A Caribbean Code of Good Practices in International Arbitration

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As we discuss and promote arbitration in the Caribbean, it is becoming increasingly evident that arbitral institutions, arbitrators and counsel (arbitration practitioners or practitioners) need to adhere to exigencies of good practices in international arbitration. In order to properly serve the parties and the process, arbitration practitioners must observe high standards of ethical conduct. Codes of good practices or guidelines are construed to advance these objectives. Existing international codes of good practices set forth generally accepted standards of ethical conduct for the guidance of arbitration practitioners in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration. Significantly, adherence to high ethical standards serve to preserve the enforceability of the award, which is the objective of the parties' decision to go to arbitration.

International codes of good practices incorporate internationally accepted arbitration practices, principles, ethics, procedures and rules, which can be adopted by the various practitioners. Such guidelines are needed in a region where the practitioners are still not fully equipped to handle international arbitrations. In order for the Caribbean, in time, to surface as a seat for international arbitrations, especially those involving disputes between or among Asian, US, European and/or Latin American parties, the international arbitration community must appreciate that the high standards found in modern international arbitration practice, are also adhered to by practitioners in the region. Acceptance of a code of good practices by the Caribbean arbitration community would serve to underscore the region's adherence to good practices.

It should be noted that although the guidelines do not impose any obligation on the parties, they potentially contribute to harmonizing arbitration practice.

What is a Code of Good of Arbitration Practice?

The arbitral process should be transparent, dependable and akin to the principles of equality, due process, and confidentiality. With this in mind and comparing existing international arbitration practice to the procedures present in the Caribbean, there exists a definite deficit in the sphere of uniform arbitration guidelines for the region.

Furthermore, international arbitration practitioners, unless customs and practices change in the Caribbean, will be frustrated by the outdated and narrowly tailored arbitration habitudes of some Caribbean institutions. A key example in this instance is the international norm of requiring arbitrators to submit statements of impartiality and independence when being considered for appointment. This practice has not become uniform in the Caribbean.

In order to promote confidence in international arbitration in the region, there is a need for the establishment of a set of guidelines consisting of a list of recommendations and practices, most of which are commonly used in international practice, that can be adopted by the various arbitration institutions

established in the region. These Guidelines would constitute the first attempt at a uniform and consolidated set of rules and recommendations for arbitral institutions in the Caribbean.

I would recommend that the Guidelines itself be divided into 4 sections. Section 1, geared solely towards arbitration institutions, listing recommendations concerning the duties of arbitral institutions. Section 2, geared towards conduct of counsel in international arbitrations. Section 3 would recommend best practices for arbitrators in international arbitration. Section 4 would consist of a model set of rules which reflect prominent international arbitration trends.

It is to note that the recommendations are not exhaustive and that most, if not all, of the recommendations are also applicable to domestic arbitrations.

The Guidelines would stress their contractual nature and primarily apply only if the parties agree. Yet, arbitrators should be able to apply the Guidelines–even if they are not contractually agreed upon–if they consider themselves authorized to rule on matters of party representation and to ensure the integrity and fairness of arbitration proceedings.

Further, the Guidelines will not displace applicable mandatory law, professional rules, and arbitration rules.

In formulating these Guidelines, we have the benefit of a wealth of international sources, including but not limited to, the ABA Rules of Professional Conduct, CIArb and IBA Guidelines on Ethics, the Spanish Arbitration Club's Code of Good Arbitration Practices and the Swiss Chamber´s Code of Ethics of Arbitrators.

Section 1: Recommendations for Arbitral Institutions

Section I would contain 8 main responsibilities for arbitral institutions, together with the requisite duties necessary to fulfill those responsibilities. They are as follows:

1. **Quality of Service**. Arbitral institutions should provide their services in an objective, efficient and responsible way.
2. **Institutional Independence**. Arbitral institutions should conduct themselves in an independent and neutral fashion in the administration of arbitration proceedings.
3. **Transparency**. Arbitral institutions should provide full and transparent information on the institution, its services and the internal procedures followed in the administration of arbitration proceedings.
4. **Speed**. Arbitral Institutions should take steps to expedite the conduct of the cases they administer.
5. **Flexibility**. Arbitral institutions should agree to adaptation of their rules in the cases they administer.
6. **Objective Selection of Arbitrators**. Arbitral institutions should use objective criteria in the selection and appointment of arbitrators.
7. **Confidentiality.** Arbitral institutions should protect the privacy and confidentiality of the cases they administer.

