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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 2004. I would like to thank Dean John D. Feerick for his guidance throughout my research and writing and Judge Howard Holtzmann for his advice and analysis. I would also like to thank all those who contributed to my research, especially Ms. Florence Peterson, Mr. Thomas Stipanowich, Prof. Jay Siegel, Mr. Robert Holtzman, Mr. Harold Moskowitz, Mr. Perry Kriedman, Mr. David Sheffer, and Mr. Richard Adelman. The points made by the author in this Note do not necessarily reflect the views of all persons whose assistance is acknowledged.

A NEW CODE OF ETHICS FOR COMMERCIAL ARBITRATORS: THE NEUTRALITY OF PARTY-APPOINTED ARBITRATORS ON A TRIPARTITE PANEL

*Olga K. Byrne**

This natural right of self-regulation is a precious possession of a democratic society, for it embodies the principles of independence, self-reliance, equality, integrity, and responsibility, all of which are of inestimable value to any community.¹

It is a call for self-reliance, a way of living in harmony with our neighbors, an endorsement of voluntarism.²

Having an impartial and neutral judge resolve disputes has been a fundamental goal in the American justice system.³ But in some arbitrations, party-appointed arbitrators on a tripartite panel are expected to act as “non-neutrals” and may be predisposed to decide in favor of the party who appointed them, while the third arbitrator is neutral. This system presents a problem to those who feel that all adjudicators should be neutral when making a decision. In international arbitration, for example, the rule is firm that arbitrators must act in an independent and impartial manner, unless the parties agree otherwise.⁴ Since increasing numbers of commercial disputes are international, professionals within the international

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1. FRANCES KELLOR, *AMERICAN ARBITRATION: IT'S HISTORY, FUNCTIONS AND ACHIEVEMENTS* 4 (1948). Mr. Kellor was the first Vice-President of the American Arbitration Association.

2. THEODORE W. KHEEL, *THE KEYS TO CONFLICT RESOLUTION: PROVEN METHODS OF SETTLING DISPUTES VOLUNTARILY* XI (1999). Mr. Kheel is the former executive director of the War Labor Board.

3. Deseriee A. Kennedy, *Predisposed with Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 *GEO. J. LEGAL ETHICS* 749, 749 (1995).

4. See International Arbitration Rules, Art. 7, American Arbitration Association, Nov. 1, 2001 (stating that “arbitrators acting under these rules shall be impartial and independent”); see also Rules of Arbitration of the International Chamber of Commerce, Arts. 7(1) and 15(2), Oct. 3, 1993 (stating respectively that “every arbitra-

community have urged that domestic commercial arbitration standards should more closely resemble international norms.⁵

The finality of arbitration is another reason for aspiring to a higher standard of neutrality. Arbitration awards are final and binding, subject to very limited review by the courts.⁶ Wide discretion is left to the parties, their attorneys and the arbitrators to fashion the procedure as they wish, without any judicial interference.⁷ The binding nature of arbitral awards requires a clear ethics code to create some behavioral benchmark and uphold the integrity of arbitration practice.⁸

Currently, the American Arbitration Association ("AAA") and the American Bar Association ("ABA") are working to revise the existing ethics code for commercial arbitrators in a way that encourages neutrality of all arbitrators. This Note refers to a text prepared by a team from the AAA and the ABA (herein called the "2003 Revision"). That text is expected to become effective March 1, 2004, but it must be recognized that at the time of this writing (October 1, 2003), it had not been finally approved by either organization. The text had been approved by the Executive Committee of the AAA, but was subject to further refinement, and it had not yet been acted on by all of the concerned bodies of the ABA. Meanwhile, the existing code of ethics remains in effect.

In the following analysis, Part I of this Note describes the importance of the tripartite panel and the new standards that it is expected will be adopted in a revised code of ethics for commercial

tor must be and remain independent of the parties involved in the arbitration" and "in all cases, the Arbitral Tribunal shall act fairly and impartially").

5. MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* §1:01 at 3 (3d ed. 2001).

Commercial arbitration, as used generally, is not confined to traditional commercial transactions.

....

It is also used to decide controversies arising out of building and engineering contracts, agency and distribution arrangements, close corporation and partnership relations, separation agreements, individual employment contracts, license agreements, leases, estate matters, contracts of government agencies and municipal bodies with private firms for construction work, stock exchange transactions and controversies in the broad insurance field, reinsurance arrangements, inter-insurance company subrogation claims, and in still newer areas such as uninsured motorist accident claims, as well as those involving medical malpractice.

Id.

6. See *infra* notes 44-52 and accompanying text.

7. *Id.*

8. Interview with Florence Peterson, General Counsel, American Arbitration Association, in New York, N.Y. (Sept. 13, 2002).

arbitrators. Part II examines the opposing arguments concerning the role of party-appointed arbitrators with respect to neutrality. Proponents of an all-neutral panel urge that our judicial value system should allow no other alternative, while others support the use of non-neutrals when parties mutually agree to exercise their autonomy to do that. Part III proposes that the revisers educate participants in the arbitral process of the new standards demanded of all arbitrators, so as to maintain confidence and stability in arbitration. Although arbitration is a private process and its construction should be left substantially to the preference of the parties, ethical norms create faith in the system and provide a reliable foundation upon which to structure specific mechanisms for resolution.

I. THE ARBITRATION PROCESS

Arbitration is an alternative to litigation whereby parties voluntarily submit their dispute to a tribunal of their own choosing to obtain a judicially enforceable decision.⁹ It is often chosen over litigation for its speed, cost-effectiveness, privacy, and less hostile atmosphere than the courts.¹⁰ The parties may decide the scope and content of the arbitration, define its procedures, and choose the location of the arbitration by specifying these stipulations in the arbitration agreement.¹¹ Most importantly, parties have the power to choose the decision maker.¹² This freedom to select the arbitrator is why arbitration has been described as “hiring your own private judge.”¹³ Section 5 of the Federal Arbitration Act articulates the federal policy of enforcing the parties’ right to compose their own tribunal, stating: “If in the agreement provision be made for a method of naming or appointing an arbitrator . . . , such method shall be followed.”¹⁴ Parties often want the arbitrator to be an expert in the field of the dispute and may stipulate desired

9. THOMAS H. OEHMKE, *COMMERCIAL ARBITRATION* §1:05 (Rev. ed. 2002); ANTHONY WALTON, *RUSSELL ON THE LAW OF ARBITRATION* 1 (18th ed. 1970).

10. IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* §3.2 (1st ed. 1995).

11. *Id.* at §2.6.2 (“In short, the parties can control the ‘what,’ ‘where,’ and ‘how’ of the arbitration process and ‘who’ decides.”); see also ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 5 (2d ed. 1991) (explaining that the arbitration agreement is evidence that the parties have consented to arbitrate their disputes). It is seen as an illustration of party autonomy, since it expresses the will of the parties to conduct the proceedings according to their particular needs. *Id.* The concept of party autonomy is referred to as *l'autonomie de la volonté* in international arbitration. *Id.*

12. MACNEIL ET AL., *supra* note 10, at §3.2.

13. DOMKE, *supra* note 5, at 1.

14. 9 U.S.C. §5 (1925).

qualifications in the arbitration agreement, such as technical background or industry experience.¹⁵ In many industries, business professionals prefer to settle their disputes through arbitration, where the arbitrators are acquainted with trade customs and are more likely to understand the parties' positions, rather than litigate before a jury without such qualifications.¹⁶ Courts are aware of this benefit as well. Judge Posner acknowledged that parties "prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter."¹⁷

A. The Tripartite Panel

The arbitration agreement either designates the number of arbitrators that will decide the controversy, or refers to institutional rules that provide a procedure to determine the tribunal's composition.¹⁸ Common arrangements are either a single arbitrator or a panel of three, wherein each party appoints one arbitrator and the two party-appointed arbitrators agree on a third.¹⁹ This three-member tribunal, known as a tripartite panel,²⁰ has been chosen by disputants to settle controversies for hundreds of years. For example, George Washington indicated in his will that a tripartite panel

15. Jacqueline F. Drucker, *Arbitration and Mediation of Wrongful Termination Claims: Practical Considerations*, Practising L. Inst., Mar.-Apr. 2001, at 150.

16. Letter from Roscoe Pound, Esq., Dean Emeritus of the Law School of Harvard University (Feb. 11, 1953), 8 APR DISP. RESOL. J. 1, 1 (1953), reprinted in 56 APR DISP. RESOL. J. 45, 52 (2001). For historical background, see Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 446 (1928) (describing the use of expert decision-makers in specialized mercantile courts and private voluntary arbitration tribunals to settle disputes among businessmen from the Middle Ages to the Colonial era). "Mercantile cases have always, in one way or another, been decided by merchants." *Id.* at 595.

17. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983).

18. OEHMKE, *supra* note 9, at §34:08.

19. *Id.*; see also RODOLPHE J. A. DESEIFE, SOLVING DISPUTES THROUGH COMMERCIAL ARBITRATION §3:15 (1987) (stating that the decision to choose one or three arbitrators may depend on the complexity of the case). When the arbitration refers to the rules of the AAA, one arbitrator will hear disputes that are valued at less than \$50,000, while a panel of three arbitrators will generally decide cases that amount to a higher value. *Id.* The requests of the parties are also taken into account when the AAA must determine the panel. THOMAS J. STIPANOWICH & PETER H. KASKELL, COMMERCIAL ARBITRATION AT ITS BEST 91 (2001). A panel of two arbitrators is seldom used because if the arbitrators disagree, there is no way of reaching a majority. *Id.* Under CPR Arbitration Rules, the default is a panel of three arbitrators. CPR INSTITUTE FOR DISPUTE RESOLUTION, RULES FOR NON-ADMINISTERED ARBITRATION (REV. 2000), RULE 5.1.

