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Is Three A Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations

By David J. McLean & Sean-Patrick Wilson*

I. TRIPARTITE ARBITRATIONS AND PARTY-APPOINTED ARBITRATORS GENERALLY

Tripartite tribunals involve proceedings where either the disputing parties or the dispute resolution rules provide for three arbitrators.[1] Tripartite panels are most commonly found in commercial and international arbitrations and labor disputes.[2] Unless otherwise provided for by rule or agreement, typically each party to the arbitration agrees to appoint one arbitrator, the "party-appointed arbitrator," and the two party-appointed arbitrators then select a third arbitrator, most often referred to as the "umpire," or sometimes the "chair" or the "neutral."[3] In the event the two party-appointed arbitrators cannot agree on a third arbitrator, a dispute resolution provider or a court will be called upon to appoint the neutral.[4]

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1. Arthur Lesser, Jr., *Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitrations?*, 5 ARB. J. 276, 276-77 (1950).

2. *See id.* at 277-79 (discussing the widespread use of tripartite arbitrators in labor disputes); Bernard Gold & Helmut F. Furth, Note, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 HARV. L. REV. 293 (1955) (discussing the prevalence of tripartite arbitrators in these three areas).

3. Lesser, *supra* note 1, at 279; Philip G. Phillips, *A Lawyer's Approach to Commercial Arbitration*, 44 YALE L.J. 31, 47-48 (1934).

4. *See* INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, NON-ADMINISTERED ARBITRATION RULES 6 (2007), http://www.cpradr.org/ClausesRules/2007 CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx; *see also* AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-13 (2007), http://www.adr. org/sp.asp?id=22440.

The concept of party-appointed arbitration has roots as deep as our nation. The Jay Treaty of 1794 called for party-appointed arbitrators to resolve disputes between the newly independent United States and Great Britain.[5] As early as 1886, states had begun to pass laws establishing tripartite procedures for labor arbitrations.[6] In fact, most early labor arbitrations in the United States were tripartite.[7] Today, both federal and state courts nationwide, as well as all major Alternative Dispute Resolution (ADR) institutions—including Judicial Arbitration and Mediation Services (JAMS), The International Institute for Conflict Prevention and Resolution (CPR) and the American Arbitration Association (AAA)—acknowledge party-appointed tripartite arbitration as a legitimate and oft-practiced form of dispute resolution.[8]

The benefits of party-appointed arbitration are many and varied. For one, parties may be more comfortable having their own arbitrator or may feel that their own interests will not be heard without their own representative on the panel.[9] Parties may perceive that they have more of a role or involvement in the proceedings if they select one of the three arbitrators.[10] Especially when the case is complex or the stakes are high, the disputants also may fear having their case decided by a single, possibly "irrational" arbitrator and choose instead to have their fate decided by the combined wisdom of three arbitrators.[11] Additionally, party-appointed arbitrators' substantive experience in the field in dispute often adds an

5. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty of 1974]. *See* I JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 5-6 (1898) (referring to the Jay Treaty of 1794 as the first modern international arbitral proceeding).

6. *See, e.g.,* Act of May 18, 1886, ch. 410, 1886 N.Y. Laws 630; Act of June 2, 1886, ch. 263, 1886 Mass. Acts 204; *see also* Jay Treaty of 1974, *supra* note 5.

7. Gold & Furth, *supra* note 2, at 294 (citing EDWIN E. WITTE, HISTORICAL SURVEY OF LABOR ARBITRATION 12-13 (1952)).

8. *See* AMERICAN ARBITRATION ASSOCIATION, THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2003), http://www.adr.org/sp.asp?id=32124&printable=true [hereinafter AAA, ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES]; *see also* JUDICIAL ARBITRATION AND MEDIATION SERVICES, ARBITRATORS ETHICS GUIDELINES (2003), http://www.jamsadr.com/arbitration/ethics.asp [hereinafter JAMS, ARBITRATORS ETHICS GUIDELINES]; THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION, 2007 CPR RULES FOR NON-ADMINISTERED ARBITRATION (2007), http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx#5 [hereinafter CPR, RULES FOR NON-ADMINISTRATED ARBITRATION].

9. Eugene I. Farber, *The Role of the Neutral in Party-Appointed Arbitrations*, N.Y. Law Journal, Sept. 13, 2002, at 4.

10. *Id.*

11. Seth H. Lieberman, Note, *Somethi.ng's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye that is "Nonneutral Neutrals,"* 5 CARDOZO J. CONFLICT RESOL. 215, 222 (2004).

element of expertise to the panel.[12] When there are aspects of a case that the neutral arbitrator does not fully understand, consulting with a party-appointed arbitrator who may have background in that specific field may bring additional context to the neutral's decision and often increase the correctness of the result.[13] Indeed, one of the primary purposes for using arbitration to resolve disputes is to insure that the decision-makers are familiar with the industry in which the dispute arises.[14]

From a procedural perspective, while party-appointed arbitration has its added costs, it may be an expedient way to reach a fair decision.[15] One commentator has noted that when party-appointed arbitrators are allowed to engage in private ex-parte discussions with their appointees, they can then convey helpful information that will facilitate compromise.[16]

