Recent Lessons on the Importance of Following the Rules When Appointing Arbitrators

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I. Introduction

"Federal and state policies favor arbitration for its efficient method of resolving disputes, and arbitration has become a mainstay of the dispute resolution process."[2] "Because Texas law favors arbitration, judicial review of an arbitration award is extraordinarily narrow."[3] When ruling on the merits, arbitrators "'have completely free rein to decide the law as well as the facts and are not subject to appellate review.'"[4] As the Texas Supreme Court has long recognized, "'an award of arbitrators upon matters submitted to them is given the same effect as the judgment of a court of last resort. All reasonable presumptions are indulged in favor of the award, and none against it.'"[5]

Although it is virtually impossible to challenge an ***award*** on the merits, the ***arbitrators*** who issue awards get

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[2] *Rachal v. Reitz*, 403 S.W.3d 840, 842 (Tex. 2013).

[3] *E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010); *see also* 9 U.S.C. § 10(a) (grounds to vacate under the Federal Arbitration Act or "FAA"); TEX. CIV. PRAC. & REM. CODE § 171.088(a) (grounds to vacate under the Texas Arbitration Act or "TAA").

[4] *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014) (quoting *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 148-49 (1968)).

[5] *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002) (quoting *City of San Antonio v. McKenzie Constr. Co.*, 150 S.W.2d 989, 996 (Tex. 1941)).

considerably less deference. Indeed, the Federal Arbitration Act requires courts to vacate award when:

- "there was evident partiality or corruption in ***the arbitrators***";
- "***the arbitrators*** were guilty of misconduct"; and
- "***the arbitrators*** exceeded their powers."[6]

Because of the deference given to arbitration awards, courts appear to be taking a harder look at the ***arbitrators*** who issue them. Two recent cases from the Texas Supreme Court illustrate this trend.

In ***Americo Life, Inc. v. Myer***, the Court held that, when the contractual method of appointing arbitrators is not followed, an award must be vacated because the arbitrators lacked authority to enter it.[7] And in ***Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC***, the Court held that, when arbitrators fail to disclose information that might create a reasonable impression of partiality, an award must be vacated because the nondisclosure established "evident partiality."[8] These recent cases confirm that parties should pay close attention to how the arbitrators who decide disputes are seated – or risk having their decisions vacated.

II. Law Governing the Appointment of Arbitrators

[6] 9 U.S.C. § 10(a)(2), (3), (4) (emphasis added). The TAA has similar grounds. ***See*** TEX. CIV. PRAC. & REM. CODE §§ 171.088(a)(2)(A) ("evident partiality by ***an arbitrator***"), (a)(2)(B) ("corruption in ***an arbitrator***"), (a)(2)(C) ("misconduct or wilful misbehavior of ***an arbitrator***"), (a)(3)(A) ("the arbitrators . . . exceeded their powers") (emphasis added).

[7] ***Americo Life, Inc. v. Myer***, 440 S.W.3d 18, 25 (Tex. 2014). Locke Lord LLP represented Petitioner Americo Life, Inc., in all phases of the proceeding.

[8] ***Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC***, 437 S.W.3d 518, 520 (Tex. 2014). Locke Lord LLP represented Petitioner Illinova Generating Company in the trial court and on appeal.

A. Arbitrator selection procedures

"The primary purpose of the FAA is to require enforcement of arbitration agreements 'according to their terms.'"[9] Section 5 of the FAA provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such ***method shall be followed***.[10]

Based on that language, the Texas Supreme Court has recognized that "one of the central purposes of the FAA has been to allow the parties to select their own arbitration panel if they choose to do so."[11]

If there is a breakdown in the selection process, "then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire."[12] The trial court's ruling may be challenged immediately, by mandamus.[13] Alternatively, the parties may preserve the issue for judicial review of an award.[14] Regardless of when a challenge is made, an award by an improperly appointed panel is subject to vacatur on the ground that the arbitrators lacked authority to issue it.[15]

B. Arbitrator disclosure requirements

The FAA also entitles parties to make informed decisions regarding the selection of the panel.[16] If the contract or

[9] *In re Serv. Corp. Int'l*, 355 S.W.3d 655, 659 (Tex. 2011) (quoting *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)).

[10] 9 U.S.C. § 5 (emphasis added).

[11] *In re La. Pac. Corp.*, 972 S.W.2d 63, 65 (Tex. 1998) (per curiam).

[12] 9 U.S.C. § 5.

