cost of certain rights and protections that exist for litigants.[86]

The well-established process used in JAMS arbitrations, along with the similar processes practiced by other large ADR providers,[87] is likely one of the driving forces behind the success of the top ADR service providers.[88] In fact, a substantial portion of the JAMS rules cover arbitration clauses.[89] This is unsurprising given the vast number of arbitrations that organizations like JAMS manage that stem from arbitration clauses.[90]

Organizations like JAMS handle such a large number of arbitrations that some parties are bound to dispute the outcome. JAMS has several rules in place to address this.[91] First, JAMS has an informal appeal process for arbitration awards.[92] However, the JAMS appeal process is vastly different from the rules of appeal in civil procedure.[93]

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81. *See* JAMS, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES (2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf.

82. *See* JAMS, JAMS STREAMLINED ARBITRATION RULES & PROCEDURES (2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_streamlined_arbitration_rules-2014.pdf.

83. *See id.*; c*f.* FED. R. CIV. P. (establishing the process parties and courts must follow when engaging in or conducting civil litigation.).

84. JAMS STREAMLINED ARBITRATION RULES & PROCEDURES, *supra* note 82; c*f.* FED. R. CIV. P.

85. *See ADR Types and Benefits*, *supra* note 11.

86. *See, e.g.*, FED. R. CIV. P. 38 (right to a jury); FED. R. CIV. P. 50 (judgement as a matter of law); FED. R. CIV. P. 59 (new trial).

87. *See, e.g.*, *Rules, Forms & Fees*, AM. ARB. ASS'N, https://www.adr.org/Rules (last visited Apr. 26, 2021).

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

89. *See* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, *supra* note 81.

90. *See Consumer Case Information*, JAMS, https://www.jamsadr.com/consumercases/ (last visited Apr. 26, 2021).

91. *See* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, *supra* note 81.

92. JAMS, JAMS OPTIONAL ARBITRATION APPEAL PROCEDURE (2003), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf.

93. *See id.*; *cf.* FED. R. CIV. P. 4 (summons).

The most noteworthy difference is that an appeal of a JAMS arbitration award is optional, requiring the consent of both parties before it may be processed.[94] This hardly resembles an appeal process, and the ability to appeal an arbitration award is extremely limited at best.[95]

Second, JAMS provides no procedure for vacating an arbitration award.[96] Rather than providing customers an opportunity to seek vacatur of the arbitration award, JAMS relies on the applicable state and federal rules of vacatur.[97]

Finally, the JAMS arbitration rules list few disclosure requirements for its arbitrators.[98] The rules mainly specify the manner in which the disclosures will be made, and only briefly mention disclosures "required by law."[99] Not only is this provision ambiguous, it is also unclear whether the disclosures "required by law" will be made at all.[100] The provision follows "required by law" with the language, "or within ten (10) calendar days . . . ."[101] In addition to the confusing and disjunctive disclosure requirements applicable to the arbitrator, the parties and their representatives are required to disclose any risks that are likely to cause impartiality on the part of the arbitrator.[102] Curiously, the rules appear to put the brunt of the disclosure requirements on the parties themselves, even with respect to the risk of the arbitrator's own impartiality.[103]

Given the limitations of JAMS' rules of arbitration, parties may only have the ability to challenge an arbitration award through pre-existing law, such as statutes, rules of civil procedure, and Canons of Judicial Ethics.[104]

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94. *See* JAMS OPTIONAL ARBITRATION APPEAL PROCEDURE, *supra* note 92, at 3.

95. *See id.*

96. *See* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, *supra* note 81, at 29-30.

97. *See id.* at 29 ("Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1, et seq., or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.").

98. *See* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, *supra* note 81, at 17 ("Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment.").

99. *See id.*

100. *See id.*

101. *Id.* ("Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment.").

102. *See id.* at 17-18 ("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.").

103. *See* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, *supra* note 81.

