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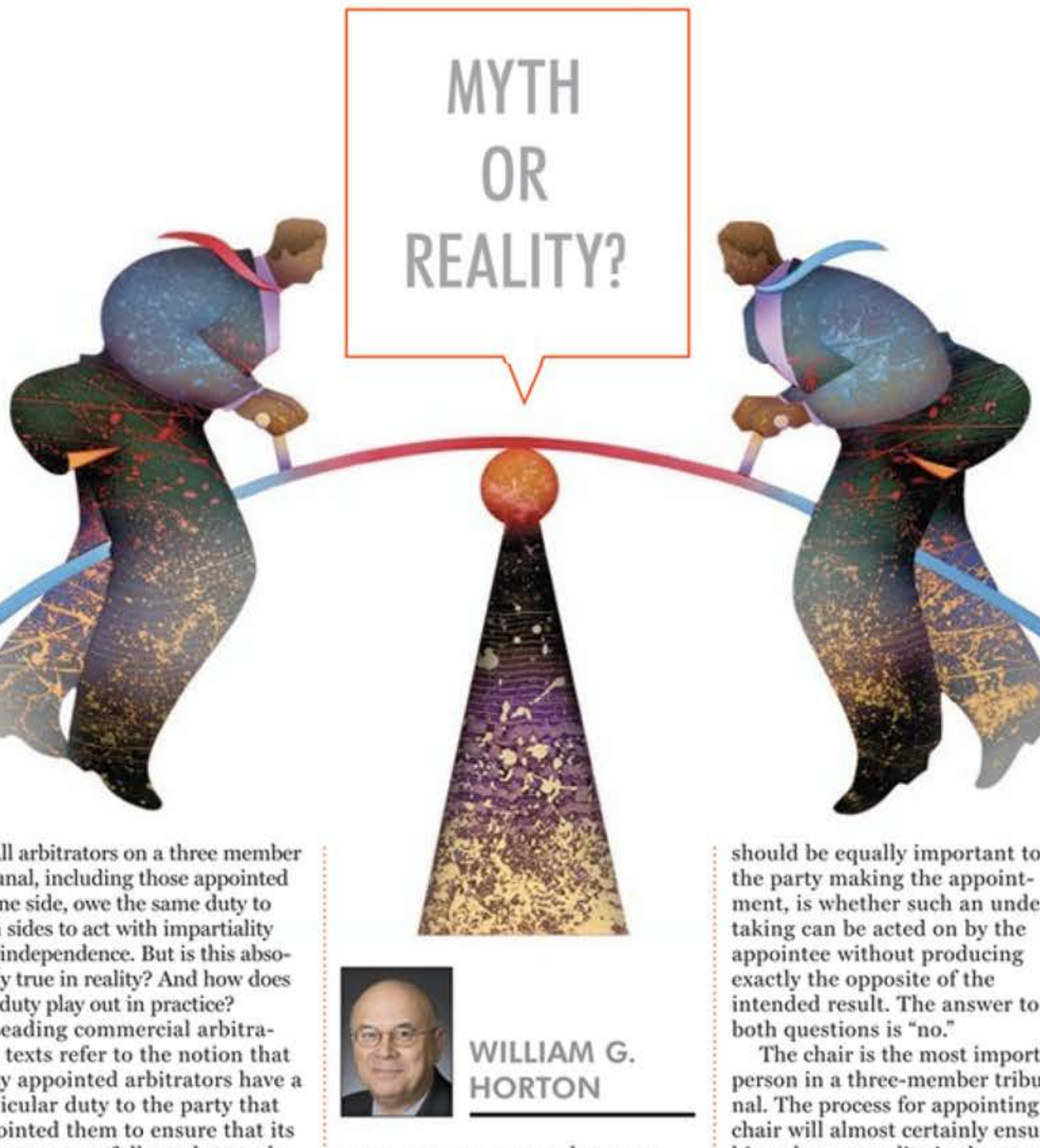
# Neutrality of party-appointed arbitrators:




All arbitrators on a three member tribunal, including those appointed by one side, owe the same duty to both sides to act with impartiality and independence. But is this absolutely true in reality? And how does this duty play out in practice?

Leading commercial arbitration texts refer to the notion that party appointed arbitrators have a particular duty to the party that appointed them to ensure that its arguments are fully understood, and candidates for such an appointment may acknowledge that duty to the party during any pre-appointment interview process. No doubt it is useful for candidates for appointment to have some encouragement, however slight, to offer parties that are considering appointing them. But is it consistent with a true duty of independence and impartiality for such statements to be made? A different question, but one that should be equally important to the party making the appointment, is whether such an undertaking can be acted on by the appointee without producing exactly the opposite of the intended result. The answer to both questions is "no."



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The chair is the most important person in a three-member tribunal. The process for appointing the chair will almost certainly ensure his or her neutrality in theory and in fact. It is extremely rare for the majority in a divided arbitration decision not to include the chair, who serves as the fulcrum of a three member tribunal.

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## New rules maintain arbitration's edge

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# Delaware court enters the arbitration business

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Traditional providers of arbitration services – and a variety of new entrants – are augmenting the market for arbitration services as never before. They are innovating, expanding the choices available to commercial arbitrations, and competing to offer arbitration options that work to meet the needs of businesses globally.

