

# *The Arbitration Newsletter*

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(John Allen Chalk, Sr., Editor)

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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.<sup>1</sup>  
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## **EVIDENT PARTIALITY IN HAWAII**

***Nordic PCL Construction, Inc. fka Nordic Construction, Ltd., a corporation v. LPIHGC, LLC, S.P. No. 10-1-0346 (JHC), Mar. 3, 2017***

In 2006, Nordic PLC Construction, Inc. (“Nordic”) and LPIHGC, LLC (“GC”) entered into a subcontracting agreement wherein Nordic agreed to provide concrete work for GC, who was building a large luxury timeshare development in Maui.<sup>2</sup> A dispute arose between Nordic and GC concerning whether or not Nordic’s concrete work was adequately level.<sup>3</sup> The dispute was submitted to binding arbitration under Chapter 658A of the Hawai’i Uniform Arbitration Act,<sup>4</sup> Hawai’i Revised Statutes (“HRS”) using the rules and procedures of the Dispute Prevention & Resolution, Inc. (“DPR”).<sup>5</sup> Anna H. Oshiro (“Oshiro”), Mark M. Murakami, Noelle Catalan, and Kenneth R. Kupchak (“Kupchak”) of Damon Key Leong Kupchak Hastert (“Damon Key”) represented Nordic.<sup>6</sup> GC’s counsel included Terence O’Toole and Judith Pavey of Starn O’Toole Marcus and Fisher (“Starn O’Toole”) and John P. Manaut of Carlsmith Ball (“Carlsmith”).<sup>7</sup> After three rounds of submitting arbitrator candidates, the parties selected the Honorable Patrick K.S.L. Yim (Ret.) (“Judge Yim”) as arbitrator in March 2009.<sup>8</sup>

Judge Yim provided the following disclosures on March 17, 2009:

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<sup>1</sup> 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. My thanks to Tave Parker Doty, Ph.D, J.D., a recent graduate of Texas A&M University School of Law, for her research and drafting assistance.

<sup>2</sup> *Nordic PCL Construction, Inc. fka Nordic Construction, Ltd., a corporation v. LPIHGC, LLC, S.P. No.10-1-0346 (JHC), \*2, Mar. 3, 2017* [hereinafter *Nordic*]; see also *Nordic PCL Constr., Inc. v. LPIHGC, LLC, 136 Haw. 29, 358 P.3d 1 (Hawai’i 2015)*.

<sup>3</sup> *Id.*

<sup>4</sup> Hawai’i adopted the Revised Uniform Arbitration Act, effective July 1, 2002.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*2–3.

<sup>7</sup> *Id.* at \*3.

<sup>8</sup> *Id.* at \*4.

(1) While serving on the bench, counsel and members of their law firms appeared before me; (2) Since retirement, I have served as a neutral for counsel and members of their law firms; (3) to the best of my knowledge, I do not know anyone involved with LPIHGC, LLC; (4) I served as a neutral in a matter where Nordic was a party. That matter was concluded at least five years ago; (5) I will provide additional disclosures as necessary throughout this proceeding; (6) These disclosures will in no way affect my ability to serve as a neutral and unbiased Arbitrator.<sup>9</sup>

Judge Yim gave each party until March 20, 2009, to file with DPR any comments about his disclosures. Neither party responded to his disclosures.<sup>10</sup> GC's counsel questioned Nordic's counsel about Nordic's prior arbitration with Judge Yim, but GC did not challenge Judge Yim's appointment after Nordic's counsel answered the questions.<sup>11</sup> Kupchack knew and told Oshiro that Yim was a trustee of the Queen Lili'uokalani Trust ("QLT") and that Kupchack's brother-in-law worked for Yim at the QLT.<sup>12</sup> There was no further discussion about the QLT connections, and there is no evidence that Nordic thought the connections would be beneficial.<sup>13</sup> Yim made a supplemental disclosure in October 2009 that one of the experts in the matter had appeared before him.<sup>14</sup>