104. *See id.* at 17-18; *see, e.g.*, CAL. CODE CIV. PROC. § 638 (2003); *Code of Conduct for United States Judges*, at canon 2, https://www.uscourts.gov/judges-judgeships/code-conduct-

ii. Rules for Vacating an Arbitration Award

Even without the opportunity to seek a correction or vacatur of an arbitration award through the arbitration service provider's rules, parties may take advantage of both federal and state statutes that do give them that opportunity.[105] Specifically, the Federal and California rules each provide a basis for correcting or overturning an arbitration award—albeit on a much more limited basis than is available through appeals of trial court rulings.[106] California requires arbitrators to disclose "all matters that could cause a person aware of the facts to *reasonably entertain a doubt* that the proposed neutral arbitrator would be able to be *impartial*."[107] The Federal Arbitration Act (FAA) provides grounds for vacatur of an arbitration award when there is "evident partiality."[108] When applied, the federal rule requires arbitrators to disclose any facts "that might create an impression of possible bias."[109] Functionally, both rules are similar but not identical.[110]

Generally, a district court must "take the award as it finds it," with only a limited ability to vacate or modify the award.[111] There is a general rule of deference when an arbitration award is brought before the court.[112] However, courts have nonetheless been willing to vacate or modify arbitration awards on the basis of evident partiality.[113]

3. Monster Energy Co. v. City Beverages

The evolution of ADR and the challenges it raises are well exemplified in the Ninth Circuit's recent *Monster Energy* case.[114] This case involved a dispute between Monster Energy Company (Monster)

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united-states-judges#c (last visited Apr. 26, 2021) ("Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.").

105. *See Procedures and Grounds for Requesting a U.S. District Court to Correct an Arbitration Award or Vacate an Arbitration Award Under the Federal Arbitration Act*, WOLFF L. OFF. (2013), https://www.wolfflaw.com/procedures-and-grounds-for-requesting-a-u-s-district-court-to-co.html [hereinafter *Requesting to Correct or Vacate an Arbitration Award*].

106. *See id.*

107. CAL. CODE CIV. PROC. § 1281.9(a) (2003) (emphasis added).

108. 9 U.S.C. § 10(a)(2) (2002).

109. *See* Commonwealth Coatings Co. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968).

110. *See Requesting to Correct or Vacate an Arbitration Award*, *supra* note 105 ("The grounds for a Court to vacate or correct an Arbitration Award are similar-but not identical-under the California and Federal Arbitration Acts.").

111. Legion Ins. Corp. v. VCW, Inc., 198 F.3d 718, 721 (8th Cir. 1999).

112. *See* Teamsters Local 853 v. J.C. Paper, Nos. C-09-04671 EDL, C-08-2464 EDL., 2010 WL 625354, at *3 (N.D. Cal. 2010).

113. *See, e.g.*, Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1138-39 (9th Cir. 2019); *Commonwealth Coatings*, 393 U.S. at 150.

114. *See Monster Energy Co.*, 940 F.3d 1130.

and City Beverages, doing business as Olympic Eagle Distributing (Olympic Eagle).[115] In 2006, Olympic Eagle signed a twenty year contract with Monster, under which Olympic Eagle would promote and sell Monster products.[116] The contract included a provision that allowed Monster to terminate the agreement without cause, provided they pay Olympic Eagle a severance fee.[117] Monster terminated the contract before the conclusion of the contractual period, leading Olympic Eagle to use Washington state law in an attempt to prohibit Monster's termination without cause.[118] In response, Monster compelled arbitration of the dispute through the arbitration clause included in its contracts with distributors.[119] The arbitration clause designated JAMS Orange County as the administrator of the arbitration.[120] Upon the commencement of the mandatory arbitration proceedings, JAMS provided both parties with a list of seven arbitrators to choose from.[121] After the parties agreed on a candidate, the arbitrator provided a disclosure statement.[122] The arbitrator's disclosure statement said, in part:

> I practice in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS. In addition, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future.[123]

Following the completion of arbitration proceedings, the arbitrator ruled in favor of Monster and awarded attorneys' fees.[124] Soon after, Monster sought to confirm the award.[125] In response, Olympic Eagle petitioned for vacatur on the basis of its later discovery that the arbitrator was a co-owner of JAMS.[126] In addition, Olympic Eagle requested information about the arbitrator's financial interest in JAMS and Monster's relationship with JAMS.[127] Initially unsuccessful in its

