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[Vol. 22: 65, 2022] *Restricting Double-Hatting*
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Restricting Double-hatting To Safeguard International Arbitrations

Yasaschandra Devarakonda*

Abstract

Double-hatting is when an individual plays the dual role of an arbitrator and a legal counsel—a concept first introduced by Professor P. Sands during an IBA conference in 2009. While it hampers the credibility of the arbitral process, its proponents oppose a complete prohibition reflecting on its benefits. The author hypothesises that this issue has been inadequately addressed in international commercial arbitrations in juxtaposition to international investment arbitrations. Supporting this, the author introduces the concept, tracing its judicial landscape and scholarly discourse in investment arbitrations highlighting the need to adopt a similar approach in commercial arbitrations. Thereafter, the definition of double-hatting in Article 6 (May 2020) and Article 4 (June 2021) of the draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement is analyzed while concurrently proposing an analogous definition for international commercial arbitrations. Lastly, the author proposes a framework to restrict double-hatting to counteract its negative implications in international commercial arbitration.

I. Introduction

Arbitrators are referred to as judges freely chosen by the parties while equating the arbitral process to that of the courts. Independence of arbitrators must be ensured at

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all costs as they have a free reign to decide the law, as well as the facts of the case, and are not subjected to appellate review.[1] First introduced in a 2009 International Bar Association ("IBA") conference, double-hatting is a prevalent practice in the international arbitration community.[2] The precise scale of the extent of its impact, however, only came into light after the introduction of the PluriCourts Investment Treaty Arbitration Database ("PITAD") in 2017.[3] Although the database primarily focused on treaty-based investment arbitrations, the study noted that in 47% of the total number of studied cases, at least one of the arbitrators was simultaneously playing the role of a legal counsel.[4] The numbers left the arbitration world dumbfounded, grappling for the need to resolve the issue of double-hatting.

The most sought-after Canadian approach, via the test of reasonableness, to determine the arbitrator's impartiality of bias is crucial for a definitive solution to double-hatting.[5] This approach, also acknowledged by the International Court of Justice, postulates the "general incompatibility" between adjudicatory and advocacy roles.[6] In the absence of sufficient safeguards against the recognized incompatibility, double-hatting creates a

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[1] Commonwealth Coatings Corp. v Continental Casualty Co., 393 U.S. 145, 145–50 (1968).

[2] Dennis H. Hranitzky & Eduardo Silva Romero, *The 'Double Hat' Debate in International Arbitration*, N.Y. L.J. 1 (June 14, 2010), https://www.dechert.com/content/dam/dechert%20files/knowledge/publication/2010/6/the-double-hat-debate-in-international-arbitration/070101031Dechert.pdf.

[3] Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?,* 29 EUR. J. INT'L L. 551, 556 (2018).

[4] Malcolm Langford, Daniel Behn & Runar Lie, *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L. 301, 308 (2017).

[5] Szilard v. Szasz, [1955] S.C.R. 3 (Can.).

[6] Langford et al., *supra* note 4; Adhiraj Lath, *Hang Up the Double Hat: Safeguarding Legitimacy in Investment Arbitration*, 1 NUJS JODR 2, 28 (2021), https://jodr.org/wp-content/uploads/2021/08/3.-Hang-up-the-Double-Hat-Adhiraj-Lath.pdf.

reasonable apprehension of bias. This highlights the absence of "institutional impartiality" in international investment arbitrations and further questions the legitimacy and credibility of the arbitral process.[7] Numerous judicial pronouncements attesting a similar view have determined against arbitrators as double-hatters, disqualifying those who have "formerly acted as counsel to a party concerning matters unrelated to the arbitration proceeding."[8]

However, proponents of double-hatting argue against a complete prohibition, pivoting on the argument that there are a limited number of arbitrators across jurisdictions specializing in multifarious fields such as maritime arbitrations, sports arbitrations, etc.[9] With the rise in the number of disputes, a complete prohibition would limit the pool of arbitrators and lead to reappointments over time. The eventuality is seemingly possible due to the lack of incentive for the next generation of legal counsel to assume the role of arbitrators.[10] The author, thus, opines that an absolute limitation is not an appropriate alternative.[11]