8. **Promotion.** Arbitral institutions should promote arbitration for the resolution of disputes.

In jurisdictions where the practice of international arbitration has had a longer history and is more developed, these recommendations may seem standard and non-innovative. However, such is not the case in the Caribbean. Comprehensive international arbitration reform is yet to be introduced in most jurisdictions in the region and as a result, arbitration institutions have only recently been operating therein. Are these arbitration institutions well-resourced for the effective and efficient administration of both domestic and international arbitrations? Like all other arbitration institutions, institutions in the Caribbean have adopted and developed their own unique practices, rules and regulations - some adhering to international standards from the start, others just catching on and the laggards - which as previously mentioned, have at times, frustrated the efforts and practice of practitioners accustomed to working in the international arbitration sector.

The recommendations contained in the Guidelines will likely serve as a useful directional point for arbitral institutions in the Caribbean to evaluate their own procedures and also grant some foresight to newer arbitration institutions.

Section II: Recommendations for Caribbean Counsel

Section II would contain at least 6 main responsibilities for counsel in arbitrations, together with the requisite duties necessary to fulfill those responsibilities. They are as follows:

1. **Probity.** Counsel should not engage in activities intended to obstruct the arbitration process.
2. **Truth and integrity.** Counsel should not make false statements to the Arbitral Tribunal or to opposing counsel.
3. **Aiding and assisting of false evidence.** Counsel should not procure, assist in the preparation of, or rely upon, any false evidence presented to the Arbitral Tribunal.
4. **Tampering.** Counsel should not conceal, or assist in the concealment of, any document which is ordered to be produced by the Arbitral Tribunal.
5. **Ex parte communications**. Counsel should not, during the arbitration proceedings, initiate unilateral contact with any member of the Arbitral Tribunal, which has not been disclosed in writing, prior to, or shortly after the time of such contact, to all other parties and all members of the Arbitral Tribunal
6. **Sanctions.** Counsels' violation of these general guidelines will be subject to sanctions at the sole discretion of the Arbitral Tribunal.

Experienced practitioners are well aware of the significance of counsel and counsel's comportment in international arbitrations. Arbitral tribunals consistently rely on counsel's professional obligations to, inter alia, comply with disclosure orders, properly communicate with witnesses, make factual representations and display decorum in addressing opposing counsel. Accordingly, the content and reliability of counsel's ethical obligations are crucial to the arbitral process. The spectacular proliferation in the number of international arbitrations, together with

the growth of the international arbitration community, emphasises the position: implicit cultural or professional expectations, including national rules of professional responsibility, existent in the Caribbean jurisdictions, cannot, if ever they could, be relied upon to ensure fair play.

However, no counsel should be put in a position where he or she has to choose between being at a disadvantage or engage in conduct which is unethical under the respective national rules.

By way of example, the Guidelines should prohibit counsel from making false submissions of fact. If counsel learns that he or she made a false submission he or she should – subject to countervailing considerations of confidentiality and privilege – promptly correct such submission. The duty of candor applies also to fact and expert witnesses. If counsel discovers that a witness intends to make false submissions, he or she should promptly take remedial measures. Moreover, he or she should urge the witness to correct or withdraw the false evidence. As the most drastic remedial measure, Guidelines may stipulate that counsel, if the circumstances so warrant, withdraws from the case.

Further, counsel must agree to comply with the Guidelines as a condition of appearing by name before the tribunal. The sanctions available to the tribunal in case of non-compliance with the Guidelines should include the following: a written reprimand, a written caution as to future conduct in the arbitration and any other measure, including drawing a negative inference and/or application of costs, necessary to fulfil the general duties of the tribunal, as specified in applicable rules or modern arbitration practice.