115. *Id.* at 1132.
116. *Id.* at 1132-33.
117. *Id.* at 1133.
118. *Id.*
119. *Monster Energy Co.*, 940 F.3d 1130.
120. *Id.* at 1133.
121. *Id.*
122. *See id.*
123. *Id.*
124. *Monster Energy Co.*, 940 F.3d 1130.
125. *Id.*
126. *Id.* at 1133.
127. *Id.*

discovery request, Olympic Eagle served JAMS with a subpoena before the dispute was eventually brought before a federal district court.[128] The district court confirmed the arbitration award and awarded Monster attorneys' fees.[129] Olympic Eagle appealed the court's decision, bringing the case before the Ninth Circuit.[130] Ultimately, the Ninth Circuit found that the arbitrator failed to disclose his ownership interest in JAMS,[131] in violation of federal law.[132] The court based its decision on the grounds that the arbitrator's ownership interest in JAMS, in conjunction with JAMS' extensive business history with Monster, established a "reasonable impression of bias."[133]

The Ninth Circuit's reversal and grant of vacatur in this case has the potential to significantly impact the practice of ADR.[134] *Monster Energy* is one of the few cases to address the paradox of Repeat Player Bias.[135] If *Monster Energy* is any indication, it appears that, at the very least, rules of impartiality will be more strictly enforced in the future.[136]

III. IDENTIFICATION OF THE LEGAL PROBLEM

The central issues that the Ninth Circuit set out to address in *Monster Energy* involved an arbitrator's disclosure obligations and the risk of Repeat Player Bias.[137] The Repeat Player Effect is, in part, the notion that frequent customers of an ADR service provider have an inherent advantage over a non-repeat opposing party to the proceeding.[138] The prevalence of arbitration clauses within employment and business contracts calls for a closer look into the fairness of ADR in those environments.[139] Given the rapid growth of ADR and arbitration clauses, it is not surprising to believe that businesses have been

128. *See id.*
129. *Monster Energy Co.*, 940 F.3d 1130.
130. *Id.*
131. *Id.* at 1138.
132. *See Requesting to Correct or Vacate an Arbitration Award*, *supra* note 105 (stating that courts have statutory authority under 9 U.S.C. § 10(a)(2) to vacate an arbitration award "where there was evident partiality . . . in the arbitrators.").
133. *Monster Energy Co.*, 940 F.3d at 1138.
134. *See id.*
135. *See id.* at 1134.
136. *See id.* at 1141-42 (Friedland, J., dissenting).
137. *See id.* at 1138.
138. *See* Edward Silverman, *The Suspicious Existence of the "Repeat Player Effect" in Mandatory Arbitration of Employment Disputes*, NAT. L. REV. (2013), https://www.natlawreview.com/article/suspicious-existence-repeat-player-effect-mandatory-arbitration-employment-disputes.
139. *See generally* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

motivated to include arbitration clauses in their contracts because they receive benefits from partaking in arbitration as opposed to trial.[140] While there is an argument to be made that the benefits from arbitration clauses equally apply to both parties, the existence of Repeat Player Bias may tip the scales in the favor of one party over the other.[141]

In determining the risk of impartiality in arbitration proceedings, the nature of the relationship between arbitrators and the parties to the dispute is an important consideration.[142] The financial interest the arbitrator has in his associated business is also relevant.[143] While these factors provide some guidance in determining the risk of evident partiality, there is no bright-line rule when applying these factors to the facts.[144] Given the fact-specific requirements for a finding of evident partiality resulting in vacatur, many parties subject to an arbitration clause are unsure of their rights and potential remedies should they find themselves arbitrating against the other party to the contract.[145] Despite the Ninth Circuit in *Monster Energy* recently laying out the requirements for vacating an arbitration award on the basis of evident partiality more clearly, it has yet to be seen whether the current rules and the extent of their enforcement go far enough to ensure adequacy and fairness in ADR proceedings.[146]

IV. ANALYSIS

The court's holding in *Monster Energy* provides substantial guidance for applying the Federal Arbitration Act.[147] The FAA's text, stating that vacatur of an award is proper "where there was evident partiality . . . in the arbitrators," hardly establishes a pragmatic solution to the risk of arbitrator partiality.[148]

This section will first discuss the Ninth Circuit's holding in *Monster Energy*.[149] Second, this section will consider whether the court correctly

140. *See id.* ("By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.").

141. *See id.*; *see also Monster Energy Co.*, 940 F.3d at 1134.

142. *See Monster Energy Co.*, 940 F.3d at 1138.

143. *Id.* at 1136.

144. *See* Kathryn A. Windsor, *Defining Arbitrator Evidentiary Partiality: The Catch-22 of Commercial Litigation Disputes*, 6 SETON HALL CIR. REV. 191, 198-99 (2009).

145. *See* Silverman, *supra* note 138.

146. *See Monster Energy Co.*, 940 F.3d at 1135.

