Kluwer Arbitration Blog

Disclosure Standards for Adjudicators in Investment Disputes: The Draft Code of Conduct for ISDS Adjudicators Through the Eyes of State Parties

Fahira Brodlija (Association ARBITRI) · Wednesday, June 29th, 2022

Two years since it was published, the draft of the Code of Conduct for Adjudicators in International Investment Disputes is still subject to discussion and refinement by States and other stakeholders participating in the UNCITRAL Working Group III (WG III). This evolving instrument, developed jointly by the ICSID and UNCITRAL Secretariats, is the first attempt to develop universal rules of conduct for arbitrators, judges and other decision-makers in investment disputes (commonly referred to as "adjudicators").

Although the Code is still a work in progress, it has recently featured prominently in a disqualification proposal filed in *Misen Energy AB (publ) and Misen Enterprises AB v. Ukraine*, ICSID Case No. ARB/21/15.[1)] This proposal illustrates how the Code may be interpreted and used by State parties, should it become binding in investment disputes. This post takes a deeper dive into the existing disclosure provisions of the Code, aiming to assess them through the eyes of a Respondent State. The post concludes with some lessons that may be drawn for the Code's drafters as they continue to shape the contours of a universal standard of disclosure for adjudicators in investment disputes.

The Disqualification Proposal in *Misen*

In *Misen,* after the Claimant identified its experts, one of the arbitrators disclosed that he had appeared in cases in which the experts were also appointed, both as counsel and arbitrator (the arbitrator initially accepted the appointment without submitting any statement of possible conflicts of interest in the case). Prompted by this disclosure, the State requested an exhaustive list of all of the arbitrator's past and present appearances in cases involving the relevant experts and other experts from their firm, as well as an explanation of the responsibilities of the arbitrator in relation to the expert testimony in the relevant cases.

The Respondent State subsequently filed a Proposal for Disqualification under Article 57 of the ICSID Convention. It alleged that the arbitrator's failure to disclose past "professional relationships" with experts appointed by the Claimant, the subsequent "piecemeal disclosures" that were made, and the "withholding of critical information" about the arbitrator's professional business and other relationships, raised "reasonable doubts as to whether the Arbitrator can be

relied upon to exercise independent judgement due to an appearance of a lack of impartiality or bias."

The State's arguments in the Proposal were based on the view that arbitrators could be disqualified not only for reasonable doubts of independence or impartiality, but for reasonable doubts as to the completeness of their disclosure. In addition, the State framed the proper disclosure standard as a seemingly unqualified "comprehensive disclosure", arguing that the Proposal should be upheld because the State could not be confident that unknown facts might exist that would satisfy the objective disqualification test.

In filing this Proposal, the State referenced the draft Code as an indication of the emerging stricter standards of disclosure for ISDS adjudicators. While noting that the Code is still not binding in a "strict legal sense", the State referred to the "spirit of the draft CoC" as indicative of a benchmark for a standard of disclosure and diligence that is higher than that envisioned by the Code itself (p. 46). In its view, the arbitrator should have taken into account the importance that the parties would ascribe to the prior cases involving the experts, rather than his assessment of the relevance of this fact under the disqualification standard, thus, transposing the vantage point of the parties as to the relevant standard in the disqualification proceedings. In this regard, the Proposal put forth a novel disclosure standard of "full and frank disclosure expected by [the State]", once again putting the expectations of the parties at the forefront and conflating the disclosure standards with the standard for disqualification.

The Chair of the ICSID Administrative Council rejected the Proposal, citing the high threshold for the disqualification of arbitrators under the ICSID framework. The Chair reaffirmed that, if the undisclosed facts do not themselves raise doubts of a manifest lack of independence and impartiality, the fact of non-disclosure itself cannot serve as a ground for disqualification (p. 128).

While the State's Proposal was therefore ultimately unsuccessful, it demonstrates how the existing disclosure provisions of the Code may be interpreted, and how such interpretations will fare in disqualification proceedings under the ICSID Rules.

