DISSENTING OPINION OF ACOBA, J.

I would affirm the findings of fact, conclusions of law, and the February 18, 2000 order by the first circuit court (the court) granting the motion of Lessee-Appellee Daiichi Hawaii Real Estate Corporation (Daiichi) to vacate the arbitration decision on a finding of evident partiality, Hawai‘i Revised Statute (HRS) § 658-9(2) (1993).[1] As an arbitrator, William M. Swope (Swope) had a duty to disclose the extensive relationship he had with Lessor-Appellant Lichter,[2] one of the parties to the arbitration. Daiichi had a right to rely on Swope's June 22, 1999 disclosure, and when a disclosure is inadequate and misleading the arbitration award should be set aside, as the court held. Plainly, Daiichi did not have actual knowledge of the wide-ranging personal and professional relationship between Swope and Lichter, nor in light of the misleading nature of the disclosure could Daiichi be justly charged with constructive notice of evident partiality. Moreover, there can be no distinction made between party-appointed arbitrators and neutral arbitrators with regard to disclosure, as the majority holds, because it is not supported by statute, the agreement, or the

[1] HRS § 658-9 states in relevant part that "the court may make an order vacating the award, upon the application of any party to the arbitration: . . . (2) Where there was evident partiality or corruption in the arbitrators, or any of them[.]"

[2] "Lichter" includes Rowlin L. Lichter, M.D., individually, and Rowlin L. Lichter, Linda Maile Harris, and Marcy Friedman as Trustees of the Martin H. Lichter Education Trust, as appropriate.

application of the code, in this case. The court's findings were supported by the evidence, and following fundamental tenets of review, we must affirm the court inasmuch as its findings were not clearly erroneous or mistaken and led irrefragably to its conclusions of law and ultimate order.

I.

It is a fundamental proposition that Swope had a duty to disclose the extent of his relationship with Lichter. In that regard, "conflicts of interest arising from personal, professional, and business relationships between the arbitrator and a party . . . [are] indications of partiality." Salud v. Fin. Sec. Ins. Co., 7 Haw. App. 329, 333, 763 P.2d 9, 11-12 (1988)[3] (emphasis added) (citing Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968)). Thus, to avoid a charge of evident partiality an arbitrator must disclose "to the parties any dealings that might create an impression of possible bias." Commonwealth Coatings, 393 U.S. at 149. Indeed, in Commonwealth Coatings the Court stated that "any tribunal [such as an arbitration board] permitted by law to try cases and

[3] Although in Salud the nature of the evident partiality was for possible actual bias regarding an alleged "misrepresent[ation of] the medical evidence[,]" the Intermediate Court of Appeals (ICA) directly applied the holding in Commonwealth Coatings, a case involving possible bias stemming from nondisclosure of a conflict of interest. Salud, 7 Haw. App. at 336, 763 P.2d at 13. The ICA noted that a "showing of any conflict of interest arising from a personal, professional, or business relationship between the arbitrator and FSIC[, the party], its counsel, principal, or agent, or from the arbitrator having any financial interest in the outcome of the arbitration" under HRS § 659-9(2) was required for a court to find evident partiality. Id.

controversies not only must be unbiased but also must avoid even the appearance of bias." Id. at 150. Accordingly, the parties to an arbitration have a right to rely on the arbitrator's disclosure.

The evidence uncovered at the court hearing on December 16, 1999 is a strong indictment of the tainted award rendered by the arbitrators.[4] Based on such evidence the court found that: (1) Swope "never disclosed that he and his law firm had a 14-year long attorney-client relationship with Dr. Lichter and eight other various Lichter entities" (findings of fact (finding) 8) (2) Swope "never disclosed that he and his law firm had worked on at least 12 different matters for Dr. Lichter [Rowlin L. Lichter, M.D. (Dr. Lichter)] and the Lichter entities; (3) Swope "never disclosed that as far back as 1989, he considered Dr. Lichter to be a 'friend and neighbor'"; (4) Swope "never disclosed that he represented Dr. and Mrs. Lichter on the sale of their personal residence"; (5) Swope "never disclosed that he had represented Dr. Lichter in the corporate management of [Dr. Lichter's] company as far back as 1989"; (6) Swope "never disclosed that as much as ten years earlier he had worked as co-counsel with Morton L. Friedman, Esq,[5] [Lichter's counsel at

[4] The court said in finding 22 that, "[d]uring the arbitration hearings, Mr. Swope had been given lead responsibility among the arbitrators for addressing legal and evidentiary issues . . . . These rulings were not rendered in favor of Daiichi." (Emphasis added.)