147. *See id.* at 1133-34, 1135-38.

148. *See* 9 U.S.C. § 10(a)(2) (2002).

149. *Monster Energy Co.*, 940 F.3d at 1132.

applied the rules of vacatur,[150] and evaluate whether the rules sufficiently address major concerns surrounding arbitration proceedings.[151]

A. The Ninth Circuit Rationale in Monster Energy

In *Monster Energy*, the Ninth Circuit considered whether the Federal Arbitration Act[152] permitted a court to vacate the arbitration award resulting from the dispute between Monster Energy and Olympic Eagle.[153] Olympic Eagle argued that the arbitrator's failure to disclose his ownership interest in JAMS supported vacatur of the award, whereas Monster contended that Olympic Eagle waived its impartiality claim by failing to timely object following its receipt of the arbitrator's disclosures.[154]

In addressing Monster's waiver claim, the court applied a constructive knowledge standard[155] to consider whether a party had waived an evident partiality claim.[156] The court previously found that failure to request disclosures may constitute waiver.[157] However, the court distinguished this case from others by characterizing the arbitrator's disclosure statement as a "partial disclosure."[158] The court acknowledged that the arbitrator's ownership interest was, in fact, a type of economic interest, and the arbitrator had explicitly disclosed his general economic interest in JAMS.[159] However, the arbitrator's disclosure of his general economic interest did not constitute constructive notice of his potential non-neutrality.[160] The arbitrator's disclosure not only left out any indication of his ownership interest, but likened his economic interest to the same interest of every other JAMS neutral.[161]

In addition to mentioning his general economic interest in JAMS, the arbitrator disclosed his own personal previous dealings with Monster as a neutral.[162] However, his disclosure also claimed that his economic interest extended only to the matters where he had served as a neutral in

150. *Id.*; *see also Requesting to Correct or Vacate an Arbitration Award*, *supra* note 105.
151. *See Monster Energy Co.*, 940 F.3d. at 1133-38.
152. 9 U.S.C.A. § 10(a)(2) (2002).
153. *See Monster Energy Co.*, 940 F.3d at 1132-34.
154. *Id.* at 1134.
155. *Id.*; *see, e.g.*, Fidelity Fed. Bank, FSB v. Durga Ma Corp., 386 F.3d 1306, 1313 (9th Cir. 2004).
156. *Monster Energy Co.*, 940 F.3d at 1134.
157. *See Fidelity Federal Bank*, 386 F.3d at 1313.
158. *Monster Energy Co.*, 940 F.3d at 1134.
159. *See id.*
160. *Id.* at 1134-35.
161. *See id.*
162. *Id.*

disputes involving Monster.[163] That was inaccurate because, as a co-owner of JAMS, the arbitrator received a direct economic benefit from ADR services performed by other JAMS neutrals involving Monster.[164] Monster argued that information relating to JAMS' ownership structure and case history were publicly available on the JAMS website.[165] However, the JAMS website fails to provide clear and comprehensive information answering Olympic Eagle's initial questions.[166] Regardless of the public availability of information that may provide notice of a risk of impartiality, the court emphasized "an arbitrator's duty to investigate and disclose potential conflicts."[167] Therefore, to expect Olympic Eagle to have identified all relevant information that was not disclosed by the arbitrator is to put the burden of the arbitrator's own disclosures on the parties.[168] The court stated that a finding of waiver in this case would "put a premium on concealment," incentivizing arbitrator's to withhold information that may disqualify them.[169]

Turning to the evident partiality issue,[170] the court looked to *Commonwealth Coatings*[171] in its analysis.[172] That case required vacatur of an arbitration award where the arbitrator failed to "disclose to the parties any dealings that might create an impression of possible bias."[173] On its face, this rule seems extremely broad.[174] Adopting a more narrowly tailored approach to the rule, the Ninth Circuit asserted that "long past, attenuated, or insubstantial connections between a party and an arbitrator" do not support vacatur on the basis of evident partiality.[175]

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163. *See id.* at 1135.

164. *See Monster Energy Co*., 940 F.3d at 1136.

165. *See* Answering Brief of Appellee Monster Energy Co.—Under Seal at 33, 35, City Beverages LLC v. Monster Energy Co., 940 F.3d 1130 (9th Cir. 2018) (No. 17-55813).