Section III: Recommendations for Arbitrators

Section III would contain at least 6 main responsibilities for arbitral institutions, together with the requisite duties necessary to fulfill those responsibilities. They are as follows:

Impartiality and independence. The arbitrators must be impartial and independent throughout the arbitral process. This means that the arbitrator must have the resolve and capacity to carry out his or her functions without favoritism to either of the parties, while maintaining a professional distance from the parties and others involved in the arbitration. The duty of impartiality and independence applies even in relation to the party that has appointed the arbitrator. Importantly, the arbitrator designated by a party does not have any special obligations to the party that appointed him or her. He or she does not have an obligation to ensure that the party's case is adequately understood by the tribunal or any other such special function.

Duty of abstention. Any candidate should refuse a nomination if he or she is not qualified or otherwise capable of discharging his or her duty; or if there are circumstances which give rise to impartiality and/or independence; or if he or she does not have the qualifications required by the parties; or if he or she does not have sufficient time to serve.

Duty to disclose. The candidate who decides to accept a nomination must disclose to the parties any facts and/or circumstances which may give rise to reasonable doubts to his or her impartiality and independence. This duty is continuous throughout the arbitration. When in doubt, the candidate should opt for disclosure.

Duty to investigate: In order to properly assess the candidate's own impartiality and/or independence, he or she must perform research about past and present relationships with the parties and subject matter of the dispute.

Prohibition against ex parte communications: The arbitrator or candidate must abstain from any unilateral or ex parte communication with the parties, including with the parties' counsel. The duty begins from the moment the arbitrator became a candidate for nomination, until the end of the proceedings. The prohibition does not include those communications which the candidate had while being considered as a candidate for nomination, provided the said communication only covered: the identity of the parties; ascertainment of the availability of the candidate; determination of whether the candidate is qualified; and presentation of a brief description of the case.

Confidentiality: The deliberations of the tribunal are secret. This duty continues even when the proceedings are terminated. Unless the parties agree to the contrary, the arbitrator must maintain the confidentiality of the information learned during the arbitration.

Section IV: Model Code

The section would cover 10 broad areas of arbitration: the arbitral agreement; appointment of arbitrators; procedure; abbreviated arbitral proceedings; emergency arbitrator; challenges; evidence; interim measures; the award and some comments on arbitration centers. While the announcement of the Guidelines is vastly important, sections therein should introduce innovatory solutions so as to provide a comparative advantage in favor of the region as a principal location for international arbitrations, especially for those involving disputes governed by English law.

The Arbitral Agreement. The Guidelines could make some very specific recommendations concerning actual arbitration agreements. The Guidelines should envisage situations where domestic law may have an effect on institutional rules and situations where current international practice causes arbitral institutions to modify their arbitration rules. They should recommend, for example, that the model arbitration clauses of institutions indicate that the applicable arbitration rules be those in force on the date of the commencement of the arbitration. This is of particular relevance in the region where arbitral institutions are now being created and/or updating and modernizing rules to adhere to international standards. This is a definite method of eliminating ambiguity in situations where the applicable rules have been amended in the period between signature of the arbitration agreement and the commencement of the arbitration proceeding. Also, of utmost importance, is the Guidelines´ recommendation that the arbitration clause expressly specifies the scope of confidentiality concerning the arbitration, or that the parties agree on this point at the

commencement of the arbitration. Arbitrations gloat of confidentiality, but there exists a great deal of ambiguity, which is often of concern.

The Appointment of Arbitrators. Common practice in the region often only permits the parties of arbitration proceedings to nominate arbitrators contained on the "*closed list*" of the arbitral institutions. This, especially on an international level, results in problems where the arbitration involves a very skilled or technical subject matter and the closed list of arbitrators does not contain sufficient experienced or well-qualified arbitrators. Additionally, the Guidelines should recommend that where the parties are of differing nationalities, that the sole or presiding arbitrator not share in nationality with either party. This is undeniably a marker to advance the practice and frequency of international arbitrations in the region, while also at the same time, increasing the perception of fairness. Of special significance are rules concerning the appointment of arbitrators which provide that as a condition precedent to appointment as arbitrator, an arbitrator sign a declaration of independence and impartiality which is provided to the parties for review. Though common in international practice, this has not been a habitual requirement by regional arbitral institutions, which often results in parties having to self-research the arbitrator and exploit available resources to ensure neutrality and fairness.

