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Cover Page Footnote

The author wishes to thank Catherine Leblond for her editorial assistance.

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*David J.Branson**

I. *Introduction*

The International Chamber of Commerce ("ICC") recently reported that American parties have become the "biggest per-party user of ICC Arbitration," and almost ten percent of ICC arbitrations commenced in 2003 were venued in the United States.[1] In addition, the American Arbitration Association ("AAA") reports that it administered 646 international arbitrations in 2002, a number near to the worldwide total of ICC arbitrations.[2]

As international arbitration in the U.S. grows, criticism of the American party-appointed arbitrator remains rampant. In books and law review articles, lawyers write that American party-appointed arbitrators engage in advocacy, *ex parte* communications with the appointing party, and are biased on the merits in favor of that party.[3] Some writers call the behavior unethical, while others label it an embarrassment.[4] Those are the American writers.

Criticism of American arbitrators for partisanship is of long standing. One hundred and one years ago, America and Great Britain failed diplomatically to settle the boundary between Alaska and western Canada. They agreed to submit the dispute to arbitration. The arbitration agreement called for each government to appoint three "impartial jurists."[5] The six appointed were men of unquestioned integrity. The Americans appointed Elihu Root, a cabinet secretary and distinguished lawyer; Henry Cabot Lodge, a sitting U.S. Senator; and George Turner, a former U.S. Senator. The British appointed Sir Louis Jette, Lt. Gov. of Quebec, and Allen Aylesworth, K.C. The third appointee was the Lord Chief Justice of England, Baron Alverstone. Even NAFTA enthusiasts could not appoint a panel of this quality.

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[1] U. S. Council for Intl. Bus., *ICC Statistics from 2003 and 2002*, www.enewsbuilder.net/uscib_news/e_article000255701.cfm (May 2004). L. Brennan reported in November 2004 that American parties have been the ICC's biggest per country users for the past six years.

[2] Am. Arb. Assn., *President's Letter & Financial Statements*, in *Annual Report* 2 (2003).

[3] Deseriee A. Kennedy, *Predisposed With Integrity: The Elusive Quest for Justice in Tripartite Arbitrations*, 8 Geo. J. Leg. Ethics 749 (1995).

[4] James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for "Non Neutrals*," 11 Am. Rev. Intl. Arb. 295 (2000).

[5] Jason Tomes, *Balfour and Foreign Policy* 184 (Cambridge U. Press 1997).

The arbitrators convened in London. On October 20, 1903, four arbitrators drew a line further east than the Canadian Prime Minister thought fair. Since Lord Alverstone joined the three Americans to make the award, Sir Willard Laurier, the first French Canadian to serve as Prime Minister, charged that Canada had been "betrayed." The American side, it was said, had engaged in *ex parte* communications with the British.[6]

Prime Minister Arthur Balfour reported to his colleagues that the American arbitrators had been biased! He said they had "behaved ill," as they were "neither judicial by position nor character, and who [had] one and all expressed the most pronounced opinions upon the key question."[7] Reputations once established are hard to change. There is a need to explain and compare American practices with European practices on this important topic.

On March 1, 2004, when the American Bar Association ("ABA") and the AAA, reacting to the steady stream of criticism from lawyers engaged in arbitration work, substantially changed their long standing Code of Ethics for Arbitrators relating to the status of the "party-appointed arbitrator." Because the AAA administers arbitrations, it also changed its governing rules for commercial arbitration on the same date.

The AAA Commercial Arbitration Rules previously stated that only the neutral arbitrator had to maintain independence and impartiality.[8] Likewise the 1977 ABA/AAA Code of Ethics made clear that only the neutral arbitrator was expected to be independent and impartial.[9] Under the new framework set forth in the ABA/AAA Code of Ethics and adopted in the AAA Commercial Arbitration Rules, the role of the biased or dependant party-appointed arbitrator was ostensibly abolished. Beginning March 1, 2004, the AAA party-appointed arbitrator should be independent and impartial - unless the parties choose otherwise.[10]

Twelve years ago, James Carter, Esq., distinguished former Chair of the ABA's International Law Section, wrote *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*. He concluded that "this will remain an insufficiently

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[6] Dr. Jay White, *The Alaska Boundary Dispute (1903)*, http://www.ac.wwu.edu/~jay/pages/dan.html (last accessed 11/15/2004).
[7] Tomes, *Balfour and Foreign Policy* at 184.
[8] American Arbitration Association, *Commercial Arbitration Rules of the American Arbitration Association* (American Arbitration Association 1999).
[9] American Bar Association, *American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes* (American Bar Association 1977).
[10] American Arbitration Association, *Commercial Arbitration Rules of the American Arbitration Association* (American Arbitration Association 2004).

examined subject."[11] Eight years later, Mr. Carter wrote a second article on the same subject with a decidedly different tone and conclusion that plainly condemns the partisan party-appointed arbitrator.[12]

This article will examine the historical changes in U.S. law on this issue, and will elaborate on a major theme in Mr. Carter's first article: the change fifty years ago in American jurisprudence from judging the conduct of party-appointed arbitrators on a "quasi-judicial" basis to a freedom of contract standard which allows parties to contract for dependent, partisan arbitrators. One thesis of this article, however, is that the change in America's public policy regarding party arbitrators is a mere reversal of the "default" position. Arbitrations conducted in the U.S. have used dependent, partisan arbitrators for centuries and courts have approved these forms of arbitration, like labor arbitration and umpirage, because parties selected them. This article explains the consequence of the changes in the law in the federal and state systems.

It is well known that American juries produce the occasional outlandish judgment. It is less well known, but true, that arbitral panels often produce their own outrageous awards. The cases show that the fear of the unknown in awards and in procedure leads parties to use the tripartite system.

This article then compares the American practice with the international practice of the "sympathetic" party-appointed arbitrator, discussing the "insufficiently examined subject" of the practice of party-appointed arbitrators in the international context. While many writers call the role of the party-appointed international arbitrator a "difficult" one, or a "delicate" one, few seem to critically examine the "difficulty" or "delicacy" in actual practice.[13]

Another thesis of this article is that the advocates of "sympathy" do not describe an arbitrator as being in a sympathetic "state of being" or making a mere benevolent waive of the hand. The sympathy they describe requires action and the exercise of consummate skill. Commentators do not say from where the arbitrator's permission to act sympathetically derives. If an arbitrator may act sympathetically, where does the duty to judge impartially come from? The truly impossible ethical position remains that the international arbitrator who is told he may act sympathetically must also be resolutely impartial in the same

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[11] James H. Carter, *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*, 3 Am. Rev. Intl. Arb. 153, 169 (1992).
[12] Carter, 11 Am. Rev. Intl. Arb. 295.
[13] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 158 (Sweet & Maxwell 1986); Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 Arb. Intl. 395, 406 (1998).

case. It appears to be an impossible position because it imposes two conflicting duties upon the same person. Acting sympathetically is described as a positive benefit for the appointing party, but it may have the negative consequence of an unjust compromise. That ought to be avoided.

II. *It Profits Not a Man to Sell His Soul for the World, but For Wales*[14] *- Or For an Arbitrator's Fee?*

Complaints about the American party-appointed arbitrator are easy to find, but it is important to recognize that they are articulated by lawyers and arbitrators, not by the courts. Critics who serve as arbitrators say that service as a party-appointed arbitrator sears the soul of a person of high integrity, forced either to betray the honest pursuit of justice by accepting the obligation to vote for the party which made the appointment, or to vote one's conscience and thus, potentially betray the party that made the appointment. Several lawyers have written law journal articles recently explaining why this ethically challenging choice should be removed from the possibilities of arbitral offerings.[15] This belief among these lawyers, who are primarily engaged in international practice, led to the changes in the ABA/AAA Code of Ethics and AAA Rules for Commercial Arbitration.[16]

James Carter presented an influential denunciation of the partial party-appointed arbitrator in his 2000 article. Mr. Carter's conclusion was definitive: "The 'nonneutral' party-appointed arbitrator is something of an embarrassment."[17] Mr. Carter also reported on the position which the ABA International Law Section took in the internal debate within the ABA leading to adoption of the new ABA/AAA Code of Ethics. The section position minced no words, either. The international lawyers, he said, described the "non-neutral" concept as "a parochial and . . . superannuated American creation with no validity in a world of globalized . . . transactions."[18] In another article reviewing the proposed change to the ABA/AAA Code of Ethics, Ms. Byrne encapsulated the view of many by saying partisanship was a practice "damaging to an arbitrator's credibility."[19]

The Center for Public Resources, a New York organization that promotes Alternative Dispute Resolution ("ADR") and acts as an

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[14] Robert Bolt, *A Man for All Seasons* 158 (Random House 1960).
[15] Kennedy, 8 Geo. J. Leg. Ethics 749.
[16] Allan Scott Rau defends the role of American partisan party-appointed arbitrators. *See* Symposium, *The Lawyer's Duties and Responsibilities in Dispute Resolution: Article: Integrity in Private Judging*, 38 S. Tex. L. Rev. 485 (1997) (reprinted in 14 Arb. Int. 115 (1998)).
[17] Carter, *supra* n. 12, at 305.
[18] *Id*. at 304.
[19] Olga K. Byrne, Student Author, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel*, 30 Fordham Urb. L.J. 1815, 1838 (2003).

appointing authority for arbitrations and mediations, convened a panel of fifty experts in 1999 to consider the future of arbitration. They reported that the "non-neutral" system "create[s] potential problems at various stages of the arbitration process."[20] "One Commissioner summed up the prevailing attitudes of Commission members" when he said that the practice was "disreputable to people who practice arbitration"[21] and "fraught with ethical problems."[22] There is no ambiguity there, either.

In 1998, Professor Orlandi of the University of Bologna presented an excellent survey of the law in European countries covering the legal principles on arbitrator impartiality. He concluded by stating the accepted European view on the status and conduct of all arbitrators: "it is far beyond any doubt that the arbitrators' failure to comply with the duty of impartiality clearly constitutes a violation of the public order."[23]

Impartiality is viewed as an issue of public order in Europe because courts hold arbitrators to the same standard of impartiality as judges.[24] It is on that point that American law diverged from its founding English principles fifty years ago. The American courts, led by the state legislatures, have retreated from acting as guarantors of judicial fairness and impartiality when the parties contract for a non-judicial process. In America, the courts have enshrined the power of the parties to contract for an arbitration "as you please" over the past half-century. They have rejected the long-standing competing policy goal of making arbitrations, like civil trials, appear fair and impartial to all citizens by making all arbitrators adhere to judicial standards of impartiality. In America today, the law on party-appointed arbitrators is still evolving but, in general, parties may bargain for their own procedural "fairness" with "their" arbitrator and the courts will not impose a higher public standard.

III. *Dependency or Bias was Accepted in Four Out of Five of The Extant Forms of Arbitration Before the Adoption of the New York, Federal Arbitration and Uniform Arbitration Acts*

A primary common law principle that is applied to arbitrators in England as once applied in America: "no man shall be a judge in his own

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[20] ABA Secs. Bus. Law and Dispute Res., *Commercial Arbitration at Its Best* 95 (Thomas J. Stipanowich & Peter H. Kaskell eds., ABA 2001) [hereinafter *Commercial Arbitration at Its Best*].
[21] *Id.* at 96.
[22] *Id*.
[23] Chiara Giovannucci Orlandi, *Ethics for International Arbitrators*, 67 U.M.K.C. L. Rev. 93, 109 (1998).
[24] For another article surveying the law of impartiality and party-appointed arbitrators in various European countries, *see* Murray L. Smith, *Impartiality of the Party-Appointed Arbitrator*, 6 Arb. Int. 320 (1991).

case."[25] In both countries, this principle was applied equally to judges and arbitrators until the 1960s.

These oft stated principles of arbitration law have been jettisoned, but modern critics of the party arbitrator ignore the long history of arbitration in which partiality has been permitted. "Evident partiality" in an arbitrator is a ground for vacating arbitral awards in the New York Arbitration Act of 1920, the Federal Arbitration Act of 1925 and, for the neutral arbitrator, in the Uniform Arbitration Act of 1955 ("UAA").[26] As the raporteur told the commissioners who were considering the draft UAA in 1955, the term "evident partiality" was taken from New York's 1829 state statute,[27] but the term traces back centuries.[28] The question that will be examined is how the courts have applied the rule over a long period of time.

A. *The Common Law in the United States Concerning Party-Appointed Arbitrators Mirrored English Law in the Early 19th Century*

1. Arbitration Boards - The Courts Demanded Impartiality

In the early 19th century, there were two primary types of arbitration in the United States. Both types were adopted directly from English common law. In both, the parties had to decide to arbitrate after the dispute arose as pre-dispute arbitration agreements were not enforceable. In the first system, called "true" arbitration, the parties appointed two arbitrators and they or a court immediately appointed a third arbitrator. The three arbitrators sat together on what was sometimes called an arbitration board, heard the evidence together, and decided the case together.

This method was, however, infrequently used for two reasons. The courts imposed two important rules on three member arbitration boards that did not apply in courts. The verdict of a three (or more) arbitrator panel had to be unanimous unless the parties expressly agreed in their written submission that a majority could decide.[29] This made the system unwieldy. Absent a unanimous agreement, the panel disbanded and the case had to go to the courts after the waste of time and cost of the arbitral proceeding. The second reason was that either party was free to revoke its agreement to arbitrate, even while the hearing was in

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[25] *Dimes v. Grand Junction Canal*, 10 E.R. 301 (1853); *Baltimore & Ohio R.R. Co. v. The Canton Co. of Balitimore*, 17 A. 394, 70 Md. 405 (1889).
[26] The UAA was thereafter adopted by thirty-six U.S. states.
[27] M. Pirsig, Proceedings of the Committee as a Whole, Uniform Arbitration Act 60H (NCCUSL 1954).
[28] *See Craft v. Thompson*, 51 N.H. 536 (1872); *Hamilton v. Wort*, 3 Blackf. 68 (Ind. 1832).
[29] *Towne v. Jaquith*, 6 Mass. 46 (1809); *Green v. Miller*, 6 Johns 39 (N.Y. 1810).

progress.[30] Therefore, if the arbitrators or one of them expressed a view against a party during the proceeding, that party could simply revoke its agreement to arbitrate and force the dispute into court, again after incurring the expense of a three party assemblage.

2. Umpirage - The Courts Accept Bias

The second dispute resolution method was simpler and more efficient. It was called arbitration but was distinguished by the name "umpirage." Each party selected an "arbitrator." The two arbitrators could hear evidence and would alone try to settle the dispute. Two lawyers or local businessmen sitting in an office using no formal procedure of any kind would suffice. If the two "arbitrators" were unable to resolve a part or the entirety of the case, they then selected an umpire who acted as a neutral. The umpire was often asked to resolve only one issue, the other issues having already been agreed upon.[31] The umpire would rehear the evidence if a party asked, but reported cases and statutes[32] show that the parties and the arbitrators frequently did not deem it necessary to reconvene a hearing to allow the umpire to hear the evidence. The two party-appointed arbitrators simply presented the case to the umpire for decision.[33] The courts accepted this procedural informality.[34]

The 19th century courts recognized a major distinction between the two systems. In the first system, the courts consistently held that in panels of three or more arbitrators, all arbitrators, including those appointed by the parties, acted in a "quasi-judicial" capacity and were held to the same standards of impartiality as a judge.[35] In the umpirage system, the original two arbitrators were not supposed to be dependent,[36] but the courts recognized the party-appointed "arbitrators" could become partisans - advocates. They recognized the obvious fact that if the two party-appointed arbitrators had heard evidence and were of different

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[30] Some courts did outlaw the practice. *See Carey v. Commissioners of Montgomery County*, where commissioners revoked their agreement to arbitrate after seven arbitrators had heard evidence and deliberated for over three weeks. 19 Ohio 245 (1850). Two arbitrators withdrew after the revocation. *Id.* Five signed an award, which the court enforced. In some states, a party could not revoke the agreement to arbitrate after the hearing was completed. *Hackney v. Adam*, 127 N.W. 519 (N.D. 1910); *Atterbury v. Trustees of Columbia College*, 123 N.Y.S. 25 (N.Y. 1910).

[31] *Blood v. Shine*, 2 Fla. 127 (1848); *Ranney v. Edwards*, 17 Conn. 309 (1845).

[32] *E.g.* Tenn. Code Ann. § 29-5-110 (2004).

[33] *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 56 F. 378 (9th Cir. 1893) (umpire had no duty to discuss his award with party-appointed arbitrators); *Wear v. Ragan*, 30 Miss. 83 (1855) (holding that when the two arbitrators failed to reach agreement and retained an umpire, it was the umpire's duty to decide the case alone and the signature of the "arbitrators" was not required on the award).

[34] *Ranney*, 17 Conn. 309.

[35] *Patterson v. Leavitt*, 4 Conn. 50 (1821); *Wilkins v. Van Winkle & Co.*, 3 S.E. 557 (Ga. 1887); *Baltimore & Ohio R.R. Co.*, 17 A. 394.

[36] *Stephenson v. Oatman*, 71 Tenn. 462 (1879) (holding that opposing party waived issue by participating in arbitration after knowledge where arbitrator was brother-in-law of a party).

opinions on the resolution of the case or issues in the case, they were by definition partial on the merits to one side when they later submitted the case to the umpire.[37] In the "umpirage system," it was clear that each party-appointed "arbitrator" was trying to convince the umpire to decide the case "his party's way."[38] In simple terms, courts acting in equity accepted umpirage because it was "fair" when the parties selected their own procedure and received equal treatment.

B. *The Courts Accept Dependence in Arbitrators*

Major growth in the use of three arbitrator panels in the United States occurred after 1875 in the practices of trade associations (the modern "guilds") and in "industrial" arbitrations. These two types of tripartite panels were markedly different because the arbitrators could be dependent upon the parties. In yet another arbitration variant, the courts approved arbitrator dependence in the practice of appraisers and estimators. By definition, dependence removed an important foundation for the "quasi-judicial" status of arbitrators.