166. *See Consumer Case Information,* JAMS, https://www.jamsadr.com/consumercases/ (last visited Apr. 28, 2021); *see also JAMS Leadership*, JAMS, https://www.jamsadr.com/jams-senior-management/ (last visited Apr. 28, 2021) (illustrating that, of the information available, none of it indicates the nature or extent of any JAMS owners' economic interest in the organization or its conducted arbitrations).

167. *Monster Energy Co*., 940 F.3d at 1135 (citing New Regency v. Nippon Herald Films, 501 F.3d 1101, 1110-11 (9th Cir. 2007)).

168. *See id.*

169. *Id.*

170. 9 U.S.C.A. § 10(a)(2) (2002).

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

172. *See Monster Energy Co.*, 940 F.3d at 1135.

173. *Id.* (quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968)). It is important to note that *Commonwealth Coatings* did not establish a standard for "evident partiality" that received a majority vote, causing some circuits to implement the standard from Justice Black's plurality opinion and others to use Justice White's concurring opinion. Here, in the Monster Energy case, the Ninth Circuit pulls from elements of both opinions.

174. *See Commonwealth Coatings*, 393 U.S. at 149.

175. *See Monster Energy Co.*, 940 F.3d at 1135.

To reconcile the lack of clarity from the previously established rules, the court synthesized them into a single, more manageable rule.[176] This rule states that, "to support vacatur of an arbitration award, the arbitrator's undisclosed interest in an entity must be substantial, *and* that entity's business dealings with a party to the arbitration must be nontrivial."[177] In essence, the court identified two requirements: (1) an arbitrator's undisclosed interest must be substantial, and (2) related business dealings with a party must be nontrivial.[178]

In applying this rule to the facts of this case, the Ninth Circuit held that both requirements were clearly met.[179] Framed in the context of the case, the court asked (1) "whether the Arbitrator's ownership interest in JAMS was sufficiently substantial," and (2) "whether JAMS and Monster were engaged in nontrivial business dealings."[180] The arbitrator did disclose that he had previously served as a neutral arbitrator in a dispute where Monster was a party, but nonetheless opted not to disclose his ownership interest in the JAMS organization.[181] This was significant because the arbitrator's status as a co-owner of JAMS entitled him to a portion of profits across all JAMS arbitrations, not just the ones that the arbitrator conducted himself.[182] The court found that the arbitrator's ownership interest was substantial given that the interest "greatly exceeds the economic interest that all JAMS neutrals naturally have in the organization."[183]

In addressing the second question regarding the trivial nature of related business dealings, the court inquired about the Monster's form contracts.[184] It found that each of Monster's form contracts contained an arbitration clause designating JAMS Orange County as the service provider.[185] Consequently, JAMS had administered ninety-seven arbitrations for Monster as of October 2019, averaging over one arbitration per month.[186] The court labeled that level of business interaction as clearly nontrivial.[187]

176. *See id.* at 1135-36.
177. *Id.*
178. *See id.* at 1136 ("Our inquiry is thus two-fold: we must determine (1) whether the Arbitrator's ownership interest in JAMS was sufficiently substantial, *and* (2) whether JAMS and Monster were engaged in nontrivial business dealings. If the answer to both questions is affirmative, then the relationship required disclosure, and supports vacatur.").
179. *See id.* at 1132.
180. *See id.* at 1136.
181. *See Monster Energy Co.*, 940 F.3d at 1136.
182. *Id.*
183. *Id.*
184. *See Monster Energy Co.*, 940 F.3d 1130.
185. *Id.*
186. *See id.*
187. *See id.* at 1136.

On these grounds, the court found that the arbitrator had a "substantial interest in [JAMS,] which has done more than trivial business with [Monster]."[188] This finding resulted in vacatur of the arbitration award, noting that the facts created an impression of bias and should have been disclosed.[189]

B. Application of Rules of Vacatur and Policy Rationale

The court's application of the two-pronged analysis provides much needed clarity and will likely serve as precedent for vacatur on the basis of partiality in future cases involving similar facts.[190] This test fits neatly within the "evident partiality" framework provided by *Commonwealth Coatings*,[191] and only serves to supplement its application.[192]

