

INTRODUCTORY NOTE TO THE AMERICAN CODE OF
ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES

By

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The Code of Ethics for Arbitrators in Commercial Disputes, jointly established by the American Bar Association ("ABA") and the American Arbitration Association ("AAA"), is the first of its kind in the United States and, perhaps, anywhere in the world. Its purpose is to help arbitrators, parties and others to address ethical questions that arise in arbitral practice, but for which full answers are not found in laws, court decisions, arbitral rules or contracts.

The Code is not merely an abstract philosophical document, but rather is designed to answer actual questions that arbitrators must face. For example: What public obligations do arbitrators have in addition to their duties to the parties? To what extent, and in how much detail, must an arbitrator disclose relationships with the parties, their lawyers and the witnesses? Should only business and financial relationships be disclosed, or social contacts as

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well? In what circumstances may an arbitrator communicate with one party outside the presence of the other party? Can an arbitrator delegate any part of his functions to an assistant? Does an arbitrator have a duty to prevent delay? To what extent and by what means is it appropriate for an arbitrator to encourage or assist settlements by the parties? After a case is over, what ethical obligations continue, and in what circumstances may an arbitrator have future relations with a party? The Code seeks to provide guidance in answering these and many other practical questions.

The Code also seeks to provide answers to the recurrent question of whether in a three-person arbitral tribunal, the two party-appointed arbitrators are governed by the same ethical standards as the third arbitrator. The sponsors of the Code state that they favor procedures in which all three arbitrators are held to the same ethical requirements. In addition, the Code recognizes that in some types of arbitration conducted in the United States, the parties, exercising their freedom to contact as they wish, may agree that the two party-appointed arbitrators need not be neutral. For those cases, the Code provides that the party-appointed arbitrators have many, but not all, of the same ethical duties as the third arbitrator.

The text of the Code makes it clear that it does not supersede applicable law and arbitral rules, or the

contracts of parties. Although established by the AAA and the ABA the Code's use is not limited to AAA cases or those in which the arbitrators are lawyers. Rather it is intended to provide guidance in all types of commercial arbitration conducted in the United States. The Preamble to the Code emphasizes that it was prepared to "contribute to the maintenance of high standards and continued confidence in the process of arbitration," not because unethical behavior had been frequent. Its purpose thus is educational not curative.

It is not the purpose of this Introductory Note to summarize or comment on the entire Code, because the full text is published in this edition of the Yearbook and should speak for itself. It may, however, be of interest to those who read the Code to know about the process by which it was drafted and adopted.

The Code is the work of a joint committee established by the AAA and the ABA, each of which appointed five members. Their effort was not to invent new concepts, but rather to codify and clarify the best existing practices consistently with legislation and case law in the United States. The Code is not only based on legal research, but also reflects answers to a questionnaire that was sent to 39,000 persons throughout the nation. More than 12,000 responses were received. Approximately 7,000 of the individuals who responded had during the previous five years

served as arbitrators, and 4,000 had been lawyers in arbitration cases. This information enabled the Committee to draft a Code that realistically reflects the views of practitioners.

Drafts of the Code were widely circulated for comment before it was completed. For example, 51,000 copies of an "Exposure Draft" were sent to bar associations, arbitral institutions, law schools and other interested persons, including thousands of arbitrators on the commercial panels of the AAA. Two public hearings were held to discuss the Code. Finally, the text that thus evolved was officially adopted in 1977 by the ABA and the AAA.

Although the Code was prepared for use in the United States and reflects American law and practice, interested observers elsewhere may find its basic concepts worth consideration on the broader plane of international commercial arbitration.