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Code of Ethics for Arbitrators in Commercial Disputes

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American Bar Association Section of International Law and Practice Reports to the House of Delegates

I. Code of Ethics for Arbitrators in Commercial Disputes*

RECOMMENDATION

BE IT RESOLVED, That the Code of Ethics for Arbitrators in Commercial Disputes approved jointly by the American Bar Association and the American Arbitration Association should be amended to provide that *unless otherwise agreed* party-appointed arbitrators in international commercial arbitrations should, to the extent practicable in the circumstances, serve as neutrals.

REPORT

As the result of a five-year process from 1972 to 1977, a Joint Committee of the American Arbitration Association and the American Bar Association prepared a "Code of Ethics for Arbitrators in Commercial Disputes"[1] which has

*This Recommendation and Report was adopted by the House of Delegates in November 1989. The Recommendation and Report was prepared by James H. Carter, Chairman of the Section's Committee on International Commercial Arbitration.

1. See Holtzmann, *The First Code of Ethics for Arbitrators in Commercial Disputes*, 33 BUS. LAW. 309 (1977), containing a copy of this Code, which also appears in 10 Y.B. Comm. Arb. 131 (1985).

been used widely since then in the United States as a guide for parties, arbitrators and the courts. In preparing that Code, the Joint Committee addressed a question that has received considerable judicial and scholarly comment: whether party-appointed arbitrators are required under all circumstances to be "neutral" in the same sense that judges are neutral or unbiased—that is, impartial in their view of the issues until evidence has been received, and independent of any overly close relationship with any of the parties.

Arbitral panels often are composed of three arbitrators, frequently with two arbitrators appointed separately by the parties and the third arbitrator selected by the first two or through the procedures of an administering arbitral institution. This method of selection is popular with parties because it permits the choice of persons with particular types of knowledge and experience, gives the parties direct participation in the process of resolving their disputes and promotes a feeling among users of commercial arbitration that this important part of the process is reasonably predictable.

The Joint Committee ultimately decided that its Code should be a general one fitting all types of commercial arbitrations and therefore must accommodate the fact that in some types of arbitration involving such appointment of two arbitrators by each party acting alone, such as labor arbitrations and arbitrations within some trade groups, it is traditionally expected and voluntarily accepted that those party-appointees need not be entirely "neutral."[2] While the Code's preamble states a preference that parties agree that all arbitrators shall comply

2. The Committee's special introductory note to Canon VII, "Ethical Considerations Relating to Arbitrators Appointed By One Party," states:

> In some types of arbitration in which there are three arbitrators it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed either by agreement of the parties or of the two arbitrators, or, failing such agreement, by an independent institution or individual. In some of these types of arbitration, all three arbitrators are customarily considered to be neutral and are expected to observe the same standards of ethical conduct. However, there are also many types of tripartite arbitration in which it has been the practice that the two arbitrators appointed by the parties are not considered to be neutral and are expected to observe many—but not all—of the same ethical standards as the neutral third arbitrator. For the purposes of this Code, an arbitrator appointed by one party who is not expected to observe all of the same standards as the third arbitrator is referred to as a "non-neutral arbitrator." This Canon VII describes the ethical obligations which non-neutral party-appointed arbitrators should observe and those which are not applicable to them.
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> In all arbitrations in which there are two or more party-appointed arbitrators, it is important for everyone concerned to know from the start whether the party-appointed arbitrators are expected to be neutrals or non-neutrals. In such arbitrations, the two 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 are to be neutral.
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> It should be noted that in cases where the arbitration is conducted outside the United States the applicable law may require that all arbitrators be neutral. Accordingly, in such cases the governing law should be considered before applying any of the following provisions relating to non-neutral party-appointed arbitrators.

with the same ethical standards—*i.e.*, neutrality—Canon VII of the AAA-ABA Code nevertheless deals expressly with such "non-neutral" party appointees by permitting them to vary their conduct in two basic ways: (1) by being "predisposed" toward the party appointing them (but nonetheless obligated "to act in good faith and with integrity and fairness" in all arbitral proceedings), and (2) by having continuing communications with an appointing party. Indeed, under the AAA-ABA Code such "non-neutral" arbitrators may, subject to the duty to disclose in general terms that they are doing so, communicate with the party who appointed them about any aspect of the case. The Code states that it is sufficient for the arbitrator to disclose the intention to have such communications in the future, with no requirement that there be disclosure before each separate occasion on which such a communication occurs.