Although the *Monster Energy* case formally addresses only the federal rules, the court allotted a sizeable portion of its holding to a discussion of comparable rules of vacatur at the state level.[193] In its discussion, the court mentioned the rules adopted by several states within its jurisdiction.[194] One focus centered on the state rules' comparisons with judge disqualification.[195] For instance, the previously mentioned California rule's disclosure requirements include the existence of any ground for disqualification of a judge.[196] Montana's rule disclosure contains a similar requirement, stating that mandatory disclosure requirements must include any ground for the disqualification of a judge.[197] In addition, the court mentions the Revised Uniform Arbitration Act (RUAA), which contains rules of arbitration that states can and have chosen to adopt.[198] RUAA "establishes a presumption of evident partiality when the arbitrator does not disclose a 'known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party . . . .'"[199] Under any of these rules, the JAMS arbitrator in *Monster Energy* would be subject to even stricter disclosure rules.[200]

188. *Id.*
189. *See id.* at 1136.
190. *See Monster Energy Co.*, 940 F.3d at 1132-38.
191. *See* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147-48 (1968).
192. *See generally Monster Energy Co.*, 940 F.3d at 1135.
193. *See id.* at 1137-38.
194. *See id.* at 1136.
195. *Id.* at 1136-37.
196. *See* CAL. CODE CIV. PROC. § 1281.9(a) (2002).
197. MONT. CODE ANN. § 27-5-116(4)(a) (2019).
198. *See Monster Energy Co.*, 940 F.3d at 1137.
199. *Id.*
200. *See generally id.*

As the court points out, the aforementioned state rules subject arbitrators to disclosure rules that are "akin to, or more burdensome than, the easily satisfied obligations we set forth here," adding that "these disclosure requirements safeguard the parties' right to be aware of the relevant information to assess the arbitrator's neutrality."[201] The court's discussion of these alternative rules serves as an acknowledgement of the prevalence of arbitration.[202] Notably, in dicta, the court stated that the United States has become an "arbitration nation."[203] As such, the rules of arbitration must continue to be improved over time.

C. Sufficiency of the Rules

The rules of arbitration vary by jurisdiction, but some rules seem to address the controversy surrounding arbitration with more clarity than others.[204] The Ninth Circuit's ruling in *Monster Energy* provided much needed clarity to the application of the Federal Arbitration Act and related precedent.[205] The lack of specificity in the FAA is certainly a concern.[206] There is significant room for varying interpretations of the statute, as demonstrated by the split among the circuits in their specific evident partiality standards.[207] This lack of clarity is a concern for a growing number of participants in arbitration and other forms of ADR.[208]

One possibility is that federal courts will establish enough precedent in interpreting the FAA to create a more uniform understanding and application of the rules. After all, the FAA is certainly not the only statute with exceedingly broad provisions,[209] and laws must frequently evolve to address the particular subjects they are designed to regulate. As such, there is an opportunity to either supplement the FAA through case law or to amend it to provide greater

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201. *Id.*

202. *See id.* at 1137-38.

203. *Monster Energy Co.*, 940 F.3d at 1130.

204. *See, e.g.*, CAL. CODE CIV. PROC. § 1281.9(a) (2003); MONT. CODE ANN. § 27-5-116(4)(a) (2019); *Monster Energy Co.*, 940 F.3d at 1137.

205. *See Monster Energy Co.*, 940 F.3d at 1133-38.

206. *See, e.g.*, *id.*

207. *See generally* JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RESEARCH SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT (2017), https://fas.org/sgp/crs/misc/R44960.pdf; *see also* Seung-Woon Lee, *Arbitrator's Evident Partiality: Current U.S. Standards and Possible Solutions Based on Comparative Reviews*, 9 ARB. L. REV. 159 (2017), http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1199&context=arbitrationlawreview.

208. *See generally* SHIMABUKURO & STAMAN, *supra* note 207.

209. *See, e.g.*, Scott H. Greenfield, *Haunted By Poorly Written Criminal Laws*, SIMPLE JUST. (Jul. 29, 2016), https://blog.simplejustice.us/2016/07/29/haunted-by-poorly-written-criminal-laws/.

context.[210] Given that the FAA is roughly a century old and still lacks the needed clarity, it may be time for the Supreme Court to hear a second case involving the FAA's evident partiality requirements, with *Commonwealth Coatings* being the only one to date.[211]

