ICSID/UNCITRAL Draft Code of Conduct for ISDS Adjudicators – Webinar Highlights

Webinar July 23, 2020

ReedSmith

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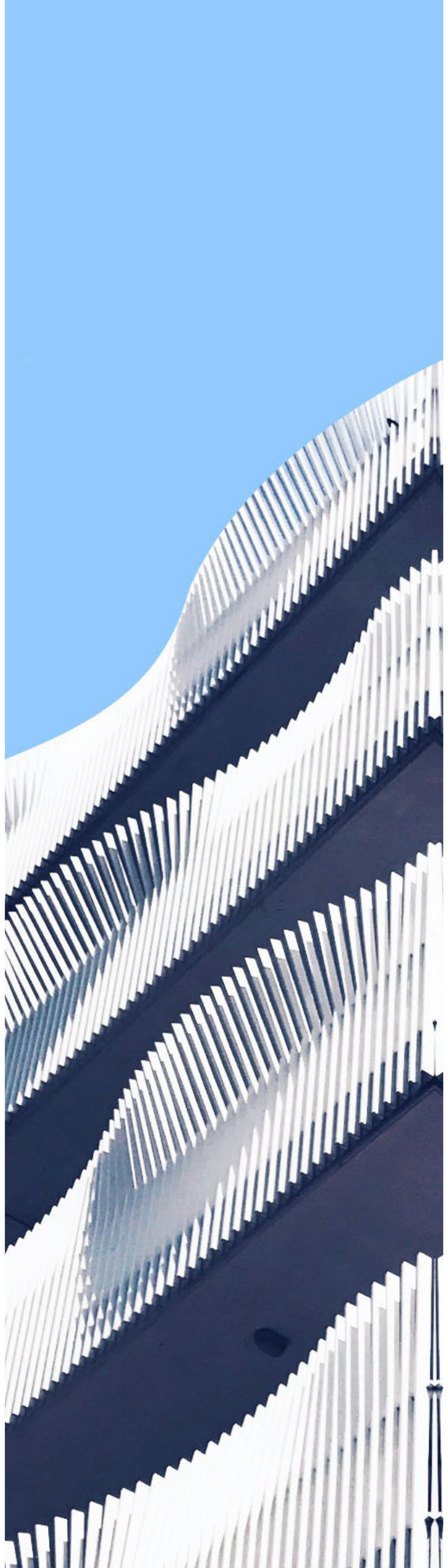
Content



Introduction

On July 23, 2020, Reed Smith's international arbitration practice hosted a webinar on the ICSID/UNCITRAL Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement. The event was held virtually and brought together thought leaders in international arbitration, including individuals involved in the preparation of the draft code.

The first panel considered the impetus behind a joint code, the process of preparing the draft code and the anticipated steps and timing for finalizing the code. The members of the first panel also addressed how they envisaged the draft code being implemented in practice, including how its use might differ among the various institutions and under different arbitral regimes.

The second panel addressed significant substantive aspects of the draft code, including: (1) enhanced disclosure obligations; (2) the treatment of repeat appointments; (3) the assessment and relevance of issue conflicts; and (4) multiple roles (also known as "double-hatting").

Reed Smith Speakers:

José Astigarraga
Partner, Miami

Belinda Paisley
Partner, London

Ben Love
Counsel, New York

Guest Speakers:

Meg Kinnear
Secretary-General of ICSID

Judith Knieper
Legal officer at UNCITRAL

Chiara Giorgetti
Richmond School of Law

Catherine Rogers
Queen Mary and Bocconi University (visiting)

Lucy Reed
Arbitration Chambers

Tom Sikora
Exxon Mobil Corporation

Juan Fernández-Armesto
Armesto & Asociados

Panel 1

What is the impetus for the draft code?

Setting the context for the draft code, the panel first explained that there have been major reform efforts in the field of investor-State dispute settlement (ISDS) for a number of years, including proposed arbitral rules amendments and other reforms under the auspices of the International Centre for Settlement of Investment

Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. In both cases, it was apparent that stakeholders were strong proponents of a code of conduct for adjudicators. ICSID and UNCITRAL felt that that it made sense for them to collaborate since they would be drawing on

the same resources and it would be helpful to have a universally accepted set of norms.

