CEA Code of Good Practice for Mediation

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Club Español del Arbitraje

MEDIATION COMMITTEE

THE CEA CODE OF GOOD PRACTICE FOR MEDIATION

Club Español del Arbitraje

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Club Español del Arbitraje

FOREWORD

Founded in 2004, the Spanish Arbitration Club (*Club Español del Arbitraje*) is the association which is the point of reference in Spain for the dissemination and study of arbitration, a task that it performs on the basis of a solid understanding of the inner workings of extrajudicial dispute resolution.

The Club set up its Mediation Committee[1] in 2010, at a time when the Spanish legislature set in motion the process of transposing Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of Mediation in Civil and Commercial Matters.[2] This legislative process crystallised with the passing of Act 5/2012 of 6 July on Mediation in Civil and Commercial Matters.

From the outset, the Mediation Committee of the Spanish Arbitration Club set itself the goal of collaborating on the sound development of mediation, and working to extend its use among economic and legal agents.

This Code of Good Practices in Mediation[3] is the end result of this two-pronged goal. Mediation in corporate disputes is in its infancy in Spain and, if its development is to be successful, then the most advisable guidelines must be drawn up. In this way, the professionals who engage in the mediation process (mediators,[4] mediation institutions and lawyers) will be able to optimise their participation and generate the necessary trust to ensure that economic agents use mediation as a dispute resolution mechanism.

It might be thought that the Code fails to address the leading characters in any mediation, namely, the parties. It is they who, in a process facilitated by the mediator, put together the agreement, enjoying for this purpose the freedom to introduce elements that do not necessarily form part of the initial dispute, and controlling the

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[1] Resolution of the Management Committee of 21 May 2010

[2] Bill on Mediation in Civil and Commercial Matters tabled at the Cabinet Meeting of 19 February 2010

[3] For the purpose of drawing up this Code of Good Practice for Mediation, the Mediation Committee appointed a sub-committee chaired by Mercedes Tarrazón and made up of David Cairns, Elena Gutiérrez and Tomás Villatoro. This sub-committee had the collaboration of Ana Ballester, Javier Fernández Samaniego, Calvin Hamilton, Clifford Hendel and Francisco M. Serrano.

The sub-committee's text was approved by the Mediation Committee on (date) and by the Club's Management Committee on (date).

[4] The use in this Code of the terms "mediator" and "lawyer" or any other term whatsoever in the masculine shall in all cases include the feminine.

outcome of the process at all times. Yet, the fact that no section of this code is devoted to the parties does not mean that their presence is in any way diminished.

Mediation calls for a change in mentality, i.e., rather than the traditional approach of delegating authority to a third party, judge or arbitrator, in order that he settle the dispute, here the parties are required to assume responsibility for addressing their own differences. To encourage them to do so, it essential that they be provided with a framework of security and trust, in which mediators act with professionalism and expertise, institutions administer cases from a standpoint of responsibility and transparency, and clients are assisted by lawyers who are not only thoroughly conversant with the process, but indeed also contribute to same. We trust that this Code will contribute to all of this.

Mediation Committee
Spanish Arbitration Club
August 2013

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SECTION I

GOOD PRACTICES FOR MEDIATORS

Article 1. Independence and impartiality

Mediators must be independent vis-à-vis the parties and act with impartiality.

Before accepting any mediation, a mediator must verify that he has no conflict of interest with the parties and disclose to said parties any personal, professional or business relationship with one or more of them which may, or may be perceived to, affect his independence or impartiality.

Similarly, in a case where a mediation has been initiated, if a situation should arise which may, or may be perceived to, affect the mediator's independence or impartiality, he must disclose same to the parties, and may only continue to act in his designated capacity with the express consent of all of them.

Article 2. Neutrality

Mediators must be neutral and remain so with respect to the dispute.

Article 3. Competence

Mediators shall only agree to participate in cases for which they consider themselves appropriately qualified and competent.

Mediators shall in all cases inform the parties of their background and experience.

