Draft Code of Conduct for Adjudicators in ISDS Proceedings: Further Practical Considerations

Kluwer Arbitration Blog
November 1, 2020

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Please refer to this post as: Felipe de Marinis, Lucy Winnington-Ingram, Zach Mollengarden, and Paige von Mehren, 'Draft Code of Conduct for Adjudicators in ISDS Proceedings: Further Practical Considerations', Kluwer Arbitration Blog, November 1 2020, http://arbitrationblog.kluwerarbitration.com/2020/11/01/draft-code-of-conduct-for-adjudicators-in-isds-proceedings-further-practical-considerations/

The Institute for Transnational Arbitration ("ITA") hosted a four-part webinar discussing the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, between 21-25 September 2020. Each part addressed specific practical considerations raised by the matters addressed in the Draft Code of Conduct: issue conflict, double hatting, repeat appointments, and implementation and enforcement of the Draft Code of Conduct.

The first session, "Is there an Issue with Issue Conflict?", was opened by Joseph E. Neuhaus (Chair – ITA) and the discussion was moderated by Chiara Giorgetti (Chair – Academic Council ITA) and Tom Sikora (Senior Vice Chair – ITA) with expert panelists Anna Joubin-Bret (Secretary – UNCITRAL), Martina Polasek (Deputy Secretary-General – ICSID), Dominique Brown-Berset (Brown&Page), Lucy Reed (Independent Arbitrator, Arbitration Chambers), and Catharine Titi (CNRS-CERSA, University Paris II Panthéon-Assas).

The starting point was Article 5.2.(d) of the Draft Code of Conduct, which currently addresses issue conflicts by requiring arbitrators to disclose "a list of all publications by the adjudicator or candidate [and their relevant public speeches]".

The panelists discussed the definition of "issue conflict" considering the fact that there is no consensus on what factual scenarios create issue conflicts nor whether it is a standalone category or a matter of independence, impartiality or both. The suggestion was to include guidelines to this effect built on concrete examples for clarity. The panel identified five scenarios that have been argued to present potential issue conflicts: (i) the arbitrator's prior publications; (ii) the arbitrator's prior statements about the parties or the case; (iii) previous or concurrent appointments where the arbitrator addressed a similar legal issue (particularly if there is a close connection between the facts and the parties in the previous cases) or multiple appointments by the same party or counsel; (iv) double hatting; and (v) prejudgment by the arbitrator based on a previous relationship with the parties, parties' affiliates, counsel or experts. In addition to this, the panel also discussed various aspects of a three-factor test that has been suggested for analyzing whether an expression of views on an issue was problematic, focusing on (a) the degree of the author's commitment to the view expressed; (b) the timing and propinquity of the expression; and (c) the specificity or proximity of the view to the issue in the arbitration.

A further note was made on the fact that the current commentary to the Draft Code of Conduct only associates issue conflict with the disclosure obligation under Article 5.2(d), although issue conflicts relates to other provisions of the Draft Code, such as Article 4 "Independence and Impartiality", Article 5 "Conflicts of Interest: Disclosure Obligations" and Article 6 "Limit on Multiple Roles". Among the recommendations made by the panelists, it was put forward that a proper balance must be struck to prevent a potential chilling effect on scholars and practitioners.

The second session of the four-part webinar, "Is there a Problem with Wearing Multiple Hats?", was opened by Joseph E. Neuhaus (Chair – ITA) and was moderated by Chiara Giorgetti (Chair – Academic Council ITA) and Tom Sikora (Senior Vice Chair – ITA) with expert panelists Andrea K. Bjorklund (Associate Dean and Professor at McGill University Faculty of Law), Anna Joubin Bret (Director – UNCITRAL), Meg Kinnear (Secretary General – ICSID), Lucinda Low (Steptoe &

Johnson LLP), Bart Legum (Dentons), and Sylvie Tabet (General Counsel – Government of Canada).

The starting point was Article 6 of the Draft Code of Conduct, which sets out a menu of options for addressing the issue of multiple roles of arbitrations in ISDS proceedings. The panelists considered the nature of the issue(s) which arise from multiple roles, including: (i) possible issue conflicts (for example, for arbitrators who are also instructed as counsel in disputes with overlapping issues; and for experts who have previously expressed a view on a certain point which a tribunal to which they are subsequently appointed is tasked with considering); (ii) lack of impartiality; and (iii) lack of independence (the latter two potentially arising out of a system of reciprocity and "clubbyness").