The scope of the scholarly discourse on double-hatting is stunted to international investment arbitrations. Perhaps hidden behind the veil of confidentiality, the field of international commercial arbitrations was left untouched. Arguments in favour of double-hatting, primarily drawn from the works of scholars such as Shapiro and Stone Sweet, pivoted on the "impartiality" and "wisdom" of the disputed resolvers and hence its irrelevance in international

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[7] Joshua Tayar, *Safeguarding the Institutional Impartiality of Arbitration in the Face of Double-Hatting,* 5 MCGILL J. DISP. RESOL. 107, 111 (2018).
[8] *Id.* (citing Sumner v Barnhill (1879), 12 N.S.R. 501 (Can.)); *see also* Ghirardosi v. Minister of Highways for British Columbia, [1966] S.C.R. 367 (Can.); Bank of Montreal v. Brown (2007), 359 N.R. 194 (FCA) (Can.).
[9] Tayar, *supra* note 7, at 107–109; Hranitzky & Romero, *supra* note 4.
[10] Hranitzku & Romero, *supra* note 2, at 1–2.
[11] *Id.*

commercial arbitrations.[12] The author finds this approach to be problematic.[13] If legitimacy and credibility are indeed a concern in arbitration, then the same must apply to international commercial arbitrations as well. The lack of safeguards against double-hatting in international commercial arbitrations would equally hamper the dispute resolution process. The author, therefore, argues in favour of a restriction, in juxtaposition to a prohibition, of double-hatting in both investment and commercial arbitrations alike.[14] With under-inclusion of international commercial arbitrations in double-hatting as a premise, the author will critically analyze Article 6 of the draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, proposing possible adaptations to arrive at a comprehensive definition suitable for international investment arbitrations and a standard for double-hatting suitable for international commercial arbitrators.[15] Thereafter, a potential framework for implementation of the restriction on double-hatting is also proposed with the aid of legislations and soft law instruments.

II. Defining Double-hatting in International Investment Arbitrations and International Commercial Arbitrations: Difference in Approaches

Article 6 of the first draft code, 2020 defines double-hatting as:

Limit on Multiple Roles

Adjudicators shall [refrain from acting]/ [disclose that they act] as counsel, expert witness, judge, agent or in

[12] *See generally* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981); Alec S. Sweet, *Judicialization and the Construction of Governance*, 32 COMPAR. POL. STUD. 147, 147 (1999).
[13] Hranitzku & Romero, *supra* note 3, at 1–2.
[14] *Id*.
[15] INTERNATIONAL CENTRE OF INVESTMENT DISPUTES (ICSID), DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN INVESTOR-STATE DISPUTE SETTLEMENT 1, 16–19, Article 6 (May 2020) [hereinafter ICSID CODE OF CONDUCT], https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf (last visited Sept. 18, 2021).

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].[16]

This is perhaps the first formal attempt to define the term "double-hatting." By regarding the scope and relevance of imposing limitations on the practice of double-hatting, the author would be borrowing the text of Article 6 while proposing a comprehensive definition for double-hatting in international commercial arbitrations.

As understood from the above-mentioned case law and comments, double-hatting is a practice which might raise suspicion of bias.[17] The author identifies three crucial parameters that need adequate consideration in defining double-hatting: first, the personnel involved in the practice of double-hatting.[18] This could be an arbitrator, legal counsel, or witness.[19] Second, the duration of time for which the suspicion of bias or conflict would exist is also important.[20] Third, we should examine circumstances where dual roles may be considered as double-hatting.[21]

Firstly, Article 6 identifies counsel, expert witnesses, judges, and agents while leaving open an ejusdem generis interpretation of the term "or in any other relevant

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[16] *Id*.
[17] *See* Tayar, *supra* note 7; Langfor et al., *supra* note 4.
[18] INTERNATIONAL CENTRE OF INVESTMENT DISPUTES (ICSID), CODE OF CONDUCT-BACKGROUND PAPERS DOUBLE-HATTING 1, 1 n.2 (2020) [hereinafter ICSID DOUBLE-HATTING], https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf.
[19] *Id*.
[20] SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY 1, 62–63 (2012), https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf.
[21] Amanda Nerea & Ronald Mutasa, *Double-hatting in International Arbitration: Time to close the Revolving Door?*, June 2019, at 1, https://www.africaarbitrationacademy.org/wp-content/uploads/2019/10/Double-Hatting-in-International-Arbitration-Time-to-close-the-Revolving-Door-By-Amanda-Nerea-and-Ronald-Mutasa-14-06-19.pdf.