20. STIPANOWICH & KASKELL, *supra* note 19, at 90.

should be selected to resolve any controversy as to his estate: "All disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants—each having the choice of one—and the third by those two."²¹

A tripartite panel may therefore consist of the two "party-appointed arbitrators" and a third arbitrator, who will generally be referred to in this writing as "the neutral."²² The custom of appointing a party arbitrator arose because of the risk that a single arbitrator might not entirely appreciate the parties' positions.²³ This system allows each party to have its own "judicial" appointee²⁴ on the panel who will make sure the party's position is clearly and effectively presented to the neutral.²⁵ Party-appointed arbitrators "help clarify technical issues"²⁶ and offer assurance to the parties that the third arbitrator "fully understands the issues and background of the case, the contentions of each party, and the possible implications of the award before it is issued."²⁷ They will "see to it that the tribunal does not overlook the strong points of [the appointing] party's case."²⁸ Throughout the course of the arbitration, when the three arbitrators confer privately during executive sessions, they combine various viewpoints on the subject area.²⁹ This exchange of ideas should lead to a more thorough and comprehensive decision.³⁰ Also, an award rendered by three per-

21. GEORGE WASHINGTON NORDHAM, *GEORGE WASHINGTON AND THE LAW* 57-58 (1982) (discussing also that George Washington had himself acted as an arbitrator). Tripartite panels can be traced back much further than the colonial period. Some evidence indicates that arbitrations in ancient Greece were most often conducted by a three-member panel and that one of these three acted as "president" of the tribunal who may have had the power to cast the ultimate deciding vote. MARCUS NEIBURH TOD, *INTERNATIONAL ARBITRATION AMONGST THE GREEKS* 102 (1913).

22. The third arbitrator may also be called an "umpire," "referee," or "chairman."

23. M. Scott Donahey, *The Independence and Neutrality of Arbitrators*, 9 J. INT'L. ARB. 4, 39 (1992).

24. See Kennedy, *supra* note 3, at 759.

25. Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 498 (1997); see also *Astoria Medical Group v. Health Ins. Plan of Greater N.Y.*, 182 N.E.2d 85, 87 (N.Y. 1962) (stating that "the very reason each of the parties contracts for the choice of his own arbitrator is to make certain that his 'side' will, in a sense, be represented on the tribunal").

26. Rau, *supra* note 25, at 498.

27. *Id.*

28. Bernard Gold & Helmut F. Furth, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 HARV. L. REV. 293, 318 (1954).

29. STIPANOWICH & KASKELL, *supra* note 19, at 91.

30. See *id.*

sons is often more acceptable to the parties and recourse to the courts is therefore less likely.³¹

B. The Party-Appointed Arbitrators

In many domestic arbitrations that use a tripartite panel, the two party-appointed arbitrators are not expected to be neutral, in the same sense as the third arbitrator, but are permitted to be “predisposed toward the party who appointed them.”³² Courts have repeatedly upheld the parties’ right to select non-neutral party-appointed arbitrators.³³

Lack of neutrality in arbitrators is not a novel feature of the arbitral process. In medieval Iceland, partiality was a known characteristic of arbitration.³⁴ Arbitrators were not expected to be neutral or impartial so long as they acted in moderation and remained effective.³⁵ In one documented case, a party who sought compensation for the alleged murder of his son agreed to allow the suspect’s brother to arbitrate the matter.³⁶ The arbitrator’s relation to one of the parties was not important because of his seemingly fair behavior.³⁷ Similarly, in eleventh century France, where arbitration was sometimes used to resolve property disputes, the parties would usually select arbitrators who were relatives, friends or business associates.³⁸

Early labor arbitrations in the United States most often used party-appointed arbitrators.³⁹ The “so-called federal Arbitration Act of 1888” strongly encouraged impartiality and disinterested-

31. *Id.* at 92; *see also* Arthur Lesser, Jr., *Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitrations?*, 5 *ARB. J.* 276, 279 (1950) (stating that when a tripartite board is selected, “the resulting award will not only be more acceptable to the parties, but also, being the product of collective judgment, will more likely be the correct answer.”).

32. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES CANON VII A(1) (1977) [hereinafter CODE OF ETHICS].

33. *See* Rau, *supra* note 25, at 500 (stating that “the lesson of the cases is that courts must recognize that parties to an arbitration agreement are taken ‘to have contracted with reference to established practice and usage in the field of arbitration’” (quoting *Astoria Med. Group v. Health Ins. Plan of Greater N.Y.*, 182 N.E.2d 85, 88 (N.Y. 1962))).

34. William Ian Miller, *Avoiding Legal Judgment: The Submission of Disputes to Arbitration in Medieval Iceland*, 28 *AM. J. LEGAL HIST.* 95, 113 (1984).

35. *Id.* at 112-13.

36. *Id.* at 121.

37. *Id.*

38. Stephen D. White, *Pactum . . . Legem Vincit et Amor Judicium: The Settlement of Disputes by Compromise in Eleventh-Century Western France*, 22 *AM. J. LEGAL HIST.* 281, 282 (1978).

39. *See* Gold & Furth, *supra* note 28, at 294.

ness,⁴⁰ but subsequent legislation in labor arbitration failed to mention the neutrality of the party-appointed arbitrators.⁴¹ Today, party-appointed labor arbitrators are most often non-neutrals.⁴² In commercial arbitration, the use of non-neutral versus neutral party-appointed arbitrators is a choice left open to the parties.⁴³ In some circumstances, non-neutral arbitrators, because of a connection with or relationship to the appointing party, prompt the opposing party to challenge the validity of the award in court.

C. Judicial Review

Judicial interference in arbitration is very limited.⁴⁴ Courts give greater deference to an arbitrator's decision than they would to a lower court, making it very difficult for the parties to have an award overturned.⁴⁵ Generally speaking, arbitrators have authority to devise remedies equal to that of the judiciary.⁴⁶ But unlike a court, they need not give express reasons for the remedy they grant,⁴⁷ are not obliged to follow rules of evidence,⁴⁸ and may use their own judgment or personal knowledge in making the decision.⁴⁹ Under AAA commercial arbitration rules for domestic cases, an arbitrator may "grant any remedy that the arbitrator deems just and equitable and within the scope of the agreement of

40. Lesser, *supra* note 31, at 278.

41. *Id.*

42. See Gold & Furth, *supra* note 28, at 296 (stating that in labor arbitration, "party-appointed arbitrators are almost always partisan" and "are often members of the organizations that are parties to the dispute"). While the authors use the term "partisan" to refer to party-appointed arbitrators who are less than neutral, this Note will refer to them as "non-neutrals" to be consistent with the 1977 Code of Ethics for Arbitrators in Commercial Disputes. See CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES 2(B)(3)(a) (as amended 1985) (noting that "[labor] arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations.").

43. CODE OF ETHICS, *supra* note 32, at pmbl.

44. These limited statutory grounds are set out in the Federal Arbitration Act, 9 U.S.C. §10 (a)(1)-(4) (2000). See also STIPANOWICH & KASKELL, *supra* note 19, at 281-85.

45. See STIPANOWICH & KASKELL, *supra* note 19, at 281-85.

46. *Id.* at 270; see also DOMKE, *supra* note 5, §1:05 (stating that "arbitration is nothing short of the parties hiring their own private judge").

47. United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."). This case applied to a domestic arbitration.

48. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 204 (1956).

49. *Id.*

the parties.”⁵⁰ Federal law does not provide a standard for courts to scrutinize the legal issues underlying an arbitral award.⁵¹ As a general rule, courts will not consider the legal merits to overturn an award unless it was procured in “manifest disregard” of the law.⁵²

By signing the agreement to arbitrate, parties express their understanding that in exchange for their ability to select the decision maker, the award will be final and binding, subject to minimal government interference.⁵³ Most often parties observe the award voluntarily.⁵⁴ But in the case of a challenge, the limited grounds under which federal courts may vacate an arbitral award are outlined in section 10 of the Federal Arbitration Act:

- (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
 - (1) Where the award was procured by corruption, fraud, or undue means.
 - (2) Where there was *evident partiality* or corruption in the arbitrators, or either of them.
 - (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
 - (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁵⁵

50. American Arbitration Association, Commercial Dispute Resolution Procedures, § R-45 (Jan. 1, 1999).

51. *Id.*

52. *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (overruled on other grounds); *see also Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743 (8th Cir. 1986) (reasoning by the court that since the arbitrators had not clearly identified the law and then proceeded contrary to its provisions, the decision was not in manifest disregard of the law).

53. *See First Options v. Kaplan*, 514 U.S. 938, 942 (1995).

54. ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 730-31 (2002). The authors cite statistics that suggest less than one percent of private sector labor arbitration awards are challenged in court. *Id.* (citing Feuille & LeRoy, *Grievance Arbitration Appeals in the Federal Courts: Facts and Figures*, 45 ARB. J. 35 (1990)).

55. 9 U.S.C. §10 (a)(1)-(4) (2000) (emphasis added).