The arbitration began January 25, 2010, lasted until April 29, 2010, and took approximately thirty-one days.<sup>15</sup> On October 15, 2010, Judge Yim issued a Partial Final Award, which denied all of Nordic's claims and awarded \$929,839 in GC's favor. GC was also named the prevailing party, with attorneys' fees for GC to be determined at a later date.<sup>16</sup> This award shocked Nordic, who had claimed damages against GC of \$13,005,637, including \$7,434,467 in payments withheld under the subcontract.<sup>17</sup> There was no evidence that Nordic suspected any bias or conflicts of interest on Judge Yim's part until after the Partial Final Award was issued.<sup>18</sup> Judge Yim was Nordic's first choice as arbitrator. Nordic began investigating shortly after the award whether Judge Yim exhibited bias or partiality against Nordic.<sup>19</sup> Damon Key requested from DPR that Judge Yim disclose any neutral relationships he had with Starn O'Toole or Carlsmith.<sup>20</sup>

Damon Key discovered that Judge Yim had been represented, in his capacity as QLT trustee, by Carlsmith in at least ten lawsuits filed before 2010, and various suits were taking place during 2009 and 2010 when Judge Yim served as arbitrator in the current matter.<sup>21</sup> Judge Yim's supplemental disclosure revealed that he had three concurrent neutral engagements with Starn

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<sup>9</sup> *Id.* at \*5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*6.

<sup>12</sup> *Id.* at \*7.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*8.

<sup>16</sup> *Id.* at \*8–9.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at \*9–10.

<sup>20</sup> *Id.* at \*10.

<sup>21</sup> *Id.* at \*11.

O'Toole or Carlsmith during the current arbitration's course.<sup>22</sup> After learning of Judge Yim's engagements with GC's counsel, Nordic requested DPR disqualify Judge Yim. DPR declined.<sup>23</sup>

GC filed a motion to confirm the arbitration award on November 22, 2010, in the First Circuit Honolulu County Court ("Circuit Court"). Nordic filed a motion to vacate the arbitration award December 29, 2010.<sup>24</sup> The Circuit Court granted GC's motion to confirm the award and Nordic appealed to the Intermediate Court of Appeals.<sup>25</sup> The Intermediate Court of Appeals reversed the Circuit Court, holding that three contemporaneous neutral relationships with Starn O'Toole and Carlsmith, and the relationship between Carlsmith and Judge Yim as QLT trustee should have been disclosed, were not disclosed, and were sufficient to establish evident partiality pursuant to Chapter 658A-23(a)(2)(A).<sup>26</sup> GC petitioned the Hawai'i Supreme Court ("Supreme Court") for certiorari, which the Supreme Court granted.<sup>27</sup> On August 15, 2015, the Supreme Court issued its decision, which reversed the Intermediate Court of Appeals and remanded the matter to the Circuit Court to direct an evidentiary hearing and determine "whether the three contemporaneous neutral engagements or the Carlsmith QLT-connection established evident partiality" and "whether Nordic waived its challenge to Judge Yim's award due to its actual or constructive knowledge of the relationships at issue."<sup>28</sup>

Between the Supreme Court hearings and the Circuit Court evidentiary hearing, more information was discovered about the Carlsmith-QLT connection.<sup>29</sup> Manaut, an attorney with Carlsmith, who had represented GC in the arbitration, billed QLT for five hours of legal work approximately two months before Judge Yim was appointed arbitrator.<sup>30</sup> Manaut performed this work at the request of another attorney at Carlsmith, who billed QLT for 208.4 hours in 2008.<sup>31</sup> Nordic also learned that "[f]or the last decade or more, the Carlsmith firm handled most of the litigation in which QLT had been involved in Hawai'i," and 28.6% of the QLT's legal fees were paid to Carlsmith in the year before Judge Yim's appointment as arbitrator in the current matter.<sup>32</sup> Even though the QLT's operational decisions were not made by the trustees, Judge Yim knew Carlsmith performed work for QLT because Judge Yim reviewed and signed settlement agreements for QLT litigation drafted by Carlsmith.<sup>33</sup>

Judge Yim's disclosure practice was to make the disclosures he remembered. He does not have a database or practice of going through his files in making disclosures.<sup>34</sup> Judge Yim "did not think of disclosing his concurrent neutral work for Starn O'Toole or Carlsmith, and did not consider whether disclosure was required or whether a reasonable person might think that these

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<sup>22</sup> *Id.* at \*12.