U.S. courts generally have accepted that arbitration is a matter of contract and have recognized the long and honorable tradition of party-appointed arbitrators who legitimately function as "partisans once removed from the actual controversy."[3] In commercial matters, this custom is identified in particular with certain kinds of "trade" arbitrations in which the appointees are expected by all concerned to have expert knowledge of the industry and to act to greater or lesser extent as advocates before a neutral third arbitrator. The Joint Committee memorialized this practice in Canon VII of the Code as one option available to parties; but it attempted to assure, as the Code states, that all concerned are aware from the start whether the party-appointed arbitrators are to be neutrals or non-neutrals. If one arbitrator will act as a non-neutral (the implications of which the Code makes clear), then the other arbitrator, the party who appointed him or her, and the neutral chairman all should be told of this fact so that they may make appropriate adjustments in their own conduct.[4] Assurance insofar as possible of a level playing field was judged more important than attempting to impose on party-appointed arbitrators standards of neutrality which conflicted with deep-seated (but not universal) traditions of U.S. arbitration. The result was a flexible procedure which recognized differing degrees of neutrality.

Nevertheless, as noted above, the Code made reference in passing to potential problems "in cases where the arbitration is conducted outside the United States," where "the applicable law may require that all arbitrators be neutral,"

3. *E.g.*, *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962).

4. The American Arbitration Association requires disclosure of potentially disqualifying relationships from all arbitrators and regularly discusses neutrality with party-appointed arbitrators at the outset of an arbitration and solicits their agreement to serve as neutrals. For international cases administered by the AAA, since 1986 that agency's *Supplementary Procedures for International Commercial Arbitration* effectively have required party-appointed arbitrators to serve as neutrals by providing a right to challenge their impartiality or independence which does not exist under Canon VII of the AAA-ABA Code as regards party appointees in purely domestic arbitrations. See Hoellering, *Arbitrator Selection*, 3 ADR REP. 13, 14 (1987); *see also* Bond, *The Selection of ICC Arbitrators and the Requirement of Independence*, 4 Arb. Int'l (no. 4) 300 (1988).

and counseled consideration of governing law before treating party-appointed arbitrators as "non-neutral."

Explicit U.S. recognition of the existence of "non-neutral" arbitrators for arbitrations based in the United States, as contrasted with arbitrations conducted elsewhere, has been a subject of criticism among practitioners of international commercial arbitration, a field in which there is at least a decided tendency toward requiring party-appointed arbitrators to be less than partisan. This field tends to be more closely identified with arbitration of "general" commercial disputes—*i.e.*, disputes between parties to a particular contract who do not deal with each other regularly in other contexts as fellow members of the same industry or community—rather than with arbitration involving particular trades or communities where the "non-neutral" party-appointed arbitrator tradition is more likely to be found.

Critics of non-neutral arbitrators urge that all arbitrators in international arbitration, including party-appointed arbitrators, should be equally unaligned with the parties or with their views. However, they tend also to recognize that a party appointee in international arbitrations, like his or her counterpart in domestic U.S. commercial disputes, is selected by parties with the hope that the appointee will endorse the appointing party's side and help persuade the chairman of its correctness. The party may base such hope entirely on its assessment of the appointee's known views, writings in the field or prior arbitral decisions, without any suggestion to the arbitrator that he or she should be less than neutral; but the hope of predisposition nevertheless is common and often is well-founded. Some observers believe that European practice is not substantially different from domestic U.S. practice in this regard.[5] In particular, some international arbitration practitioners are dubious of the neutrality of many arbitrators appointed by governmental entities, who may be employees of other agencies of the same government. The President of the American Arbitration Association has questioned whether the universally "neutral" party-appointed arbitrator in international practice is more than an "unreliable myth."[6]

