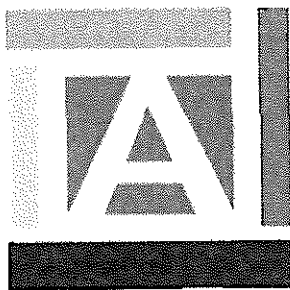


RECOMMENDATIONS  
ON THE  
INDEPENDENCE AND IMPARTIALITY OF  
ARBITRATORS

OF THE



**Spanish  
Arbitration  
Club**

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## INTRODUCTION

- I. Everyone is entitled to be tried by an independent and impartial tribunal. This principle has its origins in the courts of law, but it also applies, with certain qualifications, to arbitration proceedings.

The independence of the judiciary is absolute and is not applied, or disappplied, on a case-by-case basis. This independence is protected by the legal system, which defines the legal status of judges and shields them from interference from other public authorities. In contrast, impartiality concerns a specific proceeding and is given expression to when the judge is not biased in favor of or against any of the parties.

In arbitration proceedings, independence is relative, rather than absolute and it concerns the specific case to be heard by the judge. In order for the parties to perceive that justice is being done, it is essential that arbitrators be independent. The recipients of the arbitral award must be sure there are no ties between the arbitrators and the parties, the arbitrators and the lawyers, or the arbitrators themselves, that could influence the decision.

Arbitrators must not only be independent; in common with judges, they must also be impartial. Independence is a question of fact and impartiality is an attitude, a mental state reflecting an absence of prejudice *vis à vis* the specific case to be judged and a procedural form of conduct, that puts both parties on an equal footing.

- II. The independence and impartiality of arbitrators are two of the fundamental requirements for arbitration to work. Individuals and enterprises will only place their trust in arbitration if arbitrators are seen to be independent and deliver their rulings in an impartial way.

It is a fact that, as a general rule, only persons with experience in the industry to which the dispute relates are appointed as arbitrators. In addition, arbitrators are often appointed by the parties themselves: on a panel of three arbitrators, the standard practice is for each party to appoint an arbitrator, and the third to be agreed on by the parties or between the two co-arbitrators. Only persons held in confidence are appointed as arbitrators. It is easier to have confidence in someone you know.

There is, therefore, an inherent tension between the requirements of independence and impartiality and the tendency to appoint experts who are known and of confidence.

III. In order to defuse this tension, arbitration laws, with the UNCITRAL Model Law<sup>1</sup> at the forefront, and the rules of the main arbitration institutions, have created a system based on three principles:

- the duty of arbitrators to be and to remain independent and impartial, and to refrain from maintaining relations with the parties that may compromise their independence and impartiality;
- the duty of arbitrators to disclose during the proceeding, *ex proprio motu* or at the request of one of the parties, any circumstances likely to give rise to justifiable doubts as to their independence or impartiality; and
- the right of parties to challenge the arbitrator where circumstances exist that effectively compromise his independence and impartiality.

IV. The Spanish Arbitration Law ("*Ley de Arbitraje*" or "LA")<sup>2</sup> clearly reflects this philosophy. The Preamble<sup>3</sup> to the Law describes it as follows:

*"A duty is placed on all arbitrators, whoever has appointed them, to show due impartiality and independence from the parties to the arbitration."*

This principle is developed in Article 17 LA:

*"Article 17. Grounds for abstaining and challenging*

*1. Every arbitrator must be and must remain independent and impartial throughout the arbitration. Under no circumstances may he maintain any personal, professional or commercial relationship with the parties.*

*2. A person put forward as arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from and after the time of his appointment, shall without delay disclose any unforeseen circumstance to the parties.*

*At any time during the arbitration, any of the parties may request the arbitrators to clarify their relationships with any of the other parties.*

*3. An arbitrator may be challenged only if his circumstances give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated,*

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<sup>1</sup> UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985; Articles 12 and 13.

<sup>2</sup> Arbitration Law 60/2003 of December 23, 2003.

<sup>3</sup> IV, 3.

*only for reasons of which he becomes aware after the appointment has been made."*

The arbitration rules of the main Spanish arbitral institutions merely reprise the wording of the LA with minor nuances or simply refer to it<sup>4</sup>.

- V. The legal regime in Spain, which is, on this point, identical to the Model Law, is based on the distinction between two types of circumstances: those that "*could give rise to justifiable doubts*" as to the impartiality or independence of the arbitrator (Article 17.2 LA) and those that "*give rise to justifiable doubts as to his impartiality or independence*" (Article 17.3 LA). The first of these must simply be disclosed, while the second are the only ones that would validly allow the arbitrator to be challenged<sup>5</sup>.