Failure to Disclose as a Stand-Alone Ground for Disqualification

The disclosure provision in the current third version of the Code requires adjudicators to disclose any interest, relationship or matter that may, in the eyes of the disputing parties, give rise to doubts as to their independence or impartiality, and to make "reasonable efforts" to become aware of such interest, relationship, or matter. Although Article 10(2) of the Code does refer to the arbitrator's relationship with experts, it is also clarified that "not all matters listed in article 10(2) must be disclosed in accordance with article 10(1)."

While the scope of the disclosure obligation under the Code has varied over time as a result of ongoing WG III discussions, a breach of the disclosure obligation was never contemplated to constitute a violation of the Code. In fact, the drafters removed "conflicts of interest" from the original title of the disclosure obligation and separated it from the provisions on independence and impartiality. Most recently, they expressly stipulated in Article 10(5) that the failure to disclose cannot be a standalone ground for challenge. The comments received on this proposal emphasized that the standards for challenge are stricter than the standards for disclosure and will be assessed in light of the applicable rules.

This approach accords with the disclosure standard under most applicable procedural rules, which provide for a subjective disclosure test viewed through the lenses of the disputing parties. On the other hand, the grounds for removal and disqualification are assessed from the perspective of an objective third party with knowledge of the relevant facts and circumstances. This so-called subjective/objective dichotomy is well understood in theory, and it is adopted both in cases under the ICSID Arbitration Rules and in the most recent version of the Code. It is also reflected in the explanation of General Standard 3 of the IBA Guidelines. In practice, however, it continues to create disproportionate expectations of disclosure that parties directly link to the grounds for removal, regardless of the absence of supporting facts (as discussed in an earlier post).

The Proper Vantage Point for the Assessment of the Grounds for Disqualification

The *Misen* case highlights the gap between the level of disclosure that States perceive arbitrators to be required to meet, and the standard of disclosure that will warrant disqualification. If the fact of non-disclosure in and of itself is to be treated as a stand-alone ground for challenge, there would be no room for the exercise of good faith discretion in the disclosure process and arbitrators could be burdened with proving the non-existence of non-disclosed facts. Clearly, this gap will have to be remedied in order for the Code to be both functional and to achieve its intended effect of providing a set of binding rules that will be enforceable in practice.

One way to overcome erroneous interpretations of an arbitrator's disclosure obligations, and close the gap between these opposing expectations, would be for the Code drafters to maintain Article 10(5) and fortify it with a clear delineation as to when, and to what extent, the fact of non-disclosure will be relevant in the context of challenge proceedings under the applicable rules.

An alternative remedy would be to shift to the UNCITRAL approach (reflected in Article 12(1) of the Model Law and Article 11 of the Arbitration Rules) which requires the disclosure of "any circumstances likely to give rise to justifiable doubts as to [his] impartiality or independence." Interestingly, the first draft of the Code required the disclosure of matters that could "reasonably be considered as affecting the independence or impartiality of adjudicators", but it was replaced with the subjective standard in subsequent versions.

The qualification of the disclosure standard with "reasonable" or "justifiable" doubts can mitigate the expectations of the parties and reduce the likelihood of unfounded challenges, as indicated by various commentators on the more recent versions of the Code. This formulation can help align the expected scope of disclosure and place it within the framework that would be relevant in a challenge or disqualification proceeding. In any case, the Code will need to define clearly the effects of non-disclosure and its weight in challenge and disqualification proceedings and provide guardrails against the conflation of the two.

Conclusions: Lessons for the Drafters of the Code and the Path Forward

The disqualification proposal in this case demonstrates that States are already reading extensive disclosure obligations into the Code, tying them directly to an arbitrator's independence and impartiality. This reading of the still-evolving instrument indicates that some States have a clear vision of what the disclosure obligations of arbitrators in investment disputes *should be*, distinct

from the more balanced and moderated standards crafted through the multiple rounds of revisions of the Code.