[13] *See, e.g.*, *In re Serv. Corp. Int'l*, 355 S.W.3d at 657 (granting mandamus relief from trial court order appointing arbitrator).

[14] *See, e.g., Americo*, 440 S.W.3d at 21 (reviewing arbitrator-selection issue).

[15] *See* 9 U.S.C. § 10(a)(4); *see also Americo*, 440 S.W.3d at 21.

[16] *See* 9 U.S.C. § 10(a)(2); *see also Tenaska*, 437 S.W.3d at 523.

governing arbitration rules require arbitrators to be impartial, then potential arbitrators are required to disclose information that "might, to an objective observer, create a reasonable impression of [the arbitrator's] partiality."[17] The FAA provision that "allows courts to vacate arbitration awards 'where there was evident partiality'"[18] shows "a desire of Congress to provide not merely for any arbitration but for an impartial one."[19]

Americo Life and *Tenaska Energy* confirm that breakdowns in the selection process – either failures to follow the contractual method for selecting arbitrators or failures to disclose information that suggests arbitrator bias – are grounds for vacating arbitration awards. That confirmation underscores the importance of paying careful attention to the arbitrator-selection process.

III. *AMERICO LIFE V. MYER*: FOLLOW THE CONTRACTUAL METHOD OF APPOINTING ARBITRATORS

A. Background and procedural history

The dispute between Americo Life and Myer arose after Myer sold several life insurance marketing companies to Americo.[20] The governing contract has a mandatory arbitration agreement that requires the parties to submit any disputes to arbitration.[21] Each party is then entitled to "appoint one arbitrator" who is a "knowledgeable, independent businessperson or professional."[22] However, the arbitration agreement also provides that "[t]he arbitration proceedings shall be conducted in accordance with the

[17] *See Tenaska*, 437 S.W.3d at 520.

[18] *Id.* at 523 (quoting 9 U.S.C. § 10(a)(2)).

[19] *Id.* (quoting *Commonwealth Coatings*, 393 U.S. at 147).

[20] *Americo*, 440 S.W.3d at 20.

[21] *Id.*

[22] *Id.*

commercial arbitration rules of the American Arbitration Association."[23]

Americo submitted a contract dispute to arbitration and then attempted to exercise its contractual right to appoint an arbitrator by naming Ernest Figari, Jr., as its designated arbitrator.[24] Myer objected to Figari on the ground that he did not meet an "impartiality" requirement that was added to the AAA Commercial Arbitration Rules after the parties executed their arbitration agreement.[25] The AAA sustained Myer's objection and removed Figari from the panel.[26] The panel that was ultimately appointed entered a $26 million award in Myer's favor.[27]

Arguing that the arbitrators were improperly appointed and, therefore, exceeded their authority by deciding the matters submitted, Americo moved to vacate the award.[28] The trial court granted Americo's motion, but the Dallas Court of Appeals reversed, first holding that Americo waived its objection to Figari's removal.[29] The Texas Supreme Court reversed and remanded to the court of appeals to consider the merits.[30] Again, the Dallas Court of Appeals reversed – this time holding that the contractual requirements for appointing arbitrators should be "harmonized" with the AAA Rules and, therefore, Figari was properly stricken for not meeting the AAA's "additional requirement of impartiality."[31]

[23] *Id.*

[24] *Id.* at 21.

[25] *See id.*

[26] *Id.*

[27] *Id.*

[28] *See Myer v. Americo Life, Inc.*, 315 S.W.3d 72, 74 (Tex. App.—Dallas 2009), *rev'd*, 356 S.W.3d 496 (Tex. 2011) (per curiam).

[29] 315 S.W.3d at 76.

[30] 356 S.W.3d at 499.

[31] *Myer v. Americo Life, Inc.*, 371 S.W.3d 537, 543-44 (Tex. App.—Dallas), *rev'd*, 440 S.W.3d 18.

B. The Texas Supreme Court's analysis and holdings

In a split (5-4) decision, the Texas Supreme Court "reverse[d] the court of appeals' [second] judgment and reinstate[d] the trial court's order vacating the arbitration award."[32] The majority and dissenting opinions highlight the importance of following the contractual method of appointing arbitrators, the potential difficulties in discerning what that "method" is, and the risk of proceeding to an award over a standing objection to the panel's composition.