Many U.S. companies are incorporated in the state of Delaware. The Court of Chancery has been at the forefront in determining high-profile corporate and shareholder disputes and developing U.S. business law. A significant part of U.S. business law emanates from Delaware.

On Feb. 1, the Delaware Court of Chancery officially began its journey into the world of commercial arbitration. It is offering confidential, high-speed arbitration for large business disputes. The dispute must exclusively involve a claim for monetary damages, and the amount in dispute must exceed $1 million (although the arbitrators may grant any remedy or relief that the arbitrators deem just and equitable). The arbitrators are judges or members of the court.

In January, the Court of Chancery adopted three new rules (rules 96, 97 and 98) governing the Chancery arbitrations. The arbitrations, which must be on consent of the parties, begins with a petition for arbitration confirming that the requirements for use of the arbitration process have been met and containing the names of the parties, the claims and the remedy sought. One party must be a Delaware company and no party may be a consumer. The petition must be signed by Delaware counsel.

The arbitration proceedings are confidential and cannot be accessed by the public. They remain confidential unless and until there is an appeal, which is to the Delaware Supreme Court.

The court's arbitration procedure rules provide for a filing fee of $25,000, divided equally between the parties, and a daily fee of $6,000, again divided equally between the parties.

The arbitration process is "fast track." Unless the parties agree to an extension of time, a "preliminary conference" will occur within 30 days of the beginning the arbitration. Following the preliminary conference, the process moves forward to a "preliminary hearing" which occurs as soon as reasonably possible in the preliminary hearing, the arbitrators sets the time, date and place of the hearing. The rules provide that the "arbitration hearing generally will occur no later than 60 days following receipt of the petition."

The extensive production and depositions that are hallmarks of American litigation are not features of Court of Chancery arbitration. There is a preliminary exchange of information "necessary and appropriate for the parties to prepare," although the parties can agree to no information exchange. The preliminary exchange of information may include depositions. If the parties cannot agree, the arbitrator determines the scope of what is necessary and appropriate.

At the arbitration hearing, at least one representative of each party with an interest in the issues and, interestingly, with the authority to resolve the matter must participate. Unless all parties agree otherwise, the proceedings are closed to the public.

The rules provide a mediation and a settlement option. The parties may agree at any stage of the process to submit the dispute to the court for mediation. The mediator may not serve as the arbitrator unless the parties agree.

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Under the settlement option, the parties may seek assistance from the arbitrator in reaching a settlement. This may occur at any stage of the arbitration process prior to the arbitrator's final decision.

The arbitrator may make interim, interlocutory or partial rulings, orders and awards. Once the final award is granted, a judgment or decree is entered and enforced in the same manner as a court judgment or decree.

The fact that the Delaware court is offering confidential fast-track arbitration, done by the court's judges, is a significant innovation in arbitration. But the confidentiality feature also may prove to have significant implications for how business law develops.

The support of the Delaware courts in offering confidential initiative on the development of business law matters to be seen. If significant business disputes are resolved out of the public eye, apart from matters bound for the public's right to know, there may be significant implications for how corporate law in America – and in other jurisdictions around the world – will develop. If judges, lawyers, business people, and legal and business scholars do not know the basis on which these disputes have been determined, it

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# True spirit of impartiality serves parties best

**Neutrality**

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If party-appointed members consider that they have a duty to make sure the position of the party that appointed them is fully understood, both become *de facto* advocates. When the see-saw goes down on one side and up on the other, only the chair truly remains neutral. If party nominees simply become second counsel for the side that appointed them, the chair may find that their assistance is of limited value. The chair may also find it difficult to conduct certain aspects of the arbitration, for example in having the appointees assist with drafting portions of the award.

Senior counsel are becoming more interested in serving as arbitrators. An initial appointment as an arbitrator is hard to get, and is more likely to come as a party appointment. The whole professional experience of counsel is in serving the party that brought them the work, and it is difficult to shed this ingrained concept. Even if they know enough to avoid blatant advocacy they may be tempted to use other means, for example the expression of pre-emptive views on certain issues before they have been presented in the arbitration, asymmetrical questioning of witnesses or counsel during the hearing or displays of one-sided humour in tribunal deliberations. However, these tactics are for the most part transparent and counter-productive, especially if the other appointee does not engage in the same conduct.

All interests, including those of the parties who have appointed one of the three arbitrators, are best served if all members of the tribunal conduct themselves impartially and independently. Every tribunal member has a responsibility to ensure that the arguments of both sides are fully understood. The opinions of a party appointee will carry more weight with the chair if they are seen to be balanced and respectful of the evidence and submissions put forward by both parties.

To the extent party appointees perform their obligations in a true spirit of impartiality and independence, they will unquestionably have a greater impact on the ultimate outcome. Nor is such an approach merely a covert tactic to advance a hidden partisan agenda. In the end, it is the behaviour of tribunal members that is determinative in the deliberative process.

Once arbitrators embark on a course of conducting themselves in a truly impartial manner, it becomes difficult not to concede certain points where the evidence and law is weak and easy to argue vigorously for other conclusions when the evidence and law is strong. Usually the result will be a consensus of the tribunal in which each side has won and lost on some of its points.

The deeper motivations of party-appointed arbitrators are not in issue, nor should they be, if their participation in the process is unimpeachably independent and impartial. ■

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