The use of the term "adjudicator" is deliberate to make the draft code broadly applicable. "Adjudicator" encompasses not just tribunal members, but also members of ICSID ad hoc committees, conciliators, and other types of adjudicators in ISDS proceedings. It would also apply to judges on a future investment court.

The panel noted that one of the main criticisms of ISDS concerns arbitrator independence and impartiality. This is also reflected in the growing number of challenges to arbitrators (for example, between 1982 and 2001, there was only one challenge to an arbitrator under the ICSID Convention, whereas from 2011 to date there have been over 80 challenges). Very few of these challenges have been upheld, which demonstrates a disparity between the grounds for challenging an arbitrator employed by some users of ISDS and what arbitrators and arbitral institutions consider to be compelling reasons to uphold a challenge.

The importance of disclosure in the context of arbitrator impartiality and independence has recently been highlighted in the ICSID annulment decision in Eiser v. Spain. In that case, Eiser's appointed arbitrator's failure to disclose a pre-existing (and ongoing) relationship with

Eiser's appointed quantum experts was held to constitute an annullable error.

What was the process for preparing the draft code and what is its current status?

The panel explained that UNCITRAL Working Group III had a "three-step mandate" to (1) identify all possible concerns regarding ISDS, (2) consider and discuss whether these issues warrant reform, and (3) develop solutions.

Working Group III moved to the third stage in October 2019 and the draft code was one of the first proposed solutions discussed. The draft code is the result of these discussions, but there remain a number of issues which are currently drafted using square brackets to provide different options for further discussion. These issues require further input from Working Group III and other stakeholders. There are also a number of policy questions that need to be addressed.

The first challenge to finalizing the code concerns when Working Group III will be able to reconvene to resume discussions in light of the COVID-19 pandemic (Working Group III is due to reconvene in October 2020, but the draft code is not on the agenda). In addition, and owing to the inclusive nature of the negotiations, the public and all 193 United Nations member states

have been invited to submit their comments on the draft code. The deadline to receive comments has been extended to 30 November 2020 and all interested stakeholders are encouraged to submit any comments. The policy of Working Group III is to resolve any substantive issues by consensus. This means that all of the different viewpoints will need to be considered and discussions will continue until a mutually acceptable draft is agreed. A further challenge is that the draft code is not a standalone project, but rather it is being discussed in the context of multiple proposed reforms to the broader ISDS framework.

In the ICSID context, it was noted that whilst the proposed mechanics of the draft code's implementation were relatively straightforward (the code could be attached to the arbitrator declaration under Arbitration Rule 6(2)), there are a number of preliminary issues to be settled first. Once a consensus is reached within Working Group III, the next step will be to consult ICSID members to ascertain support for attaching the draft code to the ICSID package of disclosure documents. Consideration will be given to whether there are any necessary amendments to be made to the draft code so that it will work within the ICSID framework.

The panel was unable to give a definitive answer to when the code would be implemented, but it was thought that it would take "at least more than a year."

Explaining the structure of the draft code, the panel noted that it was divided into three parts: (1) the initial part, comprising an introductory section to include the definitions and an overview (Articles 1 to 3); (2) the obligations (Articles 4 to 11); and (3) the last Article dealing with enforcement and implementation (Article 12).

Section two contains two main kinds of provisions. These are: (1) the core ethical provisions that are mirrored in other codes and relate to integrity, fairness, efficiency, and competence; and (2) provisions where there are elements of choice in how they are adopted.

This latter category covers three main issues: (1) issue conflict; (2) multiple roles (sometimes known as "double-hatting"); and (3) repeat appointments. The policy options in respect of these provisions are very complex and there are numerous options that need to be considered. These have accordingly been drafted in bracketed form (to provide for the various options) and will be the subject of further discussions with stakeholders.

How will the draft code interrelate with other codes of conduct?