Neutrality becomes a relevant issue if a party claims that the opposing party's arbitrator exhibited "evident partiality."⁵⁶ The burden of proof rests on the party seeking vacatur of the award to demonstrate that "a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration."⁵⁷ A court generally considers four factors when determining whether there was "evident partiality": "(1) The extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the proceeding."⁵⁸

Because of this limited reviewability of arbitral awards, clear ethical standards are necessary to guide arbitrators to ensure fairness and credibility in the practice of arbitration.⁵⁹

D. The 1977 Code of Ethics

Legislators empowered arbitrators to resolve disputes. The public, having reposed that authority in arbitrators, has an interest in seeing that the arbitration is conducted justly, and the arbitrators conversely have an obligation to the public.⁶⁰

Before 1977, no formal code of ethics for commercial arbitrators existed and few instances of unethical conduct had arisen.⁶¹ Then one significant event initiated the development of the code that is still followed by commercial arbitrators today.⁶² In about 1971, a distinguished leader of the Bar was representing a party in an arbitration.⁶³ After the arbitration had begun, the client discovered that the opposing party had hired the arbitrator's law firm as coun-

56. Michael F. Hoellering, *International Arbitration Under U.S. Law and AAA Rules*, 20 ADR & THE LAW 197, 206 (1997).

57. ANR Coal Co. v. Cogentrix of N.C., 173 F.3d 493, 500 (4th Cir. 1999).

58. *Id.*

59. Interview with Florence Peterson, *supra* note 8.

60. Interview with Judge Howard M. Holtzmann, Chairman, Joint Committee of the ABA and the AAA that prepared the 1977 Code of Ethics for Arbitrators in Commercial Disputes, in New York, N.Y. (Mar. 8, 2003).

61. CODE OF ETHICS, *supra* note 32, at pmb1. In 1951, the Federal Mediation and Conciliation Service wrote and endorsed the Code of Ethics and Procedural Standards for Labor-Management Arbitration, but this did not apply to commercial disputes. CODE OF ETHICS AND PROCEDURAL STANDARDS FOR LABOR-MANAGEMENT ARBITRATION, pmb1. (1951).

62. Howard M. Holtzmann, Notes for Lecture on Ethics for Arbitrators, Yale Law School (Apr. 25-26, 2002).

63. *Id.* at section 11.

sel.⁶⁴ A different partner in the firm handled the matter and it pertained to an issue separate from the subject of the arbitration, but the attorney was unwilling to readily accept this apparent lack of independence.⁶⁵ He contacted the Chair of the Executive Committee of the AAA, Judge Howard Holtzmann, to request a copy of the code of ethics.⁶⁶ When Mr. Holtzmann responded that no such code existed, the attorney strongly urged that one be created.⁶⁷ As a result, the ABA and the AAA each appointed a five-member special committee with Judge Holtzmann acting as Chairman.⁶⁸ In 1977, the committees jointly completed the first Code of Ethics for Arbitrators in Commercial Disputes.⁶⁹

The drafters believed the Code of Ethics would encourage high standards of integrity and lasting confidence in the process of arbitration.⁷⁰ The preamble states that since commercial arbitration formed “a significant part of the system of justice on which our society relies for fair determination of legal rights . . . [it was] in the public interest to set forth generally accepted standards of ethical conduct for guidance of arbitrators and parties in commercial disputes.”⁷¹ Since its inception, the Code of Ethics has been largely followed and it continues to be in effect today.⁷²

E. Updating the Code of Ethics

Eight years ago, a committee of the ABA embarked on a project to update the 1977 Code.⁷³ The plan began to develop after the AAA asked Robert Holtzman to give lectures on arbitration that would be used for promotional purposes.⁷⁴ Before giving the lecture, however, he found that under Canon I(B) of the Code of Ethics, advertising and promotion of arbitral services were in fact prohibited.⁷⁵ This inconsistency between current practice and

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at section 2.

69. *Id.*

70. CODE OF ETHICS, *supra* note 32, at pmbl.

71. *Id.*

72. John D. Feerick, *The 1977 Code of Ethics for Arbitrators: An Outside Perspective*, 18 GA. ST. U. L. REV. 907, 925 (2002).

73. Telephone Interview with Robert A. Holtzman, Partner, Loeb & Loeb (Oct. 25, 2002).

74. *Id.*

75. CODE OF ETHICS, *supra* note 32, at Canon I(B) (stating “It is inconsistent with the integrity of the arbitration process for persons to solicit appointment for themselves.”).

practice at the time the 1977 Code was written provoked suggestions that the Code be revised.⁷⁶ The ABA convened an *ad hoc* committee of representatives from the ABA Section of Dispute Resolution, the Ethics Committee of the ABA, and representatives from the AAA, and the Center for Public Resources to revise the Code.⁷⁷ They worked from 1995 to 1999, making changes in the areas of disclosure⁷⁸ and promotions and advertising,⁷⁹ developing a version they thought would easily be approved by the ABA House of Delegates.⁸⁰

Several sections of the ABA assessed the revisions.⁸¹ To the authors' surprise, the Section of International Law and Practice ("SILP") returned it with some heavy criticism on a new issue that had not yet been addressed.⁸² The Code of Ethics recognized the ethical obligations of the neutral arbitrator on a tripartite panel separately from those of the two party-appointees, who were presumed to be acting as non-neutrals unless the parties agreed otherwise.⁸³ It provided no guidance, however, for the situation in which arbitrators are party-appointed and also act as neutrals.⁸⁴ International practice, on the other hand, generally mandates a strict standard that all arbitrators, no matter how they are appointed, must be neutral.⁸⁵ Since commercial disputes have become increasingly transnational in nature and may not fit as precisely into the category of either domestic or international arbitration,⁸⁶ the international constituents of the ABA urged the

76. See Telephone Interview with Robert A. Holtzman, *supra* note 73.

77. *Id.*

78. *Id.* Standards for arbitration disclosure had become much more sophisticated since the time of the original code. It was particularly weak on the standard of communication pre-appointment. *Id.*

79. *Id.* Canon I(B) forbade solicitations of appointment, but in fact, arbitrators and arbitral institutes were advertising their services, so the Code of Ethics was no longer consistent with the practice. *Id.* A revised version of the code allows discreet advertising and promotion. CODE OF ETHICS FOR ARBITRATORS IN DOMESTIC AND INTERNATIONAL COMMERCIAL DISPUTES Canon VIII (Working Draft 2001) [hereinafter WORKING DRAFT 2001].

80. Telephone Interview with Robert A. Holtzman, *supra* note 73.

81. *Id.*

82. *Id.*

83. *Id.*; see also CODE OF ETHICS, *supra* note 32, at Canon VII.

84. *Id.*

85. International Arbitration Rules, *supra* note 4, at Art. 7. The standards set forth in international arbitration rules for independence and impartiality do not differentiate between party-appointed arbitrators and the third neutral. M. Scott Donahey, *The Independence and Neutrality of Arbitrators*, 9 J. INT'L. ARB. 4, 39 (1992).

86. See WORKING DRAFT 2001, *supra* note 79, at intro.

drafters to conform the Code of Ethics to fundamental international norms.⁸⁷ The SILP also advised the drafters to reassess disclosure requirements as well as the use of non-neutrals.⁸⁸ The goal was to devise an ethics code that would apply to domestic and international commercial arbitrations⁸⁹ without distinction.⁹⁰ Carol Emory, Chair of the ABA Dispute Resolution Section, formed the Ethics Task Force (“Task Force”) to take on this new issue of neutrality.⁹¹ The Task Force began to draft a new code in order to completely reassess the role of party-appointed arbitrators.⁹²

1. *The Change in Presumption*

The largest contribution of the Task Force was a change in the presumption of neutrality in situations where the parties either do not agree or do not specify whether party-appointees will be neutral or non-neutral.⁹³ Under the 1977 Code of Ethics, the presumption is that party-appointees are non-neutral.⁹⁴ Canon VII states

87. Telephone Interview with Robert A. Holtzman, *supra* note 73.

88. *Id.*

89. For comparison of international standards, see the International Bar Association Rules of Ethics for International Arbitrators at §3.1. “The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.” *Id.*

Facts which might lead a reasonable person, not knowing the arbitrator’s true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it. The appearance of bias is best overcome by full disclosure”

Id. at §3.2.

90. WORKING DRAFT 2001, *supra* note 79, at intro.

91. Telephone Interview with Robert A. Holtzman, *supra* note 73. The Ethics Task Force consisted of seven members from the ABA, including: Carol Emory, from the Section of Dispute Resolution; Stephen G. Harvey, from the Section of Business Law; Robert A. Holtzman, from the Section of Dispute Resolution; Carolyn B. Lamm, from the Section of Litigation; E. Nobles Lowe, from the Senior Lawyers Division; Kenneth B. Reisenfeld, from the Section of International Law & Practice; and Hugh E. Reynolds, from the Section of Torts and Insurance Practice. CODE OF ETHICS FOR ARBITRATORS IN DOMESTIC AND INTERNATIONAL COMMERCIAL DISPUTES at intro [hereinafter 2002 REVISION]. Others who participated in preparing the final 2002 Revision included the Honorable Winslow Christian of the College of Commercial Arbitrators; Florence Peterson, General Counsel of the AAA; Gerald F. Phillips, from Phillips, Lerner & Lauzon; and Thomas G. Stipanovich, President of the CPR Institute for Dispute Resolution. *Id.*

92. Telephone Interview with Robert A. Holtzman, *supra* note 73.

93. *Id.*

94. CODE OF ETHICS, *supra* note 32, at Canon VII, Introductory Note.

that, “party-appointed arbitrators should be considered non-neutrals 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.”⁹⁵

The revisers changed this default rule by reversing the presumption in favor of neutrality. Under the most recent version, it is “preferable for all arbitrators—including any party-appointed arbitrators—to be neutral, that is independent and impartial, and to comply with the same ethical standards.”⁹⁶ Since some industries have traditionally used non-neutrals, Canon X specifically addresses the ethical considerations for arbitrators who are not expected to be neutral.⁹⁷ Disclosure requirements and allowable *ex parte* communications between parties and arbitrators also changed.