1. Trade Association Arbitration

After the U.S. Civil War, and following similar developments in England, businessmen in the trades created multitudes of trade associations. They were intended to maintain trade standards and to avoid costly disputes between members.[39] To achieve these goals, the associations adopted "fair practice codes" and standard form contracts encouraging ease of compliance with the practice codes.[40] Trade association rules also required all members to settle their disputes by arbitration before members of the association's arbitration committee. This arbitration system was extant at a time when no U.S. courts would enforce agreements to arbitrate future disputes. The arbitration agreements were enforced not by the courts, but by the associations, which expelled members who refused to arbitrate. Expulsion generally meant members could no longer practice the trade.[41]

The trade association arbitration committees were usually staffed by senior members of the trade who were recognized experts in the customs of the trade. Their interest was not just to settle the dispute between the parties, but also to insure that ethical business standards

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[37] *Haven v. Winnisimmet Co.*, 93 Mass. 377 (1865).
[38] *Wilson v. Concord R.R. Co.*, 85 Mass. 194 (1861).
[39] C. F. Birdseye, *Arbitration and Business Ethics* 26 (D. Appleton & Co. 1926).
[40] Their efforts at setting clear standards were so successful that, in the 1920's, standard form contracts were involved in only five percent of the cases in the New York courts, whereas one-off agreements were involved in almost thirty percent. C. F. Birdseye, *Arbitration and Business Ethics* 29 (D. Appleton & Co. 1926).
[41] M. H. Grossman, *Commercial Arbitration* 24 (Lasalle Univ. Press 1948).

were set and maintained.[42] This system solved the major common law problems. The association was an appointing authority. The agreement to arbitrate future disputes was enforced in a practical way, by expulsion, and thus the arbitration agreement could not be revoked.[43] This system flourished. Before New York adopted the first "modern" arbitration statute in 1920, the guilds were administering thousands of arbitrations every year. The movie distribution industry alone reported 11,000 arbitrations in one year.[44]

This form of arbitration with member experts created, however, a challenge to the common law doctrine that all arbitrators in three arbitrator panels be impartial. The trade-off for expert arbitrators from the trade association was that they often knew or even did business with one or more of the parties.[45] The arbitrators could also be presumptively biased because they came from one side of the trade. In the textile trade, for example, sellers did not trust a panel of buyers.[46] The fear of prejudice practiced by one side of the trade against another is still reported.[47] Judicial independence was thus not possible, but the courts did not abandon the test or the rhetoric that the expert trade association arbitrators were acting in a "quasi-judicial" capacity.[48]

2. Industrial Arbitration

The practice of using tripartite boards in industrial disputes originated in the late 1880s. It was a time in the nascent labor movement when strikes accompanied by violence were common. Several states passed labor statutes to force the union and management to arbitrate. These were not voluntary contractual arbitrations. They were called "compulsory interest" arbitrations, and were mandated by statutes for resolving terms of new contracts.[49] The appointing authority, a government agent, was required to appoint a representative from each

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[42] C. F. Birdseye, *Arbitration and Business Ethics* 5 (D. Appleton & Co. 1926).
[43] *Cf. Graham v. Chamber of Com. of the City of Milwaukee*, 20 Wis. 63 (1865) (upholding the right of a member of Chamber to litigate a dispute with a fellow member, even though the rules required arbitration and court barred association from expelling member).
[44] C. F. Birdseye, *Arbitration and Business Ethics* 67 (D. Appleton & Co. 1926).
[45] *In re Meinig Co.*, 241 A.D. 406 (N.Y. App. Div. 1st Dept. 1934).
[46] Bernard Gold & Helmut Furth, Student Authors, *The Use of Tripartite Boards in Labor, Commercial and International Arbitration*, 68 Harv. L. Rev. 293 (1954) (sellers believed to apply less exacting standards to goods than a buyer).
[47] *Hoffman v. Cargill Inc.*, 236 F.3d 458 (8th Cir. 2001) (reversing district court's vacateur on grounds trade association panel of grain buyers unfair to grain sellers); *Harter v. Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000) (court of appeals affirmed district court finding grain buyers are not unfair arbitrators for grain sellers); *In re Sun Refining & Mktg. Co. v. Statheros Ship. Corp. of Monrovia*, 761 F. Supp. 293 (S.D.N.Y. 1991) (ship owners believed to apply less exacting standards to seaworthiness of vessel than a shipper).
[48] *In re Dukraft Mfg. Co.*, 151 N.Y.S.2d 318 (N.Y. 1956); *In re Arb. between Knickerbocker Textile Corp. and Sheila-Lynn, Inc.*, 16 N.Y.S.2d 435 (N.Y. App. Div. 1939).
[49] Gold & Furth, *supra* n. 46, at 293-96.

side of the industrial dispute to sit with a neutral. By this form of "mediation/arbitration," the state sought to compel the parties to arrive at a collective bargaining agreement to avoid strikes.[50]

Union and management officials had to be members of the panel because they were trying to agree on a contract to govern future relations.[51] In this form of statutory arbitration, two of the three arbitrators were dependent by virtue of their employment. The resulting collective bargaining agreements often included a requirement for conciliation and arbitration of grievances where union and management agents first attempted to resolve a grievance.[52] If they failed, they moved on to arbitration and these representatives selected an umpire. This is a form of voluntary arbitration that also, when using a tripartite panel, utilized arbitrators who were dependent and biased because they were the agents and employees of the parties.[53]

3. Appraisers and Estimators

The insurance industry adopted the use of "appraisers" and the construction industry adopted the use of "estimators" to determine the quantum due under insurance contracts or construction agreements. These agreements were enforced as bi-lateral contracts and thus were not viewed as voidable agreements to arbitrate future disputes. The appraisers often were dependent upon an insurer, and their dependence was accepted by the courts.[54] Likewise, in construction contracts, the courts approved contracts where an employee of a party to the contract, like the "chief engineer," was designated to measure quantum.[55]

In approving the estimates of a government officer, the U.S. Supreme Court noted not only that both parties mutually assented, waiving any claim of prejudice, but also added: "[I]t is not at all certain that the government would have given its assent to any contract which

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[50] Similar statutory schemes have recently survived court challenge where states have mandated arbitral panels for medical malpractice claims which include doctors. *Morris v. Metriyakool*, 309 N.W.2d 910 (Mich. App. 1981).
[51] Gold & Furth, *supra* n. 46, at 294.
[52] For distinctions between interest and grievance arbitration, *see Dearborn Fire Fighters Union v. City of Dearborn*, 231 N.W.2d 226 (Mich. 1975).
[53] In voluntary industrial arbitrations, the union representative on an arbitration panel represents the interest of the union, not just the union member. Therefore, the agent is present to advocate and protect union interests, not only the interests of the employees. Where the employee might be willing to compromise his grievance, the union agent may not, for fear of setting a precedent for future cases, or vice-versa. After union members secured the right to sue their union on the grounds of breach of the duty of fair representation, the union ran the risk of being sued if a union representative on a tripartite board voted against the member. *See Workman v. Greater Cleveland Regl. Trans. Auth.*, 1986 Ohio App. Lexis 9815 (Dec. 11, 1986).
[54] *Bradshaw v. Agric. Ins. Co. of Watertown*, 32 N.E. 1055 (N.Y. 1893) (holding that an appraiser could be friendly to appointer, but had to be fair and just; misleading other side on number of prior appointments is cause to vacate).
[55] *Kihlberg v. U. S.*, 97 U.S. 398 (1878).

did not confer upon one of its officers the authority in question."[56] The courts struggled, but were successful in reconciling these facts to the legal test that the estimators filled a "quasi-judicial" role. For example, in 1895, the Court of Appeals for the Sixth Circuit upheld the final estimate of a railroad's chief engineer in an opinion written by future U.S. President W.H. Taft.[57] Judge Taft said engineers assumed a "quasi judicial function." Interestingly, Judge Taft referred to *Ranger v. Great Western Railway Corp.*[58] where the House of Lords upheld the estimate of an engineer who was a shareholder in the railroad company, but where Lord Brougham's opinion said "there is no ground for considering that [the engineer] . . . was a quasi-judicial position."[59]

C. *The Courts Have Approved Dependence and Bias in Arbitrators*

What is noteworthy about this long U.S. history is that the courts approved dependence which might lead to a likely impression of bias in arbitration of industrial disputes, trade association disputes, and the use of appraisers and estimators. The courts approved of actual bias in industrial disputes and umpirage because the parties contracted for it or the parties implicitly consented to it. Even in true arbitration boards, where all three arbitrators were supposed impartial by law, independent and unbiased, courts approved dependence and bias when both parties expressly or by implication mutually accepted it by conduct in the arbitral proceeding,[60] or when one party could be said to have waived its objection.[61]

These variant arbitral forms were accepted because arbitration awards were vacated in equity. In applying the centuries old equitable tests for vacating awards, which are "fraud," "corruption," or "partiality," it mattered if the complaining party seeking to vacate an award had agreed to the procedure, acquiesced, or had remained silent and only later complained after a loss. In sum, the common thread is that state statutes and the common law, throughout the 19th and first half of the 20th centuries, gave courts the power to vacate arbitral awards for "evident partiality." Yet the courts concurrently approved of four different arbitration procedures that utilized, indeed were distinguished

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[56] *Id.* at 402.
[57] *Mundy v. Louisville & N.R. Co*., 67 F. 633, 644 (6th Cir. 1895).
[58] 5 H.L. Cas. 72 (1854).
[59] *Id.* at 116-17.
[60] *Wheeling Gas Co. v. City of Wheeling*, 5 W.Va. 448 (1872) (both parties appointed partisans); *In re Arb. between Rosenberg & Wolfe*, 41 N.Y.S.2d 14 (N.Y. App. Div. 1943) (one party appointed his brother-in-law, the other his uncle).
[61] *Dougherty v. McWhorter*, 15 Tenn. 239 (1834) (party knew arbitrators related to other party but said they were honest men); *In re Arb. between Amtorg Trading Corp. & Camden Fibre Mills, Inc.*, 277 A.D. 531 (N.Y. App. Div. 1st Dept. 1950) (contract identified presumably biased Soviet agency as arbitration board).

by, dependent and/or biased arbitrators, because the parties wanted it that way and the equity courts gave the parties what they deserved.

D. *Reforms were Focused on the Desire of Businessmen to Arbitrate Outside the Trade, Which Focused Emphasis on Arbitration Boards*

Prior to 1920, members of New York's many trade associations were not able to ask a court to compel arbitration with individuals in different trades or in international trade.[62] When they were forced into the courts, they resented the exorbitant time and cost involved. After the Civil War, the New York Chamber of Commerce organized a campaign asking the legislature to amend the common law to allow arbitration of future disputes. A Chamber representative told the New York Senate in 1874 that "prolonged lawsuits are the tumors and cancers of businessmen;"[63] a sentiment that drives arbitration today. But in that century, arbitration was anathema to most lawyers; it meant reduced fees or no fees at all. The legislature refused to act.

At the end of World War I, an economic surge was engendered and litigation increased with it. In 1917, 8,000 cases were filed in the courts of New York County. In 1920, 26,000 cases were filed, but the courts could still only process 8,000 cases per year.[64] Thus, the New York Chamber of Commerce was able to demand that the legislature provide arbitration reform because it could demonstrate that it took three years before a case could be called in court. In similar situations, an arbitration could be completed within a few weeks after a dispute arose. In 1920, the New York legislature enacted the first law in the U.S. allowing parties to contract to arbitrate future disputes. New York retained its 1829 code section allowing courts to vacate awards for, *inter alia*, "evident partiality." Only a few states, including New Jersey and Connecticut, adopted a similar law. The Commissioners for Uniform State Laws[65] attempted to draft a model arbitration law to submit to the states but their effort failed as they were unable to gain acceptance of a modern law.[66] This meant New York businessmen could enforce arbitration agreements with those outside the trade in only a few states.

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[62] *See U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915) (a U.S. company could not be compelled to arbitrate in New York under terms of a contract made in the U.K. where agreements to arbitrate future disputes had been legalized by the 1889 Arbitration Act).

[63] C. F. Birdseye, *Arbitration and Business Ethics* 32 (D. Appleton & Co. 1926).

[64] *Commercial Arbitration* 33 (D. A. Bloomfield ed., Wilson & Co. 1927).

[65] The Commissioners for Uniform State Laws is a 100 year old body that draws upon leaders of the Bar from across the country to recommend "Model Uniform Laws," such as the Uniform Sales Act and the Uniform Arbitration Act. State legislatures are free to accept or reject the proposed model laws.

[66] Introductory Note, in UAA 3 (1955).

The New York Chamber of Commerce formed an "Arbitration Foundation" which, along with the ABA, lobbied the federal Congress to adopt a similar arbitration. This enabled businessmen to compel arbitration in contracts in international trade and in contracts with parties in states that had not yet enacted modern statutes. They succeeded in 1925 when the Congress enacted the Federal Arbitration Act ("FAA").[67] The language is largely taken from the New York act. In particular, the language relating to grounds for vacateur of an award, "fraud, corruption or other undue means" and "evident partiality or corruption in the arbitrators, or either of them," are taken verbatim.

It is crystal clear that the New York arbitration law and the Federal Arbitration Act demanded impartiality in the arbitral process by all arbitrators serving on "arbitration boards." The meaning of the standard at the time is clear because court decisions before and after passage of the New York and federal arbitration statutes frequently defined the legal standard on partiality for all arbitrators, including party-appointed arbitrators. The New York Act and the FAA were intended to allow arbitration outside the trades, outside the unions, and outside the bi-lateral contracts using estimators and appraisers.

IV. *The Legal Standard Applied to Arbitrators*

A. *The "Quasi-Judicial" Standard*

In the 19th century, American courts applied the same standards of impartiality to arbitrators that they applied to judges, often citing English decisions. For example, when it was discovered that a party-appointed arbitrator was a shareholder in one of the corporate parties, the Maryland Court of Appeals in 1889 vacated the award saying:

> It has accordingly been settled by the House of Lords that a judgment rendered by a Judge in a case in which he is interested is voidable. *Dimes v. Prop. of the Grand Junc. Canal*. . . . This salutary principle, that no judge shall decide his own case, is likewise applicable to an arbitrator.[68]

Five years after New York adopted its arbitration statute, the New York Court of Appeals articulated the same standard in a case involving *ex parte* contact by a party-appointed appraiser. The appraiser had resigned a day before the award was rendered, had "been in touch with respondents' attorneys, and was obtaining cases from them to sustain their side of the controversy." The Court of Appeals restated the common law rule that a party-appointed arbitrator acts in a:

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[67] The FAA's effective date was January 1, 1926.
[68] *Baltimore & Ohio R.R. Co.*, 70 Md. at 409.

> quasi-judicial capacity and should possess the judicial qualifications of fairness to both parties so that he may render a faithful, honest and disinterested opinion. He is not an advocate whose function is to convince the umpire or third arbitrator. He should keep his own counsel and not run to his nominator for advice when he sees that he may be in the minority. When once he enters into an arbitration he ceases to act as the agent of the party who appoints him. He must lay aside all bias.[69]

The AAA began as an organization that used "arbitration boards." Concerned with the image of arbitration, the AAA made clear that its boards of businessmen, all volunteers doing a civic duty, were so competent and impartial that parties did not need to hire lawyers to plead their cases. In the first few years, the AAA administered several hundred arbitrations per year and the majority utilized three arbitrators, all impartial. The AAA reported in 1931 that lawyers appeared for parties in less than twenty-five percent of those arbitrations.[70]

The AAA adopted rules setting forth the same principles as the courts:

> Rule III. Qualification of Arbitrators: No party or person or body authorized by the parties to select the arbitrators shall select as such arbitrators any persons known to him to have any personal or financial relations with either party or any interest in the result of the arbitration which might prejudice the right of either party to a fair or impartial award; nor should the appointing power select as an arbitrator any person known to have preconceived opinions which constitute bias for or against either party. No party shall select as an arbitrator any person to act as his champion or to advocate his cause and no compensation of any arbitrator shall be arranged on this basis.[71]

There was, however, a contrary view expressed in *American Eagle*. One judge of the seven sitting had dissented. He said:

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[69] *In re Arb. between Am. Eagle Fire Ins. Co. & N. J. Ins. Co*., 148 N.E. 562, 564 (N.Y. 1925) [hereinafter *American Eagle Fire Ins. Co.*]; *see Noffsinger v. Thompson*, 98 Colo. 154, 156 (1936) (stating that a "party-appointed arbitrator must exercise a judicial impartiality and freedom from bias . . . they assume a quasi-judicial position . . . an arbitrator is not to be the agent of the party who appointed him, but an impartial judge between the parties").

[70] Am. Arb. Assn., *Code of Arbitration: Practice and Procedure of the American Arbitration Tribunal* 19 (Frances Kellor ed., Com. Clearing H. 1931).

[71] *Id.* at 188.

> The Arbitration Law is based on contract. . . . The contract having provided for an arbitration, the decision was as important as the hearings. The respondents were entitled to an arbitrator appointed by them to discuss the case and present his views, whatever they were and both parties were entitled to their arbitrators being able to act and functioning as such at the time of the decision, although the majority vote of the three could make the decision.[72]

The dissent, emphasizing the primacy of the contractual rights of the parties, foreshadows the change that would occur in the same court in 1962.

B. *The Legal Standard Governing Party-appointed Arbitrators Begins to Change in 1955*

In 1955, the National Conference of Commissioners on Uniform State Laws recommended that the various states adopt a "Uniform Arbitration Act" ("UAA"). The primary achievement of this model law was the enforcement of agreements to arbitrate future disputes. On the issue under consideration in this article, the UAA stated that a court could vacate an arbitral award where "there was evident partiality by an arbitrator *appointed as a neutral*. . . ."[73] This model arbitration law and its successor were thereafter adopted by over forty state legislatures. New York amended its arbitration law to mirror the provision limiting the test for impartiality to the neutral arbitrator in 1963. After a state legislature adopted this model law, the state court no longer had the power to vacate an arbitral award where a party-appointed arbitrator was "evidently partial." State legislatures, not the federal government, made the change in the law which permits "partisan" party-appointed arbitrators - advocates - in "arbitration boards" as well as in the other types of arbitral forms. An important question is why state legislatures adopted this change.

1. The Labor Movement's Growing Use of Arbitration

The UAA's limitation of the "evident partiality" standard to the neutral arbitrator was made to accommodate union/management arbitration practices. The fundamental change to arbitrator neutrality necessitated by labor practice is illustrated in The Railway Labor Act of 1926 ("RLA"). In the 1920s, a strike by any railroad union, and there were several major unions with over 450,000 members, could shut down

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[72] *American Eagle Fire Ins. Co.*, 148 N.E. at 566 (Crane, J., dissenting).
[73] UAA § 12(a)(2) (emphasis added).

all commercial transport in a region or the country.[74] The Congress therefore passed the RLA which set up a system for the resolution of labor disputes that was intended to prevent strikes from occurring.