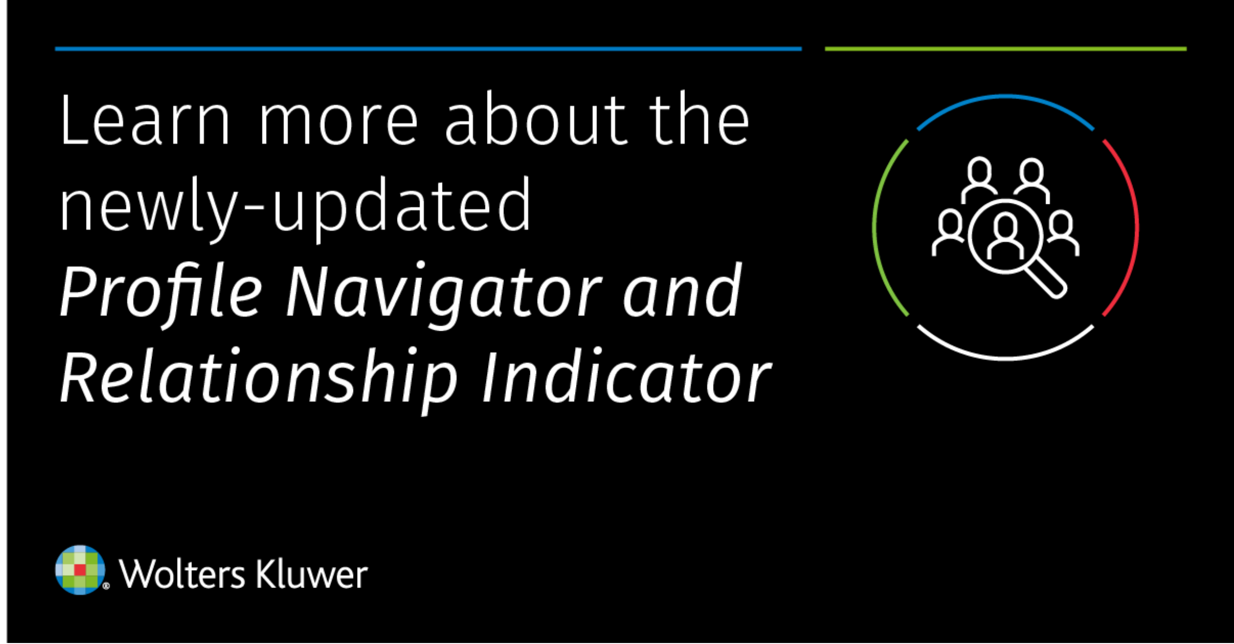
While the Code is intended to be a binding set of rules that will govern the professional ethics and conduct of adjudicators in investment disputes, its enforcement remains tied to the existing mechanisms that exist under the applicable rules. Unless the Code can effectively close the gap between the parties' expectations and the existing remedies for what they consider to be problematic conduct, its application will lead to untenable challenges and frustrations for parties and arbitrators alike.

The discussion of the Code will likely continue in the forthcoming sessions of the WG III taking place in September 2022 and February 2023. As the final contours of the Code are taking shape, this disqualification proposal provides a rare, preemptive insight into the perception of the parties of the existing disclosure provisions in the Code and the trajectory of its development. It remains to be seen whether, and to what extent, this signal will affect the transformation of the disclosure standard under the Code and whether other States will reach for it in challenge proceedings prior to its finalization.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



References

?1 The analysis in this post does not reflect the author's opinions on the merits of the disqualification proposal, the decision, or any personal views about the parties and arbitrators involved.

This entry was posted on Wednesday, June 29th, 2022 at 8:23 am and is filed under Arbitration Institutions and Rules, Code of Conduct, Disclosure, ICSID, Investment Arbitration, UNCITRAL
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.