Despite its widespread usage, for some time there has been confusion and concern among academics, courts, parties and arbitrators about the proper role of neutrality in the tripartite structure.[17] Questions have arisen concerning the procedural integrity of the tripartite system, often asking whether tripartite arbitrations offer the same level of impartiality as the courts.[18] For example, are all party-appointed arbitrators presumed to be neutral? How practical would such a presumption be? After all, as Professor Hans Smit of Columbia University points out, "[a] party-appointed arbitrator cannot help but realize that counsel who selected him was motivated by the desire that his selection would contribute to the favorable result he seeks and, to some extent, the arbitrator may act upon that

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12. *See* Astoria Med. Group v. Health Ins. Plan of Greater N.Y., 182 N.E.2d 85, 90 (N.Y. 1962) ("[A]rbitrators selected by the parties are, generally speaking, experts on the subject in controversy and bring to their task a wealth of specialized knowledge.").

13. *See* Gold & Furth, *supra* note 2, at 299; *see also* Lesser, *supra* note 1 ("[When a tripartite board is selected,] the resulting award will not only be more acceptable to the parties, but also, being the product of collective judgment, will more likely be the correct answer.").

14. Kathryn P. Broderick, *Pitfalls in Moving to All-Neutral Reinsurance Arbitration Panels*, FED'N OF DEF. & CORP. COUNS. Q., Summer 2004, *available at* http://findarticles.com/p/articles/mi_qa4023/is_200407/ai_n9440237.

15. Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel*, 30 FORDHAM URB. L.J. 1815, 1841 (2003).

16. *Id.* at 1841-42 ("Lawyers have testified that they are often more willing to move for settlement when their own party-appointed arbitrator, whom they trust, explains what concessions need to be made, rather than when it is the chairperson who points out the weaknesses in their case.").

17. *See id.*

18. *See id.*

realization."[19] Assuming this to be true, the next question to ask is whether it is legally permissible for party-appointed arbitrators to be partial. What difference, if any, exists between terms such as *partial*, *partisan* and *non-neutral*? How do we reconcile the Federal Arbitration Act's (FAA) ban on "evident partiality"[20] with the concept of having non-neutral arbitrators?

Unfortunately, neither Congress nor the Supreme Court has fully delineated the concept of neutrality of party-appointed arbitrators, and the case law among the circuit and trial courts has been less than clear. This paper will discuss issues surrounding party-appointed arbitrators on tripartite panels and will attempt to offer practical observations about what parties can expect under the tripartite system.

II. THE LEGAL STANDARDS APPLICABLE TO TRIPARTITE ARBITRATION

A. Non-Neutral Arbitrators Are Allowed

Arbitration is a creature of contract.[21] Federal law provides that where parties agree to certain rules or conditions governing their arbitration beforehand, those procedures will be followed and the resulting decision will not be upset.[22] Courts cannot require a higher level of impartiality than is provided for by the parties in an arbitration agreement.[23] Therefore, arbitrators may be selected by whatever means the parties choose, and if the parties explicitly contract for non-neutral arbitrators or if the applicable arbitration rules provide for non-neutral arbitrators, the non-neutral arbitrators will be allowed under the law.[24] Indeed, courts have held that under section five of the FAA, "partisans" may be appointed if the

19. Hans Smit, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice, by Pieter Sanders*, 11 AM. REV. INT'L ARB. 429, 429 (2000).

20. *See* 9 U.S.C. § 10(a)(2) (2008) (providing grounds for vacating an arbitration award when "there was evident partiality or corruption in the arbitrators").

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

22. 9 U.S.C. § 5 (section five of the Federal Arbitration Act requires that the method for selecting arbitrators contained in the parties agreement be followed).

23. *See* Am. Almond Prods. Co. v. Consol. Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944); *Merit Ins. Co.*, 714 F.2d at 679 ("The parties to an arbitration choose their method of dispute resolution and can ask no more impartiality than inheres in the method they have chosen.").

24. *See* Tate v. Saratoga Sav. & Loan Ass'n, 265 Cal. Rptr. 440, 445 (Cal. Ct. App. 1989) ("Courts have repeatedly upheld agreements for arbitration conducted by party-chosen, non-neutral arbitrators, particularly when a neutral arbitrator is also involved. . . . [I]t is not necessarily unfair or unconscionable to create an effectively neutral tribunal by building in presumably offsetting biases.").

arbitration agreement allows each party to appoint an arbitrator and places no explicit restrictions on who can be selected.[25]

B. The Historic Debate over Legal Presumptions of Neutrality/Non-Neutrality

For the most part, "the use of non-neutral versus neutral party-appointed arbitrators is a choice left open to the parties."[26] But what if the arbitration agreement is silent as to the neutrality or non-neutrality of the party-appointed arbitrators? While the selection of non-neutral arbitrators may be consistent with section five of the FAA, no outright presumption of neutrality or non-neutrality of party-appointed arbitrators is codified in the Act.[27] A common sense understanding of human bias raises the question whether we can realistically expect party-appointed arbitrators to act simultaneously as an impartial judge and a party advocate in the same proceeding.[28] There may be more of a risk that party-appointed arbitrators will overstep the bounds of propriety than those who are completely disinterested neutrals.[29] For this reason, one commentator points out how "it is vital to the integrity of arbitration to expressly delineate whether a party appointed arbitrator is neutral or non-neutral."[30]

i. The Prior Presumption

Codifying the early trend in domestic arbitration in the United States in 1951, the AAA's Code of Ethics and Professional Standards for Labor-Management Arbitration provided that party-appointed arbitrators are almost always partisan.[31] At that time, the majority of reported cases across jurisdictions allowed for a presumption of non-neutral party-appointed

25. *See* Crim. v. Pepperidge Farm, Inc., 32 F. Supp. 2d 326, 327-30 (D. Md. 1999); Burlington Northern R.R. v. TUCO, Inc., 960 S.W.2d. 629, 630 (Tex. 1997).