The RLA contained a comprehensive "modern" ADR system. This federal law mandated the arbitral procedure. Within ten days of the notice of a dispute, designated representatives of labor and management had to attend a "conference" "upon the line of the carrier. . . ."[75] By necessity, this meant a member of the union and a management employee of the railroad were to meet "on the line" and attempt to resolve the dispute. If the designated representatives were unable to resolve the dispute, the statute provided for mediation and for the parties to commence arbitration with three or six arbitrators. It is apparent that the legislative intent for this dispute-resolution process was to start quickly with designated people on the scene, one for the union and one for the management, and that those representatives continue to stay involved in the process as it moved forward into arbitration. Six arbitrator panels were authorized so that the union or management could augment their team with people more skilled in presenting the case to neutral arbitrators. They could each bring in an additional person without losing the contribution of the designated representative who was on the scene when the dispute started and who had gathered the evidence "on the line."

The RLA expressly stated that a party-appointed arbitrator was not "incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties."[76] The neutral arbitrators, however, had to be "wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties."[77]

The Court of Appeals for the Seventh Circuit was soon called upon to interpret the RLA in *Atchison, T. & S.F. Ry. Co. v. Bhd. of Locomotive Firemen & Enginemen.*[78] After months of hearings and deliberations, a panel of six arbitrators concluded it could not reach agreement on a major pay issue and wrote a memorandum indicating that it chose not to resolve any subsidiary issues before disbanding. The two union representatives later asked the two neutrals on the panel to revisit the issues. The neutrals agreed to reconvene but the two railroad members of the panel refused to appear, saying the panel had already dissolved itself and was, therefore, *functus officio*. The remaining four,

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[74] C. F. Birdseye, *Arbitration and Business Ethics* 11 (D. Appleton & Co. 1926).
[75] 45 U.S.C. § 152 (2004).
[76] 45 U.S.C. § 157(d) (2004).
[77] 45 U.S.C. § 155 (2004).
[78] 26 F.2d 413 (7th Cir. 1928).

two neutrals and two union arbitrators, met again and made an award in which the neutrals and union representatives reached a compromise on the pay terms. When the railroad attacked the award in federal court, the majority of the court dismissed the complaint by reference to the RLA's directive that union arbitrators were not disqualified by virtue of being interested or partisan.[79]

The dissenting opinion in the court of appeals illuminates the magnitude of the RLA's departure from the common law regarding party-appointed arbitrators in multiple arbitrator panels. The dissent recognized the common law principle that arbitrators are "quasi-judicial" officers who are not agents of the party who appoints them, and could not agree that the principal should be abandoned in labor arbitrations:

> It does not seem possible that Congress intended that this legislative provision for arbitration should have the effect of introducing a theory wholly repugnant to the fundamentals of "arbitration" as known from earliest times. Arbitrators, it is true, are not judges, constrained to proceed in strict conformity with the principles of law respecting evidence, damages or the like. But *no court* has ever said that because of the manner of their selection, those deriving their appointments from parties are the alter ego, the advocates, the partisans, of their nominators.[80]

The dissent predicted that the "view respecting advocacy, if adopted, and, if loyalty in advocacy is to be expected, and exacted, can result in nothing more than a disparagement of the law as an arbitration law. It will be the means of promoting failures."[81] Notwithstanding the warning of the dissent, the partisan role of party-appointed arbitrators in industrial arbitrations, who may be dependent and biased, has never changed.[82]

Union membership experienced explosive growth after the passage of the National Labor Relations Act in 1935 and the Labor-Management Relations Act ("LMRA") of 1947.[83] By 1950, there were over 1,200 collective bargaining agreements on file with the federal

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[79] The FAA expressly states that it does not apply to arbitrations involving railroad employees. 9 U.S.C. § 1 (2004).
[80] *Atchison*, 26 F.2d at 433 (emphasis added).
[81] *Id*. at 434.
[82] For example, in commercial arbitrations in the 19th century and in England still, a party had no right to remove "his" arbitrator after appointment because, once appointed, the arbitrator was not the party's agent. In a modern labor case, however, where the union designee was removed from his union office, the union was permitted to replace him on the arbitral panel with the new union agent. *Boston Mut. Life Ins. Co. v. Ins. Agents' Intl. Union*, 258 F.2d 516 (1st Cir. 1958).
[83] The LMRA is also called the Taft-Hartley Act.

government.[84] A majority of these collective bargaining agreements called for tripartite boards to arbitrate grievances,[85] and the AAA had begun to administer more labor arbitrations than commercial ones.[86]

Outside of the railroad industry, however, the ability to compel arbitration for disputes arising out of union agreements was in flux. Labor agreements routinely included "no strike" provisions by the union in exchange for promises by management to arbitrate grievance disputes. But, if management refused to arbitrate a grievance and absent a court order to compel arbitration, the union was impotent unless the issue was worth a strike. Most grievances, however, did not approach that threshold. Yet state courts were generally unavailable. Only four states had statutes that authorized unions to seek a state court order to compel arbitration.[87] Further, even if the employer voluntarily agreed to arbitrate, the majority of states continued to enforce the common law rule that an arbitration agreement could be withdrawn until the hearing was concluded.[88]

Unions sought relief in federal courts but most courts refused to compel arbitration, holding that the FAA excluded "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[89] The circuits had split, however, on whether the phrase modified Title 9, which would exclude federal court authority to compel arbitration, or merely modified the definition of commerce, which would not. Congress then amended the definition in 1947 and the circuits fell into line by 1951, holding that the FAA denied federal court jurisdiction to compel arbitration arising from union agreements.[90] Unions also sought relief under the Taft-Hartley Act, but most federal courts did not accept that the act provided federal court jurisdiction to enforce union agreements.[91] In sum, unions were stymied and unable to compel grievance arbitrations under their union-management collective bargaining contracts.

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[84] Arthur Lesser, Jr., *Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitration?* 5 Arb. J. 276, 277 (1950).
[85] *Id*.
[86] The 'Lectric Law Lib., *History of the AAA & Alternative Dispute Resolution*, www.lectlaw.com/files/adr07.htm (last accessed Oct. 27, 2004).
[87] California, Minnesota, Colorado, and Wisconsin. *See Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 501 (1957).
[88] *Grant v. Atlas Powder Co.*, 241 F.2d 715 (6th Cir. 1957) (discussing Tennessee law applied to a labor agreement to arbitrate).
[89] 9 U.S.C. § 1.
[90] *Amalgamated Assn. of Street, Elec. Ry. & Motorcoach Employees of Am. v. Pa. Greyhound Lines Inc.*, 192 F.2d 310 (3rd Cir. 1951).
[91] *Mercury Oil Refining Co. v. Oil Workers Intl. Union*, 187 F.2d 980 (10th Cir. 1951); *Cf. Wilson Bros. v. Textile Workers Union*, 132 F. Supp. 163 (S.D.N.Y. 1954).

2. The Adoption of a Uniform Arbitration Act in 1955

By the early 1950s, as noted, the AAA was administering more voluntary labor arbitrations than any other type of arbitration.[92] With the courts closing their doors, it was apparent from the floor debate among the state commissioners considering the draft UAA in 1954 and 1955 that providing coverage for labor agreements was a key reason for adopting the UAA. The commissioners who approved the UAA for submission to the states were not only familiar with labor arbitrations, it appears from the debates that many of the commissioners' primary arbitration experience was in labor arbitration. The Committee Chair, Professor Maynard Pirsig, later published an article concerning the intentions of the drafters and, in the section on jurisdiction and the scope of the act, labor management dispute illustrates each of the positions taken.[93] He also said:

> The Act applies to arbitration clauses in labor contracts. . . . Existing statutes validating future disputes clauses sometimes include such contracts. The rash of cases in which arbitration is sought under Section 301 of the Taft-Hartley Act would appear to indicate that enabling legislation in the states which do not now validate such clauses would meet a strong need.[94]

At the time when the commissioners were considering the UAA, the Harvard Law Review published a survey on tripartite arbitration boards. It was the most influential article that had been written on the subject. The law review article reported on a survey of persons involved in labor arbitration. The editors said it was well known in labor/management dispute resolution that the party-appointed arbitrators were not supposed to act impartially or, in other words, to perform a "judicial function." The editors reported that "[u]nion officials and [their] attorneys risk dismissal if they do not press" the union view in labor arbitrations.[95]

When the commissioners met for the final vote on the draft UAA, there was no discussion of the addition of the phrase "appointed as a neutral."[96] In particular, there was no discussion of the effect this change could have upon existing law on the conduct of party-appointed arbitrators in commercial arbitrations. In a later law review article,

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[92] *See* Carter, *supra* n. 12.
[93] Maynard E. Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 10 Vand. L. Rev. 685, 697-700 (1957).
[94] *Id*. at 692.
[95] Gold & Furth, *supra* n. 46, at 296.
[96] Maynard E. Pirsig, *Proceeding of the Committee as a Whole, Uniform Arbitration Act* 73 (NCCUSL 1955).

Professor Pirsig merely noted that the addition of the phrase "appointed as a neutral" was "new," and "it recognizes the frequent modern practice, pursuant to agreement of parties appointing their *representatives* to a board of arbitrators *to represent* and *protect their interests*."[97] He cited the 1954 Harvard Law Review article in a footnote.[98]

If only they had been patient for two more years. The U.S. Supreme Court solved the unions' problem in *Textile Workers Union of America v. Lincoln Mills of Alabama,*[99] holding that §301 of the LMRA provided federal jurisdiction allowing federal district courts to compel grievance arbitrations under collective bargaining agreements. But the UAA die had been cast.

3. The State Courts Responded to the Adoption of the UAA By Revising the Legal Standard for Reviewing "Evident Partiality" in Party-Appointed Arbitrators

State court decisions naturally followed the legislative changes prompted by the UAA. The first case to make clear that party-appointed arbitrators in a commercial "true arbitration" case could be dependent and partisan was *In re Astoria Medical Group et. al. v. Health Insurance Plan of Greater New York.*[100] The New York legislature had in the prior year amended the state arbitration act to provide that an award could be vacated for evident partiality only in the neutral arbitrator, mirroring the change in the UAA.[101] New York's highest court, in a 4-3 decision, held that the court would not remove an arbitrator because he was a "dependent" arbitrator and thus presumptively biased. The party-appointed arbitrator in question, Dr. Baehr, was a director, paid consultant, and former president of the party that appointed him.[102] The court's holding relates to that aspect of impartiality defined as dependence, the relationship of the arbitrator to the party. Citing the 1954 Harvard Law Review article, the court's opinion noted that the practice of partisan arbitrators had become common in arbitrations. "There has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot [be expected to] be neutral."[103]

Viewed in historical perspective, in order to accommodate the pending legislative change which would remove its power to vacate an arbitral award on the grounds of "evident partiality" by a party-appointed

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[97] Pirsig, *supra* n. 93, at 704 (emphasis added).
[98] *Id*.
[99] 353 U.S. 448 (1957).
[100] *In re Arbitration between Astoria Medical Group and Health Ins. Plan of Greater N.Y.*,11 N.Y.2d 128, 182 N.E.2d 85 (1962).
[101] At the time of the *Astoria* decision, the legislature's change in the state's arbitration law had not yet been signed by the Governor of New York.
[102] *Id.* at 90.
[103] *Id.* at 87.

arbitrator, the majority of the *Astoria* court needed to change the centuries old doctrine of the "quasi judicial" role of the party-appointed arbitrator. It accepted as the new principle the principal assertion of the dissent in the 1925 *American Eagle* case that the contractual right of the parties to select an arbitrator trumps the rule that arbitrators must be held to judicial standards of impartiality. The *Astoria* majority said:

> Arbitration is essentially a creature of contract, a contract in which the parties themselves charter a private tribunal for the resolution of their disputes. The law does no more than lend its sanction to the agreement of the parties, the court's role being limited to the enforcement of the terms of the contract . . . . In thus enforcing the party's contractual right to designate an arbitrator of his own choice, we implicitly recognize the partisan character of tripartite arbitration. The right to appoint one's own 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.[104]

Three justices dissented. The dissent reiterated the rationale from the majority opinion in *American Eagle.* The *Astoria* dissent said if there was:

> anything left of the concept that an arbitrator [was] a judge appointed by the parties . . . and that he acts in a quasi-judical capacity, Dr. Baehr is as a matter of law not qualified to sit on this arbitration board. Only by so holding can we preserve a concept which is rooted not in naiveté or impracticality but in integrity and principle . . . the whole affair becomes a cynical travesty of the arbitral process, calculated to bring the system of enforced arbitrations into disrepute.[105]

The dissent stated the policy opinion that abandonment of the principle that party-appointed arbitrators in commercial cases act in a "quasi-judicial" capacity was disturbing and would lead to a decline in the approval of the use of arbitration in commercial cases. Yet thirty-eight

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[104] *Id.* at 87-88 (emphasis added).
[105] *Id.* at 90-91.

states have adopted the UAA of 1955 or its new version, the Revised Uniform Arbitration Act adopted in 2000 ("RUAA").[106]

C. *A Dozen States Have Not Adopted the UAA's Change Regarding Party-appointed Arbitrators*

The law, even in America's states, is not uniform on the issue of evident partiality for party-appointed arbitrators. Not all state legislatures followed New York and the states which adopted the UAA's provision limiting the grounds to vacate an award for evident partiality to the "neutral" arbitrator. As of this writing, ten states still retain statutes that give the courts of these states the power to vacate awards for "evident partiality . . . [in] the arbitrators [or either] or any of them."[107] Even in these states, however, where the "quasi-judicial" standard is required of neutral arbitrators, contract principles allow parties to deviate from the state's statutory standard for the party-appointed arbitrator.[108]

In some states, the language of *In re Astoria Medical Group* has been adopted even though the state statute has not been changed. Louisiana, for example, retains the statutory language, "evident partiality . . . [in] the arbitrator or any of them."[109] Yet when a losing party in arbitration sought relief on the grounds that the other party's arbitrator was dependent, the state supreme court said that when parties appoint their own arbitrators, they expect "partisans" and a disclosed business relationship does not disqualify the arbitrator.[110] However, absent an agreement to accept dependent party arbitrators, in these twelve states

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[106] A list of those states which have adopted the UAA can be found at Legal Information Institute, *Uniform Business and Financial Laws Locator*, www.law.cornell.edu/uniform/vol7.html (last updated April 2003). Representative cases applying the non-neutrality principle of the UAA include: *Thomas v. Howard*, 276 S.E.2d 743 (N.C. App. 1981); *Banwait v. Hernandez*, 252 Cal. Rptr. 647 (Cal. App. 1988); *Herrin v. Stewart, Inc.*, 558 So.2d 863 (Miss. 1990); *Rios v. Tri-State Ins. Co.*, 714 S.2d 547 (Fla. Dist. App. 1998); *D&E Constr. Co. v. Denley Co., Inc.*, 38 S.W.3d 513 (Tenn. 2001).

[107] La. Stat. Ann. § 9:4210 (2004). Alabama, Connecticut, Louisiana, Mississippi, Ohio, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin; Nebraska and New Hampshire use common law principles in confirming or vacating awards.

[108] In many cases, courts with the original statutory language randomly cite decisions, like *In re Astoria Medical Group*, without noting the statutes are not the same. The prime example is a recent case from the Supreme Court of Hawaii. The arbitration was conducted while the state statute retained the "any of them" language. The court challenge to the award because of an alleged dependent party arbitrator occurred after the state legislature adopted the RUAA, removing that language. The Hawaii Supreme Court cited cases randomly from other states and never decided which statute to apply. It found a waiver of one of the statutes, presumably the first one. *In re Daiichi Haw. Real Est. Corp. v. Lichter*, 82 P.3d 411 (Haw. 2003).

[109] La. Stat. Ann. § 9:4210.

[110] *Natl. Tea Co. v. Richmond*, 548 S.2d 930 (La. 1989); *see also Anderson v. Nichols*, 359 S.E.2d 117 (W. Va. 1987) (stating that parties who appoint arbitrators expect them to act as partisans).

the courts may vacate awards on the grounds of dependence in a party arbitrator.[111]

D. *The RUAA Insists Upon Disclosure by All Arbitrators*

A major defect in the UAA/AAA form of partisan arbitration was the absence of a disclosure duty for the party arbitrator. The accepted theory is that disclosure largely cures the problem of dependence, because parties and the neutral can adapt if they have full knowledge of the arbitrator's likely bias. That is the clear message of Justice White's comment that if the parties are informed in advance "arbitrators are not automatically disqualified by a business relationship."[112] The early arbitration statutes, such as the New York statute, the FAA, and the UAA did not have provisions requiring disclosure by arbitrators, and still do not. The courts in some jurisdictions created a duty of disclosure by judicial fiat, some acting decades ago.[113] In 1968, the U.S. Supreme Court adopted a disclosure rule pursuant to the FAA in *Commonwealth Coatings Corp.*.[114] Over the next twenty-five years, many states followed suit. For example, a Maryland court adopted a disclosure rule in 1976,[115] the Wisconsin Supreme Court did so in 1978,[116] and the New Jersey Supreme Court in 1981.[117] Disclosure is particularly helpful in institutional settings where an objection can lead to removal in the appropriate case. In some states, the courts will entertain a challenge to an arbitrator on the grounds of "evident partiality" before or during arbitration.[118] Most federal courts, however, now refuse to hear complaints about partiality until after the award is rendered.[119]

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[111] *Saxton v. Cedar Hill Meml. Park Inc.*, 19 Pa. D.&C.4th 532 (Pa. Lehigh Ct. 1993) (holding that a party cannot appoint lawyer from party's law firm as arbitrator).
[112] *Cmmw. Coatings Corp. v. Contl. Cas. Co.*, 393 U.S. 145, 150 (1968).
[113] *In re Knickerbocker Textile Corp.*, 16 N.Y.S.2d 435 (N.Y. Supreme Court, New York County 1939) (vacating award because party-appointed arbitrator did not disclose relationship with party).
[114] 393 U.S. 145.
[115] *McKinney Drilling Co. v. Mach I Ltd. Partn.*, 359 A.2d 100 (Md. Spec. App. 1976); *Hartman v. Cooper*, 474 A.2d 959 (Md. Spec. App. 1984).
[116] *Ricchio Structures, Inc. v. Parkside Village, Inc.*, 263 N.W.2d 204 (Wis. 1978).
[117] *Barcon Assoc., Inc. v. Tri-County Asphalt*, 430 A.2d 214 (N.J. 1981).
[118] *E.g. In re Astoria Medical Group*, 182 N.E. 2d 85 (N.Y. 1962); *Gaer Bros. Inc. v. Mott*, 130 A.2d 804 (Conn. 1957); *Shamron v. Fuks*, 286 A.D.2d 587 (N.Y. App. Div. 1st Dept. 2001) (reinstating an arbitrator who the AAA had dismissed).
[119] *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins.*, 304 F.3d 476 (5th Cir. 2002); *Aviall, Inc. v. Ryder Systems, Inc.*, 110 F.3d 892 (2d Cir. 1997). The rationale is that there is no statutory authorization to intervene until it is time to apply Section 10. There is also no statutory authority to require disclosure, which the U. S. Supreme Court mandated in 1968; there is no statutory authority for vacating awards for manifest disregard of the law, a grounds routinely applied in the federal courts; and there is no statutory authority for accepting jurisdiction to review awards on legal grounds if the parties consent, which is allowed in Court of Appeals for the Fifth Circuit. *Cf. Third Natl. Bank in Nashville v. Wedge Group Inc.*, 749 F. Supp. 851 (M.D. Tenn. 1990).