[5] Morton L. Friedman is a California attorney who represented the Lichter Trust at the arbitration hearings. He was also the individual who

(continued...)

the arbitration hearing] with respect to the party's trust matters, the lease in question, and the property involved in the arbitration"; (7) Swope "never disclosed that he had been retained by Dr. Lichter to represent Dr. Lichter's son-in-law in a business dispute involving court litigation"; (8) Swope "never disclosed that he had represented Dr. Lichter in the conveyance of real property as a charitable donation to the Sierra Nevada College"; (9) Swope "never disclosed that he served as the primary lawyer in his law firm for matters relating to Dr. Lichter and that at least six other attorneys in his law firm had also rendered legal services on behalf of Dr. Lichter and Lichter entities"; and (10) Swope "never disclosed that an attorney-client privilege[6] between [Swope's] law firm and the Lichter Trust subsists even to the present day." Swope was duty-bound to disclose this extensive personal and professional relationship with Lichter, but, as found by the court, never did.

The court also found that Swope's actions during the arbitration and court proceedings furthered the nondisclosure, finding that: (1) "[a]t a site inspection prior to the arbitration hearings, Mr. Swope, Mr. Friedman, and Dr. and Mrs. Lichter portrayed themselves in a business like manner but not as friend and neighbor" (finding 23); (2) "[m]oreover, at the

[5](...continued)
appointed Mr. Swope as an arbitrator on behalf of the Lichter Trust.

[6] Attorney-client privilege entails a duty of confidentiality on the part of the attorney regarding confidences revealed in the course of representing a client.

arbitration hearings, Mr. Swope, Mr. Friedman, and Dr. Lichter portrayed themselves as cordial but unknown to each other" (finding 24) (emphasis added); (3) "Mr. Friedman and Dr. Lichter, both of whom were present throughout the arbitration hearings, knew that Mr. Swope and his law firm had represented many Lichter entities repeatedly over the preceding 14-year period" (finding 25); (4) "[a]s late as October 8, 1999, Lichter Trust maintained that Mr. Swope wrote only one letter for the Lichter Trust approximately nine and one-half years prior to the arbitration. Lichter Trust's Memorandum in Opposition to Motion to Vacate, filed October 8, 1999, p.7" (finding 27); and (5) "Lichter Trust maintained that position [as stated in finding 27] during oral argument at the October 19, 1999 hearing on Daiichi's Motion to Vacate" (finding 28).

II.

The entirety of Swope's disclosure, the June 22, 1999 Submission Agreement (SA) and the attached supplemental disclosure statement,[7] failed to recount the wide-ranging

[7] The disclosure in its entirety consisted of (1) a June 22, 1999 SA which stated that

> Mr. Swope disclosed that he did render legal services for Rowlin L. Lichter, MD, that consisted of a review of a standard form of consent document either in connection with an assignment of lease or for a mortgage lender in connection with the property in question. An issue of valuation was not involved. Mr. Swope recall that the documents being prepared by other legal counsel and he was asked to approve the documents as to form and content.
>
> Mr. Swope has made a Supplemental Disclosure Statement

(continued...)

representation Swope had afforded Lichter. Swope's June 22, 1999 SA which stated that Swope "did render legal services for Rowlin L. Lichter, M.D., that consisted of a review of a standard form of consent document," (emphasis added) fell woefully short of revealing the relationship recounted above. In fact, it implied that the relationship was limited to a particular incident.

Consequently, the court found, based on the disclosure, that Daiichi "reasonably believed" that the work done by Swope for Lichter were "specifically limited to a very narrow matter, narrow issue, narrow task, all written in the past tense[,] . . . an isolated instance in the past[,]" (finding 7). Allen R. Wolff, (Wolff), Daiichi's attorney, explained that if he had

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[7](...continued)

> that is attached and made a part of this agreement[,]

and (2) the Supplement Disclosure Statement that disclosed as follows:

> This Supplemental Disclosure Statement is submitted in response to the letter of May 3, 1999, from Carlsmith Ball wherein the law firm seeks additional disclosures from me due to its comment that Cades Schutte Fleming & Wright may have previously represented Daiichi Finance Corporation, an affiliate of the lessee.
> 1. William M. Swope is no longer active in the practice of law; rather he is Of Counsel to the Cades law firm.
> 2. He has never worked on any legal matter involving Daiichi Finance Corporation.
> 3. Following receipt of the Carlsmith Ball letter identified above, he has only recently been informed that other attorneys in the Casdes firm may have handled legal matters involving Daiichi Finance Corporation and that such matters may have covered acquisitions, loans, and condominium projects, but that none of such matters had anything to do with the valuation of property at 1776 Kapiolani Blvd.
> 4. He has had no involvement of any kind, nor has he received any information of any kind regarding Daiichi Finance Corporation except that he only discovered that others had worked on matters as described in the above paragraph 3 as a result of the letter form Carlsmith Ball identified above.

known the information established by the 1,500 pages of produced documents, he would have asked for a further and complete disclosure from Swope. The court in its finding 6 reiterated that "Daiichi believed that on the basis of the disclosure, the work that Mr. Swope did for Dr. Lichter in the past was minimal." Had Daiichi known the full extent of Scope's relationship, the court found in finding 30 that "Daiichi would have sought Mr.Swope's disqualification from serving as an arbitrator if, prior to the arbitration, the extent of his involvement and his law firm's involvement with Mr. Friedman, Dr. Lichter, Lichter Trust or the other Lichter entities had been disclosed."

III.

It would appear evident that a complete disclosure of possible conflict by an arbitrator is necessary because "[t]he parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed." Schmitz v. Zilveti, 20 F.3d 1043, 1047 (9th Cir. 1994) (emphasis added). Therefore, "an arbitrator's nondisclosure of facts showing a potential conflict of interest creates evident partiality warranting vacatur even when no actual bias is present." Id. at 1045 (emphasis added).

In Schmitz, the United States Court of Appeals for the Ninth Circuit applied the Commonwealth Coatings interpretation of

"evident partiality" as set forth in 9 U.S.C.A. § 10(a)(2)[8] on nondisclosure cases. Reversing the United States District Court for the District of Hawai'i, the Ninth Circuit held that an arbitrator, who failed to disclose that his law firm had several times represented a parent company of the appellee, was "evidently impartial." Thus, the arbitration award was subject to vacatur even though the arbitrator did not know, at the time of the arbitration, of his law firm's relationship with appellee's parent company. Id. at 1044-45. The Ninth Circuit specifically held that, "[i]n a nondisclosure case, the integrity of the process by which arbitrators are chosen is at issue. Showing a 'reasonable impression of partiality' is sufficient in a nondisclosure case [to warrant vacatur of an award] because the policy of section 10(a)(2) instructs that the parties should choose their arbitrators intelligently." Id. at 1047 (emphasis added) (citing Commonwealth Coatings, 393 U.S. at 151 (White, J., concurring)). In the instant case, the facts enumerated above that were not disclosed by Swope lead objectively to a "reasonable impression of partiality[.]" Id. at 1045. The "evident partiality" demonstrated on the record compromises the "integrity of the process" by which the arbitrators were chosen. Id.

[8] As Hawaii's arbitration code, HRS chapter 658-9(2), is modeled after the Federal Arbitration Act, 9 U.S.C. § 10, this court has looked to federal interpretation of "evident partiality" to inform its own interpretation. See majority opinion at 26.

IV.

While acknowledging Commonwealth Coatings, the majority relies on cases which do not support the majority's contention that Swope satisfied his duty to disclose as articulated in Commonwealth Coatings. Majority opinion at 30-31. Morelite Constr. Corp. v. New York City District Council Carpenters Benefit Fund, 748 F.2d 79, 80 (2d Cir. 1984), is inapplicable because it does not deal with a failure to disclose. Moreover, the case simply held that a father-son relationship would make an arbitrator evidently partial, a proposition that seems undisputable. In our case a similar close relationship warrants vacatur. In Peabody v. Rotan Mosle, Inc., 677 F. Supp. 1135 (M.D. Fla. 1987), it was held that where an expert witness did work for the arbitrator's former law partner's mother and brother, this relationship did not rise to the level of evident partiality. In our case, the party and the arbitrator had a professional relationship that spanned fourteen years. In Washburn v. McManus, 895 F. Supp. 392 (D. Conn. 1994), it was ruled that the fact that the arbitrator was a plaintiff in an unrelated lawsuit against his former employer at the time of the arbitration of a similar type of case did not demonstrate evident partiality. The court held that the similarities between the arbitrated claim of the party-employee against his former employer and the arbitrator's claim against his former employer were too superficial to evidence any bias. Id. at 400.