26. Byrne, *supra* note 15, at 1821 (citing the preamble of the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes).

27. 9 U.S.C. § 5.

28. Byne, *supra* note 15 at 1820, 1843.

29. *Id.* at 1838; Astoria Med. Group v. Health Ins. Plan of Greater N.Y., 182 N.E.2d 85, 90 (N.Y. 1962).

30. John D. Feerick, *The 1977 Code of Ethics for Arbitrators: An Outside Perspective*, 18 GA. ST. U. L. REV. 907, 923 (2002).

31. *See* AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS AND PROCEDURAL STANDARDS FOR LABOR-MANAGEMENT ARBITRATION 8 (1951).

arbitrators, as do treatises dating back half a century.[32] The oft-cited New York Court of Appeals case *Astoria Medical Group v. Health Insurance Plan of Greater New York* insists that a presumption of partiality is the only appropriate solution in tripartite tribunals.[33] Courts in many jurisdictions have followed Judge Fuld's reasoning in *Astoria Medical*:[34]

> Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral', at least in the sense that the third arbitrator or a judge is. And, as might be expected, the literature is replete with references both to arbitrators who are "neutrals" and those who are 'partial', 'partisan' or 'interested' and to arbitration boards composed entirely of 'neutrals' and those contrastingly denominated 'tripartite in their membership'.
>
> In fact, the very reason each of the parties contracts for the choice of his own arbitrator is to make certain his "side" will, in a sense, be represented on the tribunal.
>
> The right to appoint one's own arbitrator, which is of the essence of tripartite arbitration. . .would be of little moment were it to comprehend solely the choice of a "neutral". It becomes a valued right, which parties will bargain and litigate over, only if it involves a choice of one believed to be sympathetic to his position or favorably disposed to him.[35]

One of *Astoria Medical's* progeny is the case *Finkelstein v. Smith,* where a Florida appellate court held that it is expected that the arbitrators appointed by the disputants will act as partisans only one step removed from the controversy.[36] For many years, federal and state courts have, for the most part, agreed with the sentiments expressed in both *Astoria Medical* and *Finkelstein*.[37]

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32. *See* 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 12.01 (1958) ("In tripartite tribunals, two members are frankly partial or partisan and only the third member is in theory or fact impartial or neutral.").

33. *Astoria Med. Group*, 182 N.E.2d at 87-88.

34. *See, e.g.,* Crim. v. Pepperidge Farm, Inc., 32 F. Supp. 2d 326, 326 (D. Md. 1999); Lee v. Marcus, 396 So. 2d 208 (Fla. Dist. Ct. App. 1981); Burlington Northern R.R. v. TUCO, Inc., 960 S.W.2d. 629, 630 (Tex. 1997).

35. *Astoria Med. Group*, 182 N.E.2d at 87-88 (citations omitted).

36. Finkelstein v. Smith, 326 So. 2d 39, 40 (Fla. Dist. Ct. App. 1976) (holding that a named party was ineligible for appointment as an arbitrator).

37. *See, e.g.,* Cia de Navegacion Omsil, S.A. v. Hugo Neu Corp., 359 F. Supp. 898, 899 (S.D.N.Y. 1973) ("[A]s everyone knows, the party's named arbitrator in . . . [a tripartite] tribunal is an amalgam of judge and advocate."); Stef Shipping Corp. v. Norris Grain Co., 209 F. Supp. 249, 253 (S.D.N.Y 1962) ("[T]he arbitrator selected by the disputants cannot be expected to play a wholly impartial part."); Petition of Dover S.S. Co., 143 F. Supp. 738, 738, 741 (S.D.N.Y. 1958) ("[W]here an arbitration agreement provides for each party to select an arbitrator and that such arbitrators shall select a third, designation, by the parties themselves, of arbitrators who may not be completely disinterested is a generally accepted practice." Judge Herlands wrote that "[i]n such a case, it is quite frankly recognized that the 'neutral' arbitrator is the one selected by the parties' arbitrators."); City of Erie v. Fraternal Order of Police, No. 70, 1971 WL 14554, at *3 (Pa. Ct. C.P. Erie County Sept. 30, 1971) (stating that "realistically speaking, the [party-appointed] arbitrator might think, feel, and