Article 4. Information to be supplied to parties about the mediation

Mediators shall provide the parties with information about the mediation, including but not confined to:

(a) the nature, purpose and conduct of the mediation process;

(b) their role and that of the parties in the process;

(c) the duty of confidentiality; and,

(d) the initially envisaged cost of the proceedings.

Article 5. Diligence

Mediators shall act diligently in the performance of their official duties and shall conduct the process efficiently.

Article 6. Fees

In any case where a mediator acts *ad hoc*, he may not commence the mediation without having first informed the parties of the fees for his services and obtained their acceptance thereof.

Except where the parties agree otherwise, all fees and costs of the mediation shall be defrayed equally by the parties.

Mediators' fees shall in no way be linked to the outcome of the mediation.

Article 7. Obligation of confidentiality

Save where the law or grounds of public policy provide otherwise, mediators are subject to the obligation of confidentiality with regard to any information that they might learn by reason of the mediation process, including the fact that the mediation is to take place or has taken place, and the mediation agreement, if any.

Any information disclosed to a mediator by one of the parties in a private session may not be disclosed to the other parties, save where the former should expressly authorise him to do so.

Article 8. Resignation of mediators

Once they have accepted their appointment, mediators must perform their duties until the proceedings have come to an end, save where circumstances subsequently arise that bar them from fulfilling their obligations as mediators.

In such a case, as soon as a mediator becomes aware of these circumstances, he shall make these known to the parties, to whom he shall tender his resignation.

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SECTION II

GOOD PRACTICES FOR MEDIATION INSTITUTIONS

Article 9. Transparency and neutrality

Mediation institutions shall act independently and neutrally, and shall furnish full and transparent information about the institution, its rules and regulations and the internal procedures that it follows in the administration of mediations, including the system for appointing mediators.

Article 10. Efficiency and party autonomy

Mediation institutions shall make every effort to expedite the mediations that they administer and shall seek to ensure that mediations are conducted efficiently and responsibly, facilitating dialogue by having regard to the wishes of the parties, mediation principles and any such legal provisions as may be applicable.

Article 11. Mediation and Arbitration

Mediation institutions which also administer arbitrations shall adopt the necessary measures to ensure that such services are rendered independently and separately.

In this regard and, bearing in mind that mediations can give rise to subsequent arbitrations on the substance of a dispute and vice versa, the institutions shall ensure that the staff tasked with the first proceedings do not participate in any way whatsoever in the administration of the second.

These institutions are to keep separate lists of mediators and arbitrators.

Article 12. Appointment of mediators

Mediation institutions shall seek to ensure that the choice of a mediator is by mutual agreement of the parties, and shall proceed with such appointments of mediators as, according to their rules and regulations, it falls to them to make on the basis of objective, transparent criteria, adapting said appointments to the specific needs of each case and, wherever possible, respecting the mutual preferences of the parties.

Article 13. Independence, impartiality and neutrality of mediators

Mediation institutions shall make every effort to ensure that mediators are neutral, independent and impartial.

They shall oblige their mediators to make known to the institution any personal, professional or business relationship –pre-existing or subsequently arising during the proceedings– with one or more of the parties, which may, or may be perceived to, affect their independence or impartiality. In such cases, mediation institutions shall only appoint mediators or maintain them in their post where the parties, duly informed, expressly consent to this.

Article 14. Professional qualifications of mediators

Mediation institutions shall ensure that mediators who act in their cases possess the appropriate certification, experience, training and professional qualifications for mediating in the dispute, under the prevailing statutory provisions in force at any time.

Article 15. Confidentiality

Save where the law or grounds of public policy provide otherwise, mediation institutions shall ensure the confidentiality of the holding -present, past or future- of any mediation, the parties involved therein and the mediation agreement, if any.

Article 16. Fees

Mediation institutions shall publish detailed information on the costs of mediation and, specifically, on the fees of the mediators and the registration and administrative fees of the institution.

Article 17. Promotion of mediation and continuous training of mediators

Mediation institutions shall promote both the use of mediation as an effective form of dispute resolution and the continuous training of their mediators.