<sup>23</sup> *Id.* at \*15.

<sup>24</sup> *Id.* at \*16.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (citing *Nordic PLC Constr., Inc. v. LPIHGC, LLC*, 330 P.3d 389 (Haw. Ct. App. 2014)).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at \*18.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at \*18–19.

<sup>32</sup> *Id.* at \*19.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at \*21.

relationships would affect his impartiality.”<sup>35</sup> Judge Yim did disclose the concurrent work and QLT-Carlsmith connection in another case, but he did not think to make a supplemental disclosure in this matter.<sup>36</sup>

Under the Hawai’i Uniform Arbitration Act, HRS § 658A-12 provides, in pertinent part:

- (a) Before accepting an appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:
  - (1) A financial or personal interest in the outcome of the arbitration proceeding; and
  - (2) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.
- (b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.
- (c) ....
- (d) ... upon timely objection by a party, the court under section 658A-23(a)(2) may vacate an award.<sup>37</sup>

Under HRS § 658A-23(a)(2), upon a motion by a party to the proceeding, the court “shall vacate an award made in the arbitration proceeding” if there was “evident partiality by an arbitrator appointed as a neutral arbitrator.”<sup>38</sup> As a matter of law, failing to meet the HRS § 658A-12(a)–(b) disclosure requirements is equivalent to, and results in, evident partiality.<sup>39</sup> Thus, if the relationship between Judge Yim, as QLT trustee, and Carlsmith was of a nature that a reasonable person would consider it likely to affect Judge Yim’s impartiality as arbitrator, “then Judge Yim had a duty of reasonable inquiry to ascertain and disclose the information regarding Carlsmith’s representation of him as a QLT trustee.”<sup>40</sup>

Between the Supreme Court remanding this matter to the Circuit Court and the Circuit Court’s evidentiary hearing, the Supreme Court heard the *Madamba* case,<sup>41</sup> which involved Judge Yim and evident partiality.<sup>42</sup> There, Judge Yim’s award was vacated because he failed to disclose

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Nordic*, at \*22; HAW. REV. STAT. § 658A-12(a)–(d).

<sup>38</sup> *Nordic*, at \*22–23; HAW. REV. STAT. § 658A-23(a)(2).

<sup>39</sup> *Nordic*, at \*23; *Nordic PLC Constr., Inc. v. LPIHGC, LLC*, 358 P.3d 1, 22 (Haw. 2015) [hereinafter *Nordic PLC*]; *Noel Madamba Contracting LLC v. Romero*, 364 P.3d 518, 519–20 (2015) [hereinafter *Madamba*].

<sup>40</sup> *Nordic*, at \*23.

<sup>41</sup> *Noel Madamba Contracting LLC v. Romero*, 137 Haw. 1, 364 P.3d 518 (Hawai’i 2015).

<sup>42</sup> *Id.*

that his pension administrator was considering one of the law firms appearing before Judge Yim in a matter to represent Judge Yim's retirement account compliance issues.<sup>43</sup> The pension administrator was considering only two firms. The *Madamba* Court decided that the anticipated relationship would have resulted in an attorney-client relationship between Judge Yim and the firm.<sup>44</sup> The *Madamba* Court held that failing to disclose this sort of relationship created a reasonable impression of partiality because if Judge Yim had disclosed the fact, then it would have been reasonable for Madamba to reject Judge Yim as an arbitrator.<sup>45</sup>