D. Potential for Bias Following Monster Energy

Looking at the facts of *Monster Energy*, the potential for bias is clear.[212] When an arbitrator has an ownership interest in his ADR organization, he directly benefits from the success of that organization.[213] That fact, in isolation, is not evidence of bias. But the record in *Monster Energy* demonstrated that the profitability of JAMS, and the arbitrator's share of those profits, were tied directly to the continuation of its ongoing and extensive business relationship with Monster Energy.[214] Based on the evidence in that case, JAMS neutrals had handled no less than ninety-seven other arbitration proceedings to which Monster Energy was a party in the preceding five years, an average of at least one arbitration per month.[215] That income was generated only because Monster Energy had chosen to require JAMS as the arbitration provider for any disputes arising under any of its distributorship contracts.[216] Considering the rates charged by JAMS and the unusually high volume of such proceedings, the revenue produced by JAMS' relationship with Monster Energy was clearly substantial. As the court noted, "[s]uch a rate of business dealing is hardly trivial, regardless of the exact profit-share that the Arbitrator obtained."[217] That share of profits would necessarily be jeopardized if Monster Energy became dissatisfied with JAMS and decided to designate a different provider in its arbitration clauses. Based on those facts, it is hardly surprising that the court concluded: "these facts demonstrate that the Arbitrator had a 'substantial interest in [JAMS,] which has done more than trivial business with [Monster]'—facts that create an impression of bias, should have been disclosed, and therefore support vacatur."[218]

210. *See Requesting to Correct or Vacate an Arbitration Award*, *supra* note 105.

211. It is again worth noting that *Commonwealth Coatings* did not establish a majority standard for evident partiality under the FAA.

212. *See generally* Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1138-39 (9th Cir. 2019).

213. *See id.* at 1136.

214. *See id.*

215. *Id.*

216. *Monster Energy Co*., 940 F.3d 1130.

217. *Id.* at 1136.

218. *Id.*

This is not to say that the arbitrator was incapable of serving as an entirely unbiased neutral, but his ability to do so is not the relevant question. Disclosure requirements are not meant to measure an individual's ability to remain neutral. Rather, such requirements exist to allow the parties to evaluate the risk or appearance of partiality and decide for themselves whether they want to attempt to mitigate that risk by selecting another candidate.[219] By withholding important information regarding his position within JAMS, and JAMS' relationship with Monster, the arbitrator deprived Olympic Eagle of the opportunity to conduct its own risk assessment.[220]

When comparing the FAA to several state statutes,[221] it appears as though some of these alternative rules plainly liken an arbitrator's disclosure requirements to a sitting judge's disclosure requirements, while still allowing appropriate experts to arbitrate.[222] Presumably, this similarity is in recognition of the significance of impartiality and the analogous relationship between ADR and trial. ADR has served an important purpose in the American legal system by being more accessible than litigation and by mitigating the case overload that many courts experience.[223]

However, in many instances the system falls short as an alternative to litigation. One of the key aspects of the American judicial system is its impartiality.[224] It should be expected that participation in ADR involves foregoing many of the rules and requirements applicable to litigation, but the challenge seems to be striking the proper balance. For ADR to maintain its current advantages over litigation the process must continue to exist as a streamlined process. However, it is necessary to put a limit on the extent to which ADR procedures disregard the careful considerations of the judicial system. There are a variety of concerns surrounding arbitration,[225] but an overabundance of arbitrator disclosures is not one of them.

There is a possibility that the concerns surrounding arbitration are so deeply intertwined with the prevalence of arbitration clauses that any solution that does not address the issue of arbitration clauses directly will be insufficient. Although possible, this hardly justifies the complete

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219. *See id.* at 1134.

220. *See id.*

221. *Id.* at 1136-38.

222. *See, e.g.*, Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 148-50 (1968); *see also* MONT. CODE ANN. § 27-5-116(4)(a) (2019).

223. *See ADR Trends*, *supra* note 2.

224. *See generally* Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493 (2014).

225. *E.g.*, Colvin, *supra* note 44.

disregard of ADR rules that are indirectly related to arbitration clauses. In fact, providing clearer grounds for vacatur of an arbitration award would likely provide parties that are typically seen as "victims" of an arbitration clause an opportunity to challenge the potentially biased award.[226] Besides, arbitration clauses are not the only source of arbitrated disputes.[227] Even if arbitration clauses were somehow limited, or even eliminated altogether, arbitrations would still be the preferred option for some parties.[228] As such, there is more than enough reason to address Repeat Player Bias through disclosure requirements to improve the integrity of ADR as a whole.