Contrastingly, there was a significant relationship in the instant case. The contrast between Swope and Lichter's fourteen-year relationship and the relationship involved in the Washburn case is obvious.

V.

Unquestionably, Swope did not make a full disclosure of his relationship with Lichter. Swope's claim that his disclosure was based on recollection and the reference to his review of a consent form were plainly insufficient to reveal the facts uncovered by the court "showing a potential conflict of interest." Schmitz, 20 F.3d at 1045.

The majority relies on Swope's contention that he attempted to make the proper disclosure by requesting files from his former law firm, but was told that those files were destroyed. Majority opinion at 41. Thus, Swope had to rely on his own recollection. Id. But, the court, which listened to and observed Swope's testimony, expressed skepticism about the candidness of this representation, concluding in Conclusion 22 that "Mr. Swope was obligated to make a full and candid disclosure. Although Mr. Swope attempted to conduct a conflicts check without success, the extent of legal representation over a 14 year period overshadows his claim that the disclosure represented the full extent of his independent recollection." (Emphases added)

Here, if Swope had initially disclosed the relationship he had with Lichter, then Daiichi would have been able to intelligently assess whether Swope should be retained as an arbitrator. As the court found, it would have exercised its prerogative prior to the hearing to challenge Swope. In the absence of full disclosure, Daiichi was denied the opportunity to object to Swope. As the court concluded in Conclusion 17, "[i]t is inadequate for a lawyer or arbitrator to claim that he did not remember the representations. 'That the lawyer forgot to run a conflict check or had forgotten that he had previously represented the party is not an excuse.' Schmitz, 20 F.3d at 1048 (citing In re Siegal, 153 N.Y.S.3d 673 (1956))."

The majority also appears to construe Swope's disclosure of his review of the consent document as a "material disclosure," majority opinion at 42, rendering "Daiichi . . . fully cognizant . . . that Swope and the trustees had a prior attorney-client relationship with respect to the subject property[.]" majority opinion at 43. Although Daiichi may have been cognizant of Swope's prior attorney-client relationship with regard to the consent form, that revelation could not possibly have put Daiichi on notice of the extensive relationship between Swope and Lichter. The court found, rather, that there were material nondisclosures and conduct during the arbitration and court proceedings intended to maintain an appearance of an arms-length relationship. See supra page 3-4.

The unrebutted testimony of Daiichi's Vice-President, Yoichi Matsushita (Matsushita), was that "the nature, scope, and length of time that Mr. Swope and his firm had worked for Dr. Lichter was never disclosed to Daiichi at any point in the arbitration process." Matsushita explained that "the disclosure made by Mr. Swope in the arbitration did not indicate or imply the volume of his and his law firm's representation of Dr. Lichter[.]" (Emphasis added). Matsushita and Wolff both testified that had they known the extent of Swope's involvement with Dr. Lichter at the time of the disclosure, they would have objected to his serving on the panel. Thus, the record supports the trial court's conclusion 8 that under the circumstances Swope's disclosure "was insufficient to shift the burden to Daiichi to investigate or to constitute a waiver of any challenge."

VI.

Because Swope's June 22, 1999 disclosure was of such a limited nature in contrast to the facts, it was misleading. The disclosure stated that the consent document was prepared by other legal counsel, did not deal with an issue of valuation, and that Swope was asked to approve the document as to form and content. As mentioned, such statements suggest that Swope rendered legal services to Lichter only on this matter, and only in a limited way. Swope, in his supplemental disclosure statement stated that

"[h]e has never worked on any legal matter involving Daiichi Finance Corporation." (Emphasis added).

The court found in findings 5, 6, and 7 (1) that "Daiichi believed that there was nothing in the disclosure that indicated that Mr. Swope was currently the attorney for Dr. Lichter, Lichter Trust, or any of the various related Lichter individuals or entities;" (2) that "Daiichi believed that on the basis of the disclosure, the work that Mr.Swope did for Dr. Lichter in the past was minimal[]"; and (3) that "Daiichi reasonably believed that the disclosure, with its limiting words 'that consisted of' was a complete disclosure and not a disclosure that was merely representative of the type of things that had been undertaken by Mr. Swope on behalf of Dr. Lichter or a Lichter entity." (Emphases added.) Hence, based upon the testimony of the witnesses, the court found that Daiichi was reasonable in its belief that the contract between Swope himself and Lichter was "an isolated instance in the past." Such an isolated incident would not put Daiichi on notice of any evident partiality because Daiichi's belief was supported by common understanding that such occasional contact is not unexpected. As the Court in Commonwealth Coatings explained, "arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases[.]" 393 U.S. at 148-49. In light of this truism, it was

all the more imperative that the disclosure in this case reveal the nature of the relationship between Swope and Lichter.

