Kluwer Arbitration Blog

The Brave New and Old World of Arbitration: CEA's Code of Best Practices

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In June 2019, the Spanish Arbitration Club ("CEA") launched a new Code of Best Practices in Arbitration (the "Code"). This post briefly describes the scope of the Code and provides insights on the specific best practices proposed by CEA. The initiative is commendable, as it reflects the CEA community experience and tackles hot topics in international arbitration.

The Spanish Arbitration Club is a non-profit association dedicated to promoting the use of arbitration as a method of conflict resolution. CEA's second purpose is to develop arbitration in Spanish and Portuguese or with an Ibero-American component. The Code is the result of the work carried for almost two years to adjust CEA's Code of 2005 to the challenges of today's arbitration practice. As such, the Code is the natural response to the growing interest in adopting codes of ethics or codes of conduct for arbitrators, counsel, and other participants in the process.

The Code's philosophy puts at the forefront the aspiration of arbitration users that all participants in the proceedings adhere to enhanced standards of independence, impartiality, transparency and professionalism. The Code brings a novel perspective, as it includes, in addition to the recommendations for the arbitration institutions, – as the 2005 CEA Code did -, new ones for the participants in the arbitral process: arbitrators, counsel, experts, funders. The Code is non-binding soft law which can become binding if adopted by the parties through their arbitration agreement or during the arbitration proceedings.

Recommendations related to arbitration institutions

Confidentiality has been traditionally presented as one of the advantages of commercial arbitration. However debates have been, for example, on whether this implies that the award should not be published, or could be published after some time, and/or with the name of the parties and other sensitive information redacted.[1)] Over the last years the need to strike the right balance between confidentiality and transparency has been voiced. On one side, confidentiality provides the protection of

commercial and other business interests of the parties. On the other side, transparency is voiced to *inter alia*, ensure efficiency of the process, strengthen the legitimacy of the system, increase consistency and certainty. The question on where the balance should be placed received various answers: for example (i) the SIAC rules as amended in 2016 positioned that the awards should be published only upon consent of the parties and the tribunal, (ii) ICC adopted an opt-out approach to the publication of awards, in the 2019 Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration.

The CEA Code tips the balance in favor of transparency and recommends that all the awards are published shortly after being approved, anonymizing the name of the parties, but keeping the name of the arbitrators and of the counsel. In certain cases that justify confidentiality, the award could be published only as an excerpt, keeping the name of the arbitrators and of the counsel. [Rec. 62, 63, C.BB.PP/CEA 2019]

Taking a stance on the highly discussed issue of diversity in appointment of arbitrators, the Code gives prevalence to parties' choice. The Code does not remove party appointment – a measure that has been positioned to respond to challenges of diversity. However, the Code provides for the arbitration institution to establish objective criteria for a selection process that promotes diversity, in particular in terms of age, gender and origin.

The Code includes recommendations that arbitration institutions take measures to adequately protect personal data. [Rec. 40, 41, C.BB.PP/CEA 2019] Given the strong emphasis on data protection in the EU via the GDPR, such recommendations are in line with global privacy endeavors. Such rules also create a strong incentive for arbitration institutions to digitalize and create sound internal procedures, especially in relation to cybersecurity, automation and flow of information.

Recommendations related to the arbitral process

Arbitration institutions could envisage adopting arbitration rules similar to the Code's, in order to increase the foreseeability and, thus, the legal certainty that arbitration offers to its users, as the arbitration institutions play an important role in the promotion, development and legitimacy of the arbitration.

CEA recommends that the parties use the model arbitration clause. Additionally they should consider certain recommendations such as: (i) the seat or place of arbitration should be in a jurisdiction that ratified the New York Convention of 1958; (ii) arbitrators should apply the (rules of) law, rather than decide *ex aeqo et bono* (in equity); (iii) hybrid clauses are a no-go, such as those submitting certain disputes to arbitration and others to litigation.