role."[22] The author argues that this broad identification leads to the imposition of too many restrictions on personnel, which gives parties the leeway to file for dismissals under nefarious grounds, creating otherwise avoidable delays. In an arbitration, the most crucial players are the arbitrators and legal counsel. In the context of investment arbitrations, the crucial players would be the judges, on the one hand, and on the other hand, the agent on behalf of the state and the counsel on behalf of the investor. The author argues that expert witnesses must not be included in the list of people on whom restrictions with regards to the practice of double-hatting are identified. An arbitral tribunal has the discretion with respect to the evidentiary aspects, including the admissibility, relevance, materiality, and weight of the evidence submitted by both the parties.[23] In a circumstance where the witness is the only double-hatter, the opposite party could raise objections with respect to the witnesses' reliability, or the tribunal, on its own volition, could dismiss the witness and disregard the evidence submitted.[24] Therefore, insofar as the witnesses are concerned, it is a question of the reliability of the witness. If a witness is a double-hatter, the witness could be categorized as unreliable and all the documentary and oral evidence may be disregarded.

Additionally, the inclusion of the expert witness in Article 6 goes unexplained. Ordinarily, there exists two kinds of witnesses; witnesses of fact and expert witness—usually appointed by either of the parties or although rarely exercised, by the arbitral tribunal itself.[25] Potential conflict by double-hatting could arise even in the case of a witness of fact; if, for instance, the witness is playing the role of legal

[22] ICSID CODE OF CONDUCT, *supra* note 15.
[23] RETO MARGHITOLA, DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION 21 (2015).
[24] *See* Langford et al., *supra* note 4, at 319–21.
[25] JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBTRATION 895 (2012).

counsel in another arbitration involving the same company or similar facts, etc. Because the author argues that such instances will question the reliability of the witness anyway, there is no need to include any kind of witness within the scope of double-hatting.[26]

The limitation in Article 6, however, is that the text does not offer an option to pick and choose personnel.[27] It states, "as counsel, expert witness, judge, agent . . . ."[28] Despite the lack of provision watering this down, because it is a first draft, on the first prong, the author suggests the following:

Parameter	**International investment arbitrations**	**International commercial arbitrations**
Personnel	Judges, Agents, or Legal Counsel.	Arbitrators or Legal Counsel.

Table 1 Parameter defined—Personnel.[29]

Secondly, Article 6 touches upon the crucial aspect of the time duration.[30] The drafted text does not conclusively provide for the time for which the dual roles must be restricted.[31] However, its commentary offers two alternatives.[32] Restrictions can either be placed for the duration of the concurrent arbitrations or for a time duration of two years.[33] This time duration is crucial, as at the end of the determined period double-hatting should not lead to any negative implications. For instance, if an individual plays the role of an arbitrator and legal counsel of one of the parties, say the claimant, in two similar arbitrations, there exists a

[26] ICSID CODE OF CONDUCT, *supra* note 15.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

reasonable suspicion of bias towards the claimant in the former arbitration. The author argues that this suspicion of bias exists for the duration of that arbitration only.[34] However, the question of whether the bias remains when the arbitration is complete remains unanswered.

Ordinarily, the tribunal's role is complete once an award is passed.[35] Despite the possibility of additional awards on ancillary procedural matters, such as costs, for all practical purposes, the tribunal is non-existent after the award is rendered.[36] In such a situation, it may be reasonable to conclude that the suspicion of bias is non-existent after the award is rendered. The arbitrator could then perhaps join another arbitration as legal counsel. This demarcation is crucial to resolve the earlier discussed problem of the new generation of arbitrators who switch back and forth—playing the dual role of arbitrators and legal counsel before serving as a full-time arbitrator. Prior discourse by the international community suggests either a cap on the number of times a person can serve in a dual role before becoming a full-time arbitrator, or a two-year cooling-off period.[37] This is problematic because of the highly subjective nature of the arbitration.[38] There can be no single number which can reasonably justify a restriction. The argument for limiting double-hatting only for the duration of the arbitration,

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[34] *Id.*

[35] *See* American Arbitration Association, *What Happens After the Arbitrator Issues an Award*, AAA229 1, https://www.adr.org/sites/default/files/document_repository/AAA229_After_Award_Issued.pdf.

