

*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 and 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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**AMERICO LIFE, INC. V. MYER**  
**356 S.W.3d 496 (Tex. 2011)**

American Arbitration Association (“AAA”) administered arbitration resulted in award for \$26.38 million rendered by a panel of three arbitrators that was vacated on cross motions to confirm and vacate. The parties’ arbitration agreement was not followed in the selection of the arbitrator panel. The Dallas Court of Appeals reversed and remanded the case to the trial court finding that Americo Life, Inc. had waived its objection to the selection method for the panel based on the Federal Arbitration Act (9 USC §5). The Texas Supreme Court disagreed and reversed the Dallas Court of Appeals waiver finding. Americo objected to the AAA’s removal of its party-appointed arbitrator and “asserted a standing objection to the continuation of the arbitration without [the buyer’s initial appointment pursuant to the parties’ arbitration agreement].” 356 S.W.3d at 497. Americo cited AAA to *Brook v. Peak International*, 294 F.3d 668 (5<sup>th</sup> Cir. 2002), a case where the AAA did not follow the parties’ arbitration agreement in the selection of the sole neutral arbitrator. But in *Brook* the employee failed to maintain its objection to the AAA selection method and fully participated in the arbitration without objection. The Fifth Circuit did observe, however, that “the AAA must follow the selection procedures outlined in the arbitration agreement” citing 9 USC §5 and representative cases from the second, fourth, and seventh circuits in support of the fact that awards by “arbitrators not appointed under the method provided in the parties’ contract must be vacated.” 294 F.2d at 672-73.

**OBSERVATIONS**

1. The parties’ arbitration agreement in *Americo Life* created some confusion with their arbitrator selection process in addition to a provision that the arbitration proceedings “shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association.” This lack of clarity regarding what governed arbitrator

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selection – the selection method in the parties’ arbitration agreement or AAA’s Commercial Arbitration Rules - allowed the confirmation/vacatur dispute to continue to the Texas Supreme Court and back to the Court of Appeals.

2. If a party is not satisfied that the arbitration selection process complies with the parties’ arbitration agreement, that party must preserve a continuing objection to the arbitrator selection process and the arbitrator appointed thereby or waive the objection.
3. If the parties agree to an arbitrator selection process different from the arbitration rules adopted, make it clear in the parties’ agreement that the parties’ agreed selection method is not subject to the arbitration rules adopted.
4. When confronted with this kind of arbitrator selection confusion, make every effort to resolve the issue at the beginning of the proceeding not after an award has been issued.