VII.

The majority asserts that Daiichi had a "'wait and see' approach to challenging the arbitration decision." Majority opinion at 44. Frivolous or fraudulent post-award challenges must be discouraged.[9] Id. But, vacatur in this case would not undermine the objectives of arbitration, but rather, preserve them. There is no way in which "the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." Commonwealth Coatings, 393 U.S. at 149. "If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award." Id. (White, J., concurring) (emphasis added).

The majority ignores the foregoing propositions. Its "wait and see" formulation has no application to the facts here.

[9] The majority's argument is that Daiichi knew of the potential bias (April 9, 1990 letter evidencing Swope's involvement with subject property and attorney-client relationship with Lichter) prior to the arbitration. The majority contends that Daiichi may not "challeng[e] the arbitration decision based on information in its possession prior to the arbitration proceeding and after it had been placed on actual notice of Swope's attorney-client relationship with the trustees." Majority opinion at 44. Thus, the majority apparently believes that the parties should not be allowed to assert evident partiality, post-award simply on the revelation of a limited past attorney-client relationship with the opposing party. Id.

As the court found, had the requested disclosures been made, Daiichi would have challenged Swope. The relationships between Swope and Lichter which the court found warranted vacatur, were only uncovered as a result of judicial discovery and the post-award hearings.

VIII.

Contrary to the majority's holding, Daiichi did not waive its right to challenge the arbitration decision. Majority opinion at 43-44. This court has said that, "[g]enerally, waiver is defined as an intentional relinquishment of a known right." Coon v. City & County of Honolulu, 98 Hawai'i 233, 261, 47 P.3d 348, 376 (2002) (quoting Assoc. of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. 98, 108, 705 P.2d 28, 36 (1985)). "To constitute a waiver, there must have existed a right or privilege claimed to have been waived and the waiving party must have had knowledge, actual or constructive, of the existence of such right or privilege at the time of the purported waiver." Honolulu Fed. Sav. & Loan Ass'n v. Pao, 4 Haw. App. 478, 484, 668 P.2d 50, 54 (1983) (citing 28 Am. Jur. 2d Estoppel and Waiver §§ 157, 158 (1966)) (emphasis added). Moreover, a "waiver may be expressed or implied[,] and [i]t may be established by express statement or agreement, or by acts and conduct from which an intention to waive may be reasonably inferred." Coon, 98 Hawai'i at 261, 47 P.3d at 376 (emphasis

added) (internal quotation marks omitted) (brackets in original).

Under the evidence, Daiichi did not have actual knowledge of the extensive relationship between Swope and Lichter. As stated previously, the court found in finding 8 that Swope did not disclose that he, personally and professionally, and his law firm had maintained a fourteen-year relationship with Lichter and eight other Lichter entities, and that Daiichi believed that on the basis of the disclosure, the work that Mr. Swope did was minimal. (finding 6) Thus, Daiichi did not have actual knowledge of the extended relationship between Swope and Lichter.

Additionally, Daiichi did not have constructive knowledge or notice of the relationship between Swope and Lichter. Generally, constructive notice[10] "arise[s] as a legal inference, where circumstances are such that a reasonably prudent person should make inquires, [and, therefore,] the law charges a person with notice of facts which inquiry would have disclosed." SMG Partnership v. Nelson, 5 Haw. App. 526, 529, 705 P.2d 49, 52 (1985) (citation omitted) (brackets in original). Here, the circumstances did not give rise to a reasonable basis for further inquiry especially in light of the duty on Swope to disclose[11]

[10] The majority appears to define constructive knowledge as when one "should have known of the potential partiality of the arbitrator[.]" Majority opinion at 38.

[11] The court concluded that "[a]rbitrators, pursuant to HRS Chap. 658, are duty bound to be impartial and unbiased, doing nothing by which the rights of a party are prejudiced. HRS 658-9." (conclusion 1)

"any dealings that might create an impression of possible bias." Commonwealth Coatings, 393 U.S. at 149 (emphasis added). The court pointed out that pursuant to The Code of Ethics for Arbitrators in Commercial Disputes (Code) of the American Arbitration Association (AAA), arbitrators have an "affirmative duty of disclosure . . . [and, thus, a]n Arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias." Therefore, the majority's holding that Daiichi should be imputed with knowledge of Swope's April 9, 1990 letter revealing an attorney-client relationship with Swope[12] is not instructive.

