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Arbitration—Appointees on Tripartite Arbitration Board Allowed to Be Partial to the Views of Parties Who Select Them

Louis H. Siegel

both the theories of contract and the abuse of discretion by the school board. Broad proclamations of public policy may often place the law in rigid straits which on the surface seem to protect a class of citizens, but upon closer analysis subvert the very foundations of necessary free choice. The Court, however, has, by its strict interpretation of the statute, placed free choice in the background to ensure that local action which may be prejudicial, arbitrary, and capricious will not be used to undermine the confidence, security, and morale of the teaching profession.

W. A. C.

ARBITRATION

APPOINTEES ON TRIPARTITE ARBITRATION BOARD ALLOWED TO BE PARTIAL TO THE VIEWS OF THE PARTIES WHO SELECT THEM

Defendant, a non-profit corporation organized under the Insurance Laws of New York, entered into contracts with various partnerships of physicians, whereby the latter supplied medical assistance to the insurer's customers. Payment to the doctors was initially a fixed sum with an additional supplemental payment depending on criteria and standards both parties were to fix in the future. In the event that the parties failed to arrive at these criteria, the question was to be submitted to a tripartite arbitration board, each party selecting an arbitrator and a third chosen by the two appointees. Subsequently, the parties failed to agree. Defendant selected one of its Board of Directors as its appointed arbitrator. Plaintiff moved to disqualify him on the grounds of personal bias, interest and partiality and to have appellant substitute an impartial arbitrator. Special Term granted the motion which was affirmed by the Appellate Division and the defendant appealed to the Court of Appeals.[1] *Held*: reversed with three judges dissenting. Although a court could intervene in an appropriate case and disqualify an arbitrator *before an award has been rendered,* a member of a board of directors of a corporate party was not disqualified to act as the party's nominated arbitrator solely because of this relationship. Tripartite arbitration is implicitly partisan in nature. *In the Matter of Astoria Medical Group*, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962).

Arbitration is a method of adjudication of differences which parties, by consent, substitute for usual processes provided by law.[2] Parties to an arbitration contract are completely free to agree upon the identity of the arbitrators and the manner in which they are chosen.[3] The law recognizes the arbitration contract of the parties, and courts will not vary its terms but will implement

1. 13 A.D.2d 288, 216 N.Y.S.2d 906 (1st Dep't 1961).
2. Cf. Cross and Brown Co. v. Nelson, 4 A.D.2d 501, 167 N.Y.S.2d 573 (1st Dep't 1957).
3. See N.Y. Civil Practice Act § 1452.

the agreement and give it effectual enforcement.[4] Therefore, the arbitral tribunal, is a creature which is exclusively devised by the parties in their inherent capacity to contract privately between themselves.[5]

Despite positive language by appellate courts about the necessity of impartial arbitrators in tripartite arbitration agreements, it is an impossible ideal.[6] Arbitrators appointed by parties are selected usually because they are advocates of the cause of the party appointing them.[7] The Legislature of New York has recognized the partiality of an arbitrator appointed by a party to a contract by specifically permitting the vacating of an award of arbitration *only* where the partiality is that of an arbitrator appointed as a neutral.[8]

The majority of the Court in the instant case held that the very reason a partial arbitrator may be selected is that the parties actually contract for the choice of their own arbitrator. In practice and experience, the choice of a partial arbitrator in a tripartite arrangement is universally accepted. The choice is given so that the party can rely on the fact that his "side" is represented on the tribunal. The Court, in interpreting the arbitration clause of the contract, further stated that the parties did not intend that the appointees be impartial or they would have so provided. The dissenting judges adhered to the principle that an arbitral tribunal is "judicialized" to some degree, and the inclusion of a non-neutral arbitrator is alien to the judicial process. In answer to the argument of the minority opinion, Dean Sturges has written:

> Arbitrators, as distinguished from judges, are not appointed by the sovereign, are not paid by it, nor are they sworn to allegiance. Arbitrators exercise no constitutional jurisdiction or like role in the judicial systems—state or national. They are not generally bound to follow the law unless the parties so prescribe and, as likely as not, they are laymen technically unqualified (and not disposed) to exercise the office of professional judge.[9]

Merchants desire to compromise but may be too proud to do the compromising on their own. They can preserve their self respect by allowing "arbitrators" to do it for them. The majority of the Court in the instant case realized the necessity of each party appointing a partisan arbitrator. In effect, a tripartite arbitration tribunal, acts not as a court whereby a legal dispute is settled, but as a body where the parties may have their problems resolved to everyone's satisfaction.

L. H. S.

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4. Cf. Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 169 N.E. 386 (1929).
5. Cf. Matter of Lipschutz, 304 N.Y. 58, 106 N.E.2d 8 (1952).
6. Cf. American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 N.Y. 398, 148 N.E. 562 (1925).
7. See Phillips, A Lawyer's Approach to Commercial Arbitration, 44 Yale L.J. 31 (1934).
8. See N.Y. Civil Practice Law and Rules § 7511(b)(1)(ii) (eff. Sept. 1, 1963).
9. Sturges, Arbitration—What Is It?, 35 N.Y.U.L. Rev. 1031, 1045, 1046 (1960).