The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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Amoco D.T. Company et al. v. Occidental Petroleum Corporation, et al. 343 S.W.3d 837 (Tex.App. - Houston [14th District] 2011), pet. denied.

A dispute regarding an environmental-conditions provision in a purchase-and-sale agreement between a limited partnership of Amoco and Shell affiliates as seller ("Amoco") and Occidental Petroleum Corporation as buyer ("Oxy") of oil and gas holdings in the Permian Basin resulted in an arbitration under the Federal Arbitration Act ("FAA") by a three-arbitrator panel. Although all neutrals by the parties' arbitration agreement, two arbitrators were appointed by the respective sides and the third arbitrator by the two party-appointed arbitrators.[2] During the pre-arbitration proceedings, one of the three arbitrators moved from his prior law firm to Beck, Redden, & Secrest, L.L.P. ("Beck"). The panel issued a majority award for Amoco with one of the two majority arbitrators being the arbitrator who changed law firms and moved to Beck during the pre-arbitration proceedings.[3]

After the award was issued Oxy discovered undisclosed relationships between the lawyer who moved during the proceedings, as well as the Beck firm, and Amoco and moved to vacate based on "evident partiality" as provided in 9 U.S.C. §10(a)(2). [4] The Harris County trial court granted Oxy's motion to vacate and denied Amoco's motion to confirm the award.

Amoco appealed the trial court's vacatur judgment urging the Fourteenth Court of Appeals to adopt the "substantial interest" standard advocated by Justice White in his concurring opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*[5] Oxy urged the court of appeals to adopt the plurality opinion written by Justice Black in *Commonwealth Coatings* "that arbitrators

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.
[2] 343 S.W.3d at 840.
[3] *Id.*
[4] *Id.*
[5] 343 S.W.3d at 841; citing 393 U.S. 145, 151—52, 89 s.Ct. 337, 21 L.Ed.2d 301 (1968) ("But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.").

disclose to the parties any dealings that might create an impression of possible bias."[6] In support of its argument Amoco also requested the court of appeals to adopt the Fifth Circuit standard of "significant compromising relationship" stated in *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281—83 (5th Cir.2007). But the Fourteenth Court of Appeals chose to follow instead the Texas Supreme Court's formulation of the evident partiality standard in *Burlington N. R.R. Co. v. TUCO*.[7] The court of appeals described the *TUCO* standard as one "resembling Justice Black's standard [in *Commonweath Coatings*]."[8]

Before applying this evident partiality law to the facts of this case, the court of appeals made some observations: (1) the evident partiality standard and public policy supporting this standard is the same for Texas General Arbitration Act ("TGAA") and FAA cases;[9] (2) the party requesting vacatur of an arbitration award "must prove the existence of facts which would establish a reasonable impression of the arbitrator's partiality to one party";[10] (3) evident partiality is establish from the *nondisclosure itself* not whether "the nondisclosed information necessarily establishes partiality or bias";[11] (4) the evaluations of nondisclosed information is "better left to the parties" not the courts;[12] (5) information to be disclosed includes not only "direct financial relationships" but all relationships including "familial or close social relationships";[13] and (6) if a "reasonable person could conclude that the[circumstances] *might* affect [the arbitrator's] impartiality [that conclusion] triggers the duty to disclose."[14] Nondisclosed information is "trivial" only "if an objective observer could not believe the undisclosed information might create a reasonable impression of partiality."[15]

The court of appeals first considered whether Oxy had waived its evident partiality claim based on the court's observation "that the party opposing vacatur has the burden to prove waiver."[16] Both the Texas Supreme Court and the Fourteenth Court of Appeals have never ruled on whether a duty to investigate a potential arbitrator for partiality exists for the party seeking vacatur on that ground.[17] But the court of appeals did recognize that the evident partiality question "necessarily entails a fact intensive inquiry," although the "ultimate question regarding whether an arbitrator exhibit[s] evident partiality is one of law applied to facts." And this requires the trial court to

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[6] 343 S.W.3d at 841 (calling this "the impression of possible bias" or "appearance of bias" standard); citing 393 U.S. at 148—49.
[7] 960 S.W.2d 629, 632 (Tex.1997) ("[A] prospective neutral arbitrator … exhibits evident partiality if he or she does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality."
[8] 343 S.W.3d at 843.
[9] 343 S.W.3d at 842--843
[10] 343 S.W.3d at 843; c*iting Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225 (Tex.App. – Houston [14th District] 1993, writ denied).
[11] 343 S.W.3d at 843; *citing TUCO*, 960 S.W.2d at 636—37.
[12] 343 S.W.3d at 843; *citing TUCO*, 960 S.W.2d at 636—37.
[13] 343 S.W.3d at 843; *citing TUCO*, 960 S.W.2d at 637.
[14] 343 S.W.3d at 843; *citing TUCO*, 960 S.W.2d at 639.
[15] 343 S.W.3d at 844.
[16] 343 S.W.3d at 846.
[17] 343 S.W.3d at 845—846; *citing Mariner Fin. Grp. V. Bossle*, 79 S.W.3d 30, 33 (Tex.2002); and *Houston Village Builders, Inc. v. Falbaum*, 105 S.W.3d 38, 35 (Tex.app. – Houston [14th District] 2003, pet. denied).

"resolve conflicts in the evidence."[18] The trial court's legal conclusions will be reviewed *de novo* on appeal but the trial court's fact finding "must be reviewed for legal and factual sufficiency."[19]

Oxy claimed that another Beck lawyer represented an Amoco affiliate in a mandamus proceeding while the arbitration was in progress without disclosure. Amoco responded that Oxy had waived this complaint. But the court of appeals found no waiver by Oxy because Amoco "did not present evidence establishing that OXY would have discovered the BP Products representation through 'reasonable investigation'."[20] Amoco also did not present any evidence that Oxy failed to investigate the arbitrator in question.[21] The arbitration itself showed the ties among the various entities affiliated with Amoco and the evidence at the vacatur hearing showed that the arbitrator who moved to the Beck firm knew of the Beck firm's representation of various Amoco affiliates.[22] This meant, for the court of appeals, that "an objective person could reasonably conclude that Beck Redden's participation …was a material disclosure [that should have been made by the Beck-affiliated arbitrator]."[23]

The fact that the Beck-affiliated arbitrator had "no involvement or financial interest" in the Beck firm's representation of Amoco affiliates didn't excuse the nondisclosures of "all information that might reasonably affect the potential arbitrator's impartiality." And whether Oxy would have objected and claimed evident partiality "is not an element of the evident-partiality standard."[24] Evident partiality is established by the "failure to disclose non-trivial information" regardless of what a party might do or not do with the disclosed information.[25]

OBSERVATIONS

1. When in doubt the arbitrator should always disclose.
2. It is the arbitration parties who decide whether to object to arbitrator disclosures, not the arbitrator who decides whether or not a disclosure is evidence of partiality and, therefore, should be made.
3. Disclosure is an arbitrator's continuing obligation; events that occur during an arbitration proceeding, especially during the period prior to the final hearing, must be examined as they occur for disclosure by the arbitrator.
4. The arbitrator cannot rely on the parties to investigate but must recognize and be guided by the arbitrator's duty to disclose.

[18] 343 S.W.3d at 844.
[19] *Id.*; *citing Las Palmas Med. Ctr. V. Moore*, 349 S.W.3d 57, 66 (Tex.App. – El Paso 2010, pet. denied).
[20] 343 S.W.3d at 846.
[21] *Id*. at 846 fn6.
[22] *Id.* at 846—49.
[23] *Id.* at 49.
[24] *Id.* at 849.
[25] *Id*. at 849—50.