2. Disclosure Revised

Allegations of impartiality usually arise out of failure to disclose all circumstances and relationships that, from the parties’ point of view, may impair the arbitrator’s ability to judge impartially.⁹⁸ More fully developed disclosure requirements help to establish confidence in the process of arbitration and in the particular tribunal.⁹⁹ The revised code increases disclosure requirements¹⁰⁰ and holds non-neutrals to the same standards of disclosure as neutrals.¹⁰¹ The original code requires non-neutrals to disclose relationships with the parties, but they “need not include as detailed information as is expected from persons appointed as neutral arbitrators.”¹⁰² The new disclosure requirements encourage neutrality by raising the bar as to what must be disclosed.¹⁰³

95. *Id.* at Canon VII.

96. THE CODE OF ETHICS FOR ARBITRATORS IN DOMESTIC AND INTERNATIONAL COMMERCIAL DISPUTES, 2003 Revision, Canon X [hereinafter 2003 REVISION]. The party-appointees are to comply with the same ethical standards as the third arbitrator. *Id.* This requirement was not present in the 1977 Code of Ethics.

97. *Id.* at pmb1. The status of the party-appointed arbitrators should be settled before or during the first meeting of the parties, and arbitrators not acting as neutrals should follow the ethical obligations described in Canon X. *Id.* at Canon IX(B).

98. See Rau, *supra* note 25, at 490.

99. Charles N. Brower & Pierre-Yves Tschanz, *The Role of an Arbitrator and How to Select an Arbitrator*, in INTERNATIONAL COMMERCIAL ARBITRATION 26, 30 (Law & Business, Inc. 1983).

100. 2003 REVISION, *supra* note 96, at Canon II(A).

101. *Id.* at Canon X(B)(1).

102. CODE OF ETHICS, *supra* note 32, at Canon VII(B)(2).

103. Feerick, *supra* note 72, at 916.

3. *Ex Parte Communications Revised*

The revision of the code also increases the amount of allowable *ex parte* communications for both neutral and non-neutral arbitrators. The 1977 Code did not allow arbitrators to discuss a case with any party apart from three specific circumstances: 1) to coordinate logistical matters, such as the time and place of the proceedings, after which the arbitrator must inform the other party and allow them an opportunity to respond; 2) when a party fails to be present at a hearing an arbitrator may discuss the case with the party who is present; or 3) any discussions requested or consented to by the parties.¹⁰⁴ Canon III(B) of the revised code includes these three circumstances and lists four additional situations in which parties and arbitrators may engage in *ex parte* discussions. A prospective arbitrator may inquire about the identities of the parties or the nature of the dispute (being cautious to not discuss the merits of the case) and may respond to the parties' inquiries concerning availability or qualifications.¹⁰⁵ If the arbitration calls for a tripartite panel, the parties may discuss the selection of the third arbitrator with their party-appointed arbitrators.¹⁰⁶ The revised Canon III also allows party-appointed arbitrators and their appointing parties to discuss the arbitrator's status as neutral or non-neutral.¹⁰⁷ These increased communications are designed to foster a more productive and efficient arbitral procedure.¹⁰⁸

The provisions in Canon X of the 2003 Revision, however, are more specific than the 1977 Code regarding *ex parte* communications for non-neutrals.¹⁰⁹ Oral communications between a non-neutral and the third arbitrator, concerning any matter or issue pertinent to the case, are prohibited in the absence of the other non-neutral arbitrator.¹¹⁰ When a non-neutral communicates in writing with the neutral, a copy must be sent to the other non-neutral arbitrator.¹¹¹

104. CODE OF ETHICS, *supra* note 32, at Canon III(B)(1)-(3).

105. 2003 REVISION, *supra* note 96, at Canon III(B)(1).

106. *Id.* at Canon III(B)(2).

107. *Id.* at Canon IV(B)(4).

108. Feerick, *supra* note 72, at 915.

109. 2003 REVISION, *supra* note 96, at Canon X(C)(4).

110. *Id.* One commentator believed this prohibition to be too strict, since the neutral could disclose the nature of any oral communications held in private with one non-neutral to the other non-neutral. *See* Feerick, *supra* note 72, at 922.

111. 2003 Revision, *supra* note 96, at Canon X(C)(4).

F. The International Standard Compared

International commercial arbitration rules and ethics codes require that every arbitrator act impartially and independently of the parties involved in the arbitration.¹¹² Independence is assessed by examining any relationships the arbitrator maintains with the parties in personal, social, and financial contexts.¹¹³ An arbitrator becomes less independent if these relationships become closer.¹¹⁴

The concept of independence in international arbitration applies to party-appointed arbitrators as well as the chairperson.¹¹⁵ The International Chamber of Commerce (“ICC”) requires all arbitrators to disclose facts and circumstances to the Secretary General that may affect their independence, such as, “any past or present relationship, direct or indirect, with any of the parties, their counsel, whether financial, professional or of another kind.”¹¹⁶ Evidence reveals that even in practice, party arbitrators generally adhere to the norms of independence and impartiality.¹¹⁷

The revisers of the ABA/AAA Code of Ethics have dedicated themselves to rewrite a standard for arbitrators that is more similar to that embraced by the international community.¹¹⁸ In the 2003 Revision, Canon I(B) states: “One should accept appointment as an arbitrator only if fully satisfied (1) that he or she can serve without bias; [and] (2) that he or she can serve independently from the

112. International Arbitration Rules, *supra* note 4, at Art. 7. Independence is the “defining requirement” for arbitrators at the International Chamber of Commerce (“ICC”). See W. LAWRENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION §13.02 (2000).

113. Donahey, *supra* note 85, at 31.

114. *Id.* This is an objective test for the appearance of bias rather than for actual bias.

Thus, although it is possible for someone who is closely related to a party, in a party’s employ, or a close friend of a party, to be able to judge that party’s case without bias toward that party, the other party in the matter would likely doubt the impartiality of the arbitrator under the circumstances.

Id.

115. CRAIG ET AL., *supra* note 112, at §12.04. Party nominees should not proceed as the “agent or representative” of the appointing party. *Id.*

116. *Id.* at 59. If the arbitrator does not disclose any facts or circumstances or there is no objection to disclosures that are made, the Secretary General may confirm the nomination. *Id.* If the Secretary General does not confirm the nomination, the issue will be handed over to the Court of Arbitration. *Id.* The Court administers and supervises ICC arbitration; it is not a court in the original sense that decides cases. See CRAIG ET AL., *supra* note 112, at § 2.03.

117. *Id.* at n.16. This was the universal custom in Europe and is now the international standard. *Id.*

118. Peterson, *supra* note 8.

parties, potential witnesses and the other arbitrators.”¹¹⁹ This stipulation, which mimics the international standard of independence and impartiality,¹²⁰ is not present in the 1977 Code of Ethics.¹²¹ Canon X of the 2003 Revision, however, exempts non-neutrals from these requirements,¹²² indicating that they are not held to the same standards of independence and freedom from bias as are neutrals.

Non-neutrals under Canon X are also not obliged to follow parts (C) and (D) of Canon I,¹²³ which address relationships between an arbitrator and the parties, and conduct of the arbitrator which may affect impartiality or the appearance of impartiality:

- (C) After accepting appointment and while serving as arbitrator a person should avoid entering into any financial, business, professional or personal relationship, or acquiring any financial or personal interest that is likely to affect impartiality or that might reasonably create the appearance of partiality or bias. For a reasonable period after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances that might reasonably create the appearance that they had been influenced in the arbitration by the prospective relationship or interest.
- (D) Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamor, by fear of criticism or by self-interest. They should avoid conduct and statements that give the appearance of partiality toward any party. They should guard against partiality or prejudice based on any party’s personal characteristics, background or performance at the arbitration.¹²⁴

The types of relationships enumerated in (C) are very similar to those the ICC Secretary General is concerned with when assessing a potential international arbitrator’s independence.¹²⁵ But the Ca-

119. 2003 REVISION, *supra* note 96, Canon I(B).

120. International Arbitration Rules, *supra* note 4, at Art. 7. The Dictionary of Conflict Resolution defines impartiality as “freedom from favoritism or bias.” DOUGLAS H. YARN, *DICTIONARY OF CONFLICT RESOLUTION* 216 (1999) (quoting *Ethical Standards of Professional Responsibility*, adopted by the Society of Professionals in Dispute Resolution in June 1986).

121. *See* CODE OF ETHICS, *supra* note 32.

122. 2003 REVISION, *supra* note 96, Canon X(A)(2).

123. *Id.*

124. *Id.* Canon I(C)-(D). The 1977 Code contained very similar provisions. *See* Code of Ethics, *supra* note 32 Canon I(D)-(E).

125. *See supra* note 116 and accompanying text.

non X domestic arbitrator, who is exempt from these provisions, is held to a lower standard.¹²⁶

While international arbitration rules do adhere to strict standards, parties are nonetheless free to contract out of arbitrator independence, although it is very rare in ICC cases and the nomination may or may not be validated by the Court of Arbitration.¹²⁷ Commentators argue that it would not be desirable to select someone who would act as an advocate.¹²⁸ The third arbitrator would immediately detect this and the natural response would likely be to favor the other party with the less zealous arbitrator, and be more supportive of that side's case.¹²⁹

The international standard of independence was analyzed before a United States District Court in *Fertilizer Corp. of India et al. v. IDI Management Inc.*¹³⁰ The arbitrator appointed by Fertilizer Corp. ("FCI") had previously served for FCI as counsel in at least two litigations or arbitrations.¹³¹ This fact was not disclosed to the opposing party.¹³² When FCI moved for enforcement of the award, IDI asserted that FCI's relationship with that arbitrator violated the United States public policy pronounced by the Supreme Court that all arbitrators must be free from even the appearance of bias, not only actual bias.¹³³ The court distinguished the case before it from a previous case, which dealt with the third neutral arbitrator, while this case concerned a party-appointed arbitrator.¹³⁴ It followed a Second Circuit case instead, which held that arbitral awards should not be vacated for merely the appearance of bias.¹³⁵ Since the award was not contrary to United States public

126. See *supra* note 122 and accompanying text.

127. CRAIG ET AL., *supra* note 112, at §12.04.

128. Brower & Tschanz, *supra* note 99, at 26; CRAIG ET AL, *supra* note 112, at §12.04.

129. *Id.*

130. 517 F.Supp. 948 (S.D. Ohio, 1981). Each party had appointed an arbitrator pursuant to ICC Rules. *Id.* at 950.