1. Awards by arbitrators who are not appointed according to the "contract-specified method" must be vacated

The justices appear to have agreed on the legal principles that require vacating an award when arbitrators are improperly appointed.[33] Those principles, as set forth in the Court's opinion, include:

- "Arbitrators derive their power from the parties' agreement to submit to arbitration."[34]
- Because arbitrators "have no independent source of jurisdiction apart from the parties' consent,"[35] they "must be selected pursuant to the method specified in the parties' agreement."[36]

[32] *Americo*, 440 S.W.3d at 25. The five-member majority opinion was written by Justice Brown and joined by Chief Justice Hecht and Justices Green, Guzman, and Devine. Justice Johnson filed a dissenting opinion, which was joined by Justices Willett, Lehrmann, and Boyd.

[33] *See id.* at 21, 26.

[34] *Id.* at 21 (citing *City of Pasadena v. Smith*, 292 S.W.3d 14, 20 (Tex. 2009)).

[35] *Id.* (citing *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986)).

[36] *Id.* (citing *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672-73 (5th Cir. 2002)).

- "An arbitration panel selected contrary to the contract-specified method lacks jurisdiction over the dispute."[37]
- "[C]ourts 'do not hesitate to vacate an award when an arbitrator is not selected according to the contract-specified method.'"[38]

2. To determine the contract-specified method, apply established principles of contract construction to the arbitration agreement

The justices also appear to have agreed that, to determine the contract-specific method for appointing arbitrators, courts should look to the arbitration agreement and apply established principles of contract construction.[39] The difficulty in *Americo* was figuring out how to determine the "contract-specified method" when the arbitration agreement had *one provision* giving each party the right to select an arbitrator who was a "knowledgeable, independent businessperson or professional," and *another provision* incorporating the American Arbitration Association ("AAA") rules.[40] The AAA rules that were in effect when the parties executed the arbitration agreement provide that, when parties agree to arbitrate under the AAA rules, the rules "shall apply in the form obtaining at the time the demand for arbitration or submission agreement is received by the AAA."[41] As explained by the Court, the problem was that:

> When the parties executed their agreement, AAA rules did not require arbitrator-impartiality, but by the time Americo invoked arbitration in 2005 . . . , the AAA rules by

[37] *Id.*

[38] *Id.* (quoting *Bulko v. Morgan Stanley DW, Inc.*, 450 F.3d 622, 625 (5th Cir. 2006)).

[39] *Id.* at 21-22, 26.

[40] *Id.* at 20.

[41] AAA Commercial Arbitration Rules § 1 (1996).

> default required that "[a]ny arbitrator shall be impartial and independent . . . and shall be subject to disqualification for . . . partiality or lack of independence . . . ."[42]

The Court and the dissenting justices agreed that the term "independent," a contract-specified requirement, cannot "be read interchangeably with" the term "impartial," a rule-specified requirement.[43] The case thus turned on the effect of incorporating the AAA rules into an arbitration agreement that had its own provision on arbitrator qualifications.[44]

3. When parties agree to incorporate the AAA rules, specific provisions in their arbitration agreement take precedence and "the agreement's voice is the only to be heard"

As framed by the Court, "[t]he question is whether AAA rules on arbitrator qualifications can, as the court of appeals concluded, supplement terms agreed on by the parties that specifically speak to the same point."[45] The court of appeals assumed that, "because 'impartial' could be added without negating any expressly chosen qualifications, it was proper to [add it] to effectuate all the agreement's provisions."[46] The Supreme Court disagreed, recognizing that, if this were the end of the inquiry, "the specifically chosen terms of any agreement would be *hopelessly open-ended* whenever outside rules are incorporated by reference."[47]

[42] *Americo*, 440 S.W.3d at 21 (quoting AAA Commercial Arbitration Rules R-17(a)(I) (2003)).

[43] *Id.* at 22, 26. To reach this conclusion, the majority looked to dictionary definitions and industry norms. *Id.* at 22-24.

[44] *See id.* at 24.

[45] *Id.*

[46] *See id.*; *see also Myer*, 371 S.W.3d at 543 (holding that "the two provisions involving selection of the arbitrators can be read together and harmonized to avoid any irreconcilable conflict").

[47] *Americo*, 440 S.W.3d at 24 (emphasis added).