Exactly one year after the *Finkelstein* decision, the AAA and the American Bar Association (ABA) jointly issued the Code of Ethics for Arbitrators in Commercial Disputes expressly recognizing separate obligations of the neutral arbitrator vis-à-vis the two party-appointed arbitrators.[38] In so doing, the 1977 Code of Ethics (the 1977 Code) recognized a presumption of non-neutrality for party-appointed arbitrators in all commercial tripartite arbitrations.[39] What is more, the 1977 Code squarely permitted party arbitrators to communicate ex-parte with their appointing party "concerning any . . . aspect of the case," so long as notice of any communications was given to the opposing party beforehand.[40] Blanket notices for future communications between party and party-appointed arbitrators were authorized, and neither the nature nor the contents of the ex-parte talks ever needed to be revealed to the other parties or arbitrators.[41] This early version of the code strongly suggested that the free flow of ideas between a party and his appointed arbitrator at all stages of the arbitral proceeding was something to be encouraged.[42] However, both the presumption of non-neutrality and the allowance of ex- parte discussions with non-neutral arbitrators (authorized by the 1977 Code) were challenged by scholars, ADR providers, and some courts.[43] What emerged is an opposite presumption of neutrality and a prohibition of ex-parte communications with party-appointed arbitrators.[44]

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act a bit like the people who selected him"). Two other cases, *Lee* and *Burlington Northern R.R.* came to the same conclusion as Judge Herlands in *Dover Steamship.*

38. AAA, ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 8, at canon VII B(1) (stating that disclosures of party arbitrators' relevant interests and relationships "need not include as detailed information as is expected from persons appointed as *neutral* arbitrators") (emphasis added). "[P]arty appointed arbitrators should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators are to be neutral." *Id.* Furthermore, Canon VII permitted party-appointed non-neutrals to be "predisposed toward the party who appointed them." *Id.*

39. *See id.* at canon VII A(1).

40. *Id.* at canon VII C(2).

41. *Id.*

42. *See* Feerick, *supra* note 30, at 919-23.

43. *See* Lieberman, *supra* note 11, at 215-16.

44. *See infra* notes 54-57 and accompanying text.

ii. The Presumption is Reversed

Over the last decade, an increasing portion of academics and practitioners have taken umbrage with the concept of non-neutral arbitrators. One noted practitioner has opined that "the 'nonneutral' party-appointed arbitrator is something of an embarrassment."[45] Other commentators agree, having described the system of non-neutral party-appointed arbitration as a "black eye" on the face of ADR,[46] and an "American stepsister of dubious integrity."[47] Finding common non-disclosures and excessive party/arbitrator entanglements to be corruptive of the entire arbitration process, this camp is of the view that "any party-designate, like a neutral, should have *no* predisposed view, sympathetic or otherwise, about the merits of the case he or she will eventually decide."[48]

Amidst growing concern about the ethics and fairness behind party-appointed arbitrators, the ABA began to rethink its stance on tripartite arbitration.[49] About four years ago, perhaps in recognition of international practice and the ever increasing transnational nature of commercial disputes, the ABA's Dispute Resolution Section examined the presumption of non-neutrality.[50] They noted that for many years international arbitrations were most often held in tripartite format and always under the legal presumption that party-appointed arbitrators were expected to be wholly independent of the parties who nominated them.[51] In fact, party-appointed arbitrators in international arbitrations are presumed to be as neutral as the chairman or umpire (i.e., the third arbitrator).[52] Desiring to be in harmony with the international community, in 2003 the ABA commissioned a special task force to reassess the 1977 Code and bring it into harmony with the international community.[53] The task force ultimately revised the 1977 Code by reversing the presumption of party-appointed arbitrators, in favor of a

45. James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for 'Nonneutrals,'* 11 AM. REV. INT'L ARB. 295, 305 (2000).

46. Lieberman, *supra* note 11.

47. Robert Smit, *The Newly Revised CPR Rules for Non-Administered Arbitration of International Disputes*, 18 J. INT'L ARB. 59, 67 (2001).

48. Lieberman, *supra* note 11, at 234 n.113 (emphasis added).

49. *See* Byrne, *supra* note 15, at 1816-17.

50. *Id.* at 1826.

51. *Id.* at 1815.

52. *Id.* at 1815, 1825, 1829.

53. *Id.* at 1825-29.

presumption of neutrality, [54] and prohibiting ex-parte communication between a party and his appointed arbitrator.[55]

Today's major ADR providers in the United States have amended their rules to adopt this same presumption of neutrality, as well as a blanket prohibition on ex-parte communications. Both JAMS' Ethics Guidelines as well as CPR's Code of Ethics establish presumptions of neutrality for all arbitrators, including party-appointed arbitrators, barring any agreement to the contrary.[56] At least one state's highest court last year sought to lessen the confusion surrounding tripartite arbitration by prescribing a legal presumption of neutrality.[57]

C. The FAA and the Ban on "Evident Partiality"

The FAA governs most arbitrations, including those that are subsequently litigated and result in published decisions.[58] Courts apply a strong presumption that the FAA, and not state law, supplies the rules for arbitration absent "clear intent" in a contract to incorporate state arbitration laws.[59] Section 10(a)(2) of the FAA calls for arbitration awards to be vacated where "there was evident partiality or corruption in the arbitrators."[60] This "evident partiality or corruption" language confines itself to situations where an arbitrator has had dealings or relationships with one of the parties that might cause the arbitrator to be biased.[61] To vacate an arbitration award—or to stay an arbitration pending removal and

54. AAA, ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 8, at pmbl., (stating that it is "preferable for all arbitrators – including any party-appointed arbitrators – to be neutral, that is independent and impartial, and to comply with the same ethical standards").