131. *Id.* at 953.

132. *Id.*

133. *Id.* at 953 (citing *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968)). Under Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, recognition and enforcement may be refused "if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, art. 5, para. 2, 330 U.N.T.S. 38.

134. *Fertilizer Corp.*, 517 F.Supp. at 955.

135. *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551 (2d Cir. 1981). *But see Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2d 1196, 1201-02 (7th Cir. 1980) (holding that plaintiffs failed to state a claim of bias or the appearance of bias, but maintaining

policy, it was final and enforceable.¹³⁶ The better policy, the court decided, was "that which favors arbitration, both domestic and international."¹³⁷

Neutrality, in the international context, usually refers to a political or cultural association.¹³⁸ An arbitrator is considered "neutral" when he or she is of a different nationality than either of the parties.¹³⁹ But a party in international arbitration may freely appoint an arbitrator from its home country, of the same social and economic background, or of the same political affiliation.¹⁴⁰ So in this sense, the party-nominated, international arbitrator, who may be like-minded and therefore more sympathetic to the appointing party, is not entirely neutral.¹⁴¹

II. NEUTRALITY AND THE PROPER ROLE OF AN ARBITRATOR

A. The Role of Arbitrators in the Colonies

Settlers in the Colonies that became the United States relied heavily upon arbitration as a cost-efficient and neighborly alternative to litigation.¹⁴² Professor Bruce H. Mann described how arbitrators in seventeenth-century Connecticut used their positions in the community to facilitate the private resolution of disputes¹⁴³ at a time when arbitral awards were unenforceable in court.¹⁴⁴ The proximity of the arbitrators to the disputants, who were often from

the principles of *Commonwealth Coatings* that 9 U.S.C. §10(b) implicitly allows the appearance of bias to void an arbitration award).

136. *Fertilizer Corp.*, 517 F.Supp. at 955.

137. *Id.* IDI later filed a motion for reconsideration of the decision. *Fertilizer Corp. of India v. IDI Management Inc.*, 530 F.Supp. 542, 542 (S.D. Ohio 1981). It argued that independence and disclosure were fundamental values of both the 1955 and the 1975 ICC Rules. *Id.* at 543. This award had been rendered under the 1955 Rules. CRAIG ET AL. *supra* note 112, at §13.03. The court, however, did not reverse its decision, particularly because the award rendered was unanimous and the court found that the relations between the arbitrator and FCI did not taint the award so that it would be contrary to public policy. *Id.*

138. Donahey, *supra* note 85, at 32.

139. *Id.*

140. CRAIG ET AL., *supra* note 112, at §12.04.

141. *Id.* "Even today it is not clear whether an 'independent' arbitrator need be neutral." *Fertilizer Corp. of India v. IDI Mgmt. Inc.*, 517 F. Supp. 948, 954 (S.D. Ohio 1981).

142. Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 443-44 (1984).

143. *Id.* at 448-52.

144. *Id.* at 454. "The cohesiveness of the community, fostered by the necessity of living together in a physical and spiritual wilderness, gave adequate assurance that the parties would abide by the award of the arbitrators they had chosen." *Id.* at 455. A party who did not comply with an award "risked community disapproval." *Id.*

the same town as one another,¹⁴⁵ enhanced the “bond between arbitration and community.”¹⁴⁶ Based on existing records, Professor Mann contends that parties favored “local arbitrators, who would likely be familiar with the parties and the dispute.”¹⁴⁷ But as new colonial towns emerged and mercantile business expanded, cohesiveness in the communities weakened.¹⁴⁸ By 1730, parties could no longer depend on the personal authority of the arbitrators to assure performance of the award.¹⁴⁹

Arbitration became more formalized when Connecticut adopted the first law on arbitration in 1753,¹⁵⁰ whereby failure to comply with the award would be punishable for contempt of court.¹⁵¹ The Connecticut act, like its forerunner, the English Arbitration Act of 1698,¹⁵² was addressed particularly to the needs of the growing mercantile community. As merchants dealt more frequently with strangers, they needed more than just the good faith of the parties

145. *Id.* at 454. Jurors, on the other hand, were taken from anywhere in the colony. *Id.*

146. *Id.* at 455.

147. *Id.* at n.45. The arbitrators' positions in the community as well as perhaps a relationship with the disputants allowed them to persuade the parties to follow through with the awards. *Id.* at 454-55.

148. *Id.* at 458.

149. *Id.* at 460. “After making the award, the arbitrators could either return the notes to their makers or turn them both over to the party in whose favor they had decided.” *Id.* This “gave arbitrators a means of securing compliance with their awards that they did not have before.” *Id.* at 461. The author cites the following example:

[W]hen Eleazer Kilborn and Josiah Griswold of Wethersfield, Connecticut, selected Daniel Hovey and Joseph Herrick, two strangers whom Kilborn had met on the highway, to arbitrate their dispute over a slave in 1748, the arbitrators ‘took much pains and used many arguments with . . . Kilborn to persuade him to comply with [their] judgment’ voluntarily. Because they were strangers, the arbitrators had no personal authority, only the power implicit in custody of the notes. When they could not persuade Kilborn to comply with their award voluntarily, they had no alternative but to deliver his note to Griswold.

Id. at 463 n.77 (citing Deposition of Daniel Hovey, Apr. 6, 1750, Kilborn v. Griswold, 16 Conn. Archives, Private Controversies (2d Ser.) 102, 103 (1750)).

150. *Id.* at 468, 473. Connecticut’s “Act for the More Easy and Effectually Finishing of Controversies by Arbitration” was the first of its kind in the Colonies. *Id.* at 468 n.100. New York passed a similar statute in 1791. *Id.* at 472 n.119.

151. *Id.* at 473.

152. For an explanation of the body of law known as the “law merchant” that governed legal issues amongst merchants and traders in seventeenth-century England, see Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445 (1928). “Part of the strength of the law merchant was that it left the adjudication of mercantile questions to merchants. Arbitration, which allowed parties to choose their own judges, offered the same advantage and thus played a favored role in the resolution of commercial disputes.” Mann, *supra* note 142, at 470.

to secure compliance with the award.¹⁵³ After passage of the statute, “disputants submitted to arbitration with increasingly legalistic expectations,”¹⁵⁴ and with this, the parties’ choice of arbitrators changed as well.¹⁵⁵ “Arbitrators looked more like judges than they did before. Indeed, many of them were judges.”¹⁵⁶

The proper role of an arbitrator was transforming in the colonies and it remained unclear in the nineteenth-century. In a Harvard Law Review article, Nathan Isaacs contrasted the “legalistic view,” which likens arbitrators to judges, with the “realistic view,” generally adhered to by businesspeople, who see arbitrators as agents of the parties.¹⁵⁷ This “question of fiduciary or judge” affects the parties’ control over the arbitral procedure and the duties of the arbitrators to the parties.¹⁵⁸ Nineteenth-century courts dealt with the issue inconsistently.¹⁵⁹ One judge in Tennessee sharply criticized the realistic view:

An arbitrator is not an agent; he is not acting for and in the stead of the party selecting him, whose interest it is his bounden duty to protect, but as a person vested with power by the law to examine and determine the matters in controversy, which have been submitted to him, and whose imperative duty it is to do equal justice to the parties disputant; his duties are more of a judicial than a fiduciary character, and his determination partakes more of the nature of a judgment against, than a contract on the part of the person to be charged.¹⁶⁰

On the other hand, the author cited two opinions of Chief Justice Gibson of Pennsylvania who asserted that it is precisely the agency

153. See Mann, *supra* note 142, at 469-72.

154. *Id.* at 475. It is important to note though, that the oldest arbitration committee in the United States, the New York Chamber of Commerce, did not conform to this rising legalistic perception of arbitration. Nathan Isaacs, *Two Views on Commercial Arbitration*, 40 HARV. L. REV. 929, 934-35 (1927). For example, it was opposed to any judicial review of arbitral awards, aside from vacating an award that was procured through fraud. *Id.* The New York Chamber of Commerce, which was founded in 1768, constructed arbitration committees for merchants who chose to settle their disagreements through arbitration. MACNEIL ET AL., *supra* note 10, at §4.3.1.2.

155. Mann, *supra* note 143, at 475.

156. *Id.* at 478. The author states that after 1754, in forty percent of arbitrations at least one of the arbitrators was a justice of the peace, whereas before the statute, parties rarely appointed them. *Id.* at 475 n.126.

157. Isaacs, *supra* note 154, at 932.

158. *Id.*

159. *Id.* at 933.

160. *Id.* (citing *Collins v. Oliver*, 4 Humph. 439, 440 (Tenn. 1844)).

power vested in the arbitrators via the authorization in the parties' agreement that gives rise to the arbitral award.¹⁶¹

A disagreement, similar to Isaacs' comparison of the legalistic view and the realistic view, exists today in case law and commentary over the role of party-appointed arbitrators on tripartite panels.

