

## MEMORANDUM

**Date:** March 1, 2008

**To:** NAFTA Article 2022 Advisory Committee

**From:** Robert E. Lutz,  
Chair, Subcommittee IV-Legal Issues

**RE:** Guidance Notes on Arbitrator Conduct for Private Commercial Disputes in the NAFTA Region

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Pursuant to the *North American Free Trade Agreement, Article 2022: Alternative Dispute Resolution*, the Free Trade Commission was empowered to establish an Advisory Committee on Private Commercial Disputes “comprising persons with expertise or experience in the resolution of private international commercial disputes.” The Advisory Committee reports and provides recommendations to the Commission on general issues referred to it by the Commission with respect to the availability, use and effectiveness of arbitration and other procedures for the resolution of disputes in the free trade area. In addition, the Advisory Committee assists in maintaining a website,

<http://www.nafta-sec-alena.org/en/view.aspx?x=275>,

which purposes, *inter alia*, are to offer helpful information and advice on dispute resolution options available to those who may be faced with or are involved in transnational commercial or domestic private commercial disputes.

In connection, the Advisory Committee, specifically the Subcommittee on Legal Issues, discussed various drafts of a “Code of Ethics” that were adapted from the 2004 AAA/ABA Code of Conduct for Arbitrators in Commercial Disputes, [http://www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf) by Prof. Robert E. Lutz, a member of the Advisory Committee and Chair of the Subcommittee on Legal Issues. Drafts were discussed at several meetings of the Subcommittee and the meetings of the Advisory Committee of the Whole, and was subsequently modified to a “Notes of Arbitrator Conduct”, and ultimately proposed as “Guidance Notes for Arbitrator Conduct” at several meetings of the Committee.\* Finally, Prof. Lutz offered the proposed “Guidance Notes” for publication

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\* The Subcommittee on Legal Issues of the Advisory Committee on Private Commercial Arbitration was very helpful in offering suggestions and comments, as was the Advisory Committee of the Whole. In particular, comments and editorial suggestions from Fred Bachand, Doak Bishop, William Horton, Harry Arkin, Jose Luis Sigueiros, Carlos McCadden, Carlos Loperena, and Jose

on the website—without specific endorsement of the Advisory Committee and with attribution only to him and to the 2004 AAA/ABA Code of Conduct for Arbitrators in Commercial Disputes from which it is adapted—for consideration by potential parties and arbitrators engaged in private commercial arbitration in the NAFTA region. (The Guidance Notes, however, is not endorsed by the 2022 Advisory Committee, the American Arbitration Association, or the American Bar Association. The intention is to offer private parties from NAFTA countries with guidance regarding arbitrator conduct.

## **GUIDANCE NOTES ON ARBITRATOR CONDUCT IN PRIVATE COMMERCIAL DISPUTES IN THE NAFTA REGION**

### *Preamble*

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Pursuant to the North American Free Trade Agreement, Chapter 20, Part 2, Article 2022(1), the party nations have an affirmative duty to encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area. Persons who act as arbitrators therefore undertake serious responsibilities to the party nations, as well as to the parties and the public. Those responsibilities include important ethical obligations.

These Guidance Notes set forth generally accepted standards of ethical conduct for arbitrators and parties in commercial disputes conducted within the free trade area, in the hope of contributing to the maintenance of high standards and continued confidence in the arbitral process.

These Guidance Notes are intended to apply to arbitrations occurring in the NAFTA region in which private commercial disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by agreement of the parties, applicable arbitration rules, or law. In such cases, persons having the power to decide should observe fundamental standards of ethical conduct. Such persons are called “arbitrators,” although in some types of proceeding they might be called “umpires,” “referees,” “neutrals,” or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. These Guidance Notes recognize the fundamental differences between arbitrators and judges.

### *Neutrality*

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Maria Abascal were especially helpful and appreciated. Prof. Robert E. Lutz, however, accepts full responsibility for the final product.

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a “party-appointed arbitrator”) and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. These Notes prescribe that a standard of neutrality is required for all arbitrators – including any party-appointed arbitrators. This expectation of neutrality is especially important in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. Accordingly, this standard of neutrality applies unless the parties' agreement provides otherwise. These Notes direct all arbitrators to make pre-appointment disclosures of any facts that might give rise to justifiable doubts regarding their neutrality, independence, or impartiality. They further require that all arbitrators will conduct themselves in ways that will preserve the integrity and fairness of the process.