55. *Id.* at canon X(C)(4) (stating that oral communications between a party and his appointed arbitrator are prohibited in the absence of the other non-neutral arbitrator, and any written communication from a non-neutral arbitrator to a neutral arbitrator must be sent to the other non-neutral arbitrator).

56. JAMS, ARBITRATORS ETHICS GUIDELINES, *supra* note 8; CPR, RULES FOR NON-ADMINISTRATED ARBITRATION, *supra* note 8.

57. Borst v. Allstate Ins. Co., 2006 WI 70, ¶ 20, 291 Wis. 2d 361, ¶ 20, 717 N.W.2d 42, ¶ 20.

58. *See* 9 U.S.C. § 9 (which gives the jurisdiction of the FAA).

59. Sovak v. Chugai, 280 F.3d 1266, 1269 (9th Cir. 2002); Roadway Package Sys. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001).

60. 9 U.S.C. § 10(a)(2). Many state arbitration statutes have similar provisions. *See, e.g.*, Arizona Arbitration Act, ARIZ. REV. STAT. § 12-1512 (LexisNexis 2003); New York Arbitration Act, N.Y. C.P.L.R. 7511 (McKinney 1998); Idaho Unified Arbitration Act, IDAHO CODE ANN. § 7-912 (2004).

61. *Borst*, 291 Wis. 2d at 386-87.

reappointment of an evidently partial arbitrator—the reviewing court must find some personal interest on the part of the arbitrator, pecuniary or otherwise, that creates a manifest unfairness in the proceeding.[62]

But what does it really mean for an arbitrator to be evidently partial? Courts have struggled with this question for years. The Sixth Circuit has held that evident partiality requires more than just an appearance of bias and that there must be some actual evidence of bias.[63] The alleged partiality must be "direct, definite, and capable of demonstration" rather than remote, uncertain and speculative.[64] The party alleging evident partiality need not prove an improper motive on the part of the arbitrator existed, but only put forth facts that objectively demonstrate that such a motive could be assumed.[65] The Fourth, Fifth, Ninth and Eleventh Circuits have followed this same standard.[66] Inquiries into the potential evident partiality of an arbitrator are highly fact intensive.[67] There appears to be some threshold of sufficient partiality to one side of the dispute that makes an arbitrator evidently partial, but precisely where this threshold lies is reserved to each court and is determined on a case-by-case basis.[68]

The seminal case on evident partiality is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, in which a plurality of the United States Supreme Court held that the evident partiality standard "show[s] a desire of Congress to provide not merely for any arbitration, but for an impartial one."[69] *Commonwealth Coatings* imposed a duty on all "arbitrators to disclose to all parties any information that may create an impression of possible bias" on behalf of the arbitrator.[70] Under the Supreme Court's holding, an arbitrator is not required to disclose *every* business connection,

62. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 146-49 (1968).

63. *See* Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 329 (6th Cir. 1998).

64. Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621, 626 (6th Cir. 2002).

65. *See Andersons, Inc.*, 166 F.3d at 329.

66. *See* Gianelli Money Purchase Plan & Trust v. ADM Investor Services Inc., 146 F.3d 1309, 1312 (11th Cir. 1998); Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993); Bernstein Seawell & Kove v. Bosarge, 813 F.2d 726, 732 (5th Cir. 1987) (stating that the standard for "evident partiality" is a "strict" one, which requires "more than a mere appearance of bias" and instead requires the challenger to prove facts that establish "a reasonable impression of partiality"); Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburg, 933 F.2d 1481, 1489 (9th Cir. 1991) (stating that a party "must demonstrate more than a mere appearance of bias to disqualify an arbitrator.").

67. *See* Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429, 435 (11th Cir. 1995) (stating that an evident partiality inquiry is "fact intensive" and "highly dependent on the unique factual settings of each particular case.").

68. *See Bosarge*, 813 F.2d at 732.

69. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147 (1968).

70. *Id.* at 149.

nor give the parties a "complete and unexpurgated business biography."[71] However, if there exists any significant business dealings between an arbitrator and one of the parties, such a relationship must be disclosed.[72] The Ninth Circuit has taken the *Commonwealth Coatings* duty a step further by suggesting that, in some cases, "an arbitrator may [even] have a duty" to investigate for potential conflicts with a disputant, independent of its duty to disclose.[73]

Much to the frustration of arbitrators and practitioners everywhere, the vague "impression of possible bias" test that the Court adopted in *Commonwealth Coatings* has been found difficult to define in practice.[74] Since the Supreme Court has failed to revisit the evident partiality issue in subsequent cases, we must turn to other federal, but mostly state, courts for interpretation.[75]

Some circuit courts have recognized a difference between the application of the *Commonwealth Coatings* standard of evident partiality as it applies to neutral arbitrators and the standard applied to admittedly non-neutral party-appointed arbitrators.[76] For example, in *Sphere Drake Insurance Ltd. v. All American Life Insurance*, the Seventh Circuit found that the *Commonwealth Coatings* standard did not apply to an admittedly non-neutral party-appointed arbitrator because the *Commonwealth Coatings* case did not "so much as hint that party-appointed arbitrators are governed by" the same restrictions placed upon otherwise neutral arbitrators.[77] Judge Easterbrook stated that the ban against evident partiality in section 10(a)(2) of the FAA is just "the presumptive rule, subject to variation by mutual consent" and that parties are "free to choose for themselves to what lengths they will go in question of impartiality."[78] The Seventh Circuit canvassed cases decided since the enactment of the FAA in 1925 and noted it had yet to see a case where a party-appointed arbitrator, rather than a neutral, had

71. *Id.* at 151-52.