B. Current Case Law

In the 1968 seminal case of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, the Supreme Court held that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."¹⁶² The neutral arbitrator on a tripartite panel had failed to disclose a prior business relationship with one of the parties.¹⁶³ Justice Black reasoned that the relationship between the arbitrator and the party required that the award be vacated.¹⁶⁴ Taking a legalistic view of arbitration, he compared the ethical standards expected of an arbitrator to those demanded of an Article III judge, because if a judge had failed to disclose a similarly close financial relationship with a litigant, any decision thus rendered would undeniably be subject to review.¹⁶⁵ He was concerned with the lack of judicial review over arbitral decisions, stating: "[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."¹⁶⁶

The holding in *Commonwealth Coatings* has pervaded arbitration jurisprudence. In *Metropolitan Property & Casualty Ins. Co. v. J.C. Penney Casualty Ins. Co.*, the District Court of Connecticut

161. *Id.* (citing *Babb v. Stromberg*, 14 Pa. 397 (1850); *cf. Speer v. M'Chesney*, 2 Watts & Serg. 233 (Pa. 1841)). Isaacs compares the English courts' ready acceptance of the businessperson's view and postulates that this divergence with American courts is due to a longer history of arbitration in England and possibly the influence of Continental arbitration practice. *Id.* at 940.

162. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968).

163. *Id.* The third member of the panel, the supposedly neutral member, carried out a large business in Puerto Rico as an engineering consultant for construction projects. *Id.* at 146. One of his regular clients in this business was the respondent in this case, the prime contractor. *Id.* The business relationship was sporadic and they had had no dealings for about a year prior to the arbitration. *Id.* Over four or five years, the prime contractor had paid fees of approximately \$12,000 to the arbitrator. *Id.* The consultations even included some advice rendered on the project that was the subject of this lawsuit. *Id.*

164. *Id.* at 150.

165. *See id.* at 148.

166. *Id.* at 149.

cited Justice Black's opinion when it applied the evident partiality standard to a non-neutral, party-appointed arbitrator on a tripartite panel.¹⁶⁷ The plaintiff sought to disqualify the defendant's party-appointed arbitrator after learning that he had engaged in *ex parte* communications with the defendant prior to his selection as a member of the panel; attempted to discuss the merits of the case with the other party-appointed arbitrator prior to selection of the third arbitrator; and then failed to disclose any of these communications to the plaintiff.¹⁶⁸ Even though these allegations concerned a known non-neutral arbitrator, the court confirmed that he must nevertheless maintain his ethical duties and is obliged to "participate in the arbitration process in a fair, honest and good-faith manner."¹⁶⁹ The court suggested that the arbitrator's actions might have been contrary to what is mandated in the Code of Ethics¹⁷⁰ and may provide "a reasonable basis for which to sustain a claim of evident partiality."¹⁷¹

Another line of cases, however, has rejected the stringent standard set out in *Commonwealth Coatings*, taking a more realistic view of the arbitrator's role. In 1962, the Court of Appeals of New York, in *Astoria Medical Group v. Health Ins. Plan of Greater N.Y.*, defended the parties' freedom to contract for non-neutral arbitrators on a tripartite panel and distinguished the ethical obligations of arbitrators from those of judges.¹⁷² This was an appeal to have a party-appointed arbitrator disqualified before an award was rendered because of his alleged partiality.¹⁷³ The parties' agreement provided that each party appoints one arbitrator and those two arbitrators agree on a third.¹⁷⁴ If they could not reach agreement, the

167. 780 F.Supp. 885 (D. Conn. 1991). Michael F. Hoellering, former general counsel of the AAA, commented on federal courts' treatment of the status and behavior of party-appointed arbitrators in a 1993 article. Michael F. Hoellering, *The Independence of Party-Appointees*, 209 N.Y. L.J. 105 (1993). He cited *Metropolitan Property & Casualty Ins. Co.* as evidence that the flexibility allotted to party-appointed arbitrators in domestic cases was lessening, as courts required a higher degree of neutrality and less partisanship, drawing nearer to the international standard of impartiality and independence. *Id.*

168. *Metro. Prop. & Cas. Ins. Co.*, 780 F.Supp. at 887-888.

169. *Id.* at 892.

170. *Id.* at 893. It also noted that the *ex parte* communications complained of were not in accordance with the parties' agreement to arbitrate. *Id.*

171. *Id.* The court remanded the case to Connecticut state court. *Id.* at 896.

172. 182 N.E.2d 85 (N.Y. 1962) (stating that the court "may not rewrite [the parties'] contract" and denying the notion that an arbitration is a "quasijudicial tribunal" that imposes impartiality and dissociation from both the litigants and the dispute).

173. *Id.* at 86.

174. *Id.*

AAA would select the neutral arbitrator.¹⁷⁵ Appellant, Health Insurance Plan (“HIP”), selected Dr. George Baehr, an incorporator and former president of HIP, who was then serving as a director and consultant to the company, as its arbitrator.¹⁷⁶ Because of his relationships with HIP, the Medical Groups moved to disqualify Dr. Baehr and require HIP to select an impartial arbitrator.¹⁷⁷

The court reversed an order granting the motion to disqualify, upholding the parties’ freedom to contract for selection of the arbitrators and praising the unique value and expertise party-appointed arbitrators bring to the tripartite tribunal.¹⁷⁸ The parties’ right to choose an arbitrator “would be of little moment were it to comprehend solely the choice of a ‘neutral.’ It becomes a valued right, which parties will bargain for and litigate over, only if it involves a choice of one believed to be sympathetic to his position or favorably disposed to him.”¹⁷⁹ The court stated that it would disqualify a non-neutral party-appointed arbitrator only for overt misconduct, not merely a subjective evaluation of a relationship with the party.¹⁸⁰

Last year, the Seventh Circuit similarly upheld the parties’ right to select non-neutral arbitrators.¹⁸¹ It reversed an order to vacate an award on grounds of evident partiality, rejecting the application of section 10 (a)(2) where the parties have agreed to use non-neutrals.¹⁸² Judge Easterbrook strongly supported the parties’ rights to waive the protection of the Federal Arbitration Act, stating that if “an agreement entitles parties to select interested (even beholden) arbitrators, section 10 (a)(2) has no role to play.”¹⁸³

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 87-90.

179. *Id.* at 88. The court warned, though, that even a non-neutral arbitrator must act in good faith. *Id.* at 89. “Partisan he may be, but not dishonest.” *Id.*

180. *Id.* This is contrary to the international standard which will evaluate objectively the relationship between the party and the arbitrator. *See supra* note 114.

181. *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 623 (2002).

182. *Id.* at 620. All American challenged the award on grounds of evident partiality of Sphere Drake’s party-appointed arbitrator, Ronald Jacks. *Id.* at 619-20. Four years before the arbitration, as a partner for Mayer, Brown, Rowe & Maw, Jacks served as counsel on an unrelated matter to the Bermuda subsidiary of Sphere Drake. *Id.* at 620-21. The district court judge concluded that Sphere Drake was Jacks’ client even though the subsidiary itself appointed him and paid the fees. *Id.* at 621.

183. *Id.* at 620. While this judgment called into question the federal courts’ views of the acceptable level of neutrality from a party-appointed arbitrator, the relationship in question was relatively insignificant. The court reasoned that even had the party-arbitrator been the neutral, his prior relationship with one of the parties would

While courts are split as to whether merely the appearance of bias is sufficient to vacate an arbitral award under section 10 (a)(2), the trend seems to be that the parties' right to select non-neutral party-appointed arbitrators will be upheld.

C. The Debate Over Neutrality

The Center for Public Resources Institute for Dispute Resolution ("CPR") has been a strong advocate of completely eliminating non-neutrals from the process of arbitration.¹⁸⁴ When CPR convened a commission of over fifty experts in arbitration, the consensus they arrived at was that all arbitrators on a panel should behave as neutrals.¹⁸⁵ The commissioners denounced the non-neutral system as disreputable to the practice of arbitration, ethically inappropriate, and damaging to an arbitrator's credibility.¹⁸⁶ They claim that non-neutrals are more likely to engage in ethically questionable pressure tactics to further the interests of their appointing party, such as delaying arbitral procedures, arriving late to hearings, threatening to resign if the award is not completely satisfactory, or prolonging the decision on a third arbitrator.¹⁸⁷ Delays in selecting the neutral may cause serious problems because arbitration clauses often do not provide a time limit to appoint arbitrators and there may not be a provision to deal with the situation of a stalemate in choosing the panel.¹⁸⁸

CPR's domestic arbitration rules do not recognize a non-neutral panel. The rules offer three alternatives for arbitrator appointment: 1) each party may appoint an arbitrator and the party-ap-

not have constituted evident partiality, nor would he have been disqualified for partiality even had he served as a federal judge. *Id.* at 621.