[36] *Id.*

[37] *Id.* at n.12; Malcolm Langford, Daniel Behn, & Runar Lie, *The Ethics and Empirics of Double-hatting*, 6 ESIL REFLECTIONS (ISSUE 7), July 24, 2017, at 7.

[38] *See* Elie Kleiman & Claire Pauly, *Arbitrability and Public Policy Challenges*, Global Arbitration Review (2019), https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/1st-edition/article/arbitrability-and-public-policy-challenges.

however, is reasonable and adequately addresses limitations such as those faced by new generation of arbitrators.

However, the author argues that rendering an award should not determine whether an arbitrator should be allowed to become a double-hatter. This is because an arbitral tribunal that has become functus officio after passing the award may reconvene to render an additional award clarifying, correcting, rectifying, or interpreting the rendered award.[39] As a result, the tribunal's role may never be complete until the award is fully enforced and the dispute between the parties is permanently settled. Thus, enforcement of the award becomes the final nail in the coffin.

With the option to challenge an award either under the lex arbitri at the court of arbitration or to object to the recognition of the award, the enforcement proceedings may sometimes be tedious and time consuming.[40] Consequently, the opportunity to double-hat could be delayed. The author, however, argues that this must not be given paramount importance. In the quest to safeguard the rights of the parties, the arbitral process has allowed for a system of checks and balances, which is more than what is necessary.[41] Delayed enforcement of awards speaks volumes about the tribunal's merit. If the tribunal were either to resolve the dispute in a manner that was amicable to both the parties or leave no stone unturned during the entire arbitral process, there would

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[39] *See* New York City Bar, *The Functus Officio Problem in Modern Arbitration and a Proposed Solution*, NYCBAR.ORG (2021), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/functus-officio-problem-in-arbitration-and-a-proposed-solution.

[40] *See* Michael Ostrove, James Carter & Ben Sanderson, *Awards: Challenges*, Global Arbitration Review (2021) https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/awards-challenges.

[41] *See* Richard M. Alderman, *What's Really Wrong With Forced Consumer Arbitration?*, ABA.ORG (2010), https://www.americanbar.org/groups/business_law/publications/blt/2010/11/03_alderman/.

be little scope for the losing party to object to the enforcement of the award.

Thus, despite the potential delay, once an award is enforced, the question of suspicion of bias becomes non-existent. The restriction on double-hatting can be lifted once an award is enforced, i.e., double-hatting must be restricted only for the duration of the concurrent arbitration. Such an approach can be adopted in both investment arbitrations and commercial arbitrations.

In conclusion, on the second prong, the author suggests:

Parameter	**International investment arbitrations**	**International commercial arbitrations**
Personnel	Judges, Agents or Legal Counsels.	Arbitrators or Legal Counsels.
Duration	Till the time the arbitral award is enforced	Till the time the arbitral award is enforced

Table 2 Parameters Defined—Personnel and Duration.[42]

Thirdly, the most crucial aspect of identifying cases of double-hatting is the circumstances which would lead to suspicion of bias or conflict.[43] Article 6 has suggested the following criteria upon the fulfilment of which the individual may be categorized as a double-hatter: " . . . on matters that involve the same parties, [the same facts,] [and/or] [the same

[42] ICSID CODE OF CONDUCT, *supra* note 15.
[43] *E.g.*, Secratariats of ICSID & UNCITRAL, INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, *Draft Code of Conduct for Adjudicators in Investor-State Disputes Settlement: Version One* [hereinafter Draft Code Version One], 17 (May 1, 2020), https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf.

treaty]."[44] The author identifies ambiguity concerning three aspects in this text: first, do the same parties mean either party? Second, what is the scope of "same facts"? And third, whether the triple requirement of same parties, same facts, and same treaty is cumulative.[45]

To begin with, the author argues that double-hatting must be restricted if either of the parties are present in the other arbitration. This is relevant in instances where one state has multiple concurrent Investor-State Disputes Settlement ("ISDS") proceedings. If the individual is a judge in a proceeding involving state X in one arbitration and an agent of state X in another arbitration involving the same state, the individual may form a bias towards state X in the former arbitration. In the alternative, if the individual is legal counsel arguing against state X in the other arbitration, the individual may form a bias against the state in the former arbitration. Either way, it is crucial to ensure that both parties are not present in the second arbitration.