Procedure. As a way to encourage more international arbitrations in the region, the Guidelines should advocate that the parties be free to decide on the language of the arbitration proceedings, and that the language be neutral, taking into account the language of the arbitration agreement, language of the documents, witnesses and the ability of the arbitrators to speak a particular language. The most prominent arbitration institutions in the region are either not equipped for non-English language proceedings and/or require that the language of the arbitration be English, which would be of concern for international practitioners.

Abbreviated Arbitration Proceedings. Abbreviated arbitration proceedings should be available under the following conditions: the amount in dispute, including answer and counterclaim, is US $500,000 or less; the parties have not expressly opted out of the abbreviated provision; the parties agree the abbreviated proceedings regardless of the date of the agreement or the quantity in dispute.

Emergency Arbitrator: Unless otherwise agreed to, a party may, at any moment prior to the arbitrators being seized of the file, request the appointment of an emergency arbitrator who will be tasked with adopting interim measures that, because of facts and circumstances present at the time, cannot await the appointment of the arbitration panel.

Challenge of Arbitrators: A challenge to an arbitrator based on impartiality, independence or any other motive, should be made in written form and should substantiate the allegations. The Guidelines can stress the need for provisions for an appointing authority to be vested with jurisdiction to resolve the challenge. The decision should not be subject to appeal. However, for purposes of transparency, the decisions on challenges can be made public.

Evidence: Each party has a right to reasonably anticipate the evidence upon which the other party relies. Evidence within the control of a party shall be subject

to discovery, provided it can be shown that it is essential to the requesting party's case. The arbitrators may draw a negative reference with respect to evidence, where a party with control of the said evidence, unreasonably refuses to provide access to the same.

Interim Measures: Unless otherwise agreed, the tribunal shall, upon petition of one of the parties, agree interim measures, subject to deposit of costs if deemed appropriate. Parties, upon a request for interim measures, may also make an ex parte application for a preliminary order, in appropriate circumstances.

Award: Unless agreed otherwise, the dispute shall be resolved in an award within 2 months following the conclusion of the proceedings, subject to a possible extension period of 2 months at the discretion of the arbitrators, the court of arbitration, or upon agreement of the parties. It is to note that the tribunal does not become functus officio solely upon the expiration of the time for issuance of the award, rather, upon expiration of the term, one of the parties must provide notice to the tribunal of the said expiration. The tribunal will be granted a special grace period of 15 days after receipt of such notice to present the award. The deliberations of the arbitrators are secret. The duty to maintain the secrecy of the deliberations continue after the termination of the proceedings. In circumstances where a draft of the award has been prepared, either by majority vote or by decision of the president of the tribunal, each arbitrator may express his particular views in written form in a dissenting or other decision.

Centers for International Arbitration: As arbitration grows in popularity and as international arbitrations are increasingly attracted by the international openness of regional arbitral institutions, the Caribbean, with adequate preparedness, can promote itself as a location for international arbitrations. The uniformity contained within a set of innovative Guidelines offers confidence in the Caribbean arbitration system to foreign and domestic parties searching for ideal arbitration forums. Institutions adopting a set of Guidelines as described, are opening their doors for international arbitration practitioners and will likely see an increase in international arbitrations as a result of their determination to embrace international arbitration practices.

Conclusion: The Guidelines will only apply to the extent that, neither national codes of conduct, nor the arbitration agreement, nor the primary duty of loyalty to the party, nor the obligation to present the party's case, demand a different conduct and the parties have agreed on their application, or the tribunal decides to apply them unilaterally, if they consider themselves authorized to rule on matters of party representation to ensure the integrity and fairness of arbitration proceedings.

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