Instead, the Court stated that, "[w]hen an arbitration agreement incorporates by reference outside rules, 'the specific provisions in the arbitration agreement take precedence and the arbitration rules are incorporated only to the extent that they do not ***conflict*** with the express provisions of the arbitration agreement.'"[48] Declining to "construe 'conflict' between an agreement and incorporated rules so narrowly as to find it exists only if the rule contradicts the agreement," the Court held that, "[w]hen the agreement and incorporated rules speak to the same point, ***the agreement's voice is the only to be heard.***"[49]

The dissenting justices did not share the Court's concern about agreements being "hopelessly open-ended."[50] Instead, they took the position that parties "are entitled" to make the terms of their agreement "open to alteration" and that, if Americo and Myer wanted to avoid that possibility, they should have incorporated the 1996 rules and "exclud[ed] any amendments."[51] However, that potential solution assumes that matters specifically addressed in the agreement still require "gap-filling from the AAA rules."[52] In addition, it overlooks the possibility that parties might want to set some provisions in stone and leave others open to gap-filling rules that may be amended over time.

The dissent also took issue with "the Court's conclusion that there is a conflict between the arbitrator requirements in the trailer agreement and those in the AAA rules."[53] Because there was "no dispute that the 2003 AAA rules apply," the dissent assumed that those rules required the parties to "'specifically agree' that the arbitrators would be non-

[48] *Id.* (quoting ***Szuts v. Dean Witter Reynolds, Inc.***, 931 F.2d 830, 832 (11th Cir. 1991)) (emphasis added).

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

[50] *Id.* at 27.

[51] *Id.* at 27-28.

[52] *See id.* at 24.

[53] *Id.* at 28.

neutral" in order to avoid having their own qualification requirements supplemented by the AAA rules.[54] But that assumption is predicated on another – that the AAA rules were incorporated *in toto* and required the parties to follow a future AAA rule to ensure that their own specific agreement on arbitrator qualification requirements would "take precedence."

As the Court recognized, parties should be able to "embrace[] some uncertainty by adopting AAA rules that were subject to change" without agreeing that the rules could "alter the express terms of their agreement."[55] Recognizing that the parties would not have taken "the trouble to expressly agree on some terms if their decision to incorporate AAA rules would leave those terms open to alteration," the Court held that "[t]he AAA impartiality rule conflicts with the parties' agreement because the parties spoke on the matter [of arbitrator qualifications] and did not choose impartiality" and that, under these circumstances, "the agreement controls."[56] Although the provision at issue involved arbitrator-qualification requirements, the Court's analysis should provide guidance whenever questions arise concerning the construction of an arbitration agreement that incorporates the AAA rules.

4. The award by the improperly appointed panel had to be vacated

Confirming the importance of following the contractual method for appointing arbitrators, the Court held that "the arbitration panel was formed contrary to the express terms of the arbitration agreement" and, therefore, it "exceeded its authority when it resolved the parties' dispute."[57] The trial court's order vacating the award was thus reinstated.[58]

[54] *See id.*

[55] *Id.* at 25.

[56] *Id.*

[57] *Id.*

[58] *Id.*

IV. *TENASKA ENERGY V. PONDEROSA PINE*: ARBITRATORS MUST DISCLOSE INFORMATION THAT MIGHT CREATE A REASONABLE IMPRESSION OF PARTIALITY

A. Background and procedural history

The dispute in *Tenaska Energy v. Ponderosa Pine* arose from a contract for Tenaska to sell a power plant to Ponderosa.[59] The contract required arbitration of disputes under AAA rules.[60] Each side was entitled to select one arbitrator, and the two party-appointed arbitrators would then select a third.[61]

Ponderosa appointed Samuel Stern, whose incomplete conflict-of-interest disclosures gave rise to the issues on appeal. Stern disclosed that: he was the director of an Indian company named LexSite; Nixon Peabody, the law firm representing Ponderosa, had designated him as an arbitrator in three other cases; and he attended a meeting at Nixon Peabody and discussed outsourcing Nixon Peabody's litigation discovery work to LexSite.[62] But Stern also represented that "Nixon-Peabody and LexSite have done no business, and it is not clear that Nixon-Peabody would ever have any business to give LexSite."[63]

After the panel (including Stern) was appointed, it issued a scheduling order "stating the parties had made full disclosures of actual and potential conflicts and knowingly waived actual and potential conflicts of interest."[64] The panel ultimately issued a $125 million award in Ponderosa's favor.[65]

[59] *Tenaska*, 437 S.W.3d at 520.

[60] *Id.*

[61] *Id.*

[62] *See id.* at 520-21.

[63] *Id.* at 521.