Further, the author argues that until and unless the arbitration proceedings have re-commenced with a different tribunal, no two arbitrations can possibly be the "same."[46] The use of the words "same arbitrations" is, therefore, problematic. Instead, the use of the phrase "similar arbitrations" is suggested. Similar arbitrations could mean arbitrations relating to similar issues of law, etc., which is also crucial because an inclination favouring one interpretation of the law could cloud an arbitrator's judgement.

Furthermore, the text of Article 6 mentioned "[and/or]."[47] The application of either or all the criteria would have different implications on the scope of the restriction. Given the cascading effect of each of the

[44] Draft Code Version One, *supra* note 43, at 16.
[45] *E.g.*, *id*.
[46] *Id*.
[47] *Id*.

individual criterion, the author argues for the application of any of the three circumstances which would warrant a restriction on double-hatting. Thus, restriction on double-hatting must be enacted in cases of the same parties, similar facts, or the same treaties.

In cases of commercial arbitration, however, it is crucial to understand the varied interpretations of the provisions of lex arbitri and the biasness that may ensue. In juxtaposition to the use of the word "seat," the author argues for the inclusion of lex arbitri, as it is a broader term encompassing the legal landscape of the arbitration, including the arbitral rules and other soft law provisions.[48] Furthermore, considering the business landscape, it is crucial to include "existence of business relationships" within the ambit of "either" parties. For example, in two concurrent arbitrations involving parties with business relationships, the legal counsel of one of the parties in one arbitration might favor a related party having business relationships with the client the legal counsel serves as an arbitrator in another arbitration involving the related party. Considering the legal counsel's reasonable degree of influence due to such an existence, it must also be restricted.[49]

Regarding the inclusion of the term "similar facts," the author agrees with the text of Article 6 to the extent of its applicability in commercial arbitration cases as well.[50] In conclusion, the author suggests:

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[48] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 22–3 (Oxford University Press, 6th ed. 2015).
[49] *See generally* Draft Code Version One, *supra* note 43, at ¶ 73.
[50] Draft Code Version One, *supra* note 43 at 16.

Parameter	International investment arbitrations	International investment arbitrations
Personnel	Judges, Agents or Legal Counsels.	Arbitrators or Legal Counsels.
Duration	Till the time the arbitral award is enforced	Till the time the arbitral award is enforced
Circumstances	On matters that involve either of the parties or similar facts or same treaty	On matters that involve either of the parties, including parties with whom there exists business relationships, or similar facts or same lex arbitri

Table 3 parameters defined—Personnel, Duration and Circumstances[51]

Thus, the following definitions of double-hatting may be provided: in international investment arbitrations, juxtaposed to Article 6 of the Draft Code, the concept of double-hatting may provide that adjudicators shall refrain from acting as judges, agents, or legal counsel until the time the arbitral award is enforced on matters involving either of the parties, similar facts, or same treaties.[52] In international

[51] *Id.*
[52] *Cf. Id.*

commercial arbitrations, double-hatting may provide that arbitrators shall refrain from simultaneously acting as legal counsel, until the time the arbitral award is enforced, on matters involving either of the parties, including parties with whom either party has a business relationships, similar facts, or same lex arbitri.

