

**ICSID AND UNCITRAL RELEASE DRAFT CODE OF CONDUCT FOR  
ADJUDICATORS IN INVESTOR-STATE DISPUTE SETTLEMENT**

**Background**

In 2017, at the fiftieth session of UNCITRAL, its Working Group III was entrusted with a broad mandate to consider possible reforms in the realm of Investor-State Dispute Settlement. In October 2019, Working Group III requested that the secretariats of UNCITRAL and ICSID work together to prepare a draft Code of Conduct for Adjudicators for its consideration.

On 1 May 2020, UNCITRAL and ICSID made the first draft of the proposed Code of Conduct for Adjudicators in Investor-State Dispute Settlement publicly available, and invited comment on its provisions.

In present form, the draft Code of Conduct has 12 articles. A commentary is provided in respect of each article in order to allow insight into the provision's rationale and the issues it addresses.

In broad overview, Article 1 provides definitions of important terms. Article 2 concerns the draft Code of Conduct's applicability. Articles 3-9 concern adjudicators' obligations. Articles 10-11 govern pre-engagement interviews and adjudicators' fees. Article 12 concerns the enforcement of the duties and obligations contained in the draft Code of Conduct.

**The draft Code of Conduct**

By virtue of Articles 1 and 2, the draft Code of Conduct applies to all persons serving as "*adjudicators*" – a term which is defined broadly: "*arbitrators, members of international ad hoc, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes*".

Accordingly, as the title suggests, the draft Code of Conduct is restricted to those exercising adjudicative functions in investment disputes (and their assistants), and does not concern the ethical or professional obligations of others involved in the process, such as counsel and experts.

Article 2(2) of the draft Code of Conduct makes clear that its provisions must be complied with by prospective adjudicators "*as soon as they are contacted in relation to a possible appointment*".

Article 3 of the draft Code of Conduct sets out mandatory duties for adjudicators, requiring them at all times to:

*“(a) Be independent and impartial, and shall avoid any direct or indirect conflicts of interest, impropriety, bias and appearance of bias;*

- (b) *Display the highest standards of integrity, fairness and competence;*
- (c) *Be available and act with diligence, civility and efficiency;*
- (d) *Comply with any confidentiality and non-disclosure obligations”.*

Without prejudice to the generality of the requirement to be “*independent and impartial*”, Article 4(2) of the draft Code of Conduct provides further specific guidance for adjudicators:

“2. *In particular, adjudicators shall not:*

- (a) *Be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party to the proceedings, or fear of criticism;*
- (b) *Allow any past or ongoing financial, business, professional, family or social relationships to influence their conduct or judgement;*
- (c) *Take action that creates the impression that others are in a position to influence their conduct or judgement;*
- (d) *Use their position to advance any personal or private interests; or*
- (e) *Directly or indirectly, incur an obligation or accept a benefit that would interfere, or appear to interfere, with the performance of their duties”.*

In this way the draft Code of Conduct draws specific attention to what are described as “*the most frequently cited ethical duties of adjudicators, and ... the core elements of ethical conduct*”.

In order to avoid conflicts of interest, Article 5 of the draft Code of Conduct requires extensive disclosure by adjudicators of professional, business or other significant relationships, of direct and indirect financial interests, of prior and current arbitrator appointments, and of previous publications and other public utterances. The duty of disclosure is a “*continuing duty*”, and adjudicators “*must make a reasonable effort to become aware*” of interests, relationships or matters that could affect independence and impartiality. Article 5(4) makes clear that any doubts should be resolved in favour of disclosure.

Accordingly, the draft Code of Conduct seeks to avoid conflicts problems arising out of repeat arbitrator appointments and to create an environment in which early and fulsome disclosure of arbitrators’ interests becomes the norm.

Article 6 of the draft Code of Conduct addresses the problem of “*multiple roles*” – whereby persons routinely act as arbitrators, counsel and experts in multiple arbitrations. It appears that this article is still very much in draft form at the time of writing, with a decision still to be made on whether to have an outright ban on acting in a particular role at the same time as they are acting in another “*relevant role*” on matters concerning the same parties, facts or treaties, or alternatively whether to allow the practice to continue but with a move towards mandatory disclosure when a person acts in multiple roles.

Article 7 enshrines an outright ban on *ex parte* communications from an adjudicator to the parties concerning the proceedings, as well as a prohibition on the delegation of decision-making functions to other persons.

Article 8 aims to ensure that adjudicators do not take on so many cases that they are unable to act in respect of each one expeditiously, fairly and competently. It is clear that from draft Article 8(2) that there is a proposal for there to be a numerical limit on how many matters an adjudicator can take on at any one time.

Article 9 provides a codification of generally accepted principles of confidentiality in arbitration. In particular, an adjudicator “*shall not publicly disclose any decision, ruling or award until it is in the public domain*”.

Article 10 concerns pre-appointment interviews with prospective arbitrator candidates, and makes clear that such interviews are solely for the purposes of discussing availability and conflict of interest issues, not jurisdictional, procedural or substantive aspects of the case. It appears from draft Article 10(2) that there is a proposal for pre-appointment interviews to be disclosed to all parties upon the appointment of an adjudicator.

Article 12 of the draft Code of Conduct concerns its enforcement. However, beyond voluntary compliance and reminding adjudicators of their obligations to comply with the duties contained in the draft Code, it does not go further to implement actual sanctions apart from by way of recourse by the parties to the disqualification/removal procedures. In the commentary to draft Article 12, it is suggested that further possible sanctions are going to be the subject of debate at UNCITRAL/ICSID – including monetary and reputational sanctions (such as a public list of adjudicators who have been found to have breached the draft Code of Conduct).

### **Concluding Remarks**

Rightly or wrongly there is a growing perception that decision-makers in the investment treaty context are exposed to greater criticism for repeat appointments, taking on too many appointments as well as circumstances which generate a perception of unfairness.

The draft Code of Conduct has many parallels with the IBA Rules of Ethics for International Arbitrators, which in essence first came into existence in 1987.

The draft Code of Conduct forms part of an ongoing reform process concerning Investor-State Dispute Settlement. Whilst there remains work to be done in terms of finalising the draft Code of Conduct, it provides an important step towards greater regulation of the professional responsibilities of those acting in an adjudicative function on investment dispute matters – and is certainly to be the subject of much further debate.