[64] *Id.*

[65] *Id.*

Ponderosa moved to confirm the award, and Tenaska moved to vacate it on the ground that "Stern was neither impartial nor free from bias."[66] The evidence submitted to the trial court showed that Stern:

- "failed to disclose the true extent of his ties to LexSite and his activities for LexSite";
- "failed to disclose additional meetings or contacts regarding LexSite with Ponderosa[]'s counsel; and
- "allowed Ponderosa[]'s counsel to modify his disclosures in a way that minimized the contact" between LexSite and Ponderosa's counsel.[67]

Based on that evidence, the trial court found that "Stern's disclosures were intentionally incomplete and inaccurate."[68] Concluding that "the Nixon Peabody/LexSite relationship was material rather than trivial and the undisclosed information might yield a reasonable impression that Stern was not impartial, . . . the trial court granted [Tenaska's] motion to vacate the arbitration award."[69]

The court of appeals reversed.[70] It held that Stern's "disclosures [were] not the equivalent of a total lack of disclosure" and that Tenaska should have objected or "ask[ed] more questions."[71] The Supreme Court granted review to evaluate the "evident partiality" standard for vacating an award "in light of a partial disclosure."[72]

[66] *Id.*

[67] *Id.* at 522. Ponderosa's counsel edited Stern's disclosures to "add[] the disclaimer that 'Nixon-Peabody and Lexsite have done no business, and it is not clear that Nixon-Peabody would ever have any business to give LexSite.'" *Id.*

[68] *Id.*

[69] *Id.* at 522-23.

[70] *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, 376 S.W.3d 358, 360 (Dallas 2012), *rev'd,* 437 S.W.3d 518.

[71] 376 S.W.3d at 376.

[72] 437 S.W.3d at 520.

B. The Texas Supreme Court's analysis and holdings

In an opinion written by Justice Guzman, a unanimous Supreme Court "reverse[d] the court of appeals' judgment and reinstate[d] the trial court's order vacating the award and requiring a new arbitration."[73] The opinion reaffirms the Court's previous interpretation of the evident partiality standard, explains how that standard applies in partial disclosure cases, and provides helpful guidance on how concepts of waiver apply in nondisclosure situations.

1. The evident partiality standard

The FAA allows courts to vacate arbitration awards "where there was evident partiality or corruption in the arbitrators."[74] That provision "'show[s] a desire of Congress to provide not merely for any arbitration but for an impartial one.'"[75]

In *Commonwealth Coatings*, the United States Supreme Court provided a seminal interpretation of the "evident partiality" standard.[76] The Texas Supreme Court adopted the *Commonwealth* standard in holding that "a neutral arbitrator exhibits evident partiality 'if the arbitrator does not disclose *facts* which might, to an *objective* observer, create a reasonable impression of the arbitrator's partiality.'"[77] The question in *Tenaska* was how to apply that standard in a case involving partial disclosures.[78]

[73] *Id.* at 529.

[74] 9 U.S.C. § 10(a)(2). The dispute in *Tenaska* was governed by the FAA. *Tenaska*, 437 S.W.3d at 523. However, the Texas Arbitration Act allows vacatur under a similar standard. *See* TEX. CIV. PRAC. & REM. CODE § 171.088(a)(2)(A) ("evident partiality by an arbitrator appointed as a neutral arbitrator").

[75] *Tenaska*, 437 S.W.3d at 523 (quoting *Commonwealth Coatings*, 393 U.S. at 147).

[76] 393 U.S. 145 (1968).

[77] *Tenaska*, 437 S.W.3d at 524 (quoting *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 630 (Tex. 1997)) (emphasis added).

[78] *See id.* at 520.

2. The standard focuses on facts, not relationships

Ponderosa argued that disclosure of the relationship between Stern and Ponderosa's counsel was sufficient under *Commonwealth Coatings* and *TUCO*.[79] But the Supreme Court reaffirmed its holding that "the test for evident partiality asks whether the undisclosed '*information*' might convey an impression of the arbitrator's partiality to an objective observer."[80] As the Court explained, "[a]dopting Ponderosa's reformulation of the test would serve to encourage partial disclosures," which would "negate[] the Supreme Court's directive to be 'scrupulous to safeguard the impartiality of arbitrators.'"[81] That directive is all the more crucial because the arbitral process is otherwise "not subject to appellate review."[82]

3. The standard is objective and need not be modified

Both parties urged the Court to "revisit [its] holding in *TUCO*."[83] But the Court declined to do so.