It was noted that commentators are split on whether these issues are real or perceived. In relation to the latter, the panel commented that, for many stakeholders, perception equates to reality: whether real or perceived, the concerns arising from multiple roles risk undermining the ISDS system. This is a serious issue for a system predicated on consent.

Having identified the nature of the problem, the panel considered possible solutions and expressed a broad range of views. For some, disclosure was deemed sufficient to combat the problem as it permits the parties to make an informed choice on whether an arbitrator may have a conflict and then to deal with that accordingly through the established challenge procedures.

Others favouring a total prohibition noted that disclosure failed to solve the underlying issues, and therefore would not improve public perception. Nevertheless, the panel acknowledged the practical difficulties in deciding on the scope of any prohibition, as well as the possible adverse effects on diversity of the arbitrator pool and encouraging new talent. Possible suggestions to combat this included a transitional period whereby newer arbitrators could continue to act as counsel until the number of their appointments passed a certain threshold (e.g. five appointments).

The third session of the webinar series debated the question: "Should There Be Limits to Repeat Appointments?". Joseph E. Neuhaus (Chair – ITA) opened the session, which was moderated by Chiara Giorgetti (Chair – Academic Council ITA)

and Tom Sikora (Senior Vice Chair – ITA) with expert panelists: Meg Kinnear (ICSID), David Probst (UNCITRAL), John Crook (NATO Administrative Tribunal), Mark Feldman (Peking University), and Victoria Shannon Sahani (Arizona State University).

The panel observed that the Draft Code of Conduct does not directly discuss repeat appointments. Several panelists agreed that repeat appointments implicate an arbitrator's independence and impartiality, and more broadly, may undermine perceptions of the integrity of investor-state dispute settlement. The Draft Code of Conduct's response is to focus on fulsome disclosure rather than, for example, designating a cap on repeat appointments akin to that in Article 3.1.3 of the IBA Guidelines on Conflicts of Interest—or what the panel described as the "x appointments" approach. One panelist also noted that any cap may have a disparate impact on claimants and respondents, citing ICSID data indicating that states are more likely than investors to repeatedly appoint certain arbitrators.

Further, the panel noted that the answer to the question posed by the webinar's title may turn on context. Repeat appointments by a single party, by claimants or respondents, or in disputes addressing common issues raise distinct ethical, policy, and practical considerations. These issues should be addressed with reference to other concerns, such as diversity among arbitrators, party autonomy etc.

The last session of the four-part webinar addressed "The Questions of Implementation and Enforcement of the Draft Code," Joseph E. Neuhaus (Chair – ITA) opened the session moderated by Chiara Giorgetti (Chair – Academic Council ITA) and Tom Sikora (Senior Vice Chair – ITA) with expert panelists Meg Kinnear (ICSID), James Castello (King & Spalding), Mairée Uran Bidegain (Ministry of Foreign Affairs, Chile), David Probst (UNCITRAL) and Catherine Rogers (Queen Mary, University of London and Penn State Law). The discussion focused on the implementation and enforcement of the Draft Code and particularly Article 12 of the Draft Code of Conduct, which currently provides that "[e]very adjudicator and candidate has an obligation to comply with the applicable provisions of this code" and "[t]he disqualification and removal procedures in the applicable rules shall continue to apply."

The panelists first considered how to implement the Draft Code, with possibilities

including a Multilateral Treaty on ISDS Reform to incorporate the Code in existing and future investment treaties, incorporation into bilateral treaties, adoption by specific institutions, and *ad hoc* application by parties to specific disputes. While each of these options has its benefits and challenges, with one of the more straightforward being the possibility of ICSID attaching the Draft Code (once finalized) to the declaration signed by individual arbitrators.

The discussion then turned to enforcement. Like many similar instruments, the Draft Code currently relies on voluntary compliance subject only to the disqualification and removal procedures in the rules applicable to a particular dispute. While voluntary compliance tends to work in the vast majority of cases, there is an understandable desire to include an enforcement mechanism within the Draft Code.

For those who may view challenge and removal of arbitrators who violate the Draft Code as insufficient, other possibilities include monetary fines, reputational consequences or referral to professional disciplinary bodies. While stakeholders are additionally considering other enforcement mechanisms, panelists also mentioned the need to think about mechanisms to incentivize compliance throughout the proceeding in lieu of sanctioning non-compliance.

Full recordings of the four-part webinar on Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement are available on ITA's YouTube channel.