The set of circumstances requiring disclosure is wider than the set allowing for challenge: the parties are entitled to be informed of all circumstances that could, potentially, give rise to doubts as to the independence and impartiality of the persons who will be appointed arbitrators and be empowered to hand down a binding decision on the dispute.

It is important that users of arbitration, arbitrators, and the judges and courts that have to apply the LA, distinguish between circumstances requiring disclosure and those allowing challenge. The starting point for legal systems based on the Model Law is the principle that arbitrators must disclose all circumstances that could potentially give rise to conflict, although disclosure does not prevent them from asserting their suitability for the position. The purpose of the rule is to ensure that as much information as possible is made available to the parties and to prevent arbitrators from concealing potentially material information from them.

Full transparency also runs the risk of being abused. A party that wants to wreck the arbitration proceeding could use the information provided to found an inappropriate challenge. For this reason, the bodies that have to decide on the challenge (arbitrators, arbitration institutions and, ultimately, judges) must give such tactics short shrift: not all circumstances, if disclosed, constitute a valid ground for challenge; rather, the burden of proof falls to the challenger to show that, having regard to all aspects of the case as a whole, there is indeed a circumstance which affects the arbitrator's independence or impartiality.

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<sup>4</sup> Article 23 of the Madrid Arbitration Court Rules; Article 23 of the Barcelona Arbitration Court Rules; Articles 22 and 23 of the Spanish Court of Arbitration Rules; Articles 15 and 16 of the Rules of the Civil and Commercial Court of Arbitration.

<sup>5</sup> The Spanish Parliament has drawn a distinction between the literal meaning of Articles 12.1 and 12.2 of the Model Law.

- VI. The legal regime established by the Model Law and the LA does not provide the answer to all problems. It is rather scant: it merely distinguishes between circumstances that "could give rise" and those that do "give rise" to justifiable doubts and gives no indication whatsoever as to the scope or content of each of these concepts. Accordingly, parties are unsure as to whom they can propose as arbitrators, and arbitrators are unsure as to the circumstances that must be disclosed.

A number of institutions have issued voluntary codes of good practice amounting to recommendations. The two most important are the "Guidelines on Conflicts of Interest in International Arbitration" approved by the International Bar Association on May 22, 2004 (latest version), which contains a statement of general principles and three lists of specific situations that are strongly influenced by the common law model and applicable only to international arbitration, and the "Code of Ethics for Arbitrators in Commercial Disputes" jointly approved by the American Arbitration Association and the American Bar Association, which entered into force on March 1, 2004 and was created for local arbitrations conducted within the U.S.

However, in the Spanish legal world, there are no legal guidelines to help decide whether something is a mere circumstance that requires disclosure, or whether it allows the arbitrator to be validly challenged.

The aim of these Recommendations is to provide criteria to help draw the boundaries of the legal concepts, specifying the circumstances that require the arbitrator to abstain and those that need not be disclosed.

- VI. Not only is it necessary for arbitrators to be independent and impartial; these qualities must also be required of the institutions involved in their appointment. Arbitration institutions must appoint arbitrators following a nondiscretionary procedure that excludes the involvement of anyone who lacks the independence and impartiality required of the arbitrators themselves.

- VII. On July 28, 2005, the Spanish Arbitration Club asked a special committee<sup>6</sup> to draft a report and recommendations on the independence and impartiality of arbitrators. Presented in an initial report published in July 2006, the recommendations were reviewed by an *ad hoc* committee<sup>7</sup> appointed by the

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<sup>6</sup> Made up of Eloy Anzola, Emilio Bonelli, Pedro Claros, Julio Pablo Comadira, Cliff Hendel, Juan Hernández-Canut, Ramón Mullerat, Gonzalo Stampa and Vicente Torralba, and chaired by Juan Fernández-Armesto.

<sup>7</sup> Made up of David Arias, Juan Carlos Calvo, Miguel Ángel Fernández Ballesteros, Julio González Soria, Antonio Hierro, Jesús Remón, Vicente Sierra and Jean-Marie Vulliemmin, and chaired by José María Alonso.

Club's Managing Board, and this resulted in these Recommendations, which were approved on October 23, 2008.

- IX. Regardless of their status as recommendations, the parties may, in keeping with the principle of freedom of contract, endow these Recommendations with contractually binding force by inserting a specific reference to them in their arbitration agreement.

### SCOPE OF APPLICATION AND DEFINITIONS

1. **Application to all arbitrators**

All arbitrators, regardless of the procedure for their appointment, are subject to the same obligations and requirements as regards independence and impartiality.

2. **Definition of "arbitration"**

References in these Recommendations to "arbitration" or "arbitration proceeding" only include arbitrations or arbitration proceedings that have yet to begin or are in progress, and not those that have been suspended or concluded.

