*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.[1]

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## *INFOBILLING, INC. v. TRANSACTION CLEARING, LLC*
## 2013 WL 1501570
## (W.D. Texas 2013)

Not fully disclosing all relationships, regardless of how trivial, exposes an arbitrator to possible costly and time-consuming discovery. In *InfoBilling*, one of the three AAA arbitrators, a former state district judge in San Antonio, disclosed at the appropriate time that he knew professionally Respondent's lawyer and may have heard cases in which this lawyer appeared but could not remember any specific cases.[2] The arbitrator did not disclose that Respondent's lawyer was very active in Republican politics; was an officer in a Republican supporting PAC, which contributed approximately $200 to the arbitrator's campaign ten years earlier; and that Respondent's lawyer made a personal political contribution of $100 in the same 2003 campaign.[3] The arbitrator also did not disclose that Respondent's lawyer officed in the same ten-story office building where the former judge officed and Respondent's lawyer attended many Republican fundraisers for local judges that may have been also attended by the arbitrator in question.[4]

The panel's award denied all of Claimant's relief. Claimant then filed in federal district court in San Antonio its Motion to Vacate (based on FAA §§ 10(a)(2) (evident partiality) and (3) (arbitrator misconduct) and Texas Arbitration Act. Tex. Civ. Prac. & Rem. Code § 171.088(a)).[5] In response, Respondent filed its FRCP 12(b)(6) Motion to Dismiss and Motion to Confirm.[6]

Federal District Judge David Alan Ezra granted most of Respondent's Motion to Dismiss but found enough allegations in Respondent's FRCP12(b)(6) pleading to raise questions about the "political and/or personal ties" between the former judge and Respondent's lawyer. Based on this

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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] At time of the award the former judge had been retired for approximately seven years.

[3] 2013 WL 1501570, *3.

[4] 2013 WL 1501570, *3-4.

[5] 2013 WL 1501570, *2. The Claimant's Motion to Vacate was based on both the FAA and the TAA. The trial judge observed that there was no substantial difference between the legal standards for vacatur of the TAA and FAA that would alter the Court's analysis; thus, the Court's FAA analysis remains the same under the TAA. 2013 WL 1501570, *6.

[6] 2013 WL 1501570, *2.

analysis, the Judge ordered the Magistrate Judge to conduct a hearing and design "limited" discovery to determine "the nature of the relationship" between the former judge and Respondent's lawyer. Although Judge Ezra warned against a "fishing" expedition, he permitted the depositions of both the former judge arbitrator and Respondent's lawyer but did not allow the depositions of the other two arbitrators "without further order of the Court."[7]

## OBSERVATIONS

1. What happened to "summary" hearings on motions to vacate and confirm?[8]

2. What happened to the presumptive validity of an arbitration award?[9]

3. Nothing efficient nor economical in the subsequent discovery permitted in this case.

4. More court proceedings are possible with the open question of depositions of the other two arbitrators.

5. Excellent example to all arbitrators of the maxim "disclose, disclose, disclose" and if in doubt "disclose"!

6. What would have happened in this case if no FRCP 12(b)(6) motion had been filed with all of its factual scrutiny and the Respondent had filed only a Motion to Confirm in response to the Motion to Vacate?

7. Respondent's Motion to Dismiss[10] Claimant's Motion to Vacate rather than a response in opposition to the Motion to Vacate might have prevented the detailed examination of the Motion to Vacate under FRCP 12(b)(6) and the resulting discovery permitted by the trial judge.[11]

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[7] 2013 WL 1501570, *7.

[8] Arbitration proceedings are summary in nature to effectuate the national policy of favoring arbitration, and they require expeditious and summary hearing, with only restricted inquiry into factual issues. *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 747–48 (11th Cir. 1988) (citing *Legion Ins. Co. v. Ins. Gen. Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987) (quoting *Moses H. Cone Memorial Hospital v. Mercury*, 460 U.S. 1, 22 (1983)). *See also Baker Hughes Oilfield Opers., Inc. v. Henning Prod. Co.*, 164 S.W.3d 438, 442–43 (Tex. App.—Houston [14th Dist.] 2005, no pet.) ("Generally, summary judgment motion is not required for the trial court to confirm, modify, or vacate an arbitration award, but if a party chooses to pursue confirmation of an award through summary judgment proceedings rather than a motion procedure under TAA, that party assumes the traditional burdens and requirements of summary judgment practice . . . .").

[9] The Federal Arbitration Act expresses a presumption that arbitration awards will be confirmed. *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 932 (11th Cir. 1990); *see also* 9 U.S.C.A. § 9 (if the parties' arbitration agreement states that a judgment may be entered on an award, and a party thereafter so applies to the court, "the court **must** grant such [a confirmation] order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."); *see Porter & Clements, LLP v. Stone*, 935 S,W,2d 217, 221 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding) ("An arbitrator's award has the same effect as a judgment of a court of last resort, and the trial court may not merely substitute its judgment for the arbitrator's merely because it would have reached a different conclusion.").

[10] Coupled with Respondent's Motion to Confirm. 2013 WL 1501570, *2.

[11] *See Baker Hughes supra* at fn8 (Summary judgment not required for trial court to confirm, modify, or vacate an arbitration award **but** if a party chooses the summary judgment process, "rather than the motion procedure under the TAA [same in FAA], that party assumes the traditional burdens and requirements of summary judgment practice" and loses the presumptions in favor of an arbitration award.).