The Commission that created the confusion allowing the use of dependent arbitrators has now gone far in solving the problem. The RUAA mandates full disclosure by all arbitrators, and the states are moving quickly to adopt it.[120] Under the RUAA, all arbitrators have a duty to make reasonable inquiry and the obligation to disclose is a continuing one.[121] How can the state courts enforce a failure to disclose dependence by a party-appointed arbitrator when the RUAA statute permits vacating an award only for "evident partiality" in the neutral arbitrator? The commentary to the RUAA says a non-neutral's failure to disclose "would be covered under the corruption and misconduct provisions of Section 23(a)(2)."[122] Early cases provide authority for that proposition, where it was said a failure to disclose a preexisting bias was a fraud on the party.[123] An appellate court in Colorado recently reached this result where the parties had agreed in the contract that the party-appointed arbitrators would be impartial. State Farm's party arbitrator failed to disclose that State Farm had appointed her thirty-seven times as an arbitrator and had twice hired her as an expert witness. The court said she had a duty to disclose, and since Colorado is a UAA state, tested the failure to do so under the corruption and undue means standard.[124]

E. *The Contract Doctrine Run Amuck*

There have been two cases decided under New York state law that demonstrate how far the contract doctrine can run. In the first, the New York Court of Appeals approved an arbitration clause in a large construction contract that permitted the superintendent of the New York City Transit Authority to act as the final arbiter in *all* disputes under its own contract.[125] At first glance, it appears unexceptional; a mere modern version of the many 19th century estimator cases. It is not, however. In the estimator cases, the dependent employee was permitted to make only one type of judgment: to measure the quantum of goods or materials

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[120] Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, and Utah. The RUAA is before the legislature in many other states. For an up-to-date list, s*ee* Uniform Law Commissioners, *A Few Facts About The Uniform Arbitration Act*, nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (2002).

[121] California may lead future developments. California has adopted a rule of court that requires neutral arbitrators to answer a series of specific, detailed questions. They only apply to neutral arbitrators and do not apply to certain types of arbitrations, like international arbitrations. NASD has said the questions are too specific and it does not have the capability to supply the information in the many cases it administers in California. JAMS/Endispute, a private firm with many fewer arbitrators on its list, is one of the few commercial services that is able to keep computer records for each of its arbitrators so that it can comply with the California rule. Jay Folbert, *Arbitration Ethics -- Is California the Future?*, 18 Ohio St. J. on Dis. Res. 343 (2003).

[122] RUAA, Section 12, Part 4, in Commentary (2000).

[123] *Hyeronimus v. Allison*, 52 Mo. 102 (1873); *Beattie v. Hilliard*, 55 N.H. 428 (1875).

[124] *Nasca v. St. Farm Mut. Auto Ins. Co.*, 12 P.3d 346 (Colo. App. 2000); *cert. denied*, 2000 Colo. Lexis 1188 (Colorado has now adopted the RUAA); s*ee also Soren v. Kumbler*, 578 So.2d 836 (Fla. Dist. App. 1991).

[125] *Westinghouse Elec. Corp. v. N.Y.C. Transit Auth.*, 623 N.E.2d 531 (N.Y. 1993).

consumed in the contract.[126] In *Westinghouse*, the contract clause authorized the superintendent to decide all disputes.

Only four years before, the same New York City Transit Authority argued a slightly different contract clause. The clause stated, "engineer[s] shall in all cases determine the classification, amount . . . of several kinds of work and materials . . . and shall determine every question which may arise relative to the fulfillment of this contract . . . ," giving its engineer the authority to determine issues involving contract interpretation.[127] The New York Court of Appeals, with five of the same judges who would four years later decide *Westinghouse*, dismissed the City's argument. The unanimous opinion said the contract was the same as the estimator contracts in use for one hundred years which permitted the engineer to determine only factual measurements. Four years later, the court of appeals, again unanimously, applied the contract theory to allow the only arbitrator to be a dependent employee of a party. It did so on pure contract construction grounds. The words used in the Westinghouse contract were broader than those in *Crimmins*: "The parties to this contract authorize the Superintendent . . . to decide all questions of any nature whatsoever arising out of . . . this contract . . . and his decision shall be conclusive, final and binding on the parties."[128] The court gave the words their natural effect. The court said Westinghouse is a large sophisticated organization and this was a "multimillion dollar" agreement. In language reminiscent of the U.S. Supreme Court in *Kihlberg* a century ago where the New York Court of Appeals essentially said that if Westinghouse didn't like the contract provision, it did not have to bid on the contract.

The problem with doctrines is that they later get pushed beyond the facts on which they were based. The most recent case which pushes the contract theory further still was published in May 2004 by the Supreme Court of Connecticut. In *Hottle v. BDO Seidman*,[129] the court refused to void an arbitration clause that required a former partner of a national accounting firm to arbitrate his departure dispute before a panel of five arbitrators composed entirely of his former partners. The court rejected contentions that this was against public policy and that the arbitrators, each with a direct financial interest in the outcome, would be judging in their "own" case. The court applied New York law, and relied upon *Westinghouse Electric Corp.* to sustain the agreement. The court

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[126] *Sweet v. Morrison*, 116 N.Y. 19 (1887).
[127] *Crimmins Contr. Co. v. City of New York*, 542 N.E.2d 1097 (N.Y. 1989).
[128] *Westinghouse Elec. Corp.*, 623 N.E.2d at 532.
[129] 846 A.2d 862 (Conn. 2004).

dismissed the fact that a court in a sister state had invalidated the same arbitration agreement in *BDO Seidman v. Miller*.[130]

The *BDO Seidman* court analyzed the contract at the time the partner signed it. Under the facts of this case, the partner saw a clause designed to protect the partnership he was joining from outrageous awards or punitive damage awards - since one would expect the partners were not going to make themselves pay punitive damages. There were thousands of partners, any one of whom might leave the firm and sue. He did not think he would be one of them but when that day came, the court held him to his bargain. The Connecticut decision stands for the proposition that, under New York law, when a sophisticated party signs a contract designating the identity of the arbitrators, he is barred from later complaining about his own contract.

V. *Federal Law Issues Relating to Party Arbitrators*

A. *Effect of Statutory Grounds for Vacating International Awards*

The debate over "evident partiality" in party arbitrators can affect international parties. The U.S. codified the New York Convention in 1970 as Section Two to the FAA[131] and the Panama Convention in 1990 as Section Three.[132] If foreign arbitral awards qualify under either Section Two or Section Three, the federal courts will apply the respective Convention grounds for vacating an award. There is also federal court authority to examine the evident partiality issue under Section Two's "public policy" standard.[133] Federal courts will further apply the FAA Section One, Article 10 grounds, which include "evident partiality" if an award with a foreign party in international commerce was made in the U.S.[134]

B. *The Federal Arbitration Act's "Evident Partiality" Standard Has Not Been Amended*

While state arbitration law has changed in most states, the FAA's phrase "evident partiality in the arbitrators . . . or either of them," has not been amended. There are very few federal court decisions which discuss "evident partiality" before 1960. The few decisions that do illustrate that the federal courts recognized that the FAA's grounds for vacating awards were based upon the New York Arbitration Act and the

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[130] 949 S.W.2d 858 (Tex. App. 1997).
[131] 9 U.S.C. § 201 *et seq.* (2004).
[132] *Id.* at § 301 *et seq.*
[133] *Fertilizer Corp. of India v. IDI Mgt. Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981).
[134] *China Minmetals Materials Import and Export Co. Ltd. v. CHI MEI Corp.*, 334 F.3d 274 (3rd Cir. 2003); *Alghanim & Sons, Will. v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997); *Banco De Seguros Del Estado v. Mut. Marine Offices Inc.*, 257 F. Supp. 2d 681 (S.D.N.Y. 2003); *Am. Life Ins. Co. v. Parra*, 269 F. Supp. 2d 519 (D. Del. 2003).

New York court decisions interpreting the language were "persuasive." In 1932, the Court of Appeals for the Second Circuit said that:

> The federal act in respect to the sections now under consideration [Secs. 9 and 12] is almost verbatim like the corresponding provisions of the New York statute, so that the state practice may be regarded as highly persuasive, even if not controlling.[135]

The New York courts at that time, of course, held that the "evident partiality" standard meant that all arbitrators serving on arbitration boards had to be impartial.

An early case from the Court of Appeals for the Fourth Circuit illustrates that the FAA required three independent, impartial arbitrators. In an insurance dispute, where each party appointed an arbitrator and the court appointed an umpire, the district court had vacated the award because the insurance company's arbitrator had been employed by insurance companies over 170 times. He testified in the district court that he had attempted to secure expert testimony unfavorable to the insured by offering "payment of a substantial fee." The court of appeals reversed the district court's vacateur, but only because the insured's arbitrator also acted as an advocate. The court of appeals concluded:

> The plaintiff was of course entitled to an impartial and disinterested consideration . . . and to a tribunal consisting not merely of an impartial umpire, but also of impartial appraisers on both sides; but, having itself violated this condition, it has now no right to complain.[136]

Several federal district courts in New York were asked to interpret the term "evident partiality" before 1960. They treated party arbitrators in the same manner as the neutral arbitrator.[137] For example, in *The Petrolite* case, one party claimed the other's arbitrator was biased because he was the operator of the vessel involved in the arbitration. Judge Rifkind noted that the arbitration agreement called for an arbitration board, not umpirage. Citing *In Re American Eagle Fire Ins.*, the judge went on to say that a party appointing arbitrators to act as advocates "is highly improper when the award is to be made by a board

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[135] *The Hartbridge*; *In re North of Eng. S.S. Co.*, 57 F.2d 672, 673 (2d Cir. 1932).
[136] *Fireman's Fund Ins. Co., v. Flint Hosiery Mills, Inc.*, 74 F.2d 533, 535 (4th Cir. 1935).
[137] *Cities Serv. Oil Co. v. Am. Mineral Spirits*, 22 F. Supp. 373 (S.D.N.Y 1937) (holding that a party arbitrator's aggressive questioning was within bounds, and not evidence of evident partiality); *Petrol Corp. v. Groupement D'Achat Des Carburants*, 84 F. Supp 446 (S.D.N.Y. 1949); *In re Ilios Ship. & Trading Corp. v. Am. Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698 (S.D.N.Y. 1957); *In re Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 184 F. Supp. 116 (S.D.N.Y. 1959).

of arbitrators which is to act as a unit in hearing and deciding the case." However, Judge Rifkind noted the following: that both parties nominated arbitrators who were dependent, there was no evidentiary hearing, the arbitrators both conferred with "their" parties, and they both presented the case to the neutral arbitrator. Judge Rifkind held that the parties mutually agreed to convert their arbitration board into umpirage and that the losing party could not later complain of the procedure.[138]

A few months after *Astoria Medical Group* was decided, a federal district court in New York applied the new "rule" from *In re Astoria Medical Group* to an arbitration arising out of a charter party. The district court failed to discuss the fact that, while the New York statute had been amended, there had been no change in the language or meaning of the Federal Arbitration Act. The federal court simply said the choice before it was to follow the "old rule," that each member of an arbitral panel must be "completely neutral and impartial," or to follow the "[m]ore recent pronouncements on the conduct of arbitrators, [which] are somewhat more realistic."[139] So quickly and easily may the common law evolve, even when "applying" a thirty-five year-old legislative statute to a private contract.

That district court's facile amendment of the FAA was not the last word.[140] Many cases over the past twenty-five years demonstrate that the federal courts apply the "evident partiality" standard to party-appointed arbitrators.[141] Indeed, in 1984, the Court of Appeals for the Second Circuit wrote that when parties appoint two arbitrators who appoint a third, they must act as a board of "arbitrators . . . [and they] act in a quasi-judicial capacity."[142] Federal courts continue to examine challenges to party-appointed arbitrators under the "evident partiality" standard.[143] The Court of Appeals for the Second Circuit recently ruled on a challenge to a party-appointed arbitrator on evident partiality in an international arbitration award made in New York. The claim of evident

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[138] *Petrol Corp.*, 84 F. Supp. at 448.

[139] *In re Stef Ship. Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962); *see In re Dover Steamship Co.*, 143 F. Supp. 738, 741 (S.D.N.Y. 1956) (*in dicta*, referring to AAA Labor Arbitration Code of Ethics to support statement that party-appointed arbitrators need not be "completely disinterested").

[140] The FAA does not create jurisdiction for American parties to bring an arbitration dispute into federal court. American parties must meet additional tests to approach a federal court under the FAA. They must be citizens of different states, the value of the dispute must (now) exceed $75,000, and the contract must involve interstate commerce or a maritime transaction. *PCS 2000 LP v. Romulus Telecomm. Inc.*, 148 F.3d 32 (1st Cir. 1998).

[141] *Employers Ins. of Wausau v. Natl. Union Fire Ins. Co. of Pitt.*, 933 F.2d 1481 (9th Cir. 1991); *Evans Ins. Inc. v. Lexington Ins. Co.*, 2001 U.S. Dist. LEXIS 10419 (E.D. La. 2001); *Arcume v. City of Flint*, 132 F. Supp. 2d 549 (E.D. Mich. 2001); *Stand. Tanker (Bahamas) Co. Ltd. v. AKTI Comp. Naviera S.A.*, 438 F. Supp. 153 (E.D.N.C. 1977).

[142] *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173 (2d Cir. 1984).

[143] *U.S. Care, Inc. v. Pioneer Life Ins. Co. of Ill.*, 244 F. Supp. 2d 1057 (C.D. Cal. 2002).

partiality was based on alleged inadequate disclosure since the AAA did not forward the arbitrator's disclosure form to the other party. The court denied the challenge, holding that the burden is on the complaining party to prove the nondisclosure was evidence of bias.[144]

C. *The Freedom to Contract Doctrine is Acknowledged in Federal Courts*

The change in law in the federal system affects the height of the bar for dependence, not its existence. Whereas in 2000, Lord Woolf would say in *AT&T Corp. v. Saudi Cable Co.*[145] that arbitrators should be held to the same if not a higher standard than judges with regard to the test for bias, this standard no longer holds in America in the federal courts. It is only on this ground, however, that federal law has changed.

One impetus for this change was Mr. Justice White's concurring opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, where he said:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs . . . , of the marketplace, that they are effective in their adjudicatory function . . . arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.[146]

Judge Posner's decision in *Merit Insurance* expounded upon this idea. In a reinsurance arbitration, the neutral arbitrator was selected from an AAA list, but according to the losing party, the arbitrator's failure to disclose a long-ago business relationship with one of the parties constituted "evident partiality." Judge Posner said there were:

> fundamental differences between adjudication by arbitrators and adjudication by judges and jurors. No one is forced to arbitrate a commercial dispute unless he has consented by contract to arbitrate. . . . Courts are coercive, not voluntary, agencies and the American people's traditional fear of government oppression has resulted in a judicial system in which impartiality is prized above expertise. Thus people who arbitrate do so because they prefer a tribunal knowledgeable about the

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[144] *Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24 (2d Cir. 2004).
[145] 2 Lloyd's Rep. 127 (2000).
[146] 393 U.S. at 150 (White, J., concurring).

> subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter. . . . There is a tradeoff between impartiality and expertise. . . . No one would dream of having a judicial panel composed of one part-time judge and two representatives of the parties, but that is the standard arbitration panel. . . .[147]

Judge Posner would have accepted what Sidney Kentridge Q.C. argued in *AT&T Corp.,* that an arbitrator is subject to a lower threshold than a judge with respect to bias, exactly the position rejected by Lord Woolf. Judge Posner said:

> There is a trade-off between impartiality and expertise. The expert adjudicator is more likely than a judge or juror not only to be precommitted to a particular substantive position but to know or have heard of the parties (or if the parties are organizations, their key people) . . . . The parties to an arbitration choose their method of dispute resolution and then can demand no more impartiality than inheres in the form they have chosen.[148]

State courts may also enforce awards under the FAA. In applying the FAA, the Nebraska Supreme Court said it followed Justice White's concurrence in *Commonwealth Coatings* that arbitrators are not held to the same standards as judges.[149] The contract theory was reiterated two years ago in *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*.[150] That court relied on the Supreme Court's statement in *Volt Information Sciences,* where it said courts must "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[151] The court of appeals in *Sphere Drake* asked the

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[147] *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983).
[148] *Id.* at 679.
[149] *Dowd v. First Omaha Sec. Corp.*, 495 N.W.2d 36 (Neb. 1993).
[150] 307 F.3d 617 (7th Cir. 2002). The decision in *Sphere* is correctly decided, but its dicta is wrong in two instances. First, in making the sweeping introductory assertion that until this case, no district court has set aside an award due to an evidently partial arbitrator because they are "supposed to be advocates," the court of appeals supported the dicta with citation to two cases, both interpreting separate statutes that expressly allow partiality in a party-appointed arbitrator. The first case cited is *Astoria Medical Group*, which dealt with the new state statutory scheme that exempted party arbitrators and the second was a Seventh Circuit case interpreting the status of arbitrators under the Railway Labor Act, where, as discussed *supra*, the party arbitrators are by statute partisan representatives of union and management. The second error was to say the other party arbitrator had no power to remove the challenged arbitrator, ergo no foul. But under the Arias rules, there is no appointing authority to remove any arbitrator including the neutral. All a party can do if it receives sufficient disclosure or otherwise learns of facts that meet the evidently partial standard about any of the three arbitrators is to object and move to vacate an award under Section 10(b).
[151] *Volt Info. Sciences v. Leland Stand. U.*, 469 U.S. 468, 478 (1989).

question whether the arbitration clause in the insurance contract between the parties allowed the parties to select interested arbitrators. The court suggested the Arias rules were mixed because they required the arbitrators to have industry experience and allowed *ex parte* communications with "their principals until the case is taken under advisement, but they are supposed thereafter to be impartial adjudicators."[152] The court of appeals' holding was that the party-appointed arbitrator's undisclosed business dealings, as a lawyer for one of the parties four years prior, would not disqualify him were he sitting as a federal judge and, therefore, could not disqualify him under the lower threshold for an arbitrator. The court of appeals made clear that "evident partiality for a party-appointed arbitrator must be limited to conduct in transgression of contractual limitations."[153]

Just last year, in another example of the change in the status of the arbitrator, the federal court for the Southern District of New York was asked to consider whether a lawyer had violated the New York State Canons of Ethics after serving as an arbitrator. The court said:

> Arbitrators are not judges . . . . If a partisan arbitrator is not expected to be neutral, he cannot then be acting in a "judicial capacity," at least insofar as the obligation of judges to remain impartial and disinterested is concerned. The tendency to analogize arbitration to trial and arbitrator to judge should thus be avoided.[154]

The final word must be about Judge Posner. He did not actually say that the federal courts would enforce an award if the parties selected "three monkeys" to make it. He only said using typically colorful words that contract rules govern the selection of arbitrators:

> Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes . . . .[155]

VI. *Is the "Contract" Standard Bad Public Policy?*

A. *The Reversal of the Default Standard*

Is the reversal of the legal standard from judging arbitrators by the "quasi-judicial" standard to judging them as the parties contract for them illogical? With respect to the party arbitrator, it is a major public policy departure, but on terms parties can take care to contract for their

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[152] *Sphere Drake Ins. Ltd.*, 307 F.3d at 620.
[153] *Id*. at 622.
[154] *Feinberg v. Katz*, 2003 U.S. Dist. LEXIS 1677 at *19 (S.D.N.Y. Feb. 3, 2003).
[155] *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994).

business needs. For two centuries, court decisions embraced the principle that parties were free to agree to alter arbitral procedures or to waive material deviations from the fundamental principles which govern arbitration proceedings. Parties are not free to alter the fundamental precepts of the operation of the courts.