3. **Definition of "party"**

All references in these Recommendations to "party", where that party is an enterprise, also include companies or persons in which that enterprise has a majority or controlling stake, or companies or persons which have a majority or controlling stake in that enterprise. All references to "party", where that party is an individual, also include that individual's close relatives.

4. **Definition of "close relative" and "relative"**

"Close relative" means a spouse, spousal equivalent and ascendants and descendants in the direct line; "Relative" includes close relatives and collateral relatives to the third degree.

5. **Direct and indirect acts performed by the arbitrator**

Any act performed by, or situation relating to, a candidate or arbitrator shall also include acts performed or engaged in by a nominee or legal entity under his control.

**6. The lawyer and his firm**

1. If the candidate or arbitrator is a lawyer, the circumstances refer to him alone, except where these Recommendations expressly refer to his firm.
2. All partners who provide services in any of the offices of a firm, or in the offices of other affiliates that, pursuant to permanent agreements, share the professional name or material economic interests that may compromise their independence, form part of that firm.
3. If the candidate or arbitrator is not a lawyer, the same principles shall apply to the professional organization of which he forms part.

**7. Written correspondence**

Written correspondence shall include any means capable of allowing the contents of such correspondence to be recorded for subsequent consultation.

**RECOMMENDATIONS**

**I. DUTIES OF ABSTENTION AND DISCLOSURE**

**8. Duty of abstention**

1. Any candidate for the position of arbitrator who has doubts as to whether or not he is or will be able to remain independent and impartial in an arbitration must reject his appointment and notify such rejection in writing to the party or institution that proposed his candidature.
2. This notification must be sent as soon as possible, but within not later than 15 days, and need not be accompanied by reasons.

**9. Circumstances of Abstention**

The following are among the "Circumstances of Abstention" under which a proposal to act as an arbitrator must be rejected:

With regard to the parties

- a) Same identity: one of the parties and the candidate share the same identity;
- b) Close relative: the candidate is a close relative of one of the parties;
- c) Interest: the candidate or his firm has a significant interest in the outcome of the arbitration;
- d) Employee, executive, director: the candidate is an employee, executive or director in the enterprise of one of the parties;
- e) Significant shareholder: the candidate is a significant shareholder or member of one of the parties;
- f) Advice: the candidate or his firm has provided or is currently providing

advice to any of the parties in connection with the dispute underlying the arbitration;

- g) Manifest hostility: the candidate is clearly hostile towards any of the parties.

With regard to the lawyers

- h) Same firm: the candidate works at the firm or is a partner of any of the lawyers acting in the arbitration;
- i) Family relation with any of the lawyers: the candidate is a close relative of a lawyer defending one of the parties;
- j) Manifest hostility: the arbitrator is clearly hostile towards any of the lawyers involved in the arbitration.

**10. Acceptance by the parties of a Circumstance of Abstention**

If the parties and their lawyers are aware of the existence of a Circumstance of Abstention because of its disclosure by the candidate and, notwithstanding, both parties insist on his appointment, the candidate may accept the position and his appointment may not subsequently be contested or challenged.

**11. Circumstances of Disclosure**

1. Any candidate who has been proposed as an arbitrator and does not consider that he is subject to any of the Circumstances of Abstention, may accept his appointment although he must disclose any circumstances that could give rise to justifiable doubts as to his impartiality or independence ("Circumstances of Disclosure"). Good faith and the duty of transparency require candidates to disclose any circumstances that could, potentially, from the parties' standpoint, give rise to doubts as to their independence and impartiality.
2. In his notification, the candidate may indicate that, despite the Circumstance of Disclosure, he considers himself to be independent and impartial and accepts his appointment as arbitrator.
3. Notification of a Circumstance of Disclosure does not *per se* mean that the candidate is under a duty to reject the proposal or that a ground for challenge exists.
4. If in doubt, the candidate must opt for disclosure.

**12. Notification of Circumstances of Disclosure**

The candidate shall send, as soon as possible and within not more than 15 days of receipt of the proposal for appointment, a document addressed to the parties or, as the case may be, to the arbitral institution, setting forth all Circumstances of Disclosure which affect him and of which he is aware.

Before reporting on the existence of Circumstances of Abstention or of Circumstances of Disclosure, the candidate must undertake reasonable investigation, with the diligence required of an organized professional.

**13. Notification by the parties of Circumstances of Abstention or of**

## **Circumstances of Disclosure**

All parties and lawyers involved in an arbitration must notify all Circumstances of Abstention or Circumstances of Disclosure which may affect a candidate or an arbitrator and of which they are aware as soon as possible and within not more than 15 days of becoming so aware. Failure to notify in time shall entail waiver of entitlement to subsequently invoke that circumstance.