Writers about this issue in international commercial arbitration have recognized that party appointees may not be entirely neutral; but they argue that appointees nonetheless should be held to an ethical norm requiring that they be *formally unaffiliated* with the appointment party and that they *avoid post-appointment ex parte communications*. Such arbitrators still are said to be "impartial" and "independent," even if they are "predisposed" toward one side and thus not entirely "neutral."[7] Party-appointed international arbitrators thus appear to be allowed to

5. See, *e.g.*, Mosk, *The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-U.S. Claims Tribunal*, 1 TRANS. LAW. 253, 262 (1988); Higgins, Brown & Roach, *Pitfalls in International Commercial Arbitration*, 35 Bus. Law. 1035, 1043–44 (1980).

6. Coulson, *An American Critique of the IBA's Ethics for International Arbitrators*, 4 J. Int'l Arb. 103, 107 (1987).

7. Two leading commentators write:

> At first sight it might be thought that no valid distinction may be drawn between the concepts of *impartiality* and *neutrality*. However, it has been suggested that a party

be predisposed, just as are "non-neutral" arbitrators under the AAA-ABA Code, so long as the predisposition arises from personal views of the issues or the parties rather than from formal affiliation with a party. Such international arbitrators, however, are not recognized as having the option of announcing that they will continue post-appointment *ex parte* communications with a party about the merits of a dispute as do their U.S. counterparts under the AAA-ABA Code.

The IBA "Ethics"

Beginning in 1985, members of the International Bar Association drafted a set of principles intended to embody a detailed definition of this potentially "predisposed" but nonetheless "impartial" and "independent" international arbitrator which would be cast in terms that recognized little or no formal distinction between party-appointed arbitrators and other arbitrators. This document also was intended to define certain presumptions and preferred procedures that sought to assure that all arbitrators avoid post-appointment *ex parte* communications about the dispute with the parties. These efforts resulted in the 1987 IBA "Ethics for Arbitrators in International Commercial Disputes."[8]

A document setting forth ethical principles for arbitrators should serve a variety of purposes. It should help acquaint prospective parties to arbitrations and prospective arbitrators with the aspirational norms of the process, lead them to think well of its potential and encourage them to participate in developing arbitration in a constructive way. Ethical codes also should provide practical guidance on preferred procedures, while doing so in a sufficiently general way to avoid usurping the function of detailed and not always entirely consistent procedural rules and requirements found in institutional rules and in governing arbitration statutes. Ethical codes ideally also should, to the extent possible, make clear what sorts of practices are clearly acceptable in a world of formalized private dispute resolution, so that frivolous challenges to arbitral awards on grounds of arbitrator misconduct are minimized and courts are given guidance.

The IBA "Ethics" is a significant contribution to the development of thinking about the role of the party-appointed arbitrator, but it is only partly successful in

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> may nominate an arbitrator who is *generally* predisposed toward him, personally, or as regards his position in the dispute, provided that he is at the same time capable of applying his mind judicially and impartially to the evidence and arguments submitted by both sides.

Redfern & Hunter, *Law and Practice of International Commercial Arbitration* 171 (1986); *see also* Tapman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT'L & COMP. L.Q. 26 (1989); Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* Pt. III, para. 12.04 (1984).

8. 26 I.L.M. 583 (1987). The drafters decided not to call the document a "code" because this might suggest courts should use its standards as a basis for setting aside arbitral awards on grounds of bias. They selected instead the title "Ethics."

meeting all of these goals for an ideal general code. The principal impetus for it was to codify international resistance to "non-neutral" arbitrators who engage in *ex parte* communications with parties and sometimes even have engaged in directly disruptive conduct such as provocation of postponements. The "Ethics" does a good job of defining "impartiality" and "independence" consistently with the understanding discussed above. It codified as a "fundamental rule"[9] that all arbitrators will be held to the same standards of non-bias in this regard. The tone of the "Ethics," however, tends to be rather heavily prohibitory, with procedural details designed to assure that deviations from ethical principles will be avoided or, if discovered, sanctioned by being made generally known. The overall effect may suggest that unethical conduct by arbitrators is a significant danger to be anticipated, rather than emphasizing encouragement of high principles because these are good for the parties and the arbitral process.