The panel started by noting that different stakeholders view the draft code differently and one of the challenges in regulating adjudicators is to give content to the words in the various codes. For example, arbitrators must decide to disclose information, parties then must decide if they want to raise a challenge based on the content of that disclosure (or its alleged omissions), and any institution that must rule on that challenge would then apply the relevant standards.

The International Bar Association (IBA) Guidelines unpack many of the terms found in the draft code by reference to specific factual scenarios that can be used to assess and apply the guidelines. However, in certain instances the draft code imposes more onerous and sweeping obligations than the IBA Guidelines.

The panel also noted that the authors of the draft code had adopted the same approach towards drafting used in other ISDS codes of conduct, as opposed to the approach adopted in the IBA Guidelines. It is hoped that the commentary will assist with the code's application going forwards. In respect of any possible conflict between the draft code and other codes of conduct, it was noted that any applicable conflict rules will apply.

Might the draft code ultimately be applicable to commercial arbitrations, or is it intended to be strictly limited to ISDS?

The panel confirmed that the draft code was neither intended nor designed for commercial arbitration. Further, the background to the draft code is very specific and arises out of the discussions of Working Group III. Both Working Group III and ICSID have clear mandates for reform in ISDS, but this does not extend to commercial arbitration.

What is the temporal scope of the obligations in the draft code?

Most of the obligations apply expressly, and on a common sense basis, to the time when an individual is being considered for appointment and when acting as an adjudicator. However, there are a few places where the temporal scope might extend beyond this. For example, in relation to confidentiality, there is a proposal in Article 9(2) that adjudicators should not comment on rulings in which they participated, even after the proceedings have closed.

How will the draft code be implemented in practice? Will it have "teeth"?

The panel noted a general consensus that the general feeling was that it would not be prudent to rely on voluntary compliance and that the code should be mandatory. There have been a number of different options for enforcement outlined in the commentary to the draft code. However, these will depend on how the draft code is implemented. There are a number of proposals in this regard. For example, the draft code could be incorporated expressly into new treaties and by convention into existing treaties. Alternatively, it could be implemented by way of incorporation into procedural rules or through a multilateral instrument.

How might the draft code interact with the ICSID framework for challenges to arbitrators?

The panel responded that despite different wording under Article 14(1) of the ICSID Convention, the draft code is consistent with those overriding requirements. Article 12 of the draft code confirms that the applicable procedural rules for challenges will continue to apply. The draft code is thus intended to give further substance to those procedural rules.

It was noted that one of the criticisms of the challenge procedures in ISDS is that co-arbitrators may be reluctant to disqualify one of their own – this is perceived as an uncomfortable dynamic and any decision leading to disqualification could also have implications for the deciding arbitrator's own position in any future challenge made against him/ her. In response, the proposed amendments to the ICSID Rules are seeking to make it easier for the unchallenged arbitrators to refer a challenge to a single arbitrator to the chairman of the ICSID Administrative Council, and thereby avoid making the decision themselves.

Panel 2

The panel members began by noting that they are universally in favour of the draft code. To quote the late V. V. Veeder QC: “If we don’t regulate ourselves then the legislators will and then we will be very sorry.” After these preliminary comments, the panel considered a number of key issues arising from the draft code.

As a general point, the panel noted its concern that the extensive disclosure obligations under Article 5 created more opportunities for challenge, including strategic challenges. Some of the obligations were also considered to be unduly onerous and difficult to follow in practice. For example, in relation to the proposed requirement under Article 5(2)(a)(i) that adjudicators disclose any professional, business, and other significant relationships within the past five years with the parties, and specifically “any subsidiaries, parent-companies or agencies related to the parties,” it was noted that this would require extensive research on the part of the adjudicator that would be onerous and impracticable, especially for those who had worked in large organizations, such as multinational law firms.

The panel next drilled down into some of the issues that the disclosure obligations were intended to address.

Repeat appointments

The issue of repeat appointments is addressed by Article 5.2.(c) of the draft code, which requires disclosure of:

“All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator].”

The panel started by noting that the issue of repeat appointments is very complicated and difficult. The parties have the right to appoint their own arbitrator, but there are questions of impartiality and independence that are linked to repeat appointments. The reality is that there is a group of arbitrators who are repeatedly appointed by States because they are perceived as “pro-state” in their views and there is a group of so-called “pro-investor” arbitrators who are repeatedly appointed by the same counsel.

