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Developing an Archetypal ISDS Arbitrator: Unicorn or Rhinoceros

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Today, there is no universal code of conduct, no single professional regulatory organization or global certification process in the field of investor-state dispute settlement ("ISDS"). Instead, the field of international arbitration is didactically governed by self-policing, episodic, and distinct *ad hoc* measures serving to collectively safeguard the integrity of the international arbitration process. On the one hand, codifying best practices could improve the integrity, certainty and legitimacy of international arbitration, establishing a systemic set of ethical "do's" and "don'ts". On the other hand, a standardized code may be confusing, aspirational and ineffective. What is clear, change is afoot, particularly in the field of ISDS.

The Secretariats of the International Centre for Settlement of Investment Disputes ("ICSID") and the United Nations Commission on International Trade Law ("UNCITRAL") recently issued a Draft Code of Conduct for Adjudicators of ISDS ("Draft Code") on May 1, 2020, which was previously discussed by Professors Chiara Giorgetti and Vanina Sucharitkul on the blog. The Draft Code seeks to provide binding rules applicable to arbitrators, judges, and other ISDS adjudicators. As ICSID envisions, the Draft Code "has the potential to memorialize a uniform set of ethical expectations for ISDS generally." UNCITRAL's Working Group III on ISDS Reform addressed the drafting of the code in its thirty-fifth, thirty-seventh, and thirty-eight sessions.

But is a universal code of conduct for ISDS arbitrators actually needed? The integrity of the ISDS arbitrator is the subject of a diverse set of (hard and soft law) rules by different institutions and organizations. Applicable rules may include those of the administering institution, seat of the arbitration or as customized by the parties (e.g., IBA Guidelines on Conflicts of Interest). Other leading arbitral institutions have already undergone similar changes to improve transparency and reduce conflicts of interest within the field. Such changes include the addition of Article 24 of the 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") requiring the tribunal secretary to remain impartial and independent; Article 27 of the 2017 Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission ("CIETAC") requiring funding disclosures; and amendments to the 2017 Arbitration Rules of the International Chamber of Commerce's International Court of Arbitration ("ICC"), which now authorize a party to request from the ICC reasons for its decisions including those made on challenges, consolidations, and jurisdiction. Even the proposed multilateral court for international investment arbitration envisions measures that eschew conflicts of interest. Paragraphs 18 and 19 of the European Union's submission to the UNCITRAL Working Group III

on “Establishing a standing mechanism for the settlement of international investment disputes” of 18 January 2019 provides that “Adjudicators would be subject to strict ethical requirements” and that “[i]ndependence from governments would be ensured through a long-term non-renewable term of office.” Despite these changes, the rules are meant to offer baseline protections and where apparent deficiencies persist, the arbitration process invites the parties to tailor-make their archetypal neutral.

Similarly, the standard of review, which is the ultimate stress-test on disclosure obligations, also varies. For example, a successful application for disqualification of an arbitrator under ICSID Convention Article 57 requires demonstration of a “manifest lack of qualities” whereas only “justifiable doubts” are prescribed by UNCITRAL Arbitration Rules Article 12. For a discussion on other standards, please see blog posts by Gary Born and Chiara Giorgetti. Regardless of the variation, it is generally accepted that the standard to disqualify an arbitrator is remarkably high. The typical prerequisites of “high moral character”, “recognized competence”, and “independent judgment” are benchmarked against difficult tests that are rarely impaired. For example, only five of seventy-six publicly-listed arbitrator challenges under the ICSID Convention have been upheld. Generally speaking, the party alleging the challenge must demonstrate “manifest”, “actual”, “self-evident”, “clear”, “plain”, “evident” or “obvious” appearance of bias, “justifiable” or “reasonable” doubts” or, in some cases, a “perception of bias”. Accordingly, the current system is a patchwork, which invites ambiguity as ISDS stakeholders must evaluate the import of (each of) the (sometimes various) applicable law(s); but, if there is a convergence of outcome, does the difference in source and language even matter?