It has been suggested that the IBA "Ethics" is unrealistic in leaving a party confronting an obviously partisan appointee for the other side little opportunity to level the playing field except a successful challenge to the partisan—a remedy which may not always be available or appropriate.

The "Ethics" also has been criticized on a number of detailed points. Some urge that it should go further and address in greater detail subjects such as impartiality in the conduct of proceedings and the issue of confidentiality versus publication of awards. Some have suggested drafting changes that might be considered if the IBA prepares a second version of the "Ethics."[10] Others have suggested it should recognize an option for parties to agree expressly on the acceptability of two "non-neutral" arbitrators, reversing the AAA-ABA Code's presumption that party appointees are non-neutral unless otherwise agreed but still maintaining flexibility.

The prohibitory tone of the IBA "Ethics" and the nature of some of its procedural details ultimately led the draftsmen to suggest that it be made available for incorporation by parties as a part of their contracts but not promulgated as a statutory model or a guide to which courts should look in all circumstances when ruling on challenges in international [sic]. The IBA's introductory note to the "Ethics" states:

> The rules cannot be directly binding either on arbitrators, or on the parties themselves, unless they are adopted by agreement. Whilst the International Bar Association hopes they will be taken into account in the context of challenges to arbitrators, it is emphasized that these guidelines are not intended to create grounds for the setting aside of awards by national courts . . . . The International Bar Association wishes to make it clear that it is not the intention of these rules to create opportunities for aggrieved parties to sue international arbitrators in national courts.

9. IBA "Ethics," Rule 1.

10. For example, IBA "Ethics" Rules 3.3 and 4.2(b) make certain relationships between an arbitrator and a party or a "potentially important" witness a presumptive basis for justifiable doubts as to the arbitrator's impartiality or independence, but fails to include relationships with representatives of a party, such as the party's lawyers, in this category.

Amendment of the AAA-ABA Code of Ethics

In order to align the AAA-ABA Code more closely with the general trend toward favoring neutrality of party-appointed arbitrators in international matters, it should be amended to clarify that this is a special concern in arbitrations occurring in the United States as well as those cited elsewhere or governed by foreign law. The amended Code should continue to stress neutrality as an aspirational goal, to be followed insofar as practicable in the circumstances, in recognition of the fact that parties to international arbitrations nevertheless may agree to appoint "non-neutrals" or to accept standards of conduct for them at odds with those preferred under the Code.

The amendment, which is being considered by the American Arbitration Association, would replace the third paragraph of the Introductory Note to Canon VII ("Ethical Considerations Relating To Arbitrators Appointed By One Party") with the following:

> Many commercial arbitrations now involve parties from different countries, sometimes including governmental trading or other organizations. While these arbitrations often are similar to arbitrations between two American parties and involve the same considerations of arbitrator ethics, in international proceedings there may be a heightened need to assure impartiality of all the decisionmakers. Whether these arbitrations occur in the United States or elsewhere, the standards of arbitrator neutrality applied may affect international enforceability of the award. Arbitrators in all international commercial matters should, to the extent practicable in the circumstances, serve as neutrals.

Conclusion

The general trend toward neutrality of all arbitrators in international commercial arbitrations should be encouraged. In view of the variety of context in which international commercial arbitration occurs, however, it is not yet possible to say that there is an international consensus in favor of mandatory ethical norms requiring neutrality in all circumstances. The IBA "Ethics" recognizes this by providing for its express incorporation in agreements intended to provide for arbitration solely by neutral arbitrators. The American Bar Association should endorse the principle of full neutrality as a goal, but retain for the present the flexibility provided by the 1977 AAA-ABA Code of Ethics.

Respectfully submitted,

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