184. STIPANOWICH & KASKELL, *supra* note 19, at 96.

185. *Id.*

186. *Id.* One commissioner, who had served as the chair on tripartite panels, swore not to work on a panel with non-neutrals again because that arrangement forces the third arbitrator to essentially conduct two arbitrations: first the arbitration hearings and then the private deliberations of all three arbitrators. *Id.*

187. *Id.* at 95; *See also* Gold & Furth, *supra* note 28, at 310 (explaining that party-appointed arbitrators sometimes withdraw from the arbitration intentionally to express dissatisfaction with the proceedings and to place pressure on the other arbitrators). Such conduct, however, would be contrary to the 1977 Code of Ethics. *See* CODE OF ETHICS, *supra* note 32 at Canons IV-V. The delay caused by tripartitism is also attributable to the construction of the panel, regardless of whether the arbitrators are neutrals or non-neutrals. Gold & Furth, *supra* note 28, at 313. Three people instead of only one must be appointed and the proceedings must conform to three separate, and presumably active, schedules. *Id.*

188. Gold & Furth, *supra* 28, at 313.

pointees will then select a third, forming a tripartite panel;¹⁸⁹ 2) the parties may agree on a “screened selection process” where the party arbitrators will be unaware of who has chosen them and who will be paying their fees;¹⁹⁰ or 3) in certain cases, CPR will appoint the arbitrators.¹⁹¹ Regardless of which selection process the parties use, CPR requires that all arbitrators be independent and impartial,¹⁹² and they must disclose any circumstances that may affect impartiality or independence.¹⁹³

Stipanowich and Kaskell urge parties to avoid using party-appointed arbitrators completely, whether neutral or non-neutral, unless they “employ measures designed to avoid the abuses associated with tripartite panels.”¹⁹⁴ They distinguish international arbitration, where “differing legal and cultural perspectives” are dealt with through the use of party-appointed arbitrators, because such concerns are not present in disputes among domestic parties.¹⁹⁵

Despite such criticisms, however, many practitioners and attorneys support the use of non-neutral, party-appointed arbitrators as a feature of freedom of contract.¹⁹⁶ Under this theory, arbitration is seen first as a matter of contract, rather than a form of adjudication.¹⁹⁷ “With respect to the neutrality of the arbitrators . . . the only serious inquiry ought to be one into the understanding and underlying assumptions of the contracting parties.”¹⁹⁸ Party autonomy justifies the appointment by each party of an arbitrator who is non-neutral.¹⁹⁹ Consequently, it follows that general expectations of arbitrators, in terms of neutrality and impartiality, should be considerably more lenient than what is expected of judges.²⁰⁰ Unlike judges, arbitrators may come from the same industry and have

189. CPR Institute for Dispute Resolution, Rules for Non-Administered Arbitration Rules 5.1-5.3 (2000).

190. *Id.* Rule 5.4.

191. *Id.* Rule 6.

192. *Id.* Rule 7.1.

193. *Id.* Rule 7.4

194. STIPANOWICH & KASKELL, *supra* note 19, at 95.

195. *Id.*

196. Rau, *supra* note 25, at 487.

197. *Id.* at 487.

198. *Id.*

199. *See id.*, at 509 (explaining the potential benefits of using non-neutral arbitrators).

200. *Id.* at 493-94.

similar backgrounds as the parties.²⁰¹ They are “not apart from but of the marketplace.”²⁰²

As a matter of contract, an arbitration is influenced by the respective bargaining strength of each party, especially if it is to be understood as a means of reaching the same result the parties would have reached had they settled on their own.²⁰³ Under this theoretical framework, party-appointed arbitrators are a reflection of the parties' positions in the dispute. The relative economic strength of the parties, vis-à-vis one another would be indicated in their choice of arbitrator.²⁰⁴

Lawyers who arbitrate in the reinsurance industry generally support the use of non-neutrals. During private deliberations of the panel, the party-appointees have an opportunity to influence the umpire. They have the occasion to hear the umpire speak frankly about his or her initial views of the case and may then offer alternative outlooks in response.²⁰⁵ This often aids the advancement of a more acceptable resolution for the parties.²⁰⁶

Some say non-neutrals facilitate compromise, either because the neutral will seek a decision that the parties find mutually acceptable, or alternatively, the neutral's own view, which would have been the final decision had it been a single arbitrator panel, may be modified to reach a more intermediate result.²⁰⁷ A three-zero decision in favor of one party may be a sign that the arbitrators reached a compromise.²⁰⁸ In such a case, the arbitrator appointed by the losing party may have been very valuable to that party by explaining the realities of the case.²⁰⁹ Particularly when a damage award is at stake, a three-zero decision often will be more acceptable even to the losing party if that party is confident that its party-appointed arbitrator put forth all arguments that would enhance its position in terms of damages.²¹⁰

201. *Id.*

202. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (White, J., concurring).

203. *See* Rau, *supra* note 25, at 511.

204. *Id.*

205. Interview with Perry Kreidman, Partner, Wilson, Elser, Moskowitz, Edelman & Dicker, in New York, NY (Jan. 13, 2003).

206. Interview with David Sheiffer, Partner, Wilson, Elser, Moskowitz, Edelman & Dicker, in New York, NY (Jan. 13, 2003).

207. Gold & Furth, *supra* note 28, at 305.

208. Interview with David Sheiffer, *supra* note 206.

209. *Id.*

210. *Id.*

Another reason parties prefer non-neutral arbitrators in the reinsurance industry is due to the relatively high stakes that are the subject of the dispute.²¹¹ Parties may not feel entirely comfortable with only one person deciding the issues when faced with such high risks coupled with the limited rights to appeal an arbitral award.²¹² A party-appointed arbitrator renders the decision more acceptable because the parties know they have had someone who clearly understands their position on the panel.²¹³

The relatively small network of reinsurance arbitrators also makes the non-neutral system appealing.²¹⁴ Disputing parties choose technical experts, who are known for their experience and knowledge in a particular field, as arbitrators.²¹⁵ One attorney in reinsurance arbitration believes that the vast connections in the industry and the familiarity among all the players place neutrality at a different level.²¹⁶ But they trust that the system will work. If a party-arbitrator, in zealously advocating the appointing-party's position, lost cognizance of the reality of the case, that arbitrator would lose credibility with the umpire.²¹⁷ The non-neutral may be predisposed to one side of the case, but must maintain a genuine approach to secure the vote of the neutral. Otherwise, the third arbitrator might wish to call off further consultations with the excessively partial party arbitrator.²¹⁸ For this reason, practitioners validate the integrity of non-neutrals since it would be impractical to act as an advocate irrespective of the merits.²¹⁹

Non-neutral tripartitism may also serve to expedite the process.²²⁰ After deliberating privately with the other arbitrators, a non-neutral who is permitted to engage in *ex parte* communications with the appointing party may be able to convey helpful informa-

211. Interview with Harold Moskowitz, Partner, Wilson, Elser, Moskowitz, Edelman & Dicker, in New York, NY (Jan. 13, 2003).

212. *Id.*

213. *Id.*; see also Gold & Furth, *supra* note 28, at 302. The authors found this to be true even when the losing party's arbitrator dissents. *Id.* at 307-08.

214. Interview with Harold Moskowitz, *supra* note 211.

215. *Id.* Most parties specify that the arbitrators be insurance executives. *Id.*

216. Interview with Perry Kreidman, *supra* note 205.

217. Interview with Harold Moskowitz, *supra* note 211.

218. Gold & Furth, *supra* note 28, at 297. An attorney explained that if party-appointed arbitrators are so partisan that they lose the respect of the umpire, the arbitration is essentially being decided by only one person, because the umpire's swing vote will be uninfluenced by the other two arbitrators. This is undesirable in reinsurance arbitration because clients are hesitant to entrust resolution of their high stakes disputes to one person. Interview with Harold Moskowitz, *supra* note 211.

219. *Id.*

220. Interview with David Sheiffer, *supra* note 206.

tion that will facilitate compromise. Lawyers have testified that they are often more willing to move for settlement when their own party-appointed arbitrator, whom they trust, explains what concessions need to be made, rather than when it is the chairperson who points out the weaknesses in their case.²²¹

Labor disputes generally use non-neutral arbitrators when the arbitration clause calls for a tripartite board.²²² In labor-management arbitration, it has been the expectation of parties that a party-appointed arbitrator will vote in favor of the appointing party, even if the case is without merit and the arbitrator has personal reservations about the appointing party's position.²²³ Commercial arbitrators are less intensely partisan in that sense.²²⁴ This difference may be attributed to the pressure labor arbitrators face because of the polarization between labor and management.²²⁵ Disputes have a political undertone that coerces the arbitrator to advocate unremittingly. According to one source, a union-appointed arbitrator may never be forgiven for voting in favor of management.²²⁶ This polarization issue does not seem to exist in commercial arbitration.²²⁷ Parties select arbitrators who will understand their position and are competent to persuade the neutral. The arbitrator can advance a positive perception of the appointing party's case, comment on evidence to clarify the party's position, and interrogate witnesses in a

221. *Id.*

222. See Gold & Furth, *supra* note 28, at 296 (stating that in labor arbitration, "party-appointed arbitrators are almost always partisan" and "are often members of the organizations that are parties to the dispute"); see also CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES, 2(B)(3)(a) (as amended 1985) (noting that "[labor] arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations.").

223. Gold & Furth, *supra* note 28, at 318. Ted Kheel, an experienced and well-known labor arbitrator, contends that party-arbitrators (who in the labor-management model presumably act as non-neutrals) are useful in resolving certain types of labor disputes. They are better in interest disputes, he argues, where the controversy concerns the amount of the settlement because the party-appointees can increase the leverage of the neutral by negotiating the sum. Mr. Kheel added that rights disputes are best decided by a single arbitrator. Three person panels are more expensive and time consuming and the rights dispute has tangible criteria by which to decide the case according to contract law. Telephone Interview with Ted Kheel, Partner, Paul, Hastings, Janofsky & Walker LLP (Nov. 15, 2002).

