Kluwer Arbitration Blog

Habemus Codicem! UNCITRAL WGIII Agrees on Final Versions of Codes of Conduct for Arbitrators and Judges in ISDS

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With 17 minutes to spare before the end of the 45th Session, the chair of UNCITRAL Working Group III (WGIII), Mr Spelliscy, announced that a workable compromise had been reached on the last remaining outstanding issue (how to regulate double hatting) and that, therefore, an agreement was reached on a text of the Code of Conduct for Arbitrators in Investor-State Dispute Settlement (ISDS) to be presented for final approval at the UNCITRAL Commission in July 2023.

This is a significant development for the ISDS reform process which and has long been coming. The development of a Code of Conduct for Adjudicators in ISDS (more on the reason of the code's change of title below) has been part of WGIII's reform process since its inception in 2017. After consultations, in October 2019, WGIII requested the UNCITRAL Secretariat, together with the Secretariat of ICSID, to prepare a draft Code for Adjudicators, and the Secretariats released the first draft of the Code for discussion in May 2020 (for more on the background see here and here).

The first draft was followed by four additional drafts, each discussed at length in person (or online, as the COVID 19 pandemic struck just as the negotiations of the Code began) in formal and informal meetings, and via comments submitted by States delegations and other stakeholders and collected by the Secretariats (for the official drafts, discussion papers and other additional resources see here). After explaining the new title of the Code, this post briefly describes its content and then offers a critical assessment of the code's significance and also highlights some missing opportunities.

From One to Two Codes

Let me now explain what's with the new title. After initial negotiations, at its 43rd session in September 2022, WGIII requested the Secretariats to prepare two separate texts of the Code based on its deliberations. The initial version of the Code for Adjudicators was thus split into two Codes, which are *mutatis mutandis* very similar – the Code for Arbitrators, to be applied in ISDS cases, and the Code for Judges, to be applied in the context of a yet to be established permanent court for investment. This post focuses on the Code for Arbitrators (the Code).

What's in the Code?

The Code contains 12 articles and applies to arbitrators in and candidates for international investment dispute (IID), which are defined in Article 1 as those disputes between an investor and a State (or regional economic integration organization) pursuant to – after much discussion in the negotiations – an investment/investor protection treaty, domestic legislation on foreign investments or a contract with a foreign investor. The Code complements other applicable ethical provisions and does not override them. Consistent with its initial drafting, the Code relies heavily on disclosure. Article 11 provides a general disclosure obligation, requiring candidates and arbitrators to "disclose any circumstances likely to give rise to justifiable doubts" of their independence or impartiality. The second part of the article specifies some of the items that need to be disclosed, including all IIDs and related proceedings and any appointment as arbitrator, legal representative or expert witness by a disputing party in the past five years. Any prospective concurrent appointment as a legal representative or an expert witness in any other IID or related proceeding must also be disclosed. Discussions on disclosure of any third-party funding continued until the very end of the negotiations, and it was ultimately agreed that arbitrators and candidates should disclose "Any financial or personal interest in the outcome of the IID proceeding, any other proceeding involving the same measure(s); and any other proceeding involving a disputing party or a person or an entity identified by a disputing party as being related." The Commentary attached to the Code will also clarify that any financial interest, including a third-party founder, will need to be disclosed.

Another key provision of the Code is article 3, which defines the key concept of independence and impartiality. The general obligation of being "independent and impartial" is regulated in the first paragraph, while the following second paragraph provides a non-exhaustive list of negative obligations, including that of not be influenced by loyalty to any disputing party or other person or entity; be influenced by any past, present or prospective financial, business, professional or personal relationship, assume any function or accept any; as well not to "use his or her position to advance any financial or personal interest he or she might have in any disputing party or in the outcome of the IID proceeding; assume any function or accept any benefit that would interfere with the performance of his or her duties; or take any action that creates the appearance of a lack of independence or impartiality."