But in respect to *Westinghouse* and *BDO Seidman*, the courts went further than any of the prior common law decisions and thus overlooked future applications. These "law courts" were happily applying state contract law without regard to the later results. One result, however, signifies that future courts will be asked to enforce arbitral awards rendered by arbitrators who are biased by definition. The equity courts (would that we had them) will unhappily have to enforce them. This runs afoul of the reason courts for centuries have always retained the power to vacate awards. What will the courts say when asked to enforce an award made by the partners denying a female partner's claim she was wrongfully discharged because of violations of federal employment laws by the firm's managing partner? The arguments against arbitration of federal statutory claims dating back to *Wilko v. Swann* will be revived and, in the absence of any neutral arbitrator, rightly so. What will the courts say when the Superintendent sues a company like Westinghouse and awards the City of New York punitive damages?

Other state courts have done better. The Alabama Supreme Court refused to allow a manufacturer the unilateral right to designate the sole arbitrator.[156] The California Supreme Court refused to enforce an award where one party's union selected the arbitrator, declaring the process did "not achieve the 'minimum levels of integrity' which we must demand of a contractually structured substitute for judicial proceedings."[157]

B. *Ex Parte Communications During A Tripartite Proceeding are Not Approved by the Court - Unless the Parties Agree that They Desire Such A Procedure*

There is a perception that the change in the legal standard from impartiality in all members of arbitration boards to the contract standard permitting dependent party-appointed arbitrators is responsible for the worst of arbitration practices, *ex parte* communications during proceedings. But it is not. When the UAA and *In re Astoria Medical*

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[156] *Harold Allen Mobile Home Factory Outlet, Inc. v. Butler*, 825 So.2d 779 (Ala. 2002)*; see also Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 2001) (holding that a restaurant chain's employment agreement arbitration provision was transparently biased); *Taylor v. Nelson*, 615 F.Supp. 533 (W.D. Va. 1985) (vacating an award where artist was required by adhesion contract to arbitrate before union designated arbitrator).

[157] *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 178 (Cal. 1981).

Group removed "evident partiality" as a grounds for challenging party-appointed arbitrators, it removed the bar to dependent arbitrators, to "representatives" of the parties serving on a tripartite board. It did not remove the bar for misconduct or corruption.

If there is a "culprit" in allowing *ex parte* contact in proceedings before arbitration boards, it is the AAA. To accommodate labor practices and the umpirage practices of some trade associations, the AAA adopted rules and, with the ABA,"ethical codes," that required the neutral to make full disclosure and to avoid *ex parte* contact. The party-appointed arbitrator was allowed to make "less" disclosures because the AAA would not remove him if challenged, even if the party appointee disclosed he was the union president or the captain of the ship involved in the dispute. Since union presidents speak to union members and ship captains speak to ship owners, the AAA rules tolerated *ex parte* contacts between party arbitrators and the party. The changes made in the UAA, however, did not require parties to use dependent arbitrators or to agree to *ex parte* contacts; but, when they do both agree, the courts do not intervene to disturb party choice. They never have. The reversal of the AAA default position in the new Rules effective March 1, 2004 will make parties rethink their arbitral procedures.

When they are not mutually agreed upon, *ex parte* contacts on material matters that cause prejudice constitute "misconduct."[158] New York courts have enforced this rule over the past fifty years. In 1955, a New York state court vacated an arbitral award because the party-appointed arbitrator had *ex parte* contacts during the proceeding. The arbitrator met with the party and his counsel to discuss "material matters at issue in the arbitration proceeding."[159] The court vacated the award, defining the conduct as "misbehavior prejudicing the rights" of the other party.[160] In 1986, the New York Court of Appeals vacated an arbitral award where an arbitrator met with a party and discussed a potential settlement of the case.[161] Again the court stated that this constituted "misconduct." Likewise in 2002, a New York court vacated an arbitral award on the ground of misconduct when there were *ex parte* communications.[162]

Federal courts have also treated *ex parte* communications by arbitrators as misconduct.[163] A claim of misconduct due to *ex parte*

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[158] *Manitowoc v. Manitowoc Police Dept.*, 236 N.W.2d 231 (Wis. 1975).
[159] *Spitzer Elec. Co. v. Fred Girardi Constr. Corp.*, 147 N.Y.S.2d 40, 42 (N.Y. Sup. Ct., West. Ct., 1955).
[160] *Id*. at 43.
[161] *Goldfinger v. Lisker*, 500 N.E.2d 857 (N.Y. 1986).
[162] *Cabbard v. TIG Ins. Co.*, 300 A.D.2d 584 (N.Y. App. Div. 2d Dept. 2002).
[163] There is an oft-cited federal case where an insurance company invited its party-appointed arbitrator to its headquarters prior to the hearing and discussed documentary evidence with him. The

communication is most likely to be successful when it involves a discussion about evidence that is plainly used by the arbitrators in making the award. Since the unheard party has no chance to rebut the evidence, courts will vacate it.[164]

Two federal appellate court decisions are often cited as examples of *ex parte* contacts between a party-appointed arbitrator and a party during the arbitration which appear to bless unfair, corrupt proceedings,[165] or which appear to signal that the FAA allows party-appointed arbitrators to be biased as a matter of law.[166] Neither perception is correct. The first case is *Sunkist Soft Drinks Inc. (Del Monte) v. Sunkist Growers Inc.*[167] Each of these large corporate parties was represented by lawyers from prestigious American law firms. The dispute was over a beverage license agreement and was arbitrated under the AAA domestic commercial rules in Georgia. Del Monte appointed Mr. Jesse Meyers as its arbitrator. Mr. Meyers was the publisher of a newsletter, Beverage Digest, which covered the beverage industry. He had previously published a short news article bearing on the dispute that was favorable to Del Monte. Counsel for Del Monte first approached Mr. Meyers to see if he would act as an expert witness. The discussions evolved into his being selected as an arbitrator.

Mr. Meyers submitted his disclosure form to the AAA in which he identified his publishing business, said he had already had conversations with the party that appointed him, and indicated that he intended to act as a partisan arbitrator. This was permitted by the AAA domestic rules then in force. Mr. Meyers attended meetings with Del Monte employees who were to be witnesses, assisted counsel in selecting Del Monte's consultants, gave advice to "his" party's expert witness, and suggested lines of testimony to counsel.

After losing the case, Sunkist asked the federal court to vacate the award on the grounds of "evident partiality." The court recognized that the legal test in the FAA, "evident partiality . . . in the arbitrators or either of them,"[168] applies to all arbitrators, but noted that the parties had

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district court noted the fact that the AAA rules allow partiality in a party-appointed arbitrator, but said the failure to disclose the *ex parte* contact to the other party shows partiality and constitutes "arbitrator misconduct." The entire discussion is in *dicta. Metro. Prop. & Cas. Ins. Co. v. J. C. Penney Cas. Ins. Co.*, 780 F. Supp. 885 (D. Conn. 1991). *See also* S*pector v. Torenberg*, 852 F. Supp. 201 (S.D.N.Y. 1994) (examining *ex parte* contact under rubric of misconduct).

[164] *Totem Marine Tug & Barge Inc. v. N. Am. Towing, Inc.*, 607 F.2d 649 (5th Cir. 1979); *United Food & Com. Workers Union v. Sipco, Inc.*, 1992 U.S. Dist. LEXIS 21332 (S.D. Iowa Dec. 30, 1992).

[165] Kennedy, 8 Geo. J. Leg. Ethics 749 (criticizing the role of the party arbitrator as inconsistent with societal standards). Ms. Kennedy was one of the counsels in *Sunkist*.

[166] *U.S. Care, Inc.*, 244 F. Supp. 2d at 1064.

[167] 10 F.3d 753 (11th Cir. 1993).

[168] *Id.* at 758.

agreed to AAA arbitration. Under AAA rules and the 1977 ABA/AAA Code of Ethics, the duty of impartiality applies only to the neutral arbitrator. That version of the AAA Code of Ethics said party-appointed arbitrators "may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness."[169] The federal court of appeals saw nothing untoward in Mr. Meyers' conduct and said: "We fail to see how this [Mr. Meyer's conduct] prejudiced Sunkist or affected its right to a fair hearing."[170]

It first appears that this result is a departure from earlier judicial standards. Even if party-appointed arbitrators can be "sympathetic" and "predisposed," allowing the arbitrator to become a member of the advocacy team after appointment, to breach the confidence of the deliberations of the tribunal, and then to call that behavior "good faith, integrity and fairness" mocks the historical meaning of those words from the equity courts. In addition, the court did not discuss the fact that Georgia, the arbitration's *situs*, retains a statutory requirement for all arbitrators to take an oath. The Georgia oath requires each arbitrator "to determine impartially the matters submitted to them according to law and the justice and equity of the case without favor or affection to either party."[171]

The court got the decision right, however, for two ancient common law reasons. Sunkist's challenge on the grounds of "evident partiality" was misplaced. Perhaps Sunkist selected "evident partiality" as the grounds of attack in the hope it could prevail under that standard's presumption of bias. Mr. Meyer, however, was plainly independent. The court implicitly recognized that it was dealing with a charge of misconduct. The court concluded that Sunkist did not prove the *ex parte* communications caused prejudice, the standard in equity for vacating awards for misconduct. Sunkist may not have tried to prove that Mr. Meyer's conduct had actually caused prejudice for two reasons. These parties had engaged thirteen lawyers from eminent firms to represent them. There was no want of excellent legal advice to both sides. More importantly, the neutral arbitrator had been the Honorable Sidney Smith Jr. Judge Smith had served as a federal district court judge in Atlanta for about twenty years. He had been the Chief Judge for almost a decade. The court of appeals considering the claim also sits in Atlanta. Those judges would have known Sidney Smith. Using a form of quasi-umpirage with Sidney Smith as an umpire may be wasteful spending on a third wheel, but there was no showing it prejudiced Sunkist.

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[169] *Id.* at 759.
[170] *Id.* at 760.
[171] Ga. Code Ann. § 9-9-69 (2004).

The challenge to the award was also correctly decided for a second reason. Mr. Meyer and Del Monte disclosed in writing at the outset of the arbitration their intention to conduct *ex parte* communications during the arbitration:

> I intend to continue to communicate with them after my formal appointment. I further understand that under the code of ethics applicable to the non-neutral arbitrators in this proceeding that, having announced my intention to continue communicating with the parties appointing me I am not required to make any further disclosure regarding my further communications.[172]

Sunkist never objected to the notice of intent to engage in this common AAA practice. *Sunkist* plainly waived its right to object to the award on these facts.

In 2001, a second federal appellate decision, *Delta Mines Holding Company v. AFC Coal Properties Inc*.,[173] again approves *ex parte* conduct during the proceeding by party-appointed arbitrators on a three arbitrator panel. The court decision recounts how a party-appointed arbitrator helped prepare party witnesses, participated in a mock arbitration a few days before the hearings, and communicated the neutral arbitrator's draft award to "his" party to obtain comments before again consulting with the neutral arbitrator. The arbitrator acknowledged he was trying "to sway the [neutral] arbitrators to rule in Delta Mine's favor."[174] The court of appeals believed "there was nothing insidious about this process."[175]

Delta Mines is a variant to *Sunkist* and the case should not be cited for the same principle. The conduct in *Delta Mines* should be deemed party-approved umpirage. In *Delta Mines,* there were two simultaneous arbitrations over two different mining leases. Both parties appointed the same arbitrators for both proceedings, and they in turn selected different umpires. The two umpires were fully informed that the party-appointed "arbitrators" were partisan advocates. Indeed the umpires asked the party-appointed arbitrators, and not the parties' lawyers, to conduct examination of witnesses. One arbitrator informed counsel: "[T]he Neutrals expect the Party Arbitrator to be adequately briefed to know where the testimony is going and to be able to ask questions for clarification."[176] The umpires gave draft decisions to the

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[172] *Sunkist Soft Drinks, Inc.*, 10 F.3d at 756.
[173] 280 F.3d 815 (8th Cir. 2001).
[174] *Id.* at 819.
[175] *Id.* at 822.
[176] *Id.* at 819.

"arbitrators" and not only were aware of, but "encouraged" communication between the arbitrators and counsel about the draft awards.[177]

In *Delta Mines*, by agreeing to umpirage, both parties obviously waived their right to have party-appointed arbitrators who would not communicate with "their" parties. There is nothing intrinsically evil or "unethical" about the use of the umpirage system. The arbitrators are biased and engage in *ex parte* communications because the parties approve it. The courts have approved the use of this system for centuries.

These two *ex parte* cases do not show that the American federal courts have accepted biased party-appointed arbitrators as a matter of law. Rather these sophisticated parties got the arbitral procedure of their choice. These cases owe nothing to the changes in the law initiated by the UAA or *In re Astoria Medical Group.* The parallels to *Sunkist* and *Delta Mines* are the scores of cases over the past 200 years where courts enforce awards when parties have turned arbitration boards into a form of umpirage by consent or mutual conduct.

C. *U.S. Arbitration Users Have Not Revolted*

How have arbitration users reacted to the change in arbitration after partisan arbitrators were permitted? In the 1920s, the AAA was concerned that arbitration appear fair so that the public and the Bar would embrace it and agree to use it. Acceptance was, however, slow to come, because lawyers saw simplified arbitration procedures as a threat to their income. More importantly, lawyers said they resisted advising clients to arbitrate because of their fear that arbitrators, often businessmen, would botch the law. Their clients would then have no recourse to correct the mistake via an appeal. Several of the commissioners considering the UAA in 1955 attempted to derail the project for this reason.

Thirty years after New York had adopted its "modern" arbitration statute, only fourteen states had adopted similar arbitration statutes allowing parties to agree to arbitrate future disputes. In the 1955 debates in the committee considering the draft UAA, several of the commissioners, reflecting attitudes common in the Bar, expressed extreme hostility toward arbitration. One of the commissioners, a leading lawyer from Pennsylvania said: "I want to say in advance I am an avowed enemy of arbitration. . . . I had a rule made in our office a number of years ago that if any man approves a contract with an

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[177] *Id.* at 820.

arbitration clause, except in labor matters, he might as well resign because he will be fired if he doesn't."[178]

What has happened in the fifty years after these fundamental changes to the law relating to party arbitrators? The short answer is that the public's acceptance of arbitration is no longer a concern of the American state legislatures or the courts. The Supreme Court of the United States has stated that arbitration is a favored method of dispute resolution[179] and that the FAA preempts state law that restricts arbitration.[180] Arbitration clauses are now standard in contracts relating to the securities industry, in standard employment agreements of large and small corporations, and in customer contracts with credit card companies, banks, and telephone companies. Simply put, arbitration clauses are pervasive and public acceptance of the process is no longer in doubt.

Not only are arbitration clauses pervasive, but growth in the use of arbitration has been exponential. Between 1926 and 1930, the AAA administered 1091 arbitrations.[181] In 1956, the number was 2,817.[182] The effect of the changes in the rules on party-appointed arbitrators has been considerable, but they had no effect on the growth of arbitration. The AAA now administers approximately 110,000 arbitration cases per year.[183] NASD, the securities industry appointing authority, administers almost 8,000 per year.[184] Of the 4,000 labor/management collective bargaining agreements on file with the federal government in 1995, ninety-nine percent contained arbitration clauses.[185]

Thus, it is fair to say that the predictions in the 1928 *Atchison, T. & SF. RR. Co.* and in the 1962 *Astoria* dissent that stripping party-appointed arbitrators of their "quasi-judicial" role is "calculated to bring the system of enforced arbitrations in disrepute," has not been reflected by a decline in the use of arbitration.[186] The arbitration system has grown and is an accepted procedural method for the resolution of

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[178] Maynard. E. Pirsig, *Proceedings of the Committee as a Whole, Uniform Arbitration Ac*t 46H (NCCUSL 1955).
[179] *Moses H. Cone Meml. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1 (1983).
[180] *Southland Corp. v. Keating*, 465 U.S. 1 (1994); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Doctor's Assc., Inc. v. Casarotto*, 517 U.S. 681 (1996).
[181] Am. Arb. Assn., *supra* n. 70, at 19.
[182] www.lectlaw.com/files/adro7.
[183] American Arbitration Association, *Annual Report 2*, www.adr.org/index2.1.jsp?JSPssid=15705 (accessed September 27, 2004). The Annual Report states 174,895 matters were filed. The AAA, in a July 2004 confirmation, stated 110,354 of these matters were arbitrations and the remainder were mediations.
[184] Natl. Assn. of Sec. Dealers, *Annual Report* (2003).
[185] Bur. Nat. Aff. Inc., *Basic Patterns in Union Contracts* 38 (1996).
[186] 11 N.Y.2d at 139.

disputes, with many procedural variants available to parties to suit their variable needs.