72. *Id.*

73. Schmitz v. Zilveti, 20 F.3d 1043, 1048 (9th Cir. 1994).

74. *Commonwealth Coatings Corp.*, 393 U.S. at 149.

75. Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 FORDHAM URB. L.J. 915, 920-21 (2001).

76. *See e.g.*, Sphere Drake Ins. Ltd. v. All American Life Ins., 307 F.3d 617 (7th Cir. 2002); Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815 (8th Cir. 2001).

77. *Sphere Drake*, 307 F.3d at 623.

78. *Id.* at 620.

displayed evident partiality.[79] "[T]he lack of precedent is unsurprising, because in the main party-appointed arbitrators are *supposed* to be advocates."[80] According to *Sphere Drake*, when parties agree to select non-neutral arbitrators, "section 10(a)(2) has no role to play."[81] In a similar vein, the Eighth Circuit held that when the partiality of a party-appointed arbitrator is challenged, "the [arbitration] award should be confirmed unless the objecting party proves that the party arbitrator's partiality prejudicially affected the award," whereas in cases challenging the partiality of neutral arbitrators, no such showing is necessary.[82]

Other courts have disagreed with Judge Easterbrook's holding in *Sphere Drake*. For example, in *Metropolitan Property & Casualty Insurance Co. v. J.C. Penney Casualty Insurance. Co.*, the District Court of Connecticut cited to *Commonwealth Coatings* when it found evident partiality exhibited by a non-neutral party-appointed arbitrator.[83] In *Metropolitan Property*, the defendant was alleged to have carried on ex-parte communications with his appointed arbitrator and to have discussed the merits of the case with his appointed arbitrator prior to the appointment of the third (neutral) arbitrator.[84] Because none of these communications were disclosed to the plaintiff, the plaintiff sought to disqualify the defendant's appointed arbitrator on an evident partiality theory.[85] Finding a reasonable basis for which a claim of evident partiality could be sustained, the court noted that even though the arbitrator at issue was openly non-neutral, he was still obliged to "participate in the arbitration process in a fair, honest and good-faith manner."[86]

Similarly, in *Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, the New Jersey Supreme Court found a party-appointed arbitrator to have been evidently partial when he failed to disclose that he was a long-time creditor of the party that selected him.[87] Rejecting the logic of *Sphere Drake* and following a broader interpretation of *Commonwealth Coatings*, the New Jersey Supreme Court concluded that even party-appointed arbitrators must

79. *Id.*
80. *Id.*
81. *Id.*
82. Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 821-22 (8th Cir. 2001).
83. Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885, 890-91 (D. Conn. 1991).
84. *Id.* at 887-88.
85. *Id.* at 888.
86. *Id.* at 892.
87. Barcon Assocs. Inc. v. Tri-County Asphalt Corp., 430 A.2d 214 (N.J. 1981).

"adhere to the high standards of honesty, fairness and impartiality"[88] and established the following bright line rule:

> [E]very arbitrator, neutral or party-designated, [must] make full disclosure of possible conflicts of interest to the parties, prior to the commencement of arbitration proceedings. This disclosure should reveal any relationship or transaction that he has had with the parties or their representatives as well as any other fact which would suggest to a reasonable person that the arbitrator is interested in the outcome of the arbitration or which might reasonably support an inference of partiality.[89]

So, while courts historically have expressed an acceptance of non-neutral arbitrators and even a presumption of non-neutrality, more recently the trend has been towards favoring a presumption of neutrality among all arbitrators.[90] As a result, the flexibility and leniency historically granted to party-appointed arbitrators' conduct in the United States is dwindling because courts are requiring less partisanship and more independence of the arbitrators.[91] Eventually, the trend towards neutrality should harmonize with the whole of existing case law, leading to the vacating or overruling of existing cases supporting the prior, non-neutral, presumption.[92]

III. PRACTICAL CONSIDERATIONS GOING FORWARD

Where the tripartite agreement provides for all three arbitrators to be neutral, the arbitrators will make unanimous or two-to-one majority decisions that would fail to raise any suspicion of impartiality.[93] More difficult questions occur when non-neutrals are included in the decision making process.[94] For example, is it appropriate for non-neutral, party-appointed arbitrators to issue a ruling on pre-hearing discovery issues? At

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88. *Id.* at 220.

89. *Id.*

90. Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505, 523 (2003) ("Even when the lawyer is selected as a party-representative, the trend in tripartite arbitration is to hold the party-appointed arbitrator to standards more akin to a neutral than those of a party advocate.").