III. Draft Code of Conduct 2.0

In April 2021, the International Centre for Settlement of Investment Disputes ("ICSID") and the United Nations Commission on International Trade Law ("UNCITRAL") published the second version of the Draft Code of Conduct ("Draft Code") with substantial change to the language of Article 6.[53] The revised version of the Article, now renumbered Article 4, gives the parties the autonomy to agree on a double-hatting arbitrator.[54] Article 4 reads: "Unless the disputing parties agree otherwise, an Adjudicator in an [International Investment Dispute ("IID")] proceeding shall not act concurrently as counsel or expert witness in another IID case (involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity)."[55]

The explanation for changes in the Draft Code also highlights that the square bracketed portion of the Article presents a possible tailormade provision that would prohibit specific instances.[56]

This second version of the Article presents itself with dangerous consequences, far worse than the earlier version of the draft article.[57] In an arbitration, it is

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[53] Secratariats of ICSID & UNCITRAL, *Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Two* [hereinafter Draft Code Version Two], Art. 4 ICSID (April 19, 2021), https://icsid.worldbank.org/sites/default/files/draft_code_of_conduct_v2_en_final.pdf.
[54] *Id.*
[55] *Id.*
[56] *See id.*
[57] *Id.*

unfathomable to allow the disputing parties to agree out of the problem of double-hatting. Party autonomy is not absolute—limitations on party autonomy must exist. One such limitation is compliance with mandatory provisions of the law. In spirit, this limitation implies mandatory compliance with the overarching aims of the arbitration mechanism. Albeit disputed, double-hatting is recognized as having a negative impact on the legitimacy of arbitration.[58] It would, therefore, be a blunder to have a legislative document actively allowing the parties to agree on such a practice. Practically, the disputing parties would not even agree on such appointments. Each party would object to the proposal of the opposite party to appoint their party-appointed-arbitrator who is a double-hatter. Potentially, only chair arbitrators could be appointed in this manner, the consent for which must be obtained from the co-arbitrators and not the parties.[59] From this perspective, the draft Article 4 in the current form appears to have missed out on being pragmatic in their approach.[60]

Additionally, the presence of the square-bracketed portion of Article 4—along with the possibility of the agreement between disputing parties is ironical.[61] If party agreement on double-hatters as arbitrators is an exception that was already made, there must not be any reason to water down the provision further. Because it is not the case that party autonomy is limited by the instances mentioned in the square bracketed portion of the provision, the absence of a party agreement must strictly mean that double-hatting is not permissible.[62]

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[58] Langford et al., *supra* note 4, at 2.
[59] International Centre for Settlement of Investment Disputes, Number of Arbitrators and Method of Appointment, WORLDBANK.ORG (2021), https://icsid.worldbank.org/services/arbitration/convention/process/appointment.
[60] Draft Code Version Two, *supra* note 53, at Art. 4.
[61] *Id.*
[62] *Id.*

Therefore, the second version of the Article concerning double-hatting is more problematic than the first. In the author's opinion, this is not a matter which must be left to the disputing parties to decide on. There must be a comprehensive framework governing the issue of double-hatting. For this reason, further sections of this paper are analyzed considering Article 6 in the first Draft Code, and not the second version of the Article.

IV. Framework For Implementation of Restriction on Double-hatting in International Commercial Arbitrations

Having arrived at a comprehensive definition of double-hatting tailor made for international commercial arbitrations and having discussed the need for ensuring a restriction, the following section is an attempt to suggest an outline which could aid in enforcing the elucidated restriction.

In Section II of this article, the author defined restriction on double-hatting in the following manner: "Arbitrators shall refrain from simultaneously acting as legal counsel, until the time the arbitral award is enforced on matters involving either of the parties, including parties with whom there exists business relationships, similar facts, or same lex arbitri."

In International Commercial Arbitrations ("ICAs"), where party autonomy and freedom to contract are of utmost importance due to privacy and confidentiality, there is hardly anything that the international community can do that would effect a universal change addressing a bottleneck, such as double-hatting (which is clogging the system of effective dispute resolution).[63] However, considering the wide range

[63] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 355 (Oxford University Press, 6th ed. 2009); Kona Village Realty Inc v. Sunstone Realty Partners, XIV, 123 Haw. 476, 478; Aita v. Ojjeh, 1986 Revue De L'Arbitrage 583 (Cour d'Appel de Paris, Feb. 18, 1986); Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11 ARBITRATION INTERNATIONAL 303, 320 (1995).