V. PROPOSAL

The growing prevalence of arbitration, and the resulting increase in the power and influence that repeat players can wield over the ADR providers who depend on them for business, requires immediate action by courts and legislatures to ensure that all litigants are provided with a fair dispute resolution process.[229] That objective could be accomplished by imposing clear, unambiguous, and uniform standards for arbitrators, comparable to those imposed on judges.

In order to accomplish that goal, and address the risks of potential bias among third-party neutrals, the extent of an arbitrator's disclosure requirements must be explicit and thorough so that the parties may move forward with confidence in the impartiality of the process.[230] The rules applicable to judges are meant to mitigate the risk of impartiality as much as practicable, and there seems to be little reason why arbitrators

226. *See* Silver-Greenberg & Gebeloff, *supra* note 139.

227. *See ADR Trends*, *supra* note 2.

228. *See generally* Geyh, *supra* note 224.

229. The surest way to accomplish that goal would be to provide our court systems with enough resources to efficiently manage any and all legal disputes, eliminating the need for and attraction of private arbitration. But that prospect appears unlikely for obvious reasons.

230. *See* Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (9th Cir. 2019) ("Unlike the standards governing judges, however, our ruling in this case does not require automatic disqualification or recusal—only disclosure prior to conducting an arbitration concerning (1) the arbitrator's ownership interest, if any, in the entity under whose auspices the arbitration is conducted, *and* (2) whether the entity under whose auspices the arbitration is conducted and one or more of the parties were previously engaged in nontrivial business dealings. Once armed with that information, and the answers to any other inquiries the parties may wish to pose as a result of knowing that information, the parties can make their own informed decisions about whether a particular arbitrator is likely to be neutral. It is simplicity itself, and no real burden, for an arbitrator to disclose his or her ownership interest in an arbitration company for which he or she works, as well as the organization's prior dealings with the parties to the arbitration.").

should not be subject to a similar standard with respect to disclosures.[231] For this reason, the Ninth Circuit was apt to recognize Justice White's concurring opinion in *Commonwealth Coatings*:

> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties . . . . The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.[232]

In applying Justice White's rationale, arbitrators should be uniformly required to disclose any information that any party might reasonably believe contributes to a risk of impartiality, even if it strays slightly from Justice White's preferred, but underdeveloped standard.[233] The *Monster Energy* decision highlights the critical importance of establishing more rigorous and unambiguous standards for disclosure, as arbitration becomes more prevalent and as ADR service providers become more vulnerable to the power and influence of repeat players. No party to a court proceeding need ever be concerned that a judge's salary is dependent on the outcome of the case.

Increasingly, private contractual arbitration is being used to resolve disputes involving parties with markedly unequal bargaining power.[234] Additionally, such disputes are being resolved by arbitrators with largely unlimited authority, subject only to extremely limited review, and who remain vulnerable to influences that may undermine the fairness that should be expected from the legal system.[235] In this system, the playing field is not necessarily level when one party provides a significant amount of income for the arbitrator or the provider for which they work, while the other is a party that the arbitrator will likely never see again.[236]

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231. *See generally Model Code of Judicial Conduct*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/ (last visited Apr. 23, 2021).

232. *Monster Energy Co.*, 940 F.3d at 1138.

233. *See id.*

234. *See* SHIMABUKURO & STAMAN, *supra* note 207, at 5.

235. *See, e.g.*, *Monster Energy Co.*, 940 F.3d at 1130.

236. *See id.*

VI. CONCLUSION

The lack of disclosure requirements for arbitrators has led to the growing problem of evident partiality and Repeat Player Bias in ADR proceedings. *Monster Energy Co. v. City Beverages, LLC* serves as a significant, yet incomplete, contribution to address these problems.[237] Although the rule the court adhered to is meant to provide some clarity and guidance regarding a neutral arbitrator's disclosure requirements and the grounds for vacating an arbitration award, the court refrained from harmonizing disclosure requirements of arbitrators with the requirements applicable to judges.[238] Considering ADR is generally distinct from the court system in that it is conducted by private individuals and organizations, the extent to which the risk of repeat player bias can be mitigated is likely very limited. However, parties to an arbitration should have the right to evaluate any risk of impartiality themselves by having access to an arbitrator's disclosures akin to those required by judges. Until issues of evident partiality and Repeat Player Bias garner more attention among courts and legislatures, the supposed impartial nature of arbitrations will diminish as the industry continues to grow.

237. *See generally Monster Energy Co.*, 940 F.3d 1130.
238. *See id.* at 1137.