IS THREE A CROWD?: NEUTRALITY, PARTIALITY AND PARTISANSHIP IN THE CONTEXT OF TRIPARTITE ARBITRATIONS

Sean-Patrick Wilson
David J. McLean
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By David J. McLean and 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. Tripartite panels are most
commonly found in commercial and international arbitrations, and labor disputes.¹
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”). 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 provide the neutral.

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.² And as early as 1886, States had

* David J. McLean is a senior litigation partner at Latham & Watkins LLP and the managing partner of the
New Jersey office. He is the former co-chair of the firm’s International Dispute Resolution practice group.
Sean-Patrick Wilson is an associate in the Los Angeles office of Latham & Watkins LLP.

¹ Arthur Lesser, Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitrations?, 5 Arb. J. 276, 279 (1950); see also Phillips, A Lawyer’s Approach to Commercial Arbitration, 44 Yale L.J. 31, 47;
Helmut F. Furth and Bernard Gold, Note, The Use of Tripartite Boards in Labor, Commercial and

² United States-Great Britain Treaty of November 19, 1794, 8 STAT. 116; See I MOORE, INTERNATIONAL
ARBITRATIONS 136, 279 (1898) (referring to the Jay Treaty of 1794 as the first modern international arbitral
proceeding).
begun to pass laws establishing tripartite procedures for labor arbitrations.³ In fact, most early labor arbitrations in the United States were tripartite.⁴ Today, both Federal and State courts nationwide, as well as all major ADR institutions (including JAMS, CPR and AAA) acknowledge party-appointed tripartite arbitration as a legitimate and oft-practiced form of dispute resolution.⁵

The benefits of party-appointed arbitration are many and varied. For one, parties may be more comfortable having their own arbitrator, or feel that their own interests will not be heard without their own representative on the panel. Parties may perceive they have more of a role or involvement in the proceedings if they select one of the three arbitrators.⁶ 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.⁷ Additionally, party-appointed arbitrators’ substantive experience in the field in dispute often adds an element of expertise to the panel.⁸ To be sure, when there are aspects of a

³ See 2 LAWS OF N.Y., c. 410 (1886); see also Mass. Acts. And Resolves 1886m c, 263; 8 STAT. 116, 143 C.T.S. 145

⁴ Furth and Gold, The Use of Tripartite Boards in Labor, Commercial and International Arbitration, 68 Harv. L. Rev. 293, 294 (1955) (citing WITTE, HISTORICAL SURVEY OF LABOR ARBITRATION 12-13 (1952)).

⁵ See AMERICAN ARBITRATION ASSOCIATION (AAA), THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES. Available at http://www.adr.org/sp.asp?id=21958&printable=true; see also JUDICIAL ARBITRATION AND MEDIATION SERVICES (JAMS): ARBITRATORS ETHICS GUIDELINES. Available at: http://www.jamsadr.com/arbitration/ethics.asp; see also THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (CPR): ABOUT CPR. Available at http://www.cpradr.org/aboutcpr1.htm.


⁸ See Astoria Med. Group v. Health Ins. Plan of Greater N.Y., 11 N.Y.2d 128, 138 (1962) (stating that “arbitrators selected by the parties are, generally speaking, experts on the subject in controversy and bring to their task a wealth of specialized knowledge”).

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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. 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.

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

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 tripartite structure. 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. For example, are all party-appointed arbitrators presumed to be neutral? How practical would such a presumption be? After all -- as Professor Hans

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9 See Furth and Gold at 299; see also Arthur Lesser, Tripartite Boards or Single Arbitrators in Voluntary Labor Arbitrations?, 5 Arb. J. 276, 279 (1950) (stating that when a tripartite board is selected, “the resulting award will not only be more acceptable to the parties, but also, being the product of collective judgment, will more likely be the correct answer.”).


11 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, 1841-42 (“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.”)
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 realization.” Assuming this to be true, the next question to ask of course 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 ban on “evident partiality” with the concept of having non-neutral arbitrators?

Unfortunately, neither Congress nor the Supreme Court has delineated fully the concept of neutrality of party-appointed arbitrators, and the case law among the circuit and trial courts sometimes 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. 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. Courts cannot require a higher level of impartiality than is provided for by the parties in an arbitration.

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13 9 U.S.C. 5 (§ 5 of the Federal Arbitration Act) requires that the method for selecting arbitrators contained in the parties agreement be followed.
Therefore, arbitrators may be selected by whatever means the parties select, 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 law. Indeed, courts have held that under § 5 of the Federal Arbitration Act, “partisans” may be appointed if the arbitration agreement allows each party to appoint an arbitrator, and places no explicit restrictions on who can be selected.

