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International Arbitration Experts Discuss The Practice Of 'Double Hatting'

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Commentary

International Arbitration Experts Discuss The Practice Of 'Double Hatting'

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on the practice of "double hatting." We would like to thank the following individuals for sharing their thoughts on this important issue.

- Omer Er, Partner, Michelman & Robinson, New York
- Jovana Crncevic, Special Counsel, Withersworldwide, New York
- Andrew Aglionby, Arbitrator, London
- Margarita Sánchez, Practice Lead of International Arbitration, Miller & Chevalier, Washington, D.C.
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Mealey's: "Double hatting" is when an arbitrator acts as counsel in other disputes that may or may not relate to claims they are arbitrating. Do you believe this practice requires tighter restrictions? Why or why not?

Er: The concept of double hatting has been a topic of discussion within arbitration practice circles for some time. For many lawyers, the initial reaction is to argue against double hatting based on universal conflict of interest standards and their ethical duties. Yet when it comes to the question of whether the practice of double hatting requires tighter restrictions, there may not be a clear-cut answer.

As a practical matter, the issue is not a common problem. While bodies like the Court of Arbitration for Sport have adopted rules against double hatting, implementing such rules more broadly seems unnecessary because disputes around double hatting are so few. This is because no reputable arbitrator would cause anyone to question his/her impartiality. Similarly, no party to a dispute would seek to appoint an arbitrator they do not trust. There is more. Notwithstanding the fact that the risk of a conflict or partiality is remote, implementing rules limiting the flexibility of arbitrators serving in different capacities would also limit the freedom of parties to choose the arbitrators they prefer, which would be contrary to the flexible nature of arbitration practice.

Bottom line: Double hatting is not a serious concern impacting the reliability of the arbitration process. That being said, restrictions could be seen as beneficial to the extent it allows more diverse groups of lawyers to enter the arbitration practice in different capacities. However, double hatting restrictions should not be viewed as a trigger to establish diversity in arbitration practice as a secondary outcome.

Crncevic: Double-hatting is a uniquely prevalent practice in international arbitration. When arbitrators may have a stake in the outcome of a dispute over which they are presiding based on another case in which they act as counsel addressing similar issues, double-hatting understandably can become troubling and subject to criticism even when all parties involved have the best intentions. The circumstances—and problematic aspects—of double-hatting most readily come to light in the context of investor-State dispute settlement (ISDS) where information is often in the public domain (unlike in international commercial arbitration where disputes are generally private between the parties involved).

Certainly, limits on the practice of double-hatting are critical to ensure the independence, impartiality, and fairness of an arbitrator's decision-making. These are core principles of international arbitration and should be safeguarded in order to accord due process to the arbitrating parties and protect the integrity of the arbitral process. Standards are already in place that call on arbitrators to self-regulate, which includes the duty to disclose conflicts of interest related to the dispute. It was a welcome development that the United Nations Commission on International Trade Law (UNCITRAL) recently adopted the Code of Conduct for Arbitrators in International Investment Disputes, which enshrines the duties of independence and impartiality and regulates double-hatting.

However, placing too many restrictions on double-hatting imposes barriers on future generations of arbitration practitioners trying to secure arbitrator appointments. If the tradeoff is that, on receiving the first appointment as arbitrator in an investor-State arbitration, a practitioner must choose between serving as counsel or arbitrator, this blanket approach would necessarily narrow the pool of potential arbitrator candidates. In effect, arbitrator appointments would be reserved only for those who are already in a position to make a living exclusively as an arbitrator—which is of course a more established and smaller group of individuals. Conversely, providing arbitration practitioners with flexibility to act as arbitrators while maintaining their practice as counsel is more likely to foster a larger pool of arbitrator candidates with varied experience and expertise and facilitate party autonomy in arbitrator selection.

Moreover, limiting the ability of counsel to take arbitral appointments runs the risk of exacerbating a lack of diversity of arbitrator candidates selected to resolve ISDS disputes. The arbitration community—including parties, counsel, arbitrators, and arbitral institutions—should seek to increase the diversity of arbitrator candidates rather than limit it. Overall, a more nuanced approach that regulates double-hatting but does not ban it outright strikes a better balance.

Aglionby: There is nothing inherently wrong in counsel concurrently taking appointments as an arbitrator. All arbitrators have a duty of impartiality. If arbitrators comply with that duty then there is limited room for complaint. The suggestion from those who favour regulation appears to be that there may be some sort of bias if the same issue is considered by someone having other exposure to the issues, including most prominently the two different roles of party representative and decision maker. This seems unlikely in most cases and has not been demonstrated to be a significant issue influencing the outcome of earlier disputes.

It is a possibility, but a remote one. Any general rule prohibiting this would cause significant damage itself. What the complaints seem to aim at is an aggressive duty of "independence" for arbitrators in additional to that of impartiality. It is worth noting that the Arbitration Act 1996 in England & Wales deliberately does not include a duty of independence, and those people currently considering updating and amendments have not recommended that "independence" be introduced to the statute (as it is in some others). They considered the issue and, correctly in my view, seem to have decided that it is an unnecessary protection. And the proposed rule goes beyond even that to restrict cases party representatives can take.