### **14. Examples of Circumstances that need not be disclosed**

The following are examples of circumstances that need not be disclosed:

#### With regard to the proceeding

- a) Publications: the candidate has published scientific works or articles of a general nature, even where they relate to legal issues that may be relevant to the arbitration;

#### With regard to the parties

- a) Consumers: any of the parties produces or distributes goods or services of mass consumption and the candidate or his firm is or has been a consumer of such goods or services under terms and conditions that are analogous to those for other clients;
- b) Private financial investment: any of the parties is a listed company and the candidate or his firm owns shares or other securities issued by that company and previously acquired on a stock exchange as a private financial investment and not having a significant value;
- c) Advice by the candidate: the candidate has provided advice to any of the parties on issues other than the dispute underlying the arbitration and the provision of such advice ended over three years ago;
- d) Advice by the candidate's firm: the candidate's firm has provided advice to any of the parties on issues other than the dispute underlying the arbitration and such advice was either not significant or its provision ended over three years ago;
- e) Acting as arbitrator: the candidate has acted as an arbitrator in other arbitrations in which one of the parties has been involved;
- f) Mere social relations: the candidate maintains merely social relations or is merely acquainted with any of the parties;
- h) Association: the candidate belongs to a corporation, association or entity to which one of the parties or any of the other arbitrators also belongs, even though they may form part of the governing or managing bodies thereof.

#### With regard to the lawyers and other arbitrators

- i) Same firm: the candidate has worked or has been a partner in the same firm as any of the lawyers acting in the arbitration and that relationship ended over three years ago.
- j) Mere social relations: the candidate maintains merely social relations or is merely acquainted with the lawyers for the parties;

- k) Association: the candidate belongs to the same corporation, association or entity as any of lawyers or any of the other arbitrators, even though they may form part of the governing or managing bodies thereof.

## II. OTHER DUTIES

### 15. Obligation to maintain independence and impartiality

An arbitrator must maintain his independence and impartiality and neither he nor his firm shall accept professional engagements from the parties while he continues as arbitrator and for a reasonable time thereafter.

### 16. Unforeseen Circumstances of Abstention

1. If, during the arbitration, an arbitrator reaches the conclusion that he cannot continue to be independent and impartial, he must immediately resign and notify his resignation in writing to the parties, the other arbitrators and, as the case may be, the arbitral institution administering the arbitration.
2. The foregoing is deemed to be without prejudice to the potential application to the case of recommendation three as referred to in paragraph 10.

### 17. Unforeseen Circumstances of Disclosure

1. If, during the arbitration, an arbitrator becomes aware that he is affected by a Circumstance of Disclosure, he shall immediately notify this in writing to the parties, arbitrators and, as the case may be, the arbitral institution administering the arbitration.
2. Notification of an unforeseen Circumstance of Disclosure does not *per se* mean that the arbitrator is under a duty to tender his resignation or that a ground for challenging him exists.
3. In his notification, the arbitrator may indicate that, despite the Circumstance of Disclosure, he considers himself to be independent and impartial and has decided to continue in this position.

### 18. Prohibition on unilateral contact with the parties

1. All information concerning the arbitration which an arbitrator discloses to a party and which is not purely procedural in nature must be immediately notified to the other party.
2. During the arbitration, none of the arbitrators may have oral or written contact concerning the arbitration with any of the parties or with their lawyers without the knowledge of the rest of the arbitral panel and, in the case of the co-arbitrators, without prior authorization from the Chairman. This shall not apply to exchanges of information between the parties and the co-arbitrators appointed by them concerning the selection and appointment of the Chairman of the arbitral panel.

**19. Secrecy of deliberations**

The deliberations of, and opinions expressed within, the arbitral panel are be secret, even once the proceeding has been concluded.

**20. Settlement proposal**

The arbitrators shall refrain from inviting the parties to reach an agreement and may only collaborate with them in negotiating a possible settlement if both parties have so requested in writing. Once such consent has been given, any act performed or proposal made by the arbitrator shall not impair his independence or impartiality.

**III. APPOINTMENT OF ARBITRATORS BY ARBITRAL INSTITUTIONS**

**21. Procedure for the appointment of arbitrators**

Every arbitral institution must adopt and publish the rules that will govern the composition of, and procedure to be followed by, the body responsible for the appointment of and, as the case may be, challenge to the arbitrators.

The names of the persons making up that body and, should the institution have a list of candidates, the names of the persons on that list, shall be made public.

**22. Independence of the responsible body**

1. Each member of the body responsible for the appointment of, or challenge to, arbitrators must be independent of the parties, lawyers and arbitrators.
2. The rules of the arbitral institution must list the circumstances that prevent a member from being considered independent in an appointment or challenge. The affected member must immediately notify the Chairman of the body of the existence of any such circumstance, absent himself from the deliberation and abstain from voting on the decision.
3. When the parties are informed of the appointment or challenge, a record shall be made of the names of the members who have disqualified themselves.