A significant exception, however, is the recent annulment of the *Eiser v Spain* Award on June 11, 2020, which is understood to be the first time in ICSID’s history that an award has been annulled on the basis of an arbitrator’s lack of independence and impartiality. In that case, one of the arbitrators, Stanimir Alexandrov, failure to disclose a longstanding professional relationship with one of the Claimant’s expert witnesses from the Brattle Group led to the annulment of the €128 million award. While this annulment may be considered an outlier, it fans the flame that change is warranted.

Assuming, arguendo, deficiency in the current schemes of ethical rules and standards of review, each case ultimately boils down to its unique facts and the recent rule revisions by leading arbitral institutions are telling. Namely, certain apprehensions towards the role of the ISDS arbitrator have polarized amongst ISDS stakeholders; and pre-existing rules have been largely deemed by the international arbitration community as ineffective or unresponsive. Answers, however, are not easily found. Instead, solutions develop over time and have required regular updating. For example, in the last eleven years the ICC (2012, 2017), SCC (2010, 2017) and CIETAC (2009, 2015) have all updated their arbitration rules twice. ICSID is working on its fourth amendment (1984, 2003, 2006), which is addressing hotly debated matters such as double-hatting and third-party funding by offering clearer guidelines. Efforts against double hatting have also seeped into treaty drafting practice. The investment chapter of the new United States-Mexico-Canada Agreement, which came into force on 1 July 2020, forbids arbitrators from acting in another capacity (i.e., as counsel, party-appointed expert or witness) in any other pending arbitration under the Agreement. Moreover, there will inevitably be new considerations in the future, such as developing standardized practices to deal with cybersecurity concerns flowing from confidentiality and the digital exchange of information (see e.g., Don’t be the Weakest Link) or how to address the independence and impartiality of the underlying predictive software of artificial intelligence used to aid the arbitration process (see e.g., Arbitrator Intelligence). In other words, the ISDS world is

dynamic and nimbleness to change is its guidepost. A code of conduct that does not reflect this inherent need for flexibility may in the end stunt the development of best practices.

So, can it be achieved? The ICSID/UNCITRAL Draft Code suggests that it can be; but, questions remain. The Draft Code is currently open to comment but will it receive the input and attention that is necessary? Rounds of revision will undoubtedly mete out problem language in the text as well as problem articles. For example, draft Article 6 imposes a complete ban on double-hatting, which will have serious repercussions for who is eligible to act as an ISDS adjudicator under the Draft Code. More specifically, women, minorities, and, more generally, young professionals seeking to establish themselves as an authority within the field will be largely disadvantaged. Young, hungry, motivated individuals equipped with great budding legal minds will be forced into silos: academic, practitioner OR adjudicator, with the latter a near (financially) impracticable choice. A similar criticism may be levied at the onerous disclosure obligations. Draft Article 5(2)(d) requires prospective arbitrators to disclose a list of all publications and public speeches made by the adjudicator or candidate. The first question is whether this is even practicable, particularly in light of the illustrious careers of certain arbitrators (and given the ban against double-hatting naturally precludes younger candidates); but it also follows whether, as a natural implication, it will lead to a "scholarship chill", whereby those pining for an arbitrator's seat refrain from championing provocative argumentation and ideas because they prefer to safeguard a prospective "call up" to the big leagues as ISDS adjudicator over simply being regarded as a novel thinker of the minors. Are we also ready for a binding code? Is it even necessary in light of the stringent challenge standards discussed above? Or, will it even have the desired effect given that the archetypical arbitrator under the Draft Code will likely be an ex-government official or retired judge, who may have already procured diplomatic immunity. For those without such privilege, it will likely increase adjudicator insurance premiums, which may translate, over time, into higher arbitrator fees.

While finding answers to these questions will be challenging and debating the details a laborious process, the trending way forward for ISDS is to backstop proposed reforms against legitimacy and integrity improvement efforts. The tandem effort by ICSID and UNCITRAL in preparing the Draft Code is step in the right direction. Certainly, reforms that enhance and safeguard ISDS arbitrators' independence and impartiality ought to be encouraged and embraced; but, the bottom line of any code of conduct for ISDS arbitrators will be towed by its practical utility. Accordingly, the scale of its success will be marked by its use in ISDS.

This entry was posted on Friday, July 24th, 2020 at 8:00 am and is filed under Arbitration Institutions and Rules, Code of Conduct, ICSID, ISDS, UNCITRAL, Working Group III
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