One of the big attractions of arbitration is that the person deciding disputed issues will have some relevant experience and expertise. Someone asked to decide on, for example, a breach of contract claim should preferably have some idea what that is all about. There would have to be a powerful reason to have a blanket ban preventing a person with current experience from making that decision.

Once a person had taken an appointment as arbitrator involving a breach of contract claim, they could not take cases also involving breach of contract. This potential exclusion from large parts of professional practice would be difficult to manage. It would mean less people accepting appointments as arbitrator. Presumably an arbitrator with one case involving any particular issue might also be thought to have the potential to be biased, and so disqualified from acting as arbitrator in other cases. This is an extreme limitation on the professional lives of many, all to address a problem which is not demonstrated to exist. It seems a disproportionate response.

Most cases have multiple issues too. If one person has one issue in different cases, then the proposed

approach will prevent them acting on the other issues in any other cases, even where those are not common issues. As issues are not always known until later on in arbitrations, does that mean arbitrators must resign if later issues raise this problem? A disruptive party might be tempted to create such problems.

Most arbitrators are used to being able to understand different points of view and reaching judgments on them. Involvement as party counsel probably assists that perception, as clients do like to know their prospects of success. Knowing two sides of the same argument does not mean bias in deciding. The problems with "double hatting" are not sufficiently defined nor their impact sufficiently demonstrated to call for additional rules which would be difficult and damaging to administer.

Sánchez and Lapetina: There is a long-standing practice, especially in international arbitration, for experienced practitioners to serve—simultaneously or within a small window of time—as arbitrators in other cases. This practice is known as "double-hatting" and while it generally refers to the role of arbitrators and counsel, it may apply to other roles, including expert witnesses. Double-hatting is controversial, particularly in the context of investor-state dispute settlement (ISDS). And, as a result, there has been ongoing discussion and debate about whether and how to prohibit, restrict, or regulate the practice, in order to safeguard international arbitration proceedings.

Opponents of the practice—those that believe that practitioners should be separate from arbitrators—rely primarily on arguments rooted in conflicts of interest. Specifically, they have argued that a similar series of issues can arise in arbitrations. If a practitioner has advocated for a position in one matter, it may be hard for that practitioner, when acting as an arbitrator, to remain neutral, unbiased, and uninfluenced. This could, at a minimum, give the appearance that arbitrators lack the neutrality that is central to their charge.

Proponents of double-hatting focus on the fact that a fundamental aspect of arbitration is the parties' ability to select their arbitrators. Prohibiting practitioners from serving as arbitrators would create a far more limited pool of potential arbitrators from which to choose and would exclude several potential arbitrators with relevant, subject-matter experience. Relatedly, there have been valid concerns that separating the pools of practitioners and arbitrators could reduce the diversity of arbitrators.

Most arbitral institutions have, until recently, allowed individuals to decide whether to double-hat or not. That is, the individual is left to decide whether recusing from the role of arbitrator is necessary or appropriate given the individual's prior roles and cases. But leaving the decision to individuals inherently results in inconsistent approaches and does not address the double-hatting tension in a uniformed way. There are, however, significant changes afoot.

Various arbitral bodies have begun to implement rules (and, in the case of the Court of Arbitration of Sport, prohibitions) concerning double-hatting. These institutions are left with the difficult question of whether to prohibit double-hatting because while the practice raises questions, an outright prohibition on double-hatting is also problematic. A more moderate approach — and one recently adopted by the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) — is to regulate the practice. In an updated version of the Code of Conduct for Arbitrators in investor-state disputes, adopted in July 2023,[1] ICSID and UNCITRAL have regulated double-hatting by requiring a "cooling off" period, during which an arbitrator in one case is not permitted to serve as counsel or an expert witness in another proceeding involving the same measures or the same or related parties for a period of three years. It further prohibits arbitrators from acting as legal counsel or as an expert witness in cases involving the same provisions of the same instrument of consent for a period of one year.[2] The parties, however, may choose to opt out of these requirements. This is a reasonable, middle-of the-road approach, which balances the various interests at play, provides guidance on the practice, while still empowering the disputing parties to select arbitrators. Importantly, it forces the arbitral bodies, as opposed to individual practitioners, to regulate the practice in a uniform manner and to devise controls that will ultimately lend more credibility to the arbitral process.

Endnotes

1. *UN Member States Adopt ICSID and UNICTRAL Code of Conduct for Arbitrators in International Investment Disputes,* Press Release, July 14, 2023, *available at* UN Member States Adopt ICSID and UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes | ICSID (worldbank.org).

2. 2. *See* Code of Conduct for Arbitrators in International Investment Dispute Resolution and Commentary, Art. IV, *available at* https://icsid.worldbank.org/resources/code-of-conduct. ■

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