Recommendations related to arbitrators

The Code promotes a higher degree of transparency. It reinforces the standard of

independence and impartiality of arbitrators, which is essential for arbitration to continue to be a proper dispute resolution mechanism and selected as such. To this end, the Code targets disclosure duties via an extensive questionnaire (31 questions) for the arbitrators as to possible connections between arbitrators and the parties, with the dispute, with the counsel of the parties, with the other arbitrators or with other persons involved in the arbitration, such as third-party funders, witnesses, experts or the arbitration institution. [Rec. 84 C.BB.PP/CEA 2019]

The Code also takes a stance on the debated issue of party appointed arbitrators. As a general view, the purpose thereof is to have a balanced and fair panel while understanding various cultural or local particularities. The Code states that the party-appointed arbitrators have no duty to ensure that the case of the party appointing them is adequately understood by the other members of the tribunal, or any other special obligation or function concerning the case of the party appointing them, save if otherwise agreed by the parties. [Rec. 73 C.BB.PP/CEA 2019]

Recommendations related to counsel

The recommendations take into account that counsel is subject to a variety of deontological or ethical rules. Counsel should strive for the arbitration proceedings to be time and cost-effective. For example, after the tribunal's constitution, if there are changes with regard to the initial legal team, the arbitrators may reject such modification by reasoned decision, after hearing the parties, with a view to safeguard the integrity of the proceedings. The Code explains what is considered to impair the proceedings. [Rec. 111, 112 C.BB.PP/CEA 2019]

Counsel must refrain from knowingly making false statements, both in written pleadings and in oral submissions, or from submitting witness statements and expert reports they know to contain false information.

Unlike the IBA Guidelines on Party Representation in International Arbitration, that refer only to submissions on facts, the Code recommends that counsel refrain from knowingly citing inexistent legal authorities or from distorting their true meaning through incomplete or tendentious citations. [Rec. 118 C.BB.PP/CEA 2019]

Recommendations related to experts

The Code provides that experts should preserve the objectivity and independence of their opinions. For this, the Code recommends a non-exhaustive list of fifteen questions on potential areas of disclosure by experts, with reference to possible connections with the parties, with the dispute, with the counsel designating them, or with other stakeholders involved in the arbitration, such as third-party funders, witnesses or arbitration institution.

The Code takes a step forward and proposes that experts include in their report aspects both in favor and aspects that may prejudice the party appointing them, and

that they maintain an objective distance from all parties involved in the arbitration. [Rec. 133, 134 C.BB.PP/CEA 2019] The Code adds that the expert will act with respect and loyalty to the arbitrators and all parties. [Rec. 147 C.BB.PP/CEA 2019]

Recommendations related to third party funders

The Code posits that the party receiving funds or any other type of financing from a third party in connection to the results of the arbitration should disclose the identity of the funder in the request for arbitration or within a reasonable term, in case financing is obtained at a later stage. The recommendation is meant to protect the independence and impartiality of the arbitrators that would be then capacitated to disclose any relationship with the funders.

This rule goes in line with the standards in the IBA Guidelines on conflicts of interest in international arbitration, that require parties to disclose the existence of the funder at the earliest opportunity. The disclosure of funders for the purposes of conflicts of interest has been a matter of interest in the arbitration community and had been tackled in the last couple of years by ICC,[2)] and other institutions, such as ICSID with the proposal for amendment of the ICSID rules released in March 2019.

For the time being, the Code recommends a limited disclosure, in that the beneficiary party should only inform the tribunal and the other party about the existence and the identity of the funder. However, should the tribunal consider relevant, the funded party ought to submit additional confidential information, especially the economic conditions of the transaction. [Rec. 154-156 C.BB.PP/CEA 2019]

The authors are co-founders with others of the Romanian Chapter of the Spanish Arbitration Club.

References

↑1 For a more detailed discussion see, Alexis Mourre, Arbitral Jurisprudence in International Commercial Arbitration: The Case For A Systematic Publication Of Arbitral Awards In 10 Questions, 28 May 2009, Kluwer Arbitration Blog.

↑2 The 2019 ICC Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of arbitration refers to a duty of the arbitrators to disclose relationship with any entity having a direct interest in the dispute or an obligation to indemnify a party for the award, but does not include an obligation for the party to disclose the existence of the third-party funder. The arbitrators are encouraged to consult the Secretariat which may assist the arbitrators in this regard.

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