Rather, as noted *supra*, the larger problem facing American arbitration, and one of the principle concerns of the commissioners who drafted the RUAA, is the complaints from consumer advocates who argued that arbitration clauses are too often inserted into contracts where consumers have no bargaining power. This results in unconscionable adhesion contracts.[187]

D. *The Decline in the Use of Tripartite Panels*

Labor arbitration practices appear to have driven the change limiting impartiality to neutrals in the UAA in 1955, but unions have markedly decreased their use of tripartite panels. In the late 1940s, fifty-five percent of the 1,500 collective bargaining agreements contained arbitration clauses calling for tripartite panels.[188] In 1995, there were 4,000 collective-bargaining agreements on file with the federal government, but only ten percent called for three arbitrators.[189] Tripartite panels in the labor field have been replaced by a cadre of professional labor arbitrators who retain the trust of both sides to decide fairly. Likewise, there is less use of three arbitrator panels in commercial arbitration. In the first few years of its existence, the AAA reported seventy-five percent of the arbitrations it administered were assigned three arbitrators.[190] By 1950, it was ten percent.[191] It remains at ten percent today.[192] In sum, the use of party-appointed arbitrators in domestic U.S. arbitrations has diminished drastically. Parties are not required to use the tripartite procedure and, furthermore, choose it less and less.

VII. *The Mystery of Selecting Arbitrators*

A. *Why Do Some Parties Insist on the Tripartite Panel?*

The statistics show that the use of the tripartite panel is now the least used form of arbitral dispute resolution, yet the case reports show that there are several categories where parties continue to insist on them. It is obvious why parties want three arbitrators instead of one in very complex cases involving large sums because having three arbitrators is worth the cost. Parties fear that one person will get the result wrong.

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[187] Timothy J. Heinz, *The Revised Uniform Arbitration Act: Modernizing, Revising and Clarifying Arbitration Law*, 2001 J. Dis. Res. 1, 7 (2001).
[188] Lesser, Jr., *supra* n. 84, at 277.
[189] Bur. Nat. Aff. Inc., *supra* n. 185, at 38.
[190] Am. Arb. Assn., *supra* n. 70, at 10.
[191] Widener University, *Online Journal of Arbitration, Mediation, Negotiation and Complementary Dispute Resolution Techniques*, www.adrlawinfo.com (accessed Sept.17, 2004).
[192] Response from American Arbitration Association (AAA, July 2004).

Even in the most respected trial courts in the U.S. - the federal district courts - civil law decisions are reversed by the federal appeals courts twelve percent of the time, a statistic that has remained steady for many years.[193] In several circuits, the reversal percentage is fifteen percent.[194] This means that even when the adjudicators are professional judges, selected for federal office from the top ranks of the U.S. legal profession, vetted by the U.S. Senate before confirmation, working on the same type of federal cases year in and year out, these professional full-time judges still get it wrong twelve percent of the time when acting alone.[195] Second, if a sole arbitrator gets it wrong, whether on the facts or the law, there is no appeal process to correct the error. These reasons explain wanting three arbitrators, but there should still be no need to appoint two of the three.

Two types of arbitrations are frequently reported - those in which insurance companies are involved and those in which tripartite panels are used - which teach different, but useful, lessons. The first type is arbitration of disputes between insurance companies and reinsurers. What these arbitrations have in common are very complex contract interpretation issues and large sums of money at risk. This industry has adopted the use of tripartite panels where all arbitrators must have experience in the industry. In the reported cases, the downside is the typical trade association problem of complaints of dependence. Dependence challenges are frequent because arbitrators, who must come from the industry, have worked for various firms throughout the industry, and the insurers and reinsurers have multiple subsidiaries and treaty partners. None of the "evident partiality" challenges have been successful for the reasons stated in *Merit Insurance* twenty years ago.[196] What stands out about this type of industry arbitration is the lengths to which many parties go to retain control over the selection of all arbitrators. In some contracts when the party arbitrators cannot agree on a third, rather than using Arias' appointments, they have one or both arbitrators make a list of three, each deletes two, and they draw one by lot.[197] The lesson is that this industry has created a modern trade association form of arbitration to avoid amateur judges. These companies have opted for industry experts who know the customs and

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[193] U. S. Court of Appeals, Table B-5, in Report of U.S. Courts of Appeals - Appeals Terminated on Merits 28.

[194] *Id.*

[195] More precisely, reversal does not in every case mean the district court judge got it wrong; it rather means at least two superior ranked judges were of the opinion that he did.

[196] *See generally Sphere Drake Ins. Ltd.*, 307 F.3d 617.

[197] *Dow Corning Corp. v. Safety Natl. Cas. Corp.*, 335 F.3d 742, 748 (8th Cir. 2003) (each arbitrator proposes three, each deletes two, and draw one of the remaining two); *Natl. Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 464 (8th Cir. 2003) (each arbitrator proposes two names, each deletes one, and draw one of the remaining two); *P. Reinsurance Mgt. Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324, 1327 (9th Cir. 1987).

usages of the trade but who may have some form of dependence on the appointing party.

The other form of often reported insurance company arbitration is a polar opposite. It involves small claims where expertise is not especially needed. Most states require automobile insurance companies to offer all automobile policyholders a type of extra insurance called "underinsured/uninsured" motorist coverage. If the person who crashes into the policyholder's car, causing injury, has no auto insurance or only a low amount of coverage, the injured person may be allowed under his own policy to collect for uncovered damages. These claims are not only generally simple to understand, but are, for the most part, for small amounts of money because policy limits are usually in the $15,000 to $100,000 range. Yet, for these small, very simple cases, there are scores of reported cases where auto insurance companies routinely use tripartite panels in which each party appoints an arbitrator and an institution, such as the AAA, appoints the neutral if the parties cannot agree on a third arbitrator. The arbitration agreements are found in adhesion contracts and, thus, are dictated by the insurance company.

What is noteworthy about this form of arbitration is that the insurance companies routinely appoint lawyers to the panels. These lawyers are from firms they generally retain or are used expressly for arbitration.[198] One case shows how much extra cost this adds to the process of adjusting claims.[199] A standard State Farm Mutual Insurance auto policy called for the parties to appoint their own "impartial" arbitrator. Several policyholders sued when their lawyers discovered that State Farm had appointed two law partners to act as the State Farm arbitrator in seventy-two arbitrations (plus ten engagements as expert witnesses). The court said State Farm paid these two lawyers $70,000 in the proceeding year alone. That $70,000 is the extra annual cost for one insurance company in one city to appoint an advocate to tripartite panels to arbitrate small claims. Insurance companies are willing to add that extra cost to avoid a single neutral arbitrator![200]

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[198] The ethical issue of a lawyer serving as an arbitrator was addressed by an opinion of the New Hampshire Bar Association, which said a lawyer could serve as an arbitrator for a firm client, but not if the lawyer was engaged directly for the company on other matters. N.H. B. Assn. Op. 93/15 (1992). In the cases where the lawyer is challenged on the grounds of evident partiality, the ethical issue is not discussed. The courts treat it strictly as a dependence question. *See generally Tipton v. Systron Donner Corp*., 160 Cal. Rptr. 303 (Cal. App. 1st Dist. 1979) (party-appointed own attorney); *Bole v. Nationwide Ins. Co.*, 352 A.2d 472 (Pa. Super. 1975) (implementing three standards on dependence issue where insurance company appointed its lawyer).

[199] Nasca , 12 P.3d 346.

[200] To avoid the insurance company lawyers, states are turning to systems of approved arbitrators for uninsured motorist claims. New York's is administered by the AAA after a state panel approves lists of arbitrators. 11 N.Y. Comp. Codes, R. & Regs. 60-2.4 (2004).

It is easy to appreciate that insurance companies will choose arbitration rather than allow an American jury to make a judgment. Juries are notorious for making outrageous decisions from time to time. But, the choice of three arbitrators in the small auto cases and the formation of Arias, and in the adoption of a style of trade association arbitration in their more complex arbitrations, raises a point common to both situations - these sophisticated users are expressing a fear about the use of amateur arbitrators. They do not merely fear that one arbitrator will get it wrong. They reject one neutral arbitrator or an arbitration board with three impartial arbitrators appointed by an independent authority.

A review of cases over the last ten years shows that the industry fears are well founded. First, there are the procedural wrecks. A tortious interference claim took over fifty days of hearings spaced over two and one-half years before the three neutral arbitrators issued an award.[201] Another panel held 154 hearings over the span of fourteen months and then produced an award that the court of appeals said was "so incomprehensible that three years later the judges and parties are still trying to figure it out."[202] And then there is the case where three arbitrators held 120 separate hearings spread over five years![203]

The wrecks are not only procedural. There are also decisions by arbitrators that fit nicely in the "big leagues" of the disastrous judicial results register. It is common to find jury awards for large damage amounts for intangible sufferings that bewilder those who did not attend the trial and even some who did. It is clear that there are outlandish arbitral awards to match outlandish jury awards. A sole arbitrator in Alabama awarded the owner of a trailer home $490,000 for her claim against the manufacturer for breach of warranty. The reviewing court said the best case for actual damage to the home was $5,500. Thus the extra $485,000 was for her claim that she was humiliated to have guests visit her in the damaged home and she was afraid that accumulated moisture would start a fire.[204]

There are also the punitive damage awards. The U.S. Supreme Court approved an arbitral award of punitive damages in 1995.[205] There are many such awards at amounts that are chilling. For example, in three arbitrations conducted in the state of Illinois, there was a punitive

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[201] *Sawtelle v. Waddell & Reed*, 754 N.Y.S.2d 264 (N.Y. App. Div. 1st Dept. 2003).
[202] *IDS Life Ins. Co. v. Royal Alliance Assn.*, 266 F.3d 645, 648 (7th Cir. 2001).
[203] *E.g. U.S for Benefit of Kirchdorfer, Inc. v. Aegis/Zublin Joint Venture*, 869 F. Supp. 387 (E.D.Va. 1994).
[204] *Waverlee Homes, Inc. v. McMichael*, 855 S.2d 493, 498 (Ala. 2003) (remanding for determination of arbitrator bias due to alleged scheme in selection).
[205] *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995).

damage award of $120,000 on a defamation claim by a broker,[206] a punitive damage award of $150,000 on a contract claim by a doctor against his former unhappy partner,[207] and a $150,000 punitive damage award on a construction contract claim.[208] Of course, there are also cases outside Illinois. Three arbitrators awarded an investor $184,583 for stock losses and, in addition, awarded him $10,000,000 in punitive damages.[209] But the decision to remember is the $25,000,000 punitive damage award given to a broker against his former employer for interference with his business after leaving the firm. His actual damages were said to be about $1,000,000.[210] What do all of these disastrous punitive arbitration awards have in common - they were issued by neutral arbitrators in panels of one or three neutrals appointed by the NASD or the AAA.

In the third type of arbitration that routinely uses tripartite panels, international arbitration, another operative fear, besides fears about competence and outlandish awards, exists. Twenty years ago, Professor Lalive wrote that parties and institutions generally select a chairman from a "neutral" country and "should this principle of neutrality not be observed, an unhealthy atmosphere of doubt and fear is likely to appear."[211] It is thus common to write a venue clause into international contracts placing the venue in a neutral country to avoid a setting that favors one party over another. But, people fear the unknown. They are naturally nationalistic and may fear the unknown cultural and legal traditions of foreign arbitrators from the neutral venue. The tripartite panel augurs some ability to alleviate that fear.[212] Professor Lalive has referred to the desire to appoint an arbitrator as a right parties "fiercely" protect in their arbitration agreements. He wrote convincingly that the party must take the importance of this choice into account and use it wisely.[213] Given the American domestic arbitral awards described above, his advice ought to be followed.

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[206] *Baravati*, 28 F.3d 704 (affirming under federal law).
[207] *Ryan v. Kontrick*, 710 N.E.2d 11 (Ill. App. 1st Dist. 1999) (vacating under state law).
[208] *Edward Elec. Co. v. Automation*, 593 N.E.2d 833 (Ill. App. 1st Dist. 1992) (vacating under state law).
[209] *Sanders v. Gardner*, 7 F. Supp. 2d 151 (E.D.N.Y. 1998), *aff'd.*
[210] *Sawtelle*, 754 N.Y.S.2d 264 (ordering that the case be sent back to the arbitrators). The decision in *Sawtelle* was criticized in, Hans Smit, *Another Judicial Misstep in Correcting an Arbitral Reward*, 12 Am. Rev. Intl. Arb. 435 (2003).
[211] Pierre LaLive, *On Neutrality of the Arbitrator and the Place of Arbitration*, in *Swiss Essays on International Arbitration* 22, 25 (Intl. Council for Com. Arb. 1984).
[212] Commentators commonly refer to nationality as a basis for distinction between party and neutral arbitrators. Professor Lowenfeld suggests several examples to illustrate why arbitrators of different nationality are often helpful to each other in explicating issues that might mystify one from a different legal background. Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 Tex. Intl. L.J. 59, 66 (1995).
[213] Pierre LaLive, *Le Choix de L'Arbitre*, in *Melanges Jacques Robert Libertes* (Montchiestien 1998).

B. *"An Arbitration is Worth What the Arbitrator is Worth"*[214]

A fear should arise when a party surrenders control in the selection of arbitrators, whether selecting three or one. The discussion above of the "wrecks" is not to denigrate arbitration but to highlight the serious nature of the role arbitrators must play. Judging is a very serious and difficult business. Judges for American courts are vetted by bar associations and legislatures; they are vetted for legal skill, integrity, and temperament. They gain experience over the years they serve. Who vets arbitrators? No one really. The insight from the "wrecks" is that randomly selected arbitrators are like randomly selected jurors, all good citizens tasked to do a very difficult job.[215] The differences are that in a randomly selected arbitration panel there are only three to judge, not six or twelve, and the three do not receive any instruction in the law from a judge. These differences do not favor arbitration.

Everyone experienced in the field of arbitration has seen the occasional mediocre and incompetent chairman (no institutional slant is implied or warranted). Two decades ago the ABA surveyed lawyers who had participated in arbitrations and revealed that one-third reported dissatisfaction with the quality and training of the arbitrators.[216] If it is your case, even one mediocre appointment is too many.

In the U.S., the NASD and AAA lists of arbitrators are so large that the volunteers who send in their names are added without any real vetting. The AAA uses the list method, providing the parties many names to choose from. This gives the parties the opportunity to make inquiries about skill, judgment, and competence, although it is less useful to parties from a foreign country who will have fewer contacts to consult. Because there are many thousands of unvetted names on the AAA lists, however, it is often not possible to do more than obtain a superficial opinion when parties and their counsel vet those on the list. This method may also lead to unacceptable consequences.[217] In the international context, the practice of using institutional appointment is only slightly better because the number used is much lower and the institutions can develop a list with some familiarity of the reputations of those who have participated as arbitrators. Beyond that, there is no procedure to realistically vet institutional appointments.

Just as there are aberrational awards inexplicably awarding punitive damages in a construction contract dispute or unexplained damages in domestic arbitrations in the U.S., such startling awards can

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[214] LaLive, *supra* n. 211, at 27.
[215] The AAA still expects arbitrators to serve without pay for the first day.
[216] Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 Ind. L.J. 425, 448 (1988).
[217] *Id*. at 457.

be found in international arbitrations. The case of *Play Star v. Haschel,* reported in 2003, shows just how risky selecting arbitrators can be.[218] The parties selected a sole arbitrator from an AAA list, a Mr. Robert Y. Stebbings, Esq. According to his listing in Martindale Hubbell, Mr. Stebbings is sixty years old, graduated from Stanford University, and has a law degree from Columbia University, two of America's finest universities - so far so good.

After being properly invested as arbitrator and hearing the evidence, Mr. Stebbings issued an unreasoned award in the case in favor of Play Star in the amount of $31,762. Unreasoned awards are accepted for enforcement in American courts and are routine in domestic arbitrations.[219] The precision in the amount awarded appears to be significant, showing attention to detail. Play Star was not satisfied and requested a reasoned award pursuant to the AAA's international rules since the contract involved international commerce.[220] The AAA acquiesced after receiving an ambiguous reply from Haschel, and Mr. Stebbings agreed to comply with the request. With no further evidentiary hearings or briefings on the law or facts, he filed a reasoned award - but this time he awarded Play Star $303,087.58.

This sum naturally stunned Haschel, which asked the federal court to vacate the award. Instead, the court asked Mr. Stebbings to explain himself.[221] His explanation to the court was that he had acted "*ex aequo et bono"* the first time, but on the second go, he saw that the AAA international rules did not permit him to act *ex aequo et bono* without consent. He said he therefore reconsidered all of Play Star's claims and came to the higher amount.[222] The second award was confirmed, a chilling result, even if a court would have arrived at the identical sum in the second award. The process employed is indefensible.

Perhaps Mr. Stebbings' case illustrates Redfern and Hunter's comment that "a sole arbitrator carries out a lonely task,"[223] and can be lost as well as lonely. It is the type of result that confirms the belief of users like the reinsurance industry that tripartite panels are desirable and party selection is a necessity. This is not to say institutions are not serving a useful function. They do and often must because parties do not always agree on a neutral arbitrator - which is a great mistake based on fear, not wisdom.

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[218] *Play Star S.A. v. Haschel Export Corp.*, 476 F. Supp. 1276 (S.D.N.Y. 2003).
[219] *Graham v. Bates*, 45 S.W. 465 (Tenn. 1898); *Reichman v. Creative Real Est. Consultants, Inc.*, 476 F. Supp. 1276 (S.D.N.Y. 1979).
[220] According to J. Willems, White & Case, Paris, counsel for Play Star, the contract referred to the "AAA rules" without specifying the domestic commercial rules or the international rules.
[221] *Play Star S.A..*, 476 F. Supp. 1276.
[222] *Id*.
[223] Redfern, *supra* n. 13.

Mr. de Fina, past president of the Institute of Arbitrators & Mediators, Australia, stated the position in the negative: "Where there is the facility for party appointment it is likely that the non-appointing party will believe that the other party-appointed arbitrator will be predisposed towards that arbitrator's appointing party."[224]

The fear that the other party is "likely" to appoint a partisan is often resolved by parties appointing the sympathetic party arbitrator in defense before there has been any offense. Appointing a partisan arbitrator as a "defensive" mechanism when the contract calls for the use of the former AAA Commercial Rules might be sensible, because the other party has the contractual right to do the same and presumably will do so. The fact that defensive appointment exists in the international context speaks more to human nature than to institutional rules, since all international rules refer to impartiality.