91. *See* Michael F. Hoellering, *The Independence of Party-Appointees*, N.Y.L.J. June 3, 1993, at 3 (citing *Metro. Prop. & Cas. Ins. Co.* as evidence).

92. See Huber, *supra* note 75, at 923, noting that the current state of the law, by using a general standard of "evident partiality" reflects inconsistency and a variety of underlying values.

93. *See* Fairman, *supra* note 90, at 523.

94. *See* Farber, *supra* note 9, at 5 ("The neutral must walk the fine line between allowing participation by the non-neutral, but not allowing that non-neutral to become just another advocate.").

the arbitration hearing itself, how are evidentiary objections and motions to exclude handled? Should all three arbitrators have a vote in the ruling or only the neutral arbitrator?

Courts that have upheld the presumption of non-neutrality among party-appointed arbitrators have duly acknowledged that where arbitrators are openly partisan, they are expected to vote with the party that selected them.[95] In this scheme, the role of the third neutral arbitrator most often is reduced to a mediator or tie-breaker.[96] Some parties may prefer this arrangement, especially if they have faith in their appointed arbitrators to advocate on their behalf in ways that they cannot.[97] However, if we assume the votes of non-neutral party arbitrators usually will cancel each other out, it appears incredibly inefficient to allow party arbitrators to have a vote at all.[98] After all, would we really want every question of law that is raised throughout the arbitration process to result in a sidebar? Imagine all three arbitrators, two of whom may be unabashedly partisan, being forced to congregate and decide on every possible ruling that comes before the panel. This would result in a virtual re-argument of the entire case by the partisans to the neutral and would only serve to delay the award.

A review of reported cases involving tripartite arbitrations that were subsequently litigated suggests they most often involve two party-appointed arbitrators who select a neutral third "umpire" or "chairperson."[99] That individual, like a judge at trial, is typically responsible for all discovery and evidentiary rulings throughout the course of arbitration.[100] As a matter of efficiency and practicality, this appears to be an appropriate solution. This practice also comports with the desire to have arbitrations reflect the same

95. Of course, parties could always contract around this non-neutral presumption by specifying their desired procedures in the provisions of the arbitration agreement itself. Doing so would effectively eliminate any uncertainty about the permissible scope of party-appointed arbitrator activities and responsibilities.

96. *See* Farber, *supra* note 9 ("The final award [in a tripartite arbitration scheme] will almost always be by a majority vote of the neutral, one party-appointed arbitrator and a dissent. In effect, the neutral will decide the case.").

97. *Id.* at 4 (noting that drafters "feel more secure in having their 'own' arbitrator" and that "parties feel more direct input in deliberation if they appointed" one of the arbitrators).

98. *See* Huber, *supra* note 75, at 926 ("Why bother [with tripartite arbitration], particularly in view of the added cost and complexity associated with adding two non-neutral arbitrators whose influence and votes will almost certainly cancel out each other?").

99. Jim Creer, Guidelines *Regarding How To Formulate Terms of Remuneration*, ADR REP.,March 2008, at 22.

100. *See, e.g.*, JUDICIAL ARBITRATION AND MEDIATION SERVICES, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES 9 (2007), *available at* http://www.jamsadr.com/images/PDF/JAMS-comprehensive_arbitration_rules.PDF. (describing how under the JAMS rules the neutral arbitrator is responsible for discovery and evidentiary rulings).

kind of impartiality as is found in the court system. Yet, allowing the neutral to act as the sole decision-maker for the entire proceeding leading up to the final award begs the question of why we need the party-appointed arbitrators in the first place. How then can we find a fair and efficient compromise? Let's start with some practical observations.

A. Pre-Hearing Considerations

In the discovery context, it is not unreasonable to assume that two non-neutral arbitrators would potentially squabble over issues such as the number of depositions allowed, the extension of deadlines, and the scope of discovery. Because facts and evidence developed through discovery often bring about settlement discussions, and settlement is always to be encouraged, one argument would suggest that the discovery process should be viewed as sufficiently important to grant all three arbitrators a vote in the decision-making. A more persuasive argument, however, would favor leaving the potentially innumerable discovery skirmishes to the decision of the umpire who will not only issue impartial rulings, but hasten what often seems like a never-ending pre-hearing process.

Similar considerations apply to motions "in limine." One could argue that a ruling on a motion to exclude witnesses or preclude other evidence is more significant than a discovery ruling. In limine decisions arguably carry a stronger potential to be outcome-determinative. Thus, the argument supporting a ruling by all three arbitrators is strengthened. Similarly, although a single decision-maker is more than capable of handling in limine rulings, such rulings may be among those jurisprudential decisions more integral to the arbitration proceeding such that the input of all three arbitrators will be necessary. On the other hand, motions in limine present another instance where the scales often tip in favor of efficiency. We have seen it done both ways, in practice.