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. 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 § 5 of the FAA, no outright presumption of neutrality or non-neutrality of party-appointed arbitrators is codified in the Act. A common sense understanding of human bias begs the question whether we can realistically expect party-appointed arbitrators to act simultaneously as impartial judge and party advocate in the same proceeding. There may be more of a risk that party-
appointed arbitrators will overstep the bounds of propriety than those who are completely disinterested neutrals. For this reason, one commentator points out, “It is vital to the integrity of arbitration to delineate expressly whether a party-appointed arbitrator is neutral or non-neutral.”

i. The Prior Presumption

Codifying the early trend in domestic arbitration in the United States in 1951, the American Arbitration Association’s Code of Ethics and Professional Standards for Labor-Management Arbitration provided that party-appointed arbitrators are almost always partisan. At that time, the majority of reported cases across jurisdictions allowed for a presumption of non-neutral party-appointed arbitrators, as do treatises dating back half a century. The oft-cited N.Y. Court of Appeals case of Astoria Medical Group. Et al. v. Health Insurance Plan of Greater N.Y., insists that a presumption of partiality is the only appropriate solution in tripartite tribunals. Courts in many jurisdictions have followed Judge Fuld’s reasoning in Astoria Medical:

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

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19 AMERICAN ARBITRATION ASSOCIATION’S CODE OF ETHICS AND PROFESSIONAL STANDARDS FOR LABOR-MANAGEMENT ARBITRATION, I, 8 (1951).

20 See C. Davis, ADMINISTRATIVE LAW, 12.01 at 157 (1958) (stating “in tripartite tribunals, two members are frankly partial or partisan and only the third member is in theory or fact impartial or neutral”).

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.\(^\text{22}\)

One of Astoria Medical’s progeny is the case of 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.”\(^\text{23}\) For many years, federal and state courts have, for the most part, agreed with the sentiments expressed in both Astoria Medical and Finkelstein v. Smith.\(^\text{24}\)

Exactly one year after the Finkelstein decision, the American Arbitration Association and the American Bar Association jointly issued the Code of Ethics for Arbitrators in Commercial Disputes, expressly recognizing separate obligations of the

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\(^{24}\) See e.g., City of Erie v. Fraternal Order of Police, 1971 WL 14554 (Pa. Com. Pl.) (stating that “realistically speaking, the [party-appointed] arbitrator might think, feel, and act a bit like the people who selected him.”); Cia de Navegacion Omail, S.A. v. Hugo Neu Corp., 359 F. Supp. 898, 899 (S.D.N.Y. 1973) (stating “[A]s everyone know, 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 (1962) (stating “the arbitrator selected by the disputants cannot be expected to play a wholly impartial part.”); Petition of Dover Steamship, 143 F. Supp. 738 (1958) (deciding that where 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, at page 741, that “in such a case, it is quite frankly recognized that the ‘neutral’ arbitrator is the one selected by the parties’ arbitrators”); Lee v. Marcus, 396 So. 2d 208 (Fla. App. 1981) (same); Burlington Northern R.R. Co. v. TUCO, Inc., 960 S.W. 2d. 629, 630 (Tex. 1997) (same).
neutral arbitrator vis a vis the two party-appointed arbitrators. In so doing, the 1977 Code of Ethics ("the Code") recognized a presumption of non-neutrality for party-appointed arbitrators in all commercial tripartite arbitrations. What is more, the 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. 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. 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. However, both the presumption of non-neutrality and the allowance of ex parte discussions with non-neutral arbitrators authorized by the initial Code were to be challenged by scholars, ADR providers, and some courts. What has emerged is an opposite presumption of neutrality, and a prohibition of ex parte communications with party-appointed arbitrators.

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25 The Code of Ethics for Arbitrators in Commercial Disputes, Canon VII B(1) (1977) (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). "Party appointed arbitrators should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators be neutral." Furthermore, Canon VII permitted party-appointed non-neutrals to be "predisposed toward the party who appointed them").

26 Id. at A(1) ("Party appointed arbitrators should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators be neutral." Furthermore, Canon VII permitted party-appointed non-neutrals to be "predisposed toward the party who appointed them").