224. *Id.*

225. Telephone Interview with Jay S. Siegel, Siegel, O'Connor, Schiff & Zangari (Nov. 15, 2002).

226. *Id.*

227. *Id.*

manner that extracts further supporting evidence, while still maintaining a relatively objective stance on the merits.²²⁸

Questioning of witnesses may be particularly crucial to a party's case because the neutral often accords a higher level of respect to the arbitrator's cross-examinations than to those of the party's lawyer.²²⁹ This is an opportunity to present flaws in the other party's case and may be very advantageous to the party if executed effectively by the party arbitrator. Non-neutral arbitrators may be more effective in this area than neutral, party-appointed arbitrators. One lawyer accounted an arbitration in which his arbitrator did not look up to the practice of acting as a non-neutral.²³⁰ The arbitrator was well versed in the industry and quickly became aware of the weaknesses in the case.²³¹ During cross-examinations, the arbitrator elicited responses from witnesses that actually harmed his appointing party's case.²³² This likely would not have occurred if the arbitrator had been a shrewd non-neutral, keeping in mind the interests of the appointing party.²³³

In reality, sometimes even the neutrality of the umpire on a tripartite panel is questionable, particularly by the party who did not propose the selected umpire.²³⁴ For example, one lawyer explained why he thought the concept of neutrality in arbitration might be only a theoretical construct.²³⁵ He described a case in which the opposing party's chairperson candidate was ultimately chosen to be the third arbitrator.²³⁶ His client lost the case and attributed that in part to the other party securing its choice for the position of chairperson.²³⁷

Arbitrators appointed by one party may inevitably be predisposed to that party to some degree. In international practice, there is a theoretical commitment to independence, but "the arbitrator may quite acceptably share the nationality, or political or economic philosophy, or 'legal culture' of the party who has nominated him—and may therefore be supposed from the very beginning to

228. Gold & Furth, *supra* note 28, at 318.

229. Interview with Perry Kreidman, *supra* note 205.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

be 'sympathetic' to that party's contentions."²³⁸ Also, when arbitrators are appointed in part because of their expertise, they will automatically be predisposed in a sense because of their background. "Even decisionmakers who think of themselves as scrupulously neutral may be hard put to avoid the predispositions and preconceptions that so often seem to accompany practical experience as well as purely technical 'expertise.'"²³⁹

III. IMPLEMENTING THE CHANGES AND POSSIBLE EFFECTS

The Code of Ethics for Arbitrators in Commercial Disputes has been cited repeatedly by judges and carries a great deal of moral weight.²⁴⁰ For this reason, Florence Peterson, General Counsel of the AAA, suggested that the revisers should give great deference to the original document.²⁴¹

The success of the Code of Ethics may be partially attributable to the extensive and thorough empirical evidence the drafters collected while planning the code. They created a questionnaire and distributed it to 39,000 persons in the United States.²⁴² Over 12,000 of those people responded, of which approximately 7000 had served as arbitrators within the previous five years and 4000 had served as counsel in an arbitration.²⁴³ Two public hearings were held to discuss issues in the new code and the drafters sent 51,000 copies of an "Exposure Draft" to bar associations, arbitral institutions, law schools, and other persons interested in arbitration for comments on their progress.²⁴⁴ Judge Holtzmann's group accumu-

238. Rau, *supra* note 25, at 507. The author quotes Judge Clifford, who said to recognize the inherent partisanship in party-appointed arbitrators is "the only intellectually honest approach to the situation." *Id.* at 509 (quoting Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 430 A.2d 214, 230 (N.J. 1981) (Clifford, J., dissenting)).

239. *Id.* at 516.

240. See e.g., *Delta Mine Holding Co. v. AFC Coal Props.*, 280 F.3d 815, 818 (8th Cir. 2001); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 497 (4th Cir. 1999); *Sunkist Soft Drinks v. Sunkist Growers*, 10 F.3d 753, 756 (11th Cir. 1993); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 678 (7th Cir. 1983); *National Bulk Carriers, Inc. v. Princess Mgmt. Co.*, 597 F.2d 819, 824 (2d Cir. 1979); *Valrose Maui, Inc. v. Maclyn Morris, Inc.*, 105 F. Supp. 2d 1118, 1124 (S.D. Ha. 2000); *LLT Int'l Inc. v. MCI Telecomms. Corp.*, 18 F. Supp. 2d 349, 351 (S.D.N.Y. 1998); *Metropolitan Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F.Supp. 885, 891 (D. Conn. 1991); *Betz v. Pankow*, 31 Cal. App. 4th 1503, 1510 (Ct of App. 1995); *Beebe Med. Ctr. v. Insight Health Servs. Corp.*, 751 A.2d 426, 430 (Chanc. De. 1999).

241. Interview with Florence Peterson, *supra* note 8.

242. Howard Holtzmann, *The First Code of Ethics for Arbitrators in Commercial Disputes*, 10 Y. B. COMM. ARB. 131, 132 (1985).

243. *Id.*

244. *Id.*

lated this data to construct a code that truly reflected the practice of arbitration and what practitioners considered was ethical, rather than draft a code made up of pontifications of legal and ethical theorists.²⁴⁵

The revisers anticipate that reversing the presumption of neutrality will promote uniformity and integrity in the arbitral process.²⁴⁶ But to make such a drastic change, the institutions that endorse the new code should make efforts to reeducate parties and arbitrators before any confusion results.²⁴⁷ There is a substantial risk that parties will arrive at a pre-arbitral conference and learn of this new presumption for the first time, causing delay in the process.²⁴⁸ A more critical risk might materialize in a case where parties do not follow the particular rules of any institution and proceed *ad hoc*. As the preamble to the revision states:

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law.²⁴⁹

Suppose the issue of neutrality is never addressed and the parties, who are proceeding *ad hoc*, carry out the arbitration as they always had in the past, using non-neutrals. In such a case, a losing party may challenge the award, arguing that since the parties were silent as to neutrality, the party-appointees should have gone forward as non-neutrals.²⁵⁰ Judge Holtzmann warns that no matter what judgment the court reaches, increased litigation will create uncertainty in arbitration.²⁵¹ This would be contrary to the objective in the preamble to the 2002 Revision to maintain “continued

245. Interview with Judge Howard M. Holtzmann, *supra* note 60.

246. Interview with Florence Peterson, *supra* note 8.

247. Telephone interview with Judge Howard Holtzmann, Chairman, Joint Committee of the ABA and the AAA that prepared the 1977 Code of Ethics for Arbitrators in Commercial Disputes (Mar. 9, 2003).

248. *Id.*

249. 2003 REVISION, *supra* note 96, at pmbl.

250. Interview with Judge Howard M. Holtzmann, *supra* note 60.

251. *Id.*

confidence in the process of arbitration.”²⁵² Since the code will apply to all commercial arbitrators, and not only to those who are conducting the arbitration under the auspices of the AAA, the ABA and the AAA should reeducate any party or arbitrator who may be obligated to follow the code.²⁵³ Otherwise, it might be preferable at this time that the revised code only applies to AAA arbitrators.²⁵⁴

CONCLUSION

Despite the ongoing debate and pending revisions concerning the issue of neutrality, arbitration will remain a private, voluntary process, in which the parties are free to tailor the proceedings to meet their needs. The Code of Ethics provides behavioral guidance for arbitrators and parties, but it is not binding. In evaluating a claim of evident partiality of an arbitrator, Judge Posner commented, “Although we have great respect for the Commercial Arbitration Rules and the Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award’s validity.”²⁵⁵ The Federal Arbitration Act controls judicial analysis of an arbitration award.²⁵⁶ So long as the award is not procured through fraud, the arbitrators do not exhibit evident partiality, and they do not prejudice either of the parties, the award will be enforceable. A precise set of ethical standards that are embraced by the entire field of commercial arbitration, however, will strengthen and permeate the system in a way that cannot be ignored by the judiciary.

The new change of presumption in the revision to the Code of Ethics will encourage a change in behavior by imposing neutrality upon all party-appointed arbitrators, unless the parties’ agreement, applicable rules, or governing laws provide otherwise.²⁵⁷ This will create uniformity among procedures of the domestic and the international community, which has strongly supported the use of an all-neutral tribunal because independence and impartiality of all arbitrators are the basic standards in international arbitration²⁵⁸ and many domestic commercial disputes have international implications.²⁵⁹ Since arbitration awards are final and binding on the

252. 2003 REVISION, *supra* note 96, at pmb1.

253. Interview with Judge Howard M. Holtzmann, *supra* note 247.

254. *Id.*

255. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (1983).

256. *Id.*

257. *See supra* notes 93-96 and accompanying text.

258. *See supra* notes 82-90 and accompanying text.

259. 2002 REVISION, *supra* note 91, at pmb1.

parties, with courts giving great deference to arbitrators' decisions,²⁶⁰ well-defined ethical standards should be fixed to ensure that the arbitrator making the award is acting fairly.²⁶¹

The advantages that seem to come from non-neutral, party-appointed arbitrators may not be impossible to achieve with an all-neutral panel. Advocates of the system urge that non-neutrals stimulate confidence in the parties because they feel comfortable with someone who understands their position and can effectively advocate this to the neutral. But international arbitration places similar value on the impartial, party-appointed arbitrator, who is expected to understand the laws and cultures of the appointing party's country. Perhaps it is more important to appoint an arbitrator who is experienced in the field and who will also carry out the proceedings in a fair and honest manner. Craig, Park, and Paulsson commented: "The notion of true independence is not illusory; it refers to a professional attitude that would prevent an arbitrator from compromising his convictions and his reputation only to satisfy the party that named him."²⁶² This standard is not contrary to the ethical obligations that have been expected of non-neutral party-appointed arbitrators in United States domestic arbitrations.

A higher standard of neutrality can surely not be damaging to the system, so long as parties retain their right to appoint non-neutrals under Canon X. The new standards should be implemented, however, with care that parties who regularly resort to arbitration will understand what to expect.

260. See *supra* notes 44-52 and accompanying text.

261. Interview with Florence Peterson, *supra*, note 8; see *supra* note 166 and accompanying text.

262. CRAIG ET AL, *supra* note 112, at §12.04.