The drafters chose to address this issue by requiring disclosure, rather than attempt to intrude into the system by creating prohibitions. However, at present, the draft code simply requires that adjudicators furnish a list of their cases without confirming which side appointed them. This fails to address the key issue of repeat appointments by the same party. To meet the purpose of this provision, adjudicators need to disclose the appointing party and their counsel. This would apply equally to commercial arbitrations, subject to competing confidentiality obligations.

Separately, the panel noted that the absence of a definition for “case” gives rise to questions as to whether all cases, including those which were never formally filed, need to be disclosed. Relatedly, if the requirement also covers commercial arbitrations (which is included as one of the drafting options) then, absent the inclusion of a time limit for this requirement’s application, this provision will be unduly burdensome.

Issue conflict

Issue conflict is addressed by Article 5.2.(d) of the draft code (as above) and Article 5.2.(c) of the draft code, which requires disclosure of:

"A list of all publications by the adjudicator or candidate [and their relevant public speeches]." One panel member described "issue conflict" as an "unfortunate term." It really refers to an allegation that an arbitrator has expressed an opinion that might indicate bias on a particular issue that might arise in a particular case. This could arise through a statement made in another decision or a publication. The question is whether it is possible to give some substance to what an issue conflict is, or whether that should be developed through challenges pursuant to the various institutional frameworks over time. This is a very difficult issue and the draft code has not addressed the substance of it.

Considering the expanded disclosure requirements set out in the draft code, the panel highlighted that the temporal scope of the disclosure requirement under Article 5.2(c) would extend back many years, theoretically to also include university publications before an arbitrator entered into practice. The obligation is also a continuing one, which means that an adjudicator would be required to inform all parties in all proceedings where they are sitting, and every time they publish an article or present at a conference. This was considered to be impractical and overly burdensome.

One member of the panel stated that the consequences of this provision will undoubtedly be that parties will raise challenges on the basis of the extensive disclosure received and that this cannot possibly have been the object and purpose of the drafters. To prevent this, it was suggested that either this provision should be deleted, or it should be expressly stated that a failure to make disclosure under this provision cannot be the basis for a challenge except in exceptional circumstances.

Concurring, another member of the panel noted that the statement at paragraph 42 of the commentary to the draft code that "the mere fact of disclosure does not mean that a conflict exists" was critical and should be included within the draft code itself.

This was challenged by another panel member who noted that, on the extreme end, it is not impossible that an adjudicator will write an article that could say, for example, "any expropriation for the benefit of the public interest is not a violation." These kinds of express and specific statements should be protected against through disclosure, as envisaged by the draft code.

Multiple roles ("double-hatting")

Article 6 of the draft code includes a proposed limit on multiple roles:

"Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/or] [the same treaty]."

The panel were divided on this provision. On the one hand, one member of the panel felt that Article 6 did not go far enough and that there should be a blanket prohibition on acting as counsel or expert when also serving as arbitrator. In their view, arbitrators in ISDS decide a limited number of issues and there is a perceived risk that an arbitrator will decide a case in a way that will support the position of their client in another case where they act as counsel. This perception gives rise to criticism of ISDS and should accordingly be prohibited in the interest of the entire system.

On the other hand, another member of the panel opined that there is no evidence that double-hatting has any adverse effects and that prohibiting the practice purely due to an issue of perception rather than reality would do more harm than good. In particular, it would devastate the arbitrator pool, limiting it to former judges and retired counsel. This would destroy the pipeline and negatively impact diversity.

This was countered by another member of the panel who stated that if counsel were excluded from acting as arbitrator, there would in fact be many more vacancies for diverse candidates.

In the middle of the spectrum, one member noted that an alternative to any prohibition would be rigorous disclosure obligations.

The panel concluded by commending the drafters of the code and reiterating the need for comments from all stakeholders before the code can be finalized.

With thanks to Lucy Winnington-Ingram (Associate, London) for her work in preparing these event highlights.

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