Tenaska urged the Court to hold that, "if a court finds disclosures *intentionally misleading*, evident partiality is established and the inquiry ends."[84] But the Court held firm to *TUCO's* objective standard, stating that, "although intent may be relevant to establishing actual bias or partiality, . . . evident partiality is established from the nondisclosure itself."[85] Thus, "[a] party need not prove actual bias to demonstrate evident partiality."[86]

[79] *Id.* at 527.

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

[81] *Id.* (quoting *Commonwealth Coatings*, 393 U.S. at 149).

[82] *See id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

Ponderosa argued that the Court should "adopt the more deferential standard some other courts have employed to only set aside an award for evident partiality if a 'reasonable person *would have to conclude* that [the] arbitrator was partial.'"[87] According to Ponderosa, "adhering to the *TUCO* standard will encourage private investigation by parties that lose in arbitration and require trial courts to more frequently vacate awards."[88] But the Texas Supreme Court was not persuaded. Noting that *Tenaska* was only its second "evident partiality" case in the seventeen years since deciding *TUCO*, it adhered to its standard requiring full disclosure.[89] As the Court noted, parties cannot "'seize on every undisclosed detail as a material omission' because [the nondisclosure of] trivial information will not meet the standard we articulated in *TUCO*."[90]

4. No waiver without knowledge of undisclosed facts

Having reaffirmed *TUCO's* objective standard for evident partiality, the Court considered whether Tenaska waived its complaint about Stern by proceeding to arbitration "after he disclosed each relationship at issue" and Tenaska "agree[d] to a waiver of conflicts in [the] scheduling order in the arbitration."[91] Although "a party may waive [an evident partiality] challenge by proceeding to arbitrate based on information it *knows*," it cannot waive the challenge "by proceeding to arbitration based upon information it was *unaware* of at the time."[92] In short, a party cannot knowingly waive an evident partiality challenge that is based on the

[87] *Id.* (quoting and adding emphasis to *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)).

[88] *Id.*

[89] *See id.*

[90] *Id.*

[91] *Id.* at 528.

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

failure to disclose the very information that could have provided the basis for the challenge.

Because the waiver provision in *Tenaska* "was expressly predicated on a full disclosure that never occurred," the Court held that Tenaska did not waive its challenge to Stern's impartiality.[93] Although the Court "express[ed] no opinion as to whether parties may contractually agree to forego the full disclosure requirement,"[94] any such agreement would appear to "'put a premium on concealment' in a context where the Supreme Court has long required full disclosure."[95]

V. Lessons Learned

In *Americo* and *Tenaska*, the Texas Supreme Court vacated multi-million dollar arbitration awards because of problems stemming from the appointment of the arbitrators. These recent cases show that the Court is serious in protecting parties' rights to (i) appoint arbitrators according to the contract-specified method and (ii) make informed decisions regarding the appointment of neutral arbitrators. Collectively, the opinions suggest the following "lessons":

1. Ascertain and follow the rules governing the appointment of arbitrators. *Americo* and *Tenaska* underscore the importance of paying close attention to the procedures by which arbitrators are appointed. As both cases show, the consequences for breaking the rules can be significant.

2. When the rules are broken, consider seeking judicial intervention immediately. *Americo* confirms that awards issued by improperly appointed arbitrators are void. Thus, if a dispute arises over the appointment of arbitrators, parties should weigh the costs and benefits of seeking an immediate judicial resolution before proceeding to arbitration.

[93] *Id.* at 528-29.

[94] *Id.*

[95] *See id.* (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982)).

Otherwise, the award may be vulnerable to attack – and the time and expense spent on arbitration may be wasted.

3. Challenge the arbitrator, not the award. Although the merits of arbitration awards are virtually unreviewable, courts have more leeway to review complaints about the arbitrators who issue those awards. *Americo* and *Tenaska* illustrate some of the circumstances in which the failure to follow the rules for appointing arbitrators requires vacatur.

4. Don't count on waiver. In both *Americo* and *Tenaska*, the parties seeking to uphold the award raised waiver arguments. But the Texas Supreme Court refused to dodge the merits. The Court's waiver holdings thus work in tandem with the Court's overarching theme that arbitration awards should only be given deference when the arbitrators who issue them are properly appointed.

To sum up: Although the chances of getting an award vacated are extremely low, the only way to justify giving arbitrators "free rein" over the law and facts is to require that they be appointed in accordance with the contract-specified method and that they disclose enough information about potential conflicts of interest to enable parties to make informed decisions on the composition of their panels. When, as in *Americo* and *Tenaska*, these requirements are not followed, the chances of vacating an award increase.