The Arbitration Newsletter

(Published by Whitaker Chalk Swindle & Schwartz PLLC)
(John Allen Chalk, Sr., Editor)

August, 2014

****

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]

****

ARBITRATION CLAUSE CONSTRUCTION VACATES $26 MILLION AWARD

Americo Life, Inc., et al. v. Myer
2014 WL 2789429 (Tex. June 20, 2014)[2]

On the second time before the Texas Supreme Court,[3] the Court in a 5-to-4 vote reversed the Dallas Court of Appeals' reversal and remand of the trial court's vacation of a unanimous $26 million arbitration award to the seller of "a collection of insurance companies" ("Myer"). Justice Jeff Brown wrote the majority opinion, joined by Chief Justice Hecht and Justices Green, Guzman, and Devine. Justice Johnson wrote the dissenting opinion, joined by Justices Willett, Lehrmann, and Boyd.

The parties' arbitration agreement[4] stated that "any dispute … shall be referred to three arbitrators."[5] The agreement also provided that each side would choose an arbitrator and the two party-appointed arbitrators would choose the chair.[6] The parties further agreed: "**Each arbitrator** shall be a knowledgeable, independent businessperson or professional."[7] The arbitration agreement required the arbitration proceedings "be conducted in accordance with the commercial arbitration rules of the American Arbitration Association."[8] The parties gave the arbitrators the right "to retain a lawyer to advise them as to legal matters, but such lawyer shall have none of the relationships to Americo or Myer (or any of their Affiliates) that are **proscribed**

[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] Opinion not released for publication in the permanent law reports; subject to revision or withdrawal. Motion for Reconsideration to be heard on August 8, 2014.

[3] 2014 WL 2789429, *2 ("Nearly ten years after arbitration proceedings commenced between the parties, their case again comes before this Court.").

[4] 2014 WL 2789429, *1 (The "arbitration clause with six paragraphs of terms agreed upon by the parties … .").

[5] 2014 WL 2789429, *7.

[6] *Id.*

[7] *Id.*(emphasis added).

[8] *Id.*(With the exception that the parties retained the right "to take discovery as provided under Federal Rules of Civil Procedure Nos. 28 through 36 during a period of 90 days after the final arbitrator is appointed … .").

above for arbitrators."[9] The parties executed their purchase and sale agreement in 1998[10] and Americo invoked the parties' arbitration agreement in 2005.[11]

Myer objected to the first two arbitrators appointed by Americo (the buyer) and AAA disqualified both of them.[12] Myer did not object to the third Americo appointment and the arbitration proceeded to a unanimous final award of $26 million for Myer. Myer moved to confirm. Americo moved to vacate based on Americo's objections to AAA's disqualification of Americo's first party-appointed arbitrator.[13] Judge Carl Ginsberg, 193rd District Court, Dallas County, denied Myer's "petition" to confirm and granted Americo's motion to vacate the award. The Dallas Court of Appeals reversed the trial court on waiver and the Texas Supreme Court reversed the Court of Appeals in a *per curiam* opinion.[14] On remand the Dallas Court of Appeals found the parties' arbitration agreement to be unambiguous and the panel making the award properly appointed under both the parties' agreement and the applicable AAA Commercial Arbitration Rules (2003).

The Texas Supreme Court, on the second appeal by Americo, framed the question before it as "what the parties specified concerning the arbitrator-selection process."[15] This prompted the Court "[t]o determine the parties' intent" as reflected in "the express language of their agreement."[16] The Court's determination of the parties' intent led it into a discussion of non-neutral party-appointed arbitrators that was "commonplace **when** the parties executed their agreement in 1998."[17] In fact, the Court's analysis focuses on the prevailing or prevalent or "industry norm" party-appointed arbitrator practices "**when**" the parties entered into their arbitration agreement.[18] The Court acknowledged that the AAA Commercial Arbitration Rules regarding party-appointed arbitrator neutrality changed between 1998 (the parties' arbitration agreement) and 2005 (the demand for arbitration) so that by the time the demand for arbitration was filed in 2005,[19] unless the parties expressly agreed otherwise, all party-appointed arbitrators were required to be neutral.[20] But based on the 1998 intent of the parties, the Court concluded "the terms of the agreement do not require impartial party-appointed arbitrators."[21]

---

[9] *Id.* (Emphasis added.). "Proscribe"is not defined in the parties'arbitration clause but is defined in a recognized dictionary as "to condemn or forbid as harmful or unlawful." *Merriam-Webster's Collegiate Dictionary*,11th Ed. (2004), p. 997.
[10] 2014 WL 2789429, *3.
[11] *Id*, at *1.
[12] *See* R-17(b), AAA Commercial Arbitration Rules.
[13] 2014 WL 2789429, *2.
[14] *Americo Life, Inc. v. Myer*, 356 S.W.3d 496 (Tex.2011) (*per curiam*).
[15] 2014 WL 2789429, *2.
[16] *Id*. at 3.
[17] *Id*.
[18] *Id.* at *3, 4, 5, and 6 (emphasis added).
[19] The Court does not discuss the application of R-1 of the 2005 applicable Commercial Arbitration Rules (2003) that states: "These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA.").
[20] *Id.* at *1; *citing* AAA Commercial Arbitration Rules R-17(a)(i) (2003).
[21] *Id*. at *5.