In *Nordic*, the relationship between Judge Yim and Carlsmith was more extensive than the relationship in *Madamba*.<sup>46</sup> "From an objective reasonable person's standpoint, Carlsmith represented Judge Yim as a Trustee, Judge Yim had an attorney-client relationship with Carlsmith, and, in light of *Madamba*, a reasonable person would view this relationship as likely to affect the impartiality of Judge Yim in the arbitration proceeding."<sup>47</sup> The Circuit Court also reasoned that a reasonable person would view Carlsmith as having an advantage because (1) Carlsmith owed Judge Yim both legal and ethical duties as his attorney in the QLT matters, and (2) Judge Yim owed fiduciary duties to QLT, including ensuring that QLT was well defended and represented in pursuing QLT's legal interests.<sup>48</sup> The Circuit Court held that because a reasonable person would view the QLT-Carlsmith connection as likely to affect Judge Yim's partiality, Judge Yim should have disclosed it, failed to disclose it, and the arbitration award should be vacated as a result.<sup>49</sup>

The Supreme Court also tasked the Circuit Court with determining whether a reasonable person would view referrals to Judge Yim for neutral contemporaneous work by GC law firm members as likely to affect Judge Yim's impartiality.<sup>50</sup> One of the three concurrent neutral engagements was for Judge Yim to serve as a mediator in a matter where Carlsmith was a party and was ongoing when Judge Yim issued his disclosures in the *Nordic* matter.<sup>51</sup> The *Nordic* Court held that a reasonable person would view this paid, ongoing engagement as likely to affect Judge Yim's partiality.<sup>52</sup> The Circuit Court held that the three concurrent neutral engagements taken together created an impression of partiality, should have been disclosed, were not disclosed, and required vacating the arbitration award.<sup>53</sup> The court did not hold that Judge Yim's concurrent neutral work created "actual bias," nor did it hold that Judge Yim intentionally failed to disclose the relationships.<sup>54</sup>

The Circuit Court also held that *Nordic* did not waive its right to object to the arbitration award. "[A] party who has actual or constructive knowledge of a relationship of the arbitrator requiring disclosure 'but fails to raise a claim of partiality . . . prior to or during the arbitration

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<sup>43</sup> *Id.* at \*24.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at \*24–25.

<sup>47</sup> *Id.* at \*25.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at \*26.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at \*27.

<sup>52</sup> *Id.* at \*27–28.

<sup>53</sup> *Id.* at \*28.

<sup>54</sup> *Id.*; *Madamba*, 364 P.3d at 529 n.17.

proceeding is deemed to have waived the right to challenge the decision based on evident partiality.”<sup>55</sup> But there was nothing putting Nordic and its counsel on notice of the Carlsmith-QLT relationship until the parties learned of it on October 29, 2010, after Judge Yim issued the Partial Final Award.<sup>56</sup> Because of these facts, the Circuit Court held that Nordic did not waive its right to object to the arbitration award.

The Circuit Court granted Nordic’s motion to vacate Judge Yim’s arbitration award, denied GC’s motion to confirm the arbitration award, and referred the matter back to arbitration under HRS § 658A-23(c) with a new arbitrator and a new final hearing.<sup>57</sup>

## OBSERVATIONS

1. When in doubt disclose!
2. What constitutes a “reasonable inquiry” by a prospective arbitrator cannot be treated lightly.
3. The most obvious indicia of a “reasonable inquiry” is the ongoing maintenance of a robust database that reflects the potential arbitrator’s entire history as an arbitrator.
4. The Hawai’i courts, like the majority of U.S. federal and state courts, do not focus on “evident” when a failure to disclose occurs but on the fact of non-disclosure as *per se* “evident partiality.”
5. Failure to take seriously the disclosure inquiry risks major financial and emotional losses of time and effort resulting from a second arbitration.

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<sup>55</sup> *Nordic*, at \*29; *Nordic PLC*, 358 P.3d at 24.

<sup>56</sup> *Nordic*, at \*30.

<sup>57</sup> *Id.* at \*32–33.