### *Construction*

Various aspects of the conduct of arbitrators, including some matters covered by these Notes, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules--all of which should be consulted by the arbitrators. Moreover, these Guidance Notes do not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed, and should be read in conjunction with other applicable rules of ethics. The Guidance Notes are not intended to establish new or additional grounds for judicial review of arbitration awards. Thus, the following Guidance Notes should be read as subject to any contrary provisions of applicable law and arbitration rules, and should also be read as subject to contrary agreements of the parties. These Guidance Notes are intended to clarify and promote an arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

### GUIDANCE NOTE 1: ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.

- A. An arbitrator has a fundamental responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved and just and effective resolution of disputes achieved.
- B. One should accept appointment as an arbitrator only if fully satisfied:
  - (1) that he or she can serve impartially;
  - (2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
  - (3) that he or she is competent to serve; and

- (4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.
- C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might give rise to justifiable doubts regarding partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Guidance Note 2.
- D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, nationalism and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party or party nation.
- E. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.
- F. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

*Comment to Guidance Note 1*

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Guidance Note 1 is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

GUIDANCE NOTE 2: AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT GIVE RISE TO JUSTIFIABLE DOUBTS REGARDING HIS OR HER PARTIALITY.

- A. Persons who are requested to serve as arbitrators should, before accepting, disclose:
- (1) any known direct or indirect financial or personal interest in the outcome of the arbitration;
  - (2) any known existing or past financial, business, professional or personal relationships which might create justifiable doubts regarding impartiality or lack of independence. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
  - (3) the nature and extent of any prior knowledge they may have of the dispute;
  - (4) the nature and extent of any political or national interest or affiliation which might create justifiable doubts regarding impartiality or lack of independence parties; and
  - (5) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.
- B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.
- C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.
- D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.
- E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

- F. When all parties to the arbitration, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.
- G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:
- (1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or
  - (2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.
- H. If compliance by a prospective arbitrator with any provision of these Notes would require disclosure of confidential or privileged information, the prospective arbitrator should either:
- (1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or
  - (2) Withdraw.

*Comment to Guidance Note 2*

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator should not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

**GUIDANCE NOTE 3: AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.**

- A. If an agreement of the parties establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

- B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:
- (1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
    - (a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
    - (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.
  - (2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;
  - (3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party; No communication regarding compensation should disclose information regarding the deliberations of the arbitrator or arbitrators.
  - (4) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or
  - (5) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.
- C. Unless otherwise provided in this Guidance Note, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and (subject to the terms of any order of the arbitrator regarding the receipt of confidential or proprietary information by a party) whenever the arbitrator receives any written communication concerning the case from one party which has

not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

**GUIDANCE NOTE 4: AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.**

- A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.
- B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing.

The arbitrator should allow each party a fair opportunity to present its evidence and arguments and to be represented by counsel chosen by the party.

If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

- C. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.
- D. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.
- E. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

*Comment to Guidance Note 4, Paragraph E*

Paragraph E of Guidance Note 4 is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude *ex parte* requests for interim relief as permitted by the rules or law applicable to the arbitration.



GUIDANCE NOTE 5: AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.

- A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
- B. An arbitrator should: decide all matters justly based upon applicable law or, when agreed, upon equitable grounds; exercise independent judgment; and should not permit outside pressures to affect the decision.
- C. An arbitrator should not delegate the duty to decide to any other person.
- D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

GUIDANCE NOTE 6: AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.

- A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Note.
- C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.
- D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

**GUIDANCE NOTE 7: AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.**

- A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.
- B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:
  - (1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;
  - (2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and
  - (3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

**GUIDANCE NOTE 8: AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.**

- A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.
- B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with these Notes.

*Comment to Guidance Note 8*

This Guidance Note does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

**GUIDANCE NOTE 9: PARTY-APPOINTED ARBITRATORS PRESUMED TO BE NEUTRAL**

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 by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which these Guidance Notes apply, all three arbitrators are presumed to be neutral.

**END**