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ARBITRATION & ADR - USA

Monster Energy distribution dispute: *amicus* briefs do not create evident partiality

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In a six-year dispute between Monster Energy Co and City Beverages, LLC d/b/a Olympic Eagles Distributing (Olympic), a judge sitting in the Central District of California has denied Olympic's motion to compel arbitration in a forum other than the Judicial Arbitration and Mediation Services (JAMS), finding that the JAMS' filing of two *amicus* briefs did not create reasonable doubt as to its partiality.

Contract dispute

The underlying dispute arose in 2014 after Monster terminated its distribution agreements with Olympic. The agreements expressly allowed Monster to terminate them without cause as long as it paid a severance fee. However, Olympic challenged the terminations on the basis that the Washington state Franchise Investment Protection Act (FIPA) prohibited no-cause terminations, thereby rendering the termination provisions invalid and unenforceable.

Compelling arbitration

In 2015 Monster initiated a JAMS arbitration pursuant to the distribution agreements' arbitration clauses and concurrently filed a complaint in the district court seeking declaratory relief that the arbitration clauses were valid and enforceable. Monster subsequently filed a motion to compel arbitration.

In granting the motion to compel arbitration, the district court in relevant part rejected Olympic's arguments that because of an inequality of bargaining power between the parties, the arbitration clauses were unconscionable. Although the district court found that there existed "a degree of procedural unconscionability due to the adhesiveness of the Agreements and the lack of negotiation by Defendants", it ultimately held that "the Arbitration Provision is not substantively unconscionable [and t]herefore, the Arbitration Provision as a whole is not unconscionable". The district court also found that the arbitration agreements encompassed the parties' disputes.(1)

JAMS arbitration

A retired California state court judge was selected by the parties from a list of neutrals provided by the JAMS to preside over the arbitration. After the briefing and a two-week hearing, the arbitrator found that Olympic was not a "franchisee" and Monster was not a "franchisor" under the FIPA and that, as such, the FIPA did not apply and the no-cause termination provisions in the distribution agreements were valid and enforceable. The arbitrator also awarded Monster approximately $3 million in attorney's fees and costs after finding that the distribution agreements permitted an award of reasonable fees to the prevailing party.

Challenge to recognition

In 2017 Monster filed a petition in the district court to confirm the award. Olympic filed a cross-petition to vacate the award, arguing that in light of Monster's status as a "repeat player" before the JAMS, the arbitrator's "failure to disclose [his] ownership interest in JAMS and his financial interest in future business with Monster creates the impression of partiality in favor of Monster".

The district court confirmed the award, finding that Olympic had waived its evident partiality objection when

it failed to raise it during the arbitration. The district court relied on the arbitrator's disclosure – which stated, among other things, that he "has an economic interest in the overall financial success of JAMS" – to find that, as a sophisticated commercial entity, Olympic "certainly should have been aware" of the potential for repeat-player bias when the arbitrator disclosed his economic interest in the JAMS. Further, the district court concluded that even if Olympic had not waived its objection, there was "nothing that would strongly suggest evident partiality on the part of the Arbitrator" because he had disclosed his economic interest in the JAMS from the beginning and Olympic "offers no particularized evidence of the Arbitrator's partiality or bias resulting from his economic interest in JAMS".(2)

On appeal, the Ninth Circuit disagreed with the district court, finding in a two-to-one decision that the arbitrator's disclosure did not provide Olympic constructive notice of the arbitrator's potential "non-neutrality" because the arbitrator had not properly disclosed his ownership interest in the JAMS.(3) The Ninth Circuit found that the arbitrator's disclosure implied that he had only a general interest in the JAMS' reputation and economic wellbeing, and that his sole financial interest was in the arbitrations that he conducted. The court further concluded that while the number of arbitrations conducted by the JAMS involving Monster was publicly available information, the arbitrator's ownership interest was not public – and it was this ownership interest "that triggered the specter of partiality".