How to regulate the issue of the multiple roles – of arbitrator, counsel and expert – played by some actors was one of the most debated bones of contention up to the very end of the negotiations. Indeed, its discussion almost derailed the negotiations. On one side, some negotiators highlighted concerns about the integrity of the process and the ISDS system, the issue of independence and impartiality and the need to avoid appearance of bias. On the other side, other stakeholders raised the issue of parties' choice of arbitrators and legal representatives and the problem of ensuring diversity among the pool of arbitrators. Eventually, the compromise that was reached at the last minute provided for enhanced disclosure (art. 11), the inclusion of the obligation not to be influenced by prospective relationship (art. 3) and the more specific regulation of multiple roles in article 4.

Article 4 has been the most controversial, and the one that almost blocked the adoption of the Code. Views on how to limit multiple roles (i.e. how to regulate double hatting) diverged, and ranged from a total ban of double hatting to a simple requirement of disclosure. After prolonged debate, it was agreed that regulating double hatting was preferable. Eventually, a draft was proposed, but of course the devil was in details and discussion continued until the last session. In

the final version, paragraph 1 prohibits concurrent double hatting as arbitrator, counsel or expert in proceedings involving the same measures, the same or related parties or the same provisions of the same instrument of consent (the text of art. 4 is para. 77 here). Discussions then focused extensively on the duration of the necessary cooling off periods necessary for a former arbitrator to take counsel or expert appointments after arbitral proceedings are concluded. At the end, paras. 2-4 provide a cooling off period of three years for any other IID or related proceeding involving the same measures or involving the same or related parties, and for one year for proceeding related to the same provisions of the same instrument of consent. The disputing parties (of the dispute where the person served as an arbitrator) can in all circumstances agree otherwise.

The Code also regulated ex parte communication, confidentiality obligations, duty of diligence, issues related to integrity and competence, fees and expenses and the role of assistants (the final text is not yet available, but the text discussed on January 2023 is available here, and the amendments agreed in April 2023 are available here).

Resounding Success or Missed Opportunity?

Overall, the Code is a good compromise and a much-welcomed development. First, it clarifies the applicable ethical standards. This is fundamental and consequential as all players in ISDS now understand what the ethical expectations and requirements are. No more guessing game or divergent expectations. Second, the Code is an important element of the ISDS reform process and enhances the legitimacy of the process and ISDS itself. Stakeholders and observers alike had called for a regulation of ethics for a long time, and this is an important part of the discussion on the legitimacy of ISDS. That the Code was negotiated and approved in less than four years, in the middle of a pandemic, adds to the feeling of its success. Third, the Code includes well-reasoned and balanced provisions, which build on existing practice and also respond to calls for reform. The fact that it is rooted on disclosure also follows and builds on international precedents. Negotiators were able to find compromise on important issues, chiefly double hatting. Finally, the commentary that accompany the Code will also be important and will clarify its application.

However, there are also important missed opportunities. The first one is that it is not clear how the Code will be implemented and enforced. The Code will be made available for use by disputing parties, institutions and states, but negotiators postponed the discussion on how to make it binding, possibly by inclusion in a multilateral instrument on ISDS reform, at a later stage. Furthermore, it is not clear how the provisions of the Code will be enforced and there is no overarching institution tasked with monitoring and enforcing compliance. Article 12 on compliance is weak and provides simply that an arbitrator and a candidate “shall comply with the provisions of the Code” and that they should not accept appointments or will resign if they are not able to comply with its provisions. Challenges or disqualification will continue to be governed by the applicable rules or by the instrument of consent. Additionally, the partition of the Code into two Codes one for arbitrators and one for judges is not a welcomed development and will possibly lead to the development of two different bodies of ethical rules. Finally, although it is true that the Code was discussed and approved swiftly in international legal negotiations terms, it still took longer than previously envisaged by negotiators: a possible harbinger for future reform.

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