27 Id. at C(2).

28 Id.
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.” 29 Other commentators agree, having described the system of non-neutral party-appointed arbitration as a “black eye” on the face of alternative dispute resolution, 30 and an “American stepsister of dubious integrity.” 31 Finding common nondisclosures 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.” 32

Amidst growing concern about the ethics and fairness behind party-appointed arbitrators, the American Bar Association began to rethink its stance on tripartite arbitration. About four years ago, perhaps in recognition of international practice and the ever-increasing transnational nature of commercial disputes, the American Bar Association’s Dispute Resolution Section examined the presumption of non-neutrality. 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. In fact, party-appointed arbitrators in international arbitrations are presumed to be as neutral as the chairman or umpire (i.e., the third arbitrator). Desiring to be in harmony with the international community, in 2003 the ABA commissioned a special “Task Force” to reassess the 1977 Code of Ethics and bring it into harmony with the international community.\(^{33}\) The Task Force ultimately revised the Code by reversing the presumption of party-appointed arbitrators in favor of neutrality,\(^ {34}\) and prohibiting ex parte communication between a party and his appointed arbitrator.\(^ {35}\)

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 the CPR’s Code of Ethics establish presumptions of neutrality for all arbitrators, including party-appointed arbitrators, barring any agreement to the contrary.\(^ {36}\) And at least one state’s highest court last year sought to “lessen the confusion” surrounding tripartite arbitration by prescribing a legal presumption of neutrality.\(^ {37}\)


\(^ {34}\) \textit{The Code of Ethics for Arbitrators in Domestic and International Commercial Disputes}, 2003 Revision, Canon X (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”).

\(^ {35}\) \textit{Id.} at 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).


c. The FAA and the Ban on “Evident Partiality”

The FAA governs most arbitrations, including those that are subsequently litigated and result in published decision. Courts apply a strong presumption that the Federal Arbitration Act, and not state law, supplies the rules for arbitration absent “clear intent” in a contract to incorporate state arbitration laws. Section 10(a)(2) of the FAA calls for arbitration awards to be vacated where “there was evident partiality or corruption in the arbitrators”. 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. To vacate an arbitration award -- or to stay an arbitration pending removal and re-appointment 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.

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; the alleged partiality must be “direct, definite, and capable of demonstration” rather than remote, uncertain and speculative. 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.

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


The Fourth, Fifth, Ninth and Eleventh Circuits have followed this same standard. Inquiries into the potential “evident partiality” of an arbitrator are highly fact intensive. 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.

The seminal case on “evident partiality” is Commonwealth Coatings Corp. v. Continental Casualty, 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.” Commonwealth Coatings imposed a duty on all arbitrators to disclose to all parties any information that may create a “reasonable impression of possible bias” on behalf of the arbitrator. Under the Supreme Court’s holding, an arbitrator is not required to disclose every business connection nor give the parties a “complete and unexpurgated business biography;” however, if there exist any significant business dealings between an arbitrator and one of the parties, such a relationship must be disclosed. The Ninth Circuit has taken the Commonwealth Coatings

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41 See Gianelli Money Purchase Plan and Trust v. ADM Investor Servs., Inc., 146 F.3d 1309, 1312 (11th Cir. 1998) (same); Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993) (same); 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”).


43 Id. at 149.

44 Id. at 151-152.
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.\(^{45}\)

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. 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.\(^{46}\)

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.\(^{47}\) For example, in *Sphere Drake Ins. Ltd. v. All American Life Ins.*, the Seventh Circuit found that *Commonwealth Coatings* standard did not apply to an admittedly non-neutral party-appointed arbitrator as 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.\(^{48}\) Judge Easterbrook stated that the ban against “evident partiality” in Section 10(a)(2) of the FAA is just a “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.”\(^{49}\)

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\(^{45}\) *Schmitz v. Ziveti*, 20 F.3d 1043, 1048 (9th Cir. 1994).


\(^{47}\) See e.g., *Sphere Drake Ins. Ltd. v. All American Life Ins.*, 207 F.3d. 617 (7th Cir. 2002); *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F. 3d 815 (8th Cir. 2001).

\(^{48}\) *Sphere Drake*, 307 F.3d at 620-21.

\(^{49}\) Id. at 620.
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 displayed “evident partiality.” “[T]he lack of precedent is unsurprising, because in the main party-appointed arbitrators are supposed to be advocates.”

According to *Sphere Drake*, when parties agree to select non-neutral arbitrators, “Section 10(a)(2) has no role to play.” In a similar vein, the Eighth Circuit has held that when the partiality of a party-appointed arbitrator is challenged, “the arbitration award should be confirmed unless the objecting party proves the party arbitrator’s partiality affected the award,” whereas in cases challenging the partiality of neutral arbitrators, no such showing is necessary.