The Ninth Circuit went on to vacate the award on the basis of its conclusion that the arbitrator had failed to disclose facts "creating a reasonable impression of partiality", including that:

- as an owner, the arbitrator had a right to a portion of profits from all arbitrations, not just those which he personally conducted; and
- the JAMS had administered 97 arbitrations for Monster over the past five years as a result of the JAMS being the designated centre for dispute resolution in Monster's form contracts.(4)

Monster's petition for a rehearing *en banc* and its subsequent petition for *certiorari* to the Supreme Court were both denied.(5)

JAMS briefs

During these proceedings, the JAMS filed two *amicus* briefs:

- The first brief was in support of Monster's motion for a rehearing *en banc* in the Ninth Circuit.
- The second brief was in support of Monster's petition for *certiorari* to the Supreme Court.

According to the JAMS, these were the first briefs that it had ever filed in its 40-plus year history. In both briefs, the JAMS took the position that the Ninth Circuit's opinion "greatly expand[ed]" an arbitrator's disclosure requirements and was based on "expansive assumptions not grounded in fact". The JAMS stated that:

> *the opinion essentially establishes a per se presumption that arbitrators with any ownership interest in an ADR provider that has administered multiple cases involving one of the parties necessarily suffer from 'repeat player' bias in commercial cases they arbitrate. And the majority is factually wrong about that, given the nature of arbitration firm ownership.*

Neutral forum

On remand to the district court, Olympic filed a motion to compel arbitration in a forum other than the JAMS, arguing that by filing the two *amicus* briefs, the JAMS had created reasonable doubt as to its partiality. In further support of this argument, Olympic asserted that the JAMS rules place it in a position where it is an active participant in arbitration proceedings, including, Olympic argued, by:

- selecting the pool of arbitrators;
- unilaterally appointing the arbitrator if the parties cannot agree; and
- deciding any objections to that appointed neutral arbitrator.

Olympic argued that the district court had the power to grant such a motion because the JAMS' alleged partiality had rendered both the arbitration clauses unconscionable and the JAMS "unavailable" with "[u]navailability of the designated service provider", constituting a "lapse" under Section 5 of the Federal Arbitration Act (FAA).**(6)**

In February 2021 the district court denied Olympic's motion.(7) The court did not reach the issue of whether the FAA grants the court authority to appoint a new arbitral forum, but instead held that the *amicus* briefs did not create reasonable doubt as to JAMS' partiality. While the court acknowledged that the two *amicus* briefs had been filed "in support of [Monster]", it found that the arguments therein were challenges to the Ninth

Circuit's ruling on evident partiality and the anticipated retroactive effect of the new disclosure requirements, and did not address the arguments in the underlying dispute between Monster and Olympic – the arguments that would be at issue in the new arbitration. Further, the court found that safeguards were in place at the JAMS to protect the parties' right to an impartial tribunal, including the existence of JAMS arbitrators with no ownership interest in the institution and rules allowing the parties to select their own arbitrator before the JAMS steps in to appoint one. On this basis, the district court found that it would be a "drastic step" to disqualify every JAMS arbitrator.

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Endnotes

(1) *Monster Energy Co v Olympic Eagle Distrib*, 5:15-cv-00819, minutes (in chambers) order re: plaintiff's motion to compel arbitration and dismiss the counterclaim (CD, Cal, 29 September 2015).

(2) *Monster Energy Co v City Beverages LLC*, 5:17-cv-00295, minutes (in chambers) order re: petition to confirm arbitration award and cross-petition to vacate arbitration award (CD, Cal, 9 May 2017).

(3) *Monster Energy Co v City Beverages, LLC*, 940 F3d 1130 (9th Cir 2019):

> *[B]efore an arbitrator is officially engaged to perform an arbitration, to ensure that the parties' acceptance of the arbitrator is informed, arbitrators must disclose their ownership interests, if any, in the arbitration organizations with whom they are affiliated in connection with the proposed arbitration, and those organizations' nontrivial business dealings with the parties to the arbitration.*

(4) *Ibid.*

(5) *Monster Energy Co v City Beverages LLC*, 141 S Ct 164 (2020).

(6) Section 5 of the FAA states in relevant part that:

> *if for any... reason there shall be a lapse in the naming of an arbitrator... or in filling a vacancy... upon the application of either party to the controversy the court shall designate and appoint an arbitrator.*

(7) *Monster Energy Co v City Beverages*, 5:17-CV-00295, 2021 WL 650275 (CD, Cal, 17 Feb 2021).