The Court then decided that the parties had agreed in 1998 on an exclusive, specific method of arbitrator selection by requiring that "Each arbitrator shall be a knowledgeable, independent businessperson or professional."[22] The Court disagreed that this language could be harmonized with the parties' additional agreement that "The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association…."[23] Although not requiring a "conflict" between the parties' description of "knowledgeable, independent" versus "impartial" arbitrators (in order to permit non-neutral party-appointed arbitrators), the Court concluded that "When the agreement and incorporated rules **speak to the same point**, the agreement's voice is **the only [voice] to be heard**."[24] This means, according to the Court, that all the **three** arbitrators (whether party-appointed or not) have to be is "knowledgeable" and "independent" but not neutral. Therefore, the panel that AAA appointed exceeded its power in rendering any award because it had not been selected in compliance with the parties' agreement.[25]

OBSERVATIONS

1. The majority opinion does not address the March 1, 2004 effective change in the ABA/AAA *Code of Ethics for Arbitrators in Commercial Disputes* that made all party-appointed arbitrators impartial and independent unless otherwise agreed by the parties.[26]

2. The majority opinion does not address the duty and extensive instructions that party-appointed arbitrators have **as of March 1, 2004**, "to determine and disclose their status [of neutrality and independence] and to comply with this code, except as exempted by Canon X."[27]

3. The majority opinion by its focus on the parties' intent **when** the arbitration clause was agreed in 1998, appears to sanction the third arbitrator chosen by the two party-appointed arbitrators as a **non-neutral** since the parties' agreement states: "**Each arbitrator** shall be a knowledgeable, independent businessperson or professional."[28]

4. The majority opinion consciously chose to disregard Canon IX, A of *The Code of Ethics for Arbitrators in Commercial Disputes* by its description of the arbitration agreed by the parties as follows: "In a tripartite arbitration, each party-appointed arbitrator ordinarily advocates for the appointing party, and only the third arbitrator is considered neutral."[29]

---

[22] *Id.* at *1.
[23] *Id.*
[24] *Id.* at *5; *citing* a 1991 Second Circuit case!
[25] *Id.* at *6; *see also* 9 U.S.C. §10(a)(1).
[26] Canon I, B (1) and (2), *The Code of Ethics for Arbitrators in Commercial Disputes* (Effective March 1, 2004).
[27] *Id.*, Canon IX ("In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator." Canon IX, A.).
[28] *Id.* at *1 (emphasis added).
[29] *Id.* at *3; *see* Canon IX, A ("In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.").

5. The majority opinion turns all the Texas "evident partiality" jurisprudence on its head by stating: "Impartiality is a state of mind, but 'independent' necessarily refers to a relationship – the subject is free from someone or something."[30] If "impartiality" is "a state of mind," then arbitrators when deciding what relationships and interests to disclose can make their decisions based on what that arbitrator thinks is "evident partiality" rather than viewing what to disclose, as required by all the Texas "evident partiality" cases, through the eyes of the arbitration parties and the objective "reasonable person"!

6. The big drafting lesson out of this case is that the adoption of applicable arbitration rules in an arbitration agreement should be expressly incorporated with words that address how the parties' arbitration agreement and the arbitration rules selected by the parties interact.

7. The arbitration clause drafter now must wrestle with the puzzling observation by the majority that "the specifically chosen terms of any [arbitration] agreement would be hopelessly open-ended whenever outside rules are incorporated by reference."[31]

8. *Americo v. Myer* makes it clear that incidental comments in an arbitration agreement about arbitrator status will be viewed by Texas courts as constituting the **only** conditions that govern arbitrator selection. This case makes arbitrator selection another subject to be carefully considered and drafted to avoid the imperial control of "the [arbitration] agreement's **voice**" that now "is the only [**voice**] to be heard."[32]

THE ARBITRATOR'S ROLE IN SETTLEMENT

Is it appropriate for the arbitrator to promote or facilitate settlement in the arbitration in which he or she acts as a neutral arbitrator? Thomas J. Stipanowich and Zachary P. Ulrich address this question in "Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play."[33] The November 2009 publication of the "Final Report" of the "CEDR [Centre for Effective Dispute Resolution, London] Commission on Settlement in International Arbitration" offered both "Recommendations" and "Rules for Facilitation of Settlement in International Arbitration."[34] The CEDR Report suggested procedures that arbitrators can use in arbitration to promote settlement. Numerous initiatives addressing arbitration costs and delay followed the November 2009 CEDR Report and are discussed by Stipanowich & Ulrich including: (1) the "CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration";[35] (2) the "2013 International Arbitration Survey: Corporate Choices in International Arbitration, Industry Perspectives 2013";[36] (3) the 2011 survey of Fortune 1,000 corporate counsel;[37] and (4) the 2013 "College of Commercial Arbitrators-Straus Institute for Dispute Resolution Survey on

[30] 2014 WL 2789429, *4.
[31] *Id.* at *5.
[32] *Id.*
[33] 6 *Penn State Yearbook on Arbitration and Mediation* 1 (2014); also available at Legal Studies Research Paper Series, Paper No. 2014/20, Harnish Law Library, Pepperdine U. School of Law ("Stipanowich & Ulrich").
[34] *See* Stipanowich & Ulrich 1 fn4 and 14—15 fns 96—98.
[35] *Id*. at 11--13.
[36] *Id.* at 5—6.
[37] *Id*.

Arbitration Practice."[38] Prior to the publication of the CEDR Report, the ICC produced its "Techniques for Controlling Time and Costs in Arbitration (August 2007)" that coupled with the studies just listed focused the discussion about how to combat the costs and delay complaints about domestic and international arbitration.[39] These discussions were bound to include and question the arbitrator's role in settlement.

From the CEDR Report advocating arbitrators actively facilitate settlement in their arbitrations to the muscular/managerial arbitrator emphasis in many quarters to the solely adjudicative arbitrator role still cherished by many, Stipanowich & Ulrich highlight the questions now being discussed and provide observations regarding the roles arbitrators may play in settlement.

[38] *Id*. at 2—4 fns 9—14.
[39] *Id.* at 11—13.