Spanish Arbitration Club publishes 2019 Code of Best Arbitration Practice

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The Spanish Arbitration Club (known by its Spanish acronym CEA), has released a Code of Best Arbitration Practice. The code is the product of a two-year project under the leadership of well-known practitioners. It proposes a definition of impartiality and independence, and enumerates a list of 31 questions that arbitrators should ask themselves to decide whether to make a disclosure, stipulating a broad duty to disclose.

Speedread

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Overview

On 17 June 2019, the *Club Español de Arbitraje* (CEA) presented its *Code of Best Arbitration Practice* at its Annual Congress in Madrid. The code proposes both a fair restatement of international best practices and a few challenging recommendations. Unlike the previous code of 2005, the 2019 code does not only

deal with arbitrators' duties. The 101-page document incorporates recommendations concerning the following six sections into which it is divided:

- Arbitral institutions.
- Arbitral procedure.
- Arbitrators.
- Counsel.
- Experts.
- Third party funders.

It also includes four annexes. It constitutes "soft law" and is not binding, but rather aims to preserve integrity and efficiency in arbitration.

Arbitral institutions

In Section I, the code attempts to establish certain minimum requirements for any institution wishing to administer arbitrations or appoint arbitrators. Ensuring independence in its corporate structure and management bodies is the main principle (*Recommendation 1*). The code may be of great assistance to new institutions and provides specific recommendations to internal bodies (*Recommendations 9 to 33*). It refers to the Secretariat and to the duties of the Arbitration Court when appointing arbitrators (*Recommendations 45 to 53*). It recommends that institutions not retain a list of arbitrators, but states that if they do, the list should be published and appointments should not be restricted to those on the list (*Recommendations 54 and 55*). It also supports high levels of transparency including statistics as to the appointment of arbitrators and gender diversity (*Recommendation 61*). It supports the publication on an institution's website of an anonymised list of cases and the publicity of awards, unless the parties opt out (*Recommendations 62 to 64*).

Arbitral procedure

Section II deals with arbitral procedure. It incorporates Model Arbitration Rules (as Annex B) and proposes a model arbitration clause for any institution that decides to incorporate the arbitration rules proposed in the model.

Arbitrators

Section III is by far the most interesting section, as it deals with arbitrator duties. The code is based on the guidelines and recommendations that the main arbitral institutions and associations have already approved (for example, the International Bar Association (IBA), the American Association of Arbitrators (AAA) and the Chartered Institute of Arbitrators). The code adopts a harmonised approach and does not seek to reinvent the wheel. Most of the recommendations are internationally accepted and uncontroversial, and are helpfully set out in a well-organised and structured way.

However, certain proposals are quite novel and will surely draw the attention, and perhaps criticism, of the arbitration community. These include:

- **Recommendation 70.** The definition of impartiality and independence requires that an arbitrator be willing and able to carry out their mandate without favouring either party and that the arbitrator keep an objective distance from the parties, the dispute and anybody else involved in the arbitration.
- **Recommendation 73.** Party appointed arbitrators are not required to ensure that the case presented by the appointing party be properly understood by the rest of the arbitrators. This is a duty they owe to both parties. They do not have any other special duty or specific function on behalf of the appointing party, unless the parties agree otherwise.
- **Recommendation 82.** A breach by an arbitrator of the duty to disclose does not by itself indicate that there is a ground for removal. However, this is one factor, which must be considered and may have a bearing on the decision to disqualify or remove an arbitrator.
- **Recommendations 84-86.** The code establishes a non-exhaustive list of 31 questions that any prospective arbitrator should ask themselves in order to disclose any circumstance that, in the eyes of an objective and informed third party, may give rise to doubts as to their independence and impartiality.

Pursuant to the code, if an arbitrator answers any of the questions affirmatively, ordinarily, a disclosure should be made. Exceptionally, there might be specific situations in which a positive answer does not require disclosure. The questions refer to ties or connections with the parties, the dispute, party's counsel, co-arbitrators or other third parties involved in the dispute. In general, the list is useful and presents more positive than negative aspects. However, it is likely that this recommendation will be one of the proposals that receives criticism.