C. *What is Sympathy if Not Advocacy?*

Party appointment solves the important problem of ensuring that the best available persons are selected for the tribunal. At the same time, however, the literature over decades reports that party appointment, if it leads to partisan arbitrators, creates its own serious problem, the unjust compromise. Yet, sophisticated parties seek tripartite panels.

One reason the tripartite panel with party appointment persists in the international context is the same reason it persists in the U.S. In addition to the value of selecting the chairman, it is continuously reported that parties expect "their" arbitrator to perform a service. Many writers active in international arbitration say the party arbitrator may be "sympathetic" but also may, during deliberations, articulate to the neutral arbitrator the best formulation of the case of the party who appointed him. The important issue is whether the use of this sympathetic arbitrator increases the possible peril of the unjust compromise award.

The position describing the sympathetic arbitrator has been repeated by some of the best-known authors, who say sympathy is not partisanship, in the international arbitration community over the past twenty-five years. Perhaps the most important statement was made by Stephen Bond in 1991 when he was Secretary General of the ICC. He wrote that he was "firmly convinced that the wisest choice for any party is a co-arbitrator who is sympathetic to the proposing party and who will

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[224] A. A. de Fina, *The Party-Appointed Arbitrator in International Arbitration - Role and Selection*, 15 Arb. Intl. 381, 385 (1999).

endeavor to see that this party's position is clearly understood by the arbitral tribunal."[225]

Redfern and Hunter reported a similar standard in their treatise, *Law and Practice of International Arbitration*:

> An arbitrator nominated by a party will be able to make sure that his appointor's case is properly understood by the arbitral tribunal; in particular, such an arbitrator should be able to ensure that any misunderstanding which may arise during the deliberations of the arbitral tribunal (for instance, because of difficulties of legal practice or of language) are resolved before they lead to injustice[.]
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> . . .
>
> Difficult though it may be in practice, it is possible for an arbitrator to fulfill a useful role in representing the interests of the party who nominated him without stepping outside the bounds of independence and impartiality.[226]

The same formula has been repeated in many law journal articles in the past few years. Mr. Carter wrote that a party may select an arbitrator who "will react favorably to the argument that the party plans to present."[227] Further, the party-appointed arbitrator "may seek to assure that the position of the party who appointed him is fully understood"[228] Likewise, last year, Professor Andreas Lowenfeld wrote that he believed it was proper for a party-appointed arbitrator "to see to it that the case for the party that appointed him or her is adequately heard."[229] Additionally, Mr. Rosell said: "There is a certain expectation that party-appointed arbitrators, while not acting as advocates for the party, will play a role in helping to explain the party's position."[230] It is important to observe in these formulations that they all suggest that the sympathetic arbitrator will not only have the state of "being" sympathetic, but that sympathy requires action.

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[225] Stephen R. Bond, *The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 Nw. J. Intl. L. & Bus. 1, 7 (1991).
[226] Redfern, *supra* n. 13, at 158.
[227] Carter, *supra* n. 12, at 295.
[228] *Id*.
[229] Andreas F. Lowenfeld, *The Party-Appointed Arbitrator: Further Reflections*, in *The Leading Arbitrator's Guide to International Arbitration* 46 (Lawrence W. Newman & Richard Hill eds., Juris Publg., Inc. 2004).
[230] Jose Rosell, *The Challenge of Arbitrators*, 10 Croatia Arb. Y.B. 151, 155 (2003).

The language used to describe this sympathy is also found in American sources about partisan party-appointed arbitrators - advocates. The 1954 Harvard Law Review article reported the primary reason why businessmen said they prefer appointing their own arbitrators in the same language:

> Some businessmen expect their party appointee to perform a number of services on their behalf in the course of the arbitration: regardless of whether or not the appointee intends to vote for the party appointing him, he can expound his party's viewpoint, point out circumstances justifying his position, educe supporting evidence by interrogating the witnesses at the hearing - in short, see to it that the tribunal does not overlook the strong points of his party's case.[231]

The New York Court of Appeals in *In re Astoria Medical Group* said that the contractual right to appoint an arbitrator is valuable precisely because the party-appointed arbitrator will "be sympathetic to his position or favorably disposed to him."[232] The 1977 ABA Code of Ethics adopted the court of appeals' word, "sympathy."[233] The essence of the *In Re Astoria Medical Group* arbitrator was that he could be dependent and partisan.[234]

These American views are not only similar in the description of the duty, but also in the description of the limitation on the duty. Just as Stephen Bond wrote that the "sympathetic" arbitrator must maintain a "freedom of mind to find against that party should the facts and the law lead to that conclusion,"[235] and Mr. Carter expounded that "party-appointed arbitrators are expected to exercise independent judgment in reaching decisions . . . ,"[236] the New York Court of Appeals held the same view in *In re Astoria Medical Group*.[237] The court of appeals said that while a dependent party-appointed arbitrator could not be expected to be free from partiality, he had to be honest. The New York arbitration statute still requires all arbitrators to take an oath that they will "decide the controversy faithfully and fairly."[238] The court of appeals said that if

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[231] Gold & Furth, *supra* n. 46, at 318.
[232] 11 N.Y.2d at 135.
[233] *See generally* ABA Comm. Ethics & Prof. Resp., *Code of Professional Responsibility and Code of Judicial Conduct* (ABA 1977).
[234] *Id.*
[235] Bond, *supra* n. 225, at 8.
[236] Carter, *supra* n.12, at 295.
[237] 11 N.Y.2d at 137.
[238] N.Y. Civil Practice Law §7506(a) (Consol. 2004); *see* Conn. Gen. Stat. § 52-414 (2003). Some states that have adopted the UAA and RUAA have retained a feature of their older statutes which require all arbitrators to take an oath. Unlike New York's oath, some oaths say the arbitrator must judge impartially. This is a contradiction. *E.g.*, Alabama, Ala. Code § 6-6-6 (2004); Georgia, Ga.

the party-appointed arbitrator fails to act accordingly, his award can be attacked on evidence of misconduct.[239]

There is one American state supreme court decision which tries to divide "sympathy" from "advocacy." In 1981, New Jersey's arbitration statute allowed courts to vacate arbitral awards for "evident partiality or corruption in the arbitrators, or any thereof."[240] The New Jersey Supreme Court, however, gave a new meaning to the old standard.[241] One party to an arbitration, Barcon, appointed the president of one of its subcontractors to a three-arbitrator panel. Barcon had a twenty-year business relationship with the subcontractor, including $50,000 in contracts contemporaneous to the arbitral proceeding. There was no disclosure of these facts. On a motion to vacate the ensuing award, the Supreme Court repeated the venerable standard for judging conduct of a party-appointed arbitrator:

> An arbitrator acts in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him. . . . We emphasize that these standards must govern the conduct of all arbitrators in whose hands the dispute resolution process is entrusted - not only the so-called 'neutral' arbitrators but party-designated arbitrators as well.[242]

The *Barcon* court then appeared to make a fundamental change to the "quasi-judicial" standard. It discussed the current custom of the partisan arbitrator in American practice and said that all party-appointed arbitrators in New Jersey could be "sympathetic." While the party-appointed arbitrator had to be independent of the party appointing him, he could nonetheless "approach the arbitration . . . with some sympathy for the position of the party designating him."[243] The majority opinion then said that its ruling did not permit advocacy.[244]

Code Ann. § 9-9-69 (2004); Louisiana, La. Arb. Code Ann. art. 3111 (2004); New Jersey, N.J. Stat. Ann. § 2A:23B-29 (2004). *See In re Salter v. Farner*, 653 P.2d 413 (Colo. App. 1982) (court held UAA, which implicitly allows partisan arbitrator to trump oath).

[239] 11 N.Y.2d at 137.

[240] N.J. Stat. § 2A:24-8 (2004).

[241] *Barcon Assoc., Inc. v. Tri-County Asphalt Corp.*, 430 A.2d 214 (1981).

[242] *Id*. at 188.

[243] *Id.* at 219. *Barcon* is no longer the law in New Jersey. New Jersey's legislature amended its arbitration statute last year. New Jersey was one of the first states to adopt the RUAA, and thus joined the majority of states which limit the power of the courts to vacate awards for evident partiality in the neutral arbitrator. N. J. Stat. Ann. § 2A:23B-29. The New Jersey statute still contains a section not in the RUAA, the arbitrator's oath: "Each arbitrator shall before he proceeds to the business of the arbitration, take and subscribe an oath . . . faithfully and impartially to hear and examine the grievance in dispute . . . and to discharge his duties as such arbitrator according to the best of his skill and understanding." N.J. Stat. Ann. § 34:13-2.

[244] *See Barcon Assoc., Inc.*, 430 A.2d 214. The ICC Rules from the 1977 version onwards specifically require only independence. Commentators maintain that the ICC can reject a nominated

This is a highly flawed opinion. It starts with the premise that all arbitrators are acting in a "quasi-judicial" role but, within a few paragraphs, says two of them may have sympathy for one party but then must judge as neutral arbitrators. Then, what does sympathy mean? The only two sources the court relied upon to derive the concept of sympathy were *In re Astoria Medical Group* and the 1977 ABA Code of Ethics, which both describe sympathetic arbitrators who are advocates. *Barcon's* explanation of the opposite of sympathy - bias - further reveals the flaw in the case. After blessing sympathy, the court gave three examples of what it would deem forbidden "evident partiality." Each is an example of presumed or actual bias. The first example is a dependent relationship, which gives rise to presumed bias. The next two examples are an arbitrator who prejudged the dispute due to bias and an arbitrator who had animus for a party. These are examples of actual bias. Squeezing sympathy between a "quasi-judicial" role and a bar to presumed and actual bias leaves sympathy no role. The sympathy described is a theoretical state of being. If the permitted state of sympathy elides into action, it becomes impermissible bias and advocacy.

The commentators go further than *Barcon* - they approve of "action" during the proceeding. As noted in this article, courts for centuries have vacated arbitral awards using the words "fraud, corruption, undue means, misconduct and partiality." "Sympathy" was not a word used by the equity courts to vacate awards. Indeed, it is not even defined in *Black's Law Dictionary*.[245] The *Webster* dictionary meaning of sympathetic is "existing or operating through an affinity, interdependence or mutual association . . . favorably inclined."[246] "Partial" means "inclined to favor one party more than the other, biased."[247] The English Court of Appeal, quoting Lord Goff, used the word "favour" in describing bias in *AT&T Corp. v. Saudi Cable*: "bias in the sense that the judge might . . . unfairly regard[] with favour or disfavour the case of a party . . . . "[248] American cases which discuss the meaning of "evident partiality" also use the word "favor." "[E]vident partiality exists where it reasonably looks as though a given arbitrator would tend to favor one of the parties."[249]

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arbitrator for partiality under its challenged procedure because while Article II says an arbitrator can be challenged for lack of independence "or otherwise," the term "impartial" is not in the rules. In 1998, the ICC added in Rule 15(2) a requirement that arbitrators act impartially. As Craig, Park, and Paulsson report, this highlights a distinction between "being" impartial to "acting" impartially.

[245] *Black's Law Dictionary* (Thomson ed., 8th ed., West 2004). "Sympathy" is also not contained in West's "Words and Phrases."

[246] *Webster's New Collegiate Dictionary* 1172 (G&C Merriam Co. 1998).

[247] *Id.* at 828.

[248] 2 Lloyd's Rep. at 132.

[249] *Local 530 v. City of New Haven*, 518 A.2d 941, 949 (Conn. App. 1986).

The distinction between the two words, sympathy and partiality, is a fine one - sympathy means favoring one person, without regard to another. Partiality means favor to one person at the expense of another. It is theoretically possible for a person to be sympathetic to two persons at the same time. However, sympathy is not possible when they are the only two persons in sight and they are opposed to each other on the one point on which the arbitrator must be sympathetic - the dispute before him. In that factual case, an arbitration proceeding, sympathy must be equivalent to partiality.

D. *An Examination of the Insufficiently Examined Subject - The "Delicate" Relationship Between the Neutral and the Party-Appointed Arbitrators*

The practical aspects of the practice of sympathy as described by the commentators also illustrate that it is incompatible with impartiality. These significant problems are rarely discussed but are inherent in the party-appointed system where advocates have a duty to look for sympathetic arbitrators.

The first practical question is how a party decides to select a would-be arbitrator who will be sympathetic. There may be cases where a professional, like Mr. Meyers in *Sunkist*, has previously published an article showing a predisposition on a major issue. In the alternative, the arbitrator may have ruled on a similar issue in a prior arbitration,[250] or have a public record of decisions spanning twenty years as a federal judge, like the Honorable Sydney Smith in *Sunkist.* In such cases, a party could be reasonably assured of "sympathy" absent any *ex parte* communication with the would-be arbitrator about the case.

There is another way to ascertain sympathy. In the absence of the above methods of learning whether a potential arbitrator will be sympathetic, a party can draw on the pre-appointment interview. Many say if the party or his counsel cannot interview the prospective arbitrator, there will be no way to ascertain whether he has the required expertise, experience, and time. Although these questions can surely be answered in other ways, articles are written to describe the interview practice.[251] Craig, Park, and Paullson set forth the strictest and most appropriate test - no more than thirty minutes in the arbitrator's office and no

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[250] *Fed. Vending v. Steak & Ale of Fla., Inc.*, 71 F. Supp. 2d 1245 (S.D. Fla. 1999) (arbitrator had ruled identical contract clause valid in prior arbitration).
[251] de Fina, *supra* n. 224; Bishop, *supra* n. 13.

comments on the merits of the case.[252] The IBA Code of Ethics[253] approves of parties and their counsel meeting with prospective arbitrators, in international arbitration, prior to their appointment as a party nominated arbitrator. The IBA Code also approves of a party explaining the case to the prospective arbitrator. Can anyone imagine a party asking to interview a judge - or a judge permitting it?

How does the party-appointed arbitrator know he is supposed to be sympathetic if his duties were not discussed at the meeting? If an arbitrator is not dependent upon the appointing party, there is in law, or in human experience, no presumption he should be "sympathetic." To an independent person, sympathy for a commercial enterprise is not a natural emotional or cognitive response to being asked by that entity to serve as a paid arbitrator. The mere fact that the UAA, some American courts, and international commentators have said a party-appointed arbitrator "may be" sympathetic does not mean any arbitrator has to be. This is why the auto insurance companies appoint their own lawyers to act as arbitrators. They understand their duty. It is a fact that many of the best-known international arbitrators refuse both to hold pre-appointment interviews and to serve as "sympathetic" arbitrators.

What is the potential arbitrator to say after the party or counsel explains the case in the interview? While commentators say the arbitrator must be mute, Professor Lowenfeld described how difficult silence can be even when the potential arbitrator wishes for it. When he once opened the door to a conversation with the counsel, the party also appeared to discuss his case.[254] This is, in fact, one of the "delicate" points in the procedure. There is no need to speculate on whether this accepted practice can be easily abused. One arbitrator in 2002 candidly admitted to a federal judge how he responds when contacted about serving as an arbitrator:

> The way I approach an arbitration is, the party tells me what the case is and what their side of it is. If I disagree with them, I tell them you better not appoint me. If their case seems right, I tell them I think they're right but I haven't heard the other side so I cannot guarantee that I

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[252] Craig, Park, & Paulsson, *International Chamber of Commerce Arbitration* 212 (Oceania Publications 1984).
[253] International Bar Association, http://www.ibanet.org/publicprofinterest/Professional_Ethics.cfm#Int%20code%20of%20ethics (last accessed Jan. 15, 2005).
[254] *Id.*

> will vote your way. I have to hear all the evidence before I make up my mind.[255]

Such comments are comforting to the party seeking sympathy. For those who believe such conduct is a new idea, the exact same courting technique was described fifty years ago in a Harvard Law Review article:

> A number of businessmen seem to make it their practice to present the facts of the case to a colleague, then ask him how he would decide it, and if his view coincides with their own, request him to sit as their appointee.[256]

There is another practical question. After the hearing, during deliberations with the other two arbitrators, what does the sympathetic party-appointed arbitrator say to the other two *after* he has "put forth the best presentation of the party's case?" Does he say, in candor, "but I think it's rubbish," or even, "but I think the party which appointed me is asking for $100,000 too much?" If he does say something so patently negative at the end of his speech, the other two arbitrators will accept his disclaimer. Remaining quiet would have been more sympathetic. What does the sympathetic arbitrator say after the other sympathetic arbitrator explains *his* party's best case? Does he reply that he agrees if he does, in which case it would seem obvious that his concession would be accepted; or does he stand mute and merely allow the neutral arbitrator to filter and process the "best presentations" of the parties?

It ought to be clear that putting sympathy into practice by stating a best case requires skill. The international commentators approve arbitrator conduct involving the arbitrator condensing complex evidence into a speech for the others in deliberations. Commercial businessmen must believe it is useful to pay first rate counsel first class fees to prepare and argue a case and then to pay party arbitrators and invest them with making sure the neutral chairman understands the case. One might think that to suggest that the party arbitrator must articulate the most favorable version of the party's case to the neutral chairman is an insult to the party's counsel. In significant international or domestic arbitrations, counsel for each party submit a written brief and give an extended oral argument. Presumably the party paying counsel the high fees believes these are well done.

Quite frankly, advocates might prefer their arguments to be judged rather than to have a party-appointed arbitrator filter the arguments because of a belief that he has a duty to "present the party's

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[255] *Nationwide Mut. Ins. Co. v. First St. Ins. Co.*, 213 F. Supp. 2d 10, 18 (D. Mass. 2002).
[256] Gold & Furth, *supra* n. 46, at 319.

best case." In the privacy of the deliberations, who knows if the argument was greatly improved or seriously weakened in the retelling? Naturally, some experienced arbitrators will say they have often needed to improve on the presentation of an argument poorly made by counsel. It no doubt depends on the view. But, if the party's arbitrator can do the presentation better than the party's counsel, why is it incorrect to say that the arbitrator has simply been a better advocate?

It is surely this aspect of the practice that distinguishes it from a "sympathy" for people of one's own country or trade. It seems obvious that the role of the sympathetic arbitrator, who must act, must be secured and be based upon contract, express or implied.[257] Surely the "vigilance" Redfern and Hunter espouse for the party-appointed arbitrator must arise from a duty.[258] The commentators are describing action, and it seems a duty to act favorably to one side cannot be turned off at the whim of an arbitrator who has accepted performance of the duty. In America, because the law's premise changed fifty years ago to allow parties to contract for a partisan arbitrator, it is obvious that a party may expressly contract with an arbitrator to act sympathetically as an admitted advocate.