Summary judgment motions present instances where both neutral and non-neutral arbitrators should be required to congregate and arrive at a majority decision. At any stage in the arbitration process where a party's substantive claim or defense is threatened, the threatened party should have the right to have his appointed arbitrator fight on his behalf. Indeed, whether the ruling is on a motion to dismiss, a motion for summary judgment, or a motion on the pleadings, the substantive claims and legal rights of the parties are never more in jeopardy during these times, and each party should be entitled to have their appointed advocate fight either to keep their case alive or have it dismissed as they deem appropriate. In practice, the decision of

the umpire is likely to carry the day, but all three arbitrators should participate in the decision process.[101]

B. *Considerations at the Arbitration Hearing*

The most frequent calls for an arbitrator's services during the course of the hearings are rulings on evidentiary objections. Given that, it seems unreasonable for two partisan arbitrators to have a say in every objection at trial, as doing so would likely contribute to procedural delay, and ultimately, a tie-breaker situation where the neutral's decision prevails.[102] Therefore, much like rulings on non-dispositive discovery motions, all evidentiary objections at trial are best decided solely by the neutral.

C. *The Award*

The same rationale behind allowing the entire panel to rule on summary judgment motions compels the conclusion that all three arbitrators must have a vote in the final award. The award is the most significant stage at the proceeding and is of greatest importance to the disputants.[103] Each party will no doubt want its designated arbitrator to advocate for a greater or lesser award, respectively. All must participate and decide.

While it is proper to include all three arbitrators in the decision-making process for the award, giving all three arbitrators a say in the outcome has a tendency to complicate matters, particularly for the neutral arbitrator. In most tripartite arbitrations, the decisions of whether to grant an award and what the award amount will (or will not) be are expected to be made by majority vote.[104] Since only three arbitrators are on the panel, to obtain a majority vote the neutral is forced to align himself with one of the party-appointed arbitrators.[105]

But what happens when the neutral does not agree with either of the partisan arbitrator's positions? This issue was explored in 1955 by Helmut Furth and Bernard Gold in their Harvard Law Review note entitled *The Use*

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101. *See* Kenneth S. Carlston, *Codification of International Arbitral Procedure*, 47 AM. INT. L. J. 203, 208 (1953).

102. *See* Gold & Furth, *supra* note 2, at 313-14 (stating that tripartite arbitration may be more costly because of delays induced by tripartism).

103. *See id.* at 309 ("The arbitration is viewed as a complete failure by both sides if no award is produced.").

104. *Id.* at 308.

105. *See id.* at 310 (stating that this situation arises only where each party has ordered the partisan arbitrators not to leave the position of the party at the open hearing).

of Tripartite Boards in Labor, Commercial, and International Arbitration.[106] The authors found that when the neutral arbitrator disagrees with both sides of the debate, one possible outcome is for no award to be granted because a majority decision could not be reached.[107] They noted, however, that such a stalemate is "extremely unlikely" in practice, given "the parties' desire to get the matter settled, the time and money already invested in the proceeding, and the further expenditures that would have to be made should there be no award."[108] Furthermore, they observed that the entire tripartite proceeding is considered a "complete failure" by both sides if the neutral cannot arrive at a decision.[109]

With arbitral stalemates so heavily disfavored by all parties, a great deal of pressure then rests on the shoulders of the neutral. Since the neutral cannot render an award independent of the other two arbitrators,[110] it is often the case that to obtain a majority vote, neutrals feel forced to "compromise" their decisions.[111] In an effort to avoid these compromised awards, arbitrators sometimes allow issues relating to the award to be split and voted on individually: "[F]or example, [in a labor arbitration], if the neutral desires to reinstate a discharged employee without awarding him back pay, he can have the partisans vote on reinstatement and back pay separately."[112] Alternatively, the neutral could simply threaten "to vote with the partisan who takes a position closest to his own."[113] In either case, the potential for negotiation between the arbitrators and eventual compromise by the neutral is ever-present in the tripartite structure.[114] While some may find this cause for concern, it may be that the difficulties faced by the neutral in a tripartite

106. *See generally id.*

107. *See* Gold & Furth, *supra* note 2, at 308.

108. *Id.*

109. *Id.* at 309.

110. This would only be allowed if a provision in the arbitration agreement allowed the neutral to have binding decision-making authority should a majority not be obtained.

111. *See* Gold & Furth, *supra* note 2, at 308-09 (stating that some lawyers "prefer a tripartite board when they have a weak case since they believe they have a better chance to get a compromise decision").

112. *Id.* at 309.

113. *Id.* Caveats to this approach obviously include the possibility of alienating both party arbitrators. Gold and Furth cite to one case in which the neutral told the partisan arbitrators to vote on separate pieces of paper and that the figure nearest to his own would become the award . . . and both arbitrators resigned in outrage. *Id.* (citing M. Herbert Syme, *Tri-Partitism and Compulsory Arbitration*, *in* NEW YORK UNIVERSITY THIRD ANNUAL CONFERENCE ON LABOR 195, 199 (Emanuel Stein ed., 1950)).

114. *See id.* at 308.

panel are no different than the problems encountered daily by civil juries and multi-judge courts who render binding majority decisions despite vocal dissenters.[115] From that perspective, compromise awards appear to be par for the course.

IV. PARTING WORDS

While the law is far from settled in the arena of tripartite arbitration, consideration of the issues addressed in this paper allows potential parties to arbitration to think prospectively about what provisions they may wish to add, or fail to add, in future arbitration agreements. It similarly helps potential arbitrators understand how courts have construed their roles as arbitrators, and the roles of any co-arbitrators with whom they may be empanelled.

115. *Id.* at 309.