The critical question is not whether Daiichi knew that there had been an attorney-client relationship between Lichter and Swope because, surely, it did as a result of the disclosure. Rather, Daiichi, as the court found, did not know of the extent of the relationship. Inasmuch as it is a given that arbitrators cannot sever all their ties with the business world, such a disclosure was insufficient under these circumstances. See Commonwealth Coatings, 393 U.S. at 148-49. Because Daiichi could reasonably rely on Swope's disclosure, it cannot justly be charged with failing to investigate further.

Hence, Daiichi could not have intentionally waived its right to challenge the arbitration decision. The April 9, 1990

[12] The April 9, 1990 letter from Swope, as representative of the Lessor (Martin H. Lichter, deceased; co-trustees: Rowlin Lobert Lichter; and Linda Maile Harris), to Kapiolani Capital and Nobuo Kuniyuki set out the rights and duties under the lease.

letter would only have made Daiichi aware of the attorney-client relationship between Swope and Lichter as to this particular property. The letter did not evidence the lengthy relationship between Swope and Lichter. Therefore, even if Daiichi were imputed with knowledge of the April 9, 1990 letter, no "intention to waive may be reasonably inferred." Coon, 98 Hawai'i at 261, 47 P.3d at 376. The court's decision to vacate the arbitration award based on evident partiality was predicated on the far-reaching relationship between Swope and Lichter, not simply the attorney-client relationship as to the subject property. Daiichi could not waive what it did not know or would not have reason to know.

IX.

Although the majority contends that a distinction should be drawn between party-appointed arbitrators and neutral arbitrators, this proposition is not supported by statute, the agreement, the code itself, or the proceedings herein. Majority opinion at 31-38. Initially, it is to be noted that neither the parties nor the court raised or considered the application of Canon VII of the Code or any distinction between the arbitrators as "party-appointed arbitrators" or "neutral arbitrators." Accordingly, none of the foregoing was raised in this appeal. Thus, this issue was not before this court.

HRS § 658-9 applies in this case and on its face does

not provide for a distinction between a "party appointed arbitrator' and a "neutral arbitrator." See supra note 1. Because there was no agreement between the parties to apply HRS chapter 658A (the Uniform Arbitration Act), it is inapplicable. HRS § 658A-3 (Supp. 2002).[13] Moreover, the code itself states, in the preamble, that "[t]his code does not take the place or supersede such agreements, rules, or laws and does not establish new or additional grounds for judicial review of arbitration[.]" (Emphasis added.) Hence, the Act does not supplant HRS § 658-9. Additionally, the statutory provisions of HRS Chapter 658A (the Uniform Arbitration Act) do not provide a distinction between "party-appointed arbitrators" and "neutral arbitrators" for purpose of determining "partiality." See supra note 1.[14] Thus, on its face, no ambiguity exists. Ross v. Stouffer Hotel Co., 76 Haw. 454, 461, 879 P.2d 1037, 1044 (1994) (holding that "where

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[13] HRS § 658A-3 states in relevant part as follows:

> (b) This chapter governs an agreement to arbitrate made before July 1, 2002, if all the parties to the agreement or to the arbitration proceeding so agree in a record. If the parties to the agreement or to the arbitration do not so agree in a record, an agreement to arbitrate that is made before July 1, 2002, shall be governed by the law specified in the agreement to arbitrate or, if none is specified, by the state law in effect on the date when the arbitration began or June 30, 2002, whichever first occurred.

(Emphasis added).

[14] Although the majority argues that the commentary to the Uniform Arbitration Act (2001) "recognizes a distinction between the disclosure requirements applicable to 'party-appointed' and 'neutral' arbitrators[,]" majority opinion at 36, the legislative history does not indicate that the commentary to the Uniform Arbitration Act was adopted. Moreover, there is no indication that the parties intended that the arbitrators were to conduct themselves as anything other than neutral arbitrators.

the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond the language for a different meaning"). Even in the situation where two arbitrators appointed by the parties appoint a third arbitrator, "[t]he sponsors of th[e] code believe that it is preferable for parties to agree that all arbitrators should comply with the same ethical standards." Code, Preamble (Emphasis added.) Therefore, the assertion by the majority that it is "intuitive reason that a party-appointed arbitrator might view the proceedings through a more subjective and partial lens than a neutral arbitrator[,]" majority opinion at 32 (emphasis added), does not comport with the facts under our governing arbitration statute or the preference expressed by the code.