But, in the U.K. and in most European countries, arbitrator conduct based on sympathy which includes action is wrong. In *Norjarl A/S v. Hyundai Heavy Industries Company Ltd.*,[259] the Court of Appeals reiterated the rule that arbitrators, once appointed, have "quasi-judicial" status. "An arbitrator, par excellence, is in a quasi-judicial position. He must avoid the reality and appearance of bias."[260] Mr. Justice Mustill said in *Succula Ltd. and Pomona Shipping Co. Ltd. v. Harland and Wolff Ltd.* that after an "arbitrator accepts an appointment . . . he becomes a judicial officer, with exactly equal duties towards both parties. It is unnecessary to discuss whether the relationship is contractual in nature - it is clear that the duties are owed to both parties."[261] At an earlier time,

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[257] It is striking to see reports that arbitrators agree to serve without any discussion of duty or compensation. *See K/S Norjarl A/S v. Hyundai Heavy Indus. Co., Ltd.*, 1 Lloyd's Rep. 260 (1991) (expressing displeasure that there had been no pre-appointment arrangements); *Aetna Cas. & Sur. Co. v. Grabbert*, 590 A.2d 88 (R.I. 1991) (submitting a bill for ten percent of the amount awarded without any prior agreement on his contingency method of billing and the court had apoplexy). To avoid this problem, *see* Murray L. Smith, *Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment*, 8 Arb. Intl. 17 (1992) (offering a list of items, including schedule of fees, a potential arbitrator might send to a party before accepting appointment).
[258] Redfern, *supra* n. 13.
[259] 1 Lloyd's Rep. 524 (1991).
[260] *Id*. at 884.
[261] 2 Lloyd's Rep. 381, 388 (1980).

American courts also evoked the party-appointed arbitrator's duty to both parties.[262]

In the U.K., the courts follow the rule of arbitrator impartiality so strictly that they demand impartiality even when the arbitrators are employed in umpirage. In *Wessanen's Koninklijke Fabrieken N.V. v. Isaac Modiano Brothers & Sons, Ltd.,* the court said that at the outset of the umpirage, when only two arbitrators are engaged, both must adhere to the "quasi-judicial" standard of impartiality.[263] After it arises that the two cannot agree and they select an umpire, they are in law *functus officio* as arbitrators and, thereafter, become advocates for their parties before the umpire. This rule was applied, for example, to Mr. Chesterman, whom a charterer called its "first choice arbitrator."[264] The court said the term "first choice" was more suitable for produce in Covent Garden than an arbitrator but understood the charterer meant that Mr. Chesterman was a well-known arbitrator frequently employed by this party.[265] Working in an umpirage system, he may have to be impartial Monday morning, may be an advocate on Tuesday and, in the next case, impartial again Wednesday morning, all for the same party. The purity of the rule is, however, maintained. Under American law, Mr. Chesterman would be called a partisan arbitrator on Monday morning.

Under U.K. law, arbitrators simply cannot be asked by one party to be sympathetic to only one, and they are forbidden by law to assume that role. It appears simply impossible to reconcile the international commentators' observations about sympathy and stating the best case with English law and, according to commentators, the law of most European countries.[266]

E. *Sympathy Leads to Compromise*

This is not to argue sympathetic arbitrators are evil, or unethical, or an embarrassment. It is only to say the sympathetic international arbitrator who is expected to put a best case to the chairman stands on the same "pedestal" as the American party-appointed arbitrator who must be independent, but may be partisan. In America, parties are free to make those contracts.

What would appear to be wrong would be to give sympathetic arbitrators to parties that, with full understanding, want three impartial

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[262] *Moshler v. Shear*, 102 Ill. 169 (1882) (stating that "we wholly fail to realize that an arbitrator belongs more to one party than another").
[263] *Wessanen's Koninklijke Fabrieken N.V. v. Isaac Modiano, Brother & Sons, Ltd.*, 2 Lloyd's Rep. 257 (1960).
[264] *See Owners of the M. v. Tradax Export S.A.*, 1 Q.B. 527 (1970).
[265] *Id*.
[266] Orlandi, *supra* n. 23; Smith, *supra* n. 24.

ones. There is some evidence that users do want full impartiality. In a recent survey of in-house counsel in the U.S., eighty-seven percent said they would prefer all neutral arbitrators in an international arbitration.[267]

But, assume they want sympathetic ones. The literature over the century shows that there is not only a benefit to using partisan arbitrators, but also a risk in using the sympathetic party-appointed arbitrator, although the risks are not discussed with the benefits in the commentaries. The process of two sympathetic arbitrators, each making their parties best case to the chairman, may lead to an unjust compromise. How do sympathetic arbitrators bring about an unjust compromise? They do so by doing their job well, which is long described by the courts as "zeal," a word the Privy Council used in 1888 to depict the conduct of party arbitrators.[268]

An American court called it zeal in a simple 1919 case where only the quantum of damage was in dispute.[269] A fire destroyed goods in a store, the owner and insurance company each appointed an arbitrator, and together selected the chairman. This should have led to an arbitration board of three "quasi-judicial" arbitrators. But as often happens, one arbitrator argued for payment of one hundred percent of the claimed value of the lost goods, while the other arbitrator argued for fifty percent. The chairman picked eighty-five percent. The court described the lost goods as "second hand and badly shopworn."[270] It is clear the court thought the compromise was on the wrong end of the spectrum but affirmed the award because the arbitrators were merely "zealous for what they conceive to be the rights of the party who nominated them."[271] Zeal in arbitrators leads to results that ought to be abhorred in judging, forcing a neutral arbitrator to split the baby by slanting, in his opinion, more than is just merely to achieve an award at all.[272]

The manner in which the skilled party-appointed sympathetic arbitrator extracts a compromise in more complex cases was explained seventy-five years ago in *Atchison T. & S.F.*[273] The federal court of appeals said the negotiations were taken to the "psychological moment" when the most advantageous compromise can be extracted and explained this "negotiating" technique:

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[267] Douglas Earl McLaren, *Party-Appointed vs List Appointed Arbitrators: A Compromise*, 20 J. of Intl. Arb. 233 (2003).
[268] *Roland v. Cassidy*, 13 App. Cas. 770 (1888).
[269] *R. E. Jones & Co. v. N. Assurance Co.*, 207 S.W. 459, 462 (Ky. 1919).
[270] *Id.*
[271] *Id.*
[272] It is not suggested that compromise alone is the result of a flawed process. It occurs in appellate courts from time to time. The issue is *why* a judge or arbitrator compromises, not *if* he does.
[273] 26 F.2d at 419.

> The normal or probable attitude of the partisan arbitrators is illustrated by the record in the instant case. An open-minded consideration of the questions at issue can hardly be expected where arbitrators are chosen to represent contestants. It is somewhat of a misnomer to call them arbitrators. They are advocates. It could hardly be expected that such partisans would surrender one iota of their claims until the arrival of the psychological moment for concessions.[274]

The dissent noted a theme which has continuously been repeated: "[T]he contentions of the partisan members persistently asserted would prove discouraging to the neutral arbitrators . . . ."[275] The Center for Public Resources ("CPR") experts repeated that idea in 1999. Professor Stipanowich reported that a CPR expert said:

> Working as the neutral chair of a tripartite panel with party-[appointed] arbitrators is like having two arbitrations. The chair faces the prospect of managing the arbitration hearings and then listening to the same arguments all over again during the arbitrators' deliberations.[276]

Which party benefits from unjust compromise? It is usually the party with the weaker case. As the Harvard Law Review editors noted in 1954: "[S]ome lawyers prefer a tripartite board when they have a weak case since they believe they have a better chance to get a compromise decision."[277] If a claimant has a weak case on liability and/or damage quantum, a compromise trading a few claims for higher damages benefits the claimant. If a defendant has a weak case on liability and/or damages, a compromise reducing the damage award benefits the defendant.

The probability that party-appointment leads to sympathy and compromise was recognized when the New York arbitration statute was passed in 1920 by Columbia University Law School Dean Harlan Stone, later to become Chief Justice of the U. S. Supreme Court. He wrote a critique of the New York Arbitration Act and said that the customary method where parties appoint arbitrators and together select the third leads to:

> a serious impediment to successful arbitration. . . . The practical effect of this procedure is the substitution of a board of negotiation for a judge. . . . The appointment of

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[274] *Id*.
[275] *Id*. at 432.
[276] *Commercial Arbitration at Its Best*, *supra* n. 20, at 96.
[277] Gold & Furth, *supra* n. 46, at 309.

> mere negotiators is likely to result only in an award which is a [mere] compromise disappointing to both sides with consequent distrust of arbitration.[278]

In 1950, an article which surveyed labor arbitrators for the AAA reported on the dislike of the need to compromise in tripartite labor panels.[279] Even though fifty-six percent of collective bargaining arbitration agreements of that period contained tripartite arbitration clauses, seventy-five percent of the labor arbitrators surveyed preferred to serve alone.[280] Experienced labor arbitrators perceived no benefit from the supposed expertise of the party agents. More importantly, experienced arbitrators said the party-appointed arbitrators inevitably forced them into negotiating a compromise award.[281]

Many have reported that the essence of the problem is the pressure exerted on the neutral arbitrator. In 1968, Professor Martin Domke, a long serving vice-president of the AAA, recommended against use of tripartite boards in commercial arbitrations because, he said that the party arbitrator put the neutral arbitrator in a difficult position: "He may have to compromise[,] . . . depriv[ing] arbitration . . . of one of its benefits . . . ."[282]

The pressure on the chairman was also discussed in the 1954 Harvard Law Review. The authors reported that experienced arbitrators in their survey said party-appointed arbitrators contribute to the "tendency" to reach compromise results by the practice of urging extenuating circumstances on the neutral arbitrator: "Several arbitrators concluded that, given an *indulgent* chairman, a partisan arbitrator could produce enough 'mitigating' circumstances to make inroads on almost any award."[283]

Forty years later, Professor Rau discussed the same issue but emphasized the opposite possibility. He said a chairman might need "to trim or adjust his position . . . and ultimately perhaps to concur, reluctantly, in an award different from the one he might have preferred. . . . [But] . . . a *strongminded* chairman . . . has a better chance of obtaining the result he prefers by playing one partisan arbitrator off against the other in the age-old game of chicken . . . ."[284] Or, as the court

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[278] Harlan F. Stone, *The Scope and Limitations of Commercial* Arbitration, in *Commercial Arbitration* 129, 134 (Daniel Bloomfield ed., H.W. Wilson Co. 1927).
[279] Lesser, Jr., *supra* n. 84.
[280] *Id.*
[281] *Id*. at 278-80.
[282] Martin Domke, *The Law and Practice of Commercial Arbitration* 198 (Callaghan & Co. 1968).
[283] Gold & Furth, *supra* n. 46, at 322 (emphasis added).
[284] Rau, *supra* n. 16, at 501-02.

of appeals said seventy-five years ago, he might wait for the right "psychological moment."

In a thoroughly candid account of the deliberative process, Professor Lowenfeld described in 2003 how the process described by Professor Stone in 1926 may actually operate in international arbitrations. Professor Lowenfeld illustrated one of the various ways in which panels of three reach decisions through this example:

> Sometimes a solution is proposed (I avoid the word compromise) whereby C would withdraw his dissent and A and B would agree to reduce (or increase) the proposed award of damages, so that the decision will emerge as a unanimous one. Is it appropriate for the chairman to propose such an outcome? Would C be doing the right thing to accept it if he is not convinced by the position of A and B, but calculates that the party that appointed him would be better off paying less (or winning more) than if he insisted on his view to the end?[285]

Is that a strong-minded chairman or an indulgent one?

Craig, Park, and Paulson, Redfern and Hunter, and others, suggest that sympathy, when overt or too overt, will not be successful.[286] They say selecting a patently biased nominee will be "counterproductive," because the chairman will discount the views of an advocate in the deliberations. This is true. But, to say it can be badly done does not mean it is not done, or done well. It ignores what advocacy requires - skill.

Good advocates adjust to the argument and to the audience. Mr. Justice Roskill described the skillful practice of advocacy by Lord Mustill years ago in *Rahcassi Shipping Company S.A. v. Blue Star Line Ltd.*[287] Justice Roskill said:

> Mr. Mustill gave me eight possible alternative meanings of the phrase[;] . . . Mr. Mustill also contended (although he did not strongly press the argument for he felt difficulty in so doing in the light of certain authorities which are binding on me). . . . The argument is an attractive one. If I may say so, it was very attractively put.[288]

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[285] Lowenfeld, *supra* n. 229, at 48.
[286] Craig, *supra* n. 252, at 212; Redfern, *supra* n. 13, at 171.
[287] 1 Q.B. 173 (1969).
[288] *Id.*

With a weak case, the advocate offered choices, retreated when right to do so, and put forth sufficient charm and erudition to provoke a compliment. Mr. Mustill's client lost the case, but want of advocacy was not the cause. If only the party seeking a sympathetic arbitrator could select Lord Mustill, it would not be counterproductive. But, alas, this cannot be done. Mustill and Boyd is one of the few treatises on the subject which does not approve of the "sympathetic" arbitrator.[289]

When advocacy is done well, there are reports in the literature of how it ends. Professor Lowenfeld has been acting as an arbitrator in international cases for over thirty years. He wrote, last year, that if the neutral arbitrator said to the two arbitrators that "his" party was due $300,000, but he had believed "his party" should, in justice, receive $200,000, it was accepted practice to remain silent and form a majority with the chairman at $300,000:

> Suppose under the [C]hairman's draft the party that appointed you would be awarded $300,000, while in your own estimation $200,000 would have covered the party's loss. Most arbitrators in that situation would just keep quiet - i.e., go along with the chairman.[290]

What he is implicitly saying is that if a party-appointed arbitrator were to say to the chairman that the award should be lowered by $100,000 and it was; and if, after the award was made, the party who appointed him learned of this exemplary act of impartiality, the party who believed he had appointed a sympathetic arbitrator would no doubt say, like Mr. Laurier said 101 years ago: "I have been betrayed."[291] On the other hand, when the sympathetic arbitrator remains silent, the losing party who may have been ordered to pay $100,000 too much, will no doubt repeat what Mr. Balfour said: "Their arbitrator behaved ill; he was biased." This is an echo over the century. Nor is it avoidable when parties appoint their arbitrators seeking sympathy - because an arbitrator who has a duty to act favoring one side must act accordingly throughout the proceeding.

VIII. *Conclusion*

American courts for centuries have enforced arbitral awards where the party-appointed arbitrators were dependent, or biased, and where the parties expressly or impliedly selected the practice or waived any objection. It is submitted that the international practice, approved by many commentators, that a party-appointed arbitrator may be

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[289] *The Law and Practice of Commercial Arbitration in England*, Sir Michael J. Mustill and Stewart C. Boyd, Second Edition, Butterworths, 1989. Craig, Park, & Paulsson is another such treatise.
[290] Lowenfeld, *supra* n. 229, at 47.
[291] *See supra* part I.

sympathetic by acting for that party is similar to the "partisan" practice described in American cases. The difference lies in that, in America, courts and parties accept that parties may agree to employ party-appointed arbitrators who are not neutral and impartial, but rather who are advocates. They may, of course, do the opposite and contract for complete impartiality, with arbitrators who act in the "quasi-judicial" role defined by the courts. The American courts expect the parties to contract for the procedures they think right for their dispute.

It is submitted that sympathy in action continues in the international arena, to use Professor Rau's phrase, as a "tension" between practice and rhetoric,[292] only because it is virtually impossible for the courts to find proof of actual bias from the words said in deliberations or to police its often inevitable abuse - the compromise award. Courts will not allow parties to depose arbitrators to explain themselves after they have rendered an award.[293] In fact, the unanimous award which might have been the result of unjust compromise is often cited by the courts as proof that none of the arbitrators were biased![294] In other words, sympathy may survive in practice simply because it is not detectable - by the courts.

If parties want total impartiality in all arbitrators, they can contract so that an institution appoints all arbitrators. Professor Carbonneau made this point: "A rule of full neutrality would eventually eliminate the parties' authority to appoint arbitrators and would shift it to an external and disinterested party."[295] But, such action is risky when amateur judges are being selected to judge in complex cases. As the American cases demonstrate, using three randomly selected neutral arbitrators is not always a positive experience. The parties should want to play a role in forming the full panel in order to control the level of competence and experience as they see fit. They must then instruct the arbitrators of the mutual agreement of the parties that all arbitrators are to act impartially.

If detailed rules have not been set forth in the contract, at the first hearing the parties, counsel, and arbitrators should discuss what they agree the panel members and parties may do. They should expressly discuss "sympathy," *ex parte* contacts, and compromise. The new

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[292] Allan Scott Rau, *On Integrity in Private Judging*, 14 Arb. Intl. 115, 130 (1998).
[293] *Hoeft v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003) (arbitrators may only be deposed about claims of bias or prejudice on clear evidence of impropriety, but not about the "thought process underlying their decisions"); *Certain Underwriters at Lloyds v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926 (N.D. Cal. 2003) (procedural rulings, reliance on one party's evidence is not evidence of evident partiality).
[294] *Fertilizer Corp. of India*, 517 F. Supp. at 954; *Aetna Cas. & Sur. Co.*, 590 A.2d at 90.
[295] Thomas E. Carbonneau, *The Exercise of Contract Freedom in Marking Arbitration Agreements*, 36 Vand. J. Transnatl. L. 1189, 1213 (2003).

ABA/AAA Code of Ethics offers a list of rules for both choices, partial arbitrators and impartial ones, and thus provides an excellent check list for use at a hearing. It is important to record in writing to what the parties have agreed in order to avoid future court challenges on the grounds of partiality or misconduct. Projecting integrity onto unknown others is a risky business.

Even if sympathetic arbitrators are wanted, compromise can be avoided, as Mark Blessing suggested, by granting the chairman the power to issue an award alone - lawful umpirage.[296] The presence of two sympathetic arbitrators would insure that the umpire does not overlook important points he must decide or important facts presented, if paying two more arbitrators can be justified economically by the amount in dispute.

What parties must think more about as they draft each arbitration clause, and again as they approach the conduct of an arbitration, is the balance between the positive role of a partisan to prevent shocking awards with the negative risk of unjust compromise when parties are free to use and agree to use partisan arbitrators. When parties seek what they say they want most in judging - justice - they will seek one to three experienced arbitrators with established reputations from the trade or the law, and instruct them to act with resolute impartiality.

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[296] Smith, *supra* n. 24, at 336 (reporting interview with Mr. Blessing).