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SECTION III

GOOD PRACTICES FOR LAWYERS REPRESENTING

PARTIES IN A IN MEDIATION

Article 18. Good faith and mutual respect

Lawyers shall conduct themselves in accordance with the principles of loyalty, good faith and mutual respect, having regard at all times to the ethical principles and code of conduct of the profession.

Article 19. Collaboration in mediation

Lawyers shall collaborate in the efficient conduct of the mediation, showing respect for the mediator's activity.

Article 20. Confidentiality

Lawyers shall, within the scope and limits required by law, the rules and regulations applicable thereto, and the ethical principles and code of conduct of their profession, ensure the confidentiality of the mediation and of all information and content matter stemming from said mediation and the mediation agreement, if any.

Article 21. Information about the mediation procedure

Lawyers shall inform their clients of the nature of mediation and, in particular, about:

(a) its underlying principles –confidentiality, voluntary participation, freedom to choose and equality of the parties; and independence, impartiality and neutrality of the mediators;

(b) the conduct of the proceedings;

(c) the procedural effects of mediation; and,

(d) the legal consequences of any agreement that might be reached.

Article 22. Assistance to clients in mediation

Lawyers shall assist their clients in the search for a consensual resolution of the dispute.

To this end, lawyers, when engaged in preparing the mediation with their clients, shall not only analyse the legal dimension of the dispute with them, but shall also encourage them to consider the corporate dimension.

Together with their clients, lawyers shall analyse the investment in terms of the money and time required for a judicial or arbitral settlement -as the case may be- of the dispute, as well as the probabilities of their clients' claims being recognised in this setting.

Similarly, lawyers shall help their clients to generate options that might allow for a consensual settlement of the dispute.

Article 23. Drawing-up of contract incorporating the mediation agreement

Should the parties reach a total or partial agreement in the mediation and wish to incorporate this into a contract, the lawyers who have taken part in the proceedings shall make every effort to ensure that the terms of the agreement reached are reflected in it, whether said agreement has been drawn up by them, another lawyer or a third party.

Article 24. Duty to inform mediators

Lawyers shall inform mediators forthwith of any circumstance that might affect the course of the mediation and especially, where applicable, of their clients' decision to withdraw from the mediation.

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ANNEX A

REFERENCES

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This proposal draws on the following documents:

- *UIA Code de Conduite pour les Médiateurs*
- IMI Code of Professional Conduct
- CIArb Code of Professional and Ethical Conduct for Members
- Council of Europe, European Code of Conduct for Mediators
- *CNM La Chartre et le Code de la Médiation*
- Law Council of Australia, Guidelines for Lawyers in Mediations
- AAA, ABA and ACR Standards of Conduct for Mediators

In addition the following sources were consulted:

- *Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago. Código de Ética de los Mediadores*
- *Federación Argentina de la Magistratura y la Función Judicial. Código de Ética de los Mediadores*
- CPR Georgetown University Commission on Ethics and Standards in ADR. Model Rule for the Lawyer as Third-Party Neutral
- The Law Society Guidelines for those involved in Mediations
- *Código Deontológico de la Abogacía Española* and Council of Bars and Law Societies of Europe (CCBE) Code of Conduct for European Lawyers.

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ANNEX B

MEMBERS OF THE MEDIATION COMMITTEE

Club Español del Arbitraje

CHAIRPERSON:

Mercedes Tarrazón

MEMBERS OF THE MEDIATION COMMITTEE:

José María Alonso
Jesús Remón
Miguel Ángel Fernández-Ballesteros
Ana Ballester
David Cairns
Pedro Claros
Paulino Fajardo
Javier Fernández Samaniego
Elena Gutiérrez
Calvin Hamilton
Clifford Hendel
Iván Heredia
Pablo Martínez-Alcalá
Juan Ramón Montero
Giulio Palermo
Lorenzo Prats
Antonio Sánchez-Pedreño
Francisco Manuel Serrano
Carmen Venegas
Tomás Villatoro