Additionally, the introductory note to Canon VII indicates that such a distinction in treatment must be made at the beginning of the arbitration.[15] There was never any agreement in the lease that Canon VII was to apply. The court

[15] The introductory note to Canon VII states in relevant part that:

> In all arbitrations in which there are two or more party-appointed arbitrators, it is important for everyone concerned to know from the start whether the party-appointed arbitrators are expected to be neutrals or nonneutrals. In such arbitrations, the two party-appointed arbitrators should be considered nonneutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators be neutral.

(Emphasis added.) Nothing in the record indicates this matter was even considered by the parties as they all proceeded on the basis that all the arbitrators were to be neutral. The arbitration agreement dated June 22, 1999 even states that the three arbitrators "certify that they are not biased relative to either Party, their agents or representatives."

took judicial notice of Canon II at the hearing upon the request of Daiichi. No party requested judicial notice of Canon VII. If Lichter sought to apply another standard, then Lichter had the opportunity to request the court do so at that time. It would be unfair in this situation to apply a rule which the parties and the court did not consider. Indeed, Canon II was only one of several authorities on which the court grounded its decision. The court primarily relied on the fact that "Hawaii has adopted the standard of evident partiality that was set forth in Schmitz," (which had cited Commonwealth Coatings), referring to Schmitz in conclusions 4, 5, 6, 7, 11, and 19.

Assuming arguendo that Canon VII(B)(1) applies, Swope did not satisfy that requirement of disclosure. The majority relies on Canon VII(B)(1) to explain that Swope's disclosure need only be "sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from person appointed as neutral arbitrators." Majority opinion at 35. Swope did not meet this standard. Swope's disclosure was misleading, as discussed infra. Most cases the majority discusses deal with parties who had notice of the distinction between the standard for disclosure between a party-appointed arbitrator and a neutral arbitrator, prior to the arbitration. See Ad-Med, Inc. v. Bruce J. Iteld, M.D., 728 So.2d 556, 558 (La. Ct. App. 1999) (applying the rules of the AAA because the arbitration agreement between the parties

expressly adopted its application); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 752, 755 (11th Cir. 1995) (applying rules of the AAA because expressly adopted in licensing agreement); Stef Shipping Corp. v. Norris Grain Co., 209 F. Supp. 249, 253-54 (S.D.N.Y. 1962);[16] Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 817 (8th Cir. 2001) (applying rules of AAA because lease agreements provided that arbitration be governed by "applicable rules of the American Arbitration Association"); Washburn, 895 F. Supp. at 394 (applying the rules of the AAA because arbitration was submitted to the American Arbitration Association for resolution); Astoria Med. Group v. Health Ins. Plan of Greater New York, 182 N.E.2d 85, 86 (N.Y. 1962) (applying rules of AAA because the contract stated that if the third arbitrator could not be decided on, the AAA would select the arbitrator). The only two cases cited by the majority in which the court sua sponte applied the rules of the AAA were in Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885, 892 (D. Conn. 1991) and Aetna Cas. & Sur. Co. v. Grabbert, 590 A.2d 88 (R.I. 1991). In both cases the courts applied the rules of the AAA as "guidance" and both cases found that the party-appointed arbitrator violated his duty. Metro.

[16] Although the majority cites to Stef Shipping for the proposition that a party-appointed arbitrator consulting with his nominator prior to the arbitration hearing is not sufficient to vacate an arbitration award, majority opinion at 37-38, this case is inapplicable. 209 F. Supp. at 253-54. Stef Shipping holds that "the arbitrator selected by the disputants cannot be expected to play a wholly impartial part." Id. at 253. But, Stef Shipping was decided in 1962, prior to the publication of the rules of the AAA. Stef Shipping may differentiate a party-appointed arbitrator, but still, it did not express a requisite disclosure requirement.

Prop., 780 F. Supp. at 891; Grabbert, 590 A.2d at 93.

In this case, the parties had the opportunity and undisputed right to object to an arbitrator prior to the arbitration decision. Neither Daiichi nor any party had notice or agreed that a distinction would be applied between a party-appointed arbitrator and a neutral arbitrator. The prerequisites set forth in the Code for distinguishing between party-appointed arbitrators and neutral arbitrators are only meaningful when parties have knowledge of the distinction before they arbitrate, not later, on an appeal from a court order pertaining to the award. The record indicates the parties proceeded on the basis that all the arbitrators would be neutral, not that two of them could act as nonneutrals.

