

UN Code Likely To Promote Good Arbitration Practices

By **James Rogers, Kenneth Beale and Jonathan Cowe** (September 25, 2023)

On July 21, as part of its 56th annual session in Vienna, the United Nations Commission on International Trade Law, or UNCITRAL, adopted a code of conduct for arbitrators in international investment dispute resolution.

The code, which has been in development for over six years, is applicable to investment arbitration proceedings by consent of the parties or as required in the instrument of consent, i.e., the relevant investment treaty under which arbitration is commenced.

It seeks to address the often-vocal criticism leveled against investor-state dispute settlement, or ISDS, in recent years concerning transparency and the role and independence of arbitrators.

In doing so, the code introduces various guidelines reinforcing the duties of independence and impartiality incumbent on arbitrators as well as regulating the practice of double-hatting, i.e., of arbitrators also acting as counsel in investor state arbitrations, including via the introduction of specific disclosure requirements. The code is currently awaiting final publication.

This article sets out to explain the genesis and aim of the code and summarizes its key provisions.

Background

Established in 1966 by the United Nations General Assembly, UNCITRAL is the core legal body of the U.N.

It plays a crucial role in promoting and harmonizing international trade law by formulating and modernizing rules and model laws applicable to cross-border commercial transactions.

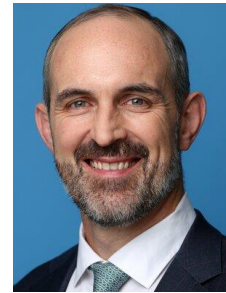
For example, as relevant to arbitration, the UNCITRAL Model Law on International Commercial Arbitration provides a legislative blueprint for countries to adopt or adapt into their domestic legislation.

Of similar prominence are the UNCITRAL Arbitration Rules, which provide a comprehensive set of procedural rules often adopted in international commercial contracts and regularly used in investor-state arbitrations.

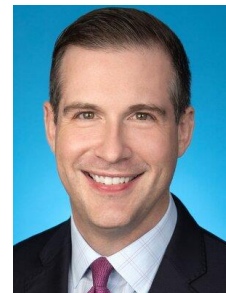
And, perhaps most significantly, although the convention was prepared by the U.N. prior to the establishment of UNCITRAL, UNCITRAL performs a crucial role in the modern promotion of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Lack of Transparency in the Past

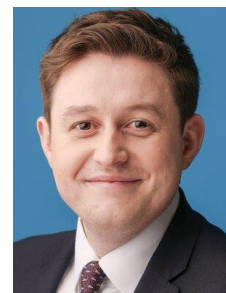
Investment treaties between states, as underpinned by the ISDS system, are designed to



James Rogers



Kenneth Beale



Jonathan Cowe

protect private investors and their investments in foreign countries, but public perception is that it overly and unfairly curtails the rights of governments to act in the best interest of the state and its public.

These criticisms are compounded by concerns with the transparency of the process. Detractors argue that ISDS proceedings often take place behind closed doors, away from public scrutiny and are overseen by a closed shop of private arbitrators without proper accountability.

Attempts have been made in the past to address these concerns, including via the 2014 UNCITRAL Mauritius Convention on Transparency.

This convention operates on an opt-in basis, allowing countries to choose whether it applies. It sought to address concerns related to a lack of transparency in ISDS by, inter alia, (1) allowing interested third parties such as NGOs to participate in the arbitration process and submit amicus briefs; and (2) ensuring public hearings and open access to arbitration documents, unless justified on the basis of confidentiality.

However, many of the same criticisms of ISDS remained.

One particular concern is the practice of double-hatting, where an individual serves as both an arbitrator and legal counsel in different investment arbitration cases.

One obvious consequence of this is that arbitrators may appear as counsel before tribunals composed of arbitrators with whom they had previously sat.

It is also easy to conceive of a double-hat arbitrator being predisposed to a particular line of argument, after having recently advanced that same argument as counsel.

Critics argue that this practice therefore undermines the integrity of ISDS and erodes public trust in the system.

The Code

The code of conduct represents the latest of various initiatives among the wider arbitration community, aimed at improving transparency.

In particular, the code reinforces the importance of arbitrator independence and impartiality, via Article 3, which requires that arbitrators must act independently and impartially, avoiding any bias or conflict of interest that could affect their decision making.

As is standard practice already, arbitrators are also obligated by Article 11 to disclose any potential conflicts of interest or relationships that could affect their neutrality before accepting an appointment.

In turn, Articles 7 and 8 impose a general prohibition on ex-parte communication — unless permitted by the instrument of consent, applicable rules, or by the agreement of the parties to the dispute — and require arbitrators to respect the confidentiality of the proceedings and the information disclosed by the parties.

The code also focuses on the conduct of proceedings. Article 5 imposes a duty of diligence, requiring that arbitrators devote sufficient time to proceedings and that they render all decisions in a timely manner.

Arbitrators are also obliged by Article 6 to conduct proceedings in accordance with standards of integrity, fairness and civility, and must not delegate their decision-making function.

Finally, Article 9 provides that arbitrators' fees and expenses shall be reasonable, discussed with the parties as soon as possible, and recorded accurately.

Article 10 of the code acknowledges that in large, complex arbitration, tribunals often employ a tribunal secretary to assist with the administration of the case. This article establishes the good practice that, prior to the engagement of a tribunal secretary or assistant, arbitrators should agree their scope, duties, fees and expenses with the parties and further ensure the assistant acts in accordance with the code also.

As for double-hatting, Article 4 provides that, unless the disputing parties agree otherwise, the arbitrator shall not act concurrently as a legal representative or an expert witness in any other proceedings involving the same measures, parties or investment treaty.

Arbitrators are subsequently prohibited from acting as a legal representative or expert witness in any ISDS case or related proceeding involving the same measure or the same or related parties for three years after serving as arbitrator; and in cases involving the same provisions of the same treaty for one year.

It is fair to say that this aspect of the code was hotly debated. Despite the obvious criticism of double-hatting, supporters of the practice argued that it produced arbitrators with broader, more rounded, experience.

Article 4 as finally adopted represented something of a compromise, falling short of a full prohibition as was initially proposed. Critics may also note that the impact of these double-hatting provisions is curtailed due to the voluntary nature of the code.

Comment

To many, the provisions of the code simply represent a standard of good practice that is already well established. Most international arbitration practitioners practice to these standards already. Those that do not are very much in the minority.

However, by codifying them, albeit on a voluntary basis, the code is a vocal statement of, and is therefore likely to reinforce, those standards of good practice. This can only be a good thing and hopefully goes some way to improving the public perception of the ISDS system.

While investment treaties do curtail the ability of states to legislate in their self-interest, the corollary is that they help create a stable investment environment by requiring that all investments and investors are treated alike. In so doing, they help attract investment.

Attempts to improve the ISDS system, and the public's perception of it, should therefore be applauded.

James Rogers and Kenneth Beale are partners, and Jonathan P. Cowe is an associate, at Jenner & Block LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.