Other courts have disagreed with Judge Easterbrook’s holding in *Sphere Drake*. For example, in *Metropolitan Property & Casualty Ins. Co. v. J.C. Penney Casualty Ins. Co.*, the District Court of Connecticut cited to *Commonwealth Coatings* when it found evident partiality exhibited by a non-neutral party appointed arbitrator. In *Metro Property*, the defendant was alleged to have carried on ex parte communications with his appointed arbitrator, and discussed the merits of the case with his appointed arbitrator prior to the appointment of the third (neutral) arbitrator. As none of these communications were disclosed to the plaintiff, the plaintiff sought to disqualify the defendant’s appointed arbitrator on an “evident partiality” theory. Finding a reasonable

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50 *Id.*

51 *Id.*

52 *Delta Mine Holding Co. v. AFC Coal Props., In.*, 280 F. 3d at 821-22 (8th Cir. 2001).

basis for which a claim of evident partiality could be sustained, the court noted that even though arbitrator at issue was openly non-neutral, he is still obliged to “participate in the arbitration process in a fair, honest and good-faith manner.”

Similarly, in *Barcon Associates, Inc. v. Tri-County Asphalt Corporation*, 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. 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 “adhere to the high standards of honesty, fairness and impartiality” and a bright-line rule was established that:

> [E]very arbitrator, neutral or party-designated, [must] make full disclosure of possible conflict 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.

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. As a result, the flexibility and leniency historically granted to party-appointed arbitrators’ conduct in the

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54 Id. at 892.


56 Id. at 192.

57 Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 Ohio St. J. on Disp. Resol. 505, 523 (2003) (stating that “even when a 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.”).
United States has been dwindling, as courts are requiring less partisanship and more independence of the arbitrators.\(^{58}\) Eventually, the trend towards neutrality should harmonize with the whole of existing case law, leading to the vacation or overruling of existing cases supporting the prior (non-neutral) presumption.

(III) Practical Considerations Going Forward

Where the tripartite agreement provides for all three arbitrators to be neutral, the arbitrators will make unanimous or 2-1 majority decisions that would fail to raise any suspicion of impartiality. More difficult questions occur when non-neutrals are included in the decision-making process. For example, is it appropriate for non-neutral, party-appointed arbitrators to issue a ruling on pre-hearing discovery issues? At 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?

Courts which 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.\(^{59}\) In this scheme, the role of the third “neutral” arbitrator most often is reduced to a mediator or tie-breaker.\(^{60}\) While some parties may prefer this arrangement, especially if they have faith in their appointed arbitrator to advocate on their behalf in a way that they themselves cannot, if we assume

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\(^{59}\) 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.

\(^{60}\) See Eugene I. Farber, *The Role of the Neutral in Party-Appointed Arbitrations*, N.Y. L.J., Sept. 13, 2002, at col. 4 (stating “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.”).
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. 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 reargument 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 which are subsequently litigated suggest they most often involve two party-appointed arbitrators who select a neutral third “umpire” or “chairperson.” That individual, like a judge at trial, is typically solely responsible for discovery and evidentiary rulings throughout the course of arbitration. 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 kind of impartiality as is found 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

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evidence developed through discovery often bring about settlement discussions, and settlement is always to be encouraged, one argument suggests 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, favors 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, these 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 an instance 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.

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. 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. 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 is expected to be made by majority vote.62 Since only three arbitrators are on the panel, in order to obtain a majority vote the neutral is forced to align himself with one of the party-appointed arbitrators.

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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 of Tripartite Boards in Labor, Commercial, and International Arbitration*. 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 on the basis of no majority decision being reached. 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 future expenditures that would have to be made should there be no award”. 63 Furthermore, they observed that the entire tripartite proceeding is considered a “complete failure” by both sides if the neutral cannot arrive at a decision. 64

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, 65 it is often the case that to obtain a majority vote, neutrals feel forced to “compromise” their decisions. 66 In an effort to avoid these “compromised” awards, arbitrators sometimes allow issues relating to the award be split and voted on individually: “For example [in a labor arbitration], if the neutral desires to reinstate a discharged employee without awarding him back pay, he can

63 *Id.*

64 *Id.*

65 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.

66 Furth and Gold at 308-09. (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.” *Id.* at 309.)
have the partisans vote on reinstatement and back pay separately. Alternatively, the neutral could simply threaten to vote with the partisan who takes a position closest to his own. In either case, the potential for negotiation between the arbitrators and eventual compromise by the neutral is ever-present in the tripartite structure. While some may find this cause for concern, it may be that the difficulties faced by the neutral in a tripartite panel are no different than the problems encountered daily by civil juries and multi-judge courts who render binding majority decisions despite vocal dissenters. From that perspective, “compromise” awards appear to be par for the course.

d. 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, and the roles of any co-arbitrators with whom they may be empanelled.

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67 Id. at 309.

68 Caveats to this approach obviously include the possibility of alienating both party arbitrators. Furth and Gold 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. at 309 (citing to Syme, Tri-Partitism and Compulsory Arbitration, in NYU THIRD ANNUAL CONFERENCE ON LABOR 195, 199 (1950)).

69 Id.