X.

On appeal we are to pay due deference to the trial court's findings.

> We review a trial court's [findings of fact] under the clearly erroneous standard. A [finding of fact] is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed. [A finding of fact] is also clearly erroneous when the record lacks substantial evidence to support the finding. [This court has] defined substantial evidence as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Beneficial Hawaii, Inc. v. Kida, 96 Hawai'i 289, 305, 30 P.3d 895, 911 (2001) (internal quotation marks and citations omitted). Here, the court took evidence and observed the demeanor of the

witnesses. This court has held that "[a]n appellate court will not pass upon issues dependent upon credibility of witnesses and the weight of the evidence; this is the province of the trial judge." Amfac v. Waikiki Beachcomber Inv., 74 Haw. 85, 117, 839 P.2d 10, 28 (1992) (quoting Nani Koolau Co. v. K & M Constr., Inc., 5 Haw. App. 137, 140, 681 P.2d 580, 584 (1984)) (emphasis added). "A [conclusion of law (COL)] that is supported by the trial court's [findings of facts] and that reflects an application of the correct rule of law will not be overturned." Id. at 119, 839 P.2d at 29. Moreover, where "a COL [such as conclusion 8] presents mixed questions of fact and law [it] is reviewed under the clearly erroneous standard because 'the court's conclusions are dependent upon the facts and circumstances of each individual case.'" Id. (quoting Coll v. McCarthy, 72 Haw. 20, 28, 804 P.2d 881, 886 (1991)).

Although the majority overturns conclusion 8,[17] which affirms that Swope carried the burden of disclosure, the findings that support this conclusion are not clearly erroneous. Inasmuch

[17] COL 8 states as follows:

> By disclosing only one discrete and minor representation, Mr. Swope could not shift to Daiichi the burden to investigate and discover the vast expanse of the hidden relationship between the arbitrator and the many Lichter entities. Unlike the facts in Behring Int., Inc. v. Local 295 International Brotherhood of Teamsters etc., 449 F.Supp. 513 (1978) and Kiernan v. Piper Jaffray Companies, Inc., 137 F.3d 588 (1998), the disclosure in this case was insufficient to shift the burden to Daiichi to investigate or to constitute a waiver of any challenge.

(Emphases added.) Contrary to the majority's view, conclusion 8 involves a mixed question of fact and law.

as conclusion 8 involves mixed questions of fact and law, the clearly erroneous standard applies. To summarize, the following findings support conclusion 8: (1) that Swope never disclosed his personal relationship or the extent of his fourteen-year professional relationship with Lichter (findings 8 to 17); (2) that based on Swope's disclosure Daiichi was not concerned because there was nothing in the disclosure that indicated that Swope was currently the attorney for Dr. Lichter, Lichter Trust, or any of the various related Lichter individuals or entities (finding 5); (3) that based on the disclosure, Daiichi believed that Swope's work for Lichter in the past was minimal (finding 6); (4) that Daiichi reasonably believed, based on the language of the disclosure, that Swope's representation of Lichter was "limited to a very narrow matter" and "an isolated instance in the past[]" (finding 7); (5) that "[u]pon learning that there was an undisclosed matter where the arbitrator's law firm had represented a corporate affiliate of Daiichi, Daiichi requested that Mr. Swope make a supplemental disclosure relating to his firm's prior work for Daiichi's corporate affiliate" (finding 20); and (6) that "Daiichi would have sought Mr. Swope's disqualification from serving as an arbitrator if, prior to the arbitration, the extent of his involvement and his law firm's involvement with Mr. Friedman, Dr. Lichter, Lichter Trust or the other various Lichter entities had been disclosed" (finding 30).

Here, there was substantial evidence to support the

findings. See Beneficial Hawaii, 96 Hawai‘i at 305, 30 P.3d at 911 (substantial evidence is "credible evidence . . . of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion"). The court listened to the testimony of the participants, observed their demeanor, weighed the evidence and based its findings and conclusions on its observations of the witnesses and on the evidence. As reflected in its decision, the court found that Swope failed to disclose the extensive relationship between himself and Lichter, thus the limited nature of the disclosure misled Daiichi.

This court must give due deference to the court's findings that found Swope violated his duty to disclose. To do otherwise invades the province of the trial court. Amfac, 74 Haw. at 117, 839 P.2d at 28. Applying the fundamental tenets of review, the vacatur of the arbitration award should be affirmed.