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]

EVIDENT PARTIALITY REVISITED
CROUCH CONSTRUCTION COMPANY, INC. v. CAUSEY[2]

The plurality (Justice Black) and concurring (Justice White) opinions in *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968) continue to generate lots of appellate discussion regarding "evident partiality" as used in 9 U.S.C. §10(a)(2)[3] and §12(a)(2) of the Uniform Arbitration Act (1955).[4] The South Carolina Supreme Court in *Crouch Construction* has recently weighed in on what "evident partiality" means in the South Carolina Uniform Arbitration Act.[5] Although a state arbitration law case, the South Caroline Supreme Court acknowledged "no South Carolina precedent construing this standard" and found it "appropriate in this instance to look to federal interpretations of the FAA's 'evident partiality' standard for guidance in interpreting the South Carolina statute."[6] The trial court vacated an arbitration award on "evident partiality" because the arbitrator did not disclose that the brother of one of his law partners was an employee of an independent, non-party engineering company that provided two fact and expert engineering witnesses in the arbitration.[7]

The South Carolina Supreme Court rejected the "appearance-of-bias standard" and instead found that "the approach that best comports with the language" of the state arbitration act requires the party seeking vacatur to establish "that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration."[8] "Evident" in "evident partiality" means, according to the South Carolina Supreme Court, that which is "direct, definite,

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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] 405 S.C. 155, 747 S.E.2d 482 (August 14, 2013).

[3] "(2) where there was evident partiality or corruption in the arbitrators, or either of them; … ."

[4] "(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; … ."

[5] S.C.Code §15-48-130(a)(2)(2005) (based on the 1955 Uniform Arbitration Act).

[6] 747 S.E.2d at 487-88.

[7] Neither of which were the brother in question. 747 S.E.2d at 485 ("…the arbitrator had a duty to discover and disclose his law partner's familial relationship with a GS2 employee … .").

[8] 747 S.E.2d at 488 (*citing ARN Coal Co. v. Cogentrix of North Carolina*, 173 F.3d 493 (4th Cir.1999); *Morelite Const. Corp. v. NYC Dist. Council Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir.1984)).

and capable of demonstration" and is "more than a vague appearance of bias."[9] A showing of "evident partiality," therefore, requires "that a reasonable person would easily recognize it." [10] The strong language of the statute (*i.e.* "evident") means that "the undisclosed facts [by the arbitrator] must be 'powerfully suggestive of bias'."[11] The trial court's interpretation must begin with the statutory language of "evident," which requires rejection of "the appearance-of-bias standard."[12]

The court listed four factors to be used in the determination of "evident partiality"[13] and concluded that the burden of proof is on "the party seeking to have the arbitration award set aside."[14] After applying the four factors described in *ANR Coal* to the facts of this case, the court concluded there was no "evident partiality" and reversed and remanded to the trial court "for confirmation of the arbitration award."[15]

The court cautioned that nothing in its opinion should be interpreted "to demean the importance of timely and full disclosure by arbitrators." The arbitrator's duty to disclose "all material information is an important one, critical to ensure the fundamental fairness of the arbitral proceedings." But this duty should not diminish "the basic integrity of the arbitration process" that prevents the judiciary from "meddling" in the process or not recognizing that the judiciary's role is limited and narrow when acting "as judge of the arbitrator's impartiality."[16]

OBSERVATIONS

1. This opinion contains a footnote 12 that summarizes what the court calls "the majority of courts" that have rejected the appearance-of-bias standard for "evident partiality."[17]

2. Although this opinion cites the Fifth Circuit's *Positive Software Solutions*[18] as rejecting the "appearance-of-bias standard," one should be careful about adopting that observation without a careful reading of the *Positive Software* case.

3. The Texas Supreme Court remains steadfastly in the "appearance-of-bias" camp both in its interpretation of the FAA and the TGAA.[19]

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[9] 747 S.E.2d at 488 (*citing Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d. Cir.2013)).
[10] *Id.* (*citing Freeman* and *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir.1983)).
[11] *Id.*
[12] 747 S.E.2d at 488.
[13] 747 S.E.2d at 489 (*citing ANR Coal*, 173 F.3d at 500) ("... (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding.").
[14] 747 S.E.2d at 489.
[15] "Respondents have not met their burden of showing specific facts, directly or circumstantially, which demonstrate the arbitrator acted in a partial or biased manner." 747 S.E.2d at 491.
[16] 747 S.E.2d at 486 (*citing Commonwealth Coatings*, 393 U.S. 145, 151 (White, J., concurring).
[17] Citing Second, Third, Fifth, Sixth, and Eleventh Circuit cases.
[18] *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278 (5th Cir.2007).
[19] *Burlington Northern R. Co. v. TUCO, Inc.*, 960 S.W.2d 629, 630 (Tex.1997) ("Under section 171.014 of the Texas Civil Practice and Remedies Code, a court shall vacate an arbitration award if there has been 'evident partiality by

4. The *per se* bias standard (although not *actual* bias) created by the mere fact of non-disclosure does appear, in a number of jurisdictions, to be moving toward a more objective and heavier burden for the movant than the "appearance-of-bias" standard.

5. But this development in vacatur jurisprudence in no way should be interpreted to lessen an arbitrator's continuing duty to disclose throughout the arbitration proceeding.

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an arbitrator appointed as a neutral.' We hold that a neutral arbitrator selected by the parties or their representatives exhibits evident partiality under this provision if the arbitrator does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality."). *Burlington N. R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 630 (Tex. 1997).