This is partly because some of the questions require that the arbitrator review files during the preceding 10-year period. For example, questions 8 and 19 inquire as to whether a party or counsel appointed the arbitrator in other arbitrations in the past 10 years. It is doubtful that one appointment 10 years ago could affect the independence and impartiality of a prospective arbitrator. Perhaps, the question should have added other additional factors.

Equally, some questions are too broad. For example, the questionnaire queries whether in the past or currently, the arbitrator had any personal or professional relationship with the parties, arbitrators, lawyers, arbitral institution, experts or witnesses that could be considered relevant for disclosure. Given that the question is so open, it does not assist a prospective arbitrator in distinguishing the red flags. Further, in some jurisdictions, particularly in Latin American, almost every appointment would require a previous disclosure, which is not always advisable.

The questionnaire may also raise some difficulties for its application in large law firms. Since the code rightly establishes that any potential arbitrator holds the identity of the law firm to which they belong (*Recommendation 86*), the due diligence process that the code proposes during the entire arbitration can become too burdensome and very difficult to satisfy even if the arbitrator acts diligently. Lastly, the code does not provide any guidance on how to deal with a group of companies. Therefore, it may require a supplement.

Despite the potential criticisms raised above, it is positive that the code supports a broad duty to disclose and generally, in case of doubt, it is always more advisable to disclose. Other interesting provisions to note are:

- **Recommendation 90.** The parties are barred from communicating with any arbitrator or prospective arbitrator *ex parte* except for clearing conflicts and selecting the arbitrator. In the course of the selection process, the prospective arbitrator may, but does not have to, interview or keep any communications *ex parte*. Nevertheless, if an arbitrator does have *ex parte* conversations with a party, this fact must be disclosed to the other parties and arbitrators. Under no circumstances should the arbitrator discuss the details or merits of the specific dispute.
- **Recommendation 97.** The arbitrators must not delegate to any tribunal appointed secretary, any decision-making function and neither may the secretary assess the parties' position of fact or law.

Counsel

Section IV contains recommendations for party's counsel in the arbitration. Most of them recall the *IBA Guidelines on Party Representation in International Arbitration* and follow its key principles. It provides that if any counsel discovers any false statement of fact, counsel must inform its client of this and explain its duty to remedy it (*Recommendation 117*). If, in the course of an arbitration, counsel discovers the existence of a document in the possession of the client that should have been produced, but was not, counsel must immediately inform the client of the duty to produce it. Yet, it does not impose any duty on counsel to disclose it voluntarily or without permission of its client (*Recommendation 126*). This course of action is consistent with the principle established in *Recommendation 107,* whereby any duty under this section is subordinated to the overriding and fundamental duty of any lawyer to defend its client with loyalty as well as to present its case in the most effective manner (*Recommendation 107*). Interestingly, the code imposes on counsel an obligation to refrain from willfully citing non-existent legal authorities or distorting their true meaning through incomplete or tendentious citations (*Recommendation 121*). Lastly, if counsel fails to comply with any of the duties established in this Section, the arbitrators, after hearing both parties and the lawyer, may adopt any measure to preserve the integrity of the proceedings. In particular, the arbitrators may admonish the lawyer in writing or verbally, draw adverse inferences and take into account their behavior when imposing costs as well as, most notably, communicate the facts to the bar in which the lawyer is registered, to establish deontological responsibilities (*Recommendation 132*).

Experts

Section V refers to experts acting in arbitration (*Recommendations 133 to 153*). There are very useful recommendations and tips for consolidating the statute of experts in the international arena. The code deals with the experts' duty to disclose, confidentiality, fees and content of the report. Independence and objectivity are of course the key features of the expert's statute contained in the code.

Third party funding

With the purpose of avoiding potential conflicts of interests, Section VI confirms that the parties have a duty to disclose whether they have received any funds or obtained any finance from a third party linked to the outcome of the arbitration, as well as the identity of the third party (*Recommendations 154 to 156*).

In sum, the CEA has provided a thorough, thoughtful and well-written code of best practice. The publication of its English translation is also eagerly awaited.

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