of applicability and popularity of the soft law provisions, the author suggests suitable amendments to it.[64] These suggestions could be the first step toward realizing a regulated regime of double-hatting in international commercial arbitrations.[65]

A detailed analysis of the following will be undertaken:

1. UNCITRAL Model Law on International Commercial Arbitration
2. IBA Guidelines on Conflicts of Interest in International Arbitration
3. Reforms by Arbitral Institutions

Albeit a more widely recognized instrument with over 165 countries as contracting states, the author does not argue for an amendment to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 for two reasons.[66] First, Article VII of the convention only sets a minimum standard which allows for the states to be liberal.[67] In such a scenario, even if a mechanism to restrict double- hatting were to be introduced, the states could potentially circumvent the same.[68] Second, the grounds under which the recognition and enforcement of the award may be refused under Article V of the convention are already incorporated in Chapters VII and VIII of the Model Law.[69] Thus, the inter alia argued amendment to the Model Law would suffice.

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[64] *See generally* Draft Code Version Two, *supra* note 53.
[65] *Id.*
[66] CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, 1958 (330 UNTS 3).
[67] Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, FIFTY YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 692 (2009).
[68] Aita v. Ojjeh, 1986 Revue De L'Arbitrage 583 (Cour d'Appel de Paris, Feb. 18, 1986); Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11 Arbitration International 303, 320 (1995).
[69] Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICHIGAN JOURNAL OF INTERNATIONAL LAW 115, 176 (2018).

A. UNCITRAL Model Law on International Commercial Arbitrations

In 1985, the UNCITRAL Secretariat suggested a model legislation ("Model Law") on commercial arbitrations for the consideration of lawmakers across jurisdictions who may choose to adopt, either in part or in full, the text of the Model Law as part of their domestic legislation governing commercial arbitrations.[70] Since its inception, and with the latest amendments in 2006, over 116 jurisdictions across eighty-three states have incorporated this suggested pattern into their respective domestic legislations.[71] Considering its wide reach, the author suggests additional amendments to the relevant provisions of the Model Law to enforce a restriction on double-hatting. The domestic legislations that have adopted the Model Law may then effect similar amendments.[72] This is significant because these domestic legislations comprise the law of the potential seat of an arbitration.[73] An international commercial arbitration must comply with the mandatory provisions of the law of the seat.[74] If the Model Law were to restrict the practice of double-hatting, then arbitrations in those jurisdictions that have amended their domestic legislations to impose a similar restriction would have to ensure mandatory compliance. With a greater number of jurisdictions imposing such restrictions, the unfettered practice of double-hatting would eventually cease to exist.

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[70] UNITED NATIONS GENERAL ASSEMBLY RESOLUTION, 1985 (40/72).
[71] U.N. Comm'n on Int'l Trade L. [UNCITRAL], Rep. on the Status of Conventions and Model Laws, at 3, U.N. Doc. A/CN.9/1020 (2020).
[72] U.N. Comm'n on Int'l Trade L. [UNCITRAL], *Frequently Asked Questions—UNCITRAL Texts*, https://uncitral.un.org/en/about/faq/texts (last visited Sept. 23, 2021) ("UNCITRAL legislative texts, such as conventions, model laws, and legislative guides, may be adopted by States through the enactment of domestic legislation.").
[73] *Id.*
[74] *Id.*

An amendment to the text of the Model Law is, however, complex.[75] Prior to delving into any suitably amendable provisions, one must consider the amendment procedure. In 2006, recognizing the need to adapt to modern advancements in the field of arbitration, and expressing appreciation for the crucial recommended interpretation of Articles II and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the United Nations General Assembly adopted a resolution amending the Model Law.[76] The amendments, via revisions to its various articles, intended to modernize the form requirement of an arbitration agreement.[77] While observers may consider a mere amendment to effect a restriction on double-hatting trivial, revisiting the Model Law fourteen years after its previous amendment does seem necessary. Considering that the prior amendment was a revision to only a few chapters of the Model Law, it may perhaps be an ideal time to focus on the other chapters as well. The author considers amendments to Chapters III and VII as necessary for implementing a restriction on double-hatting. Articles 11 and 34 of the Model Law may be amended in the following manner:

Article 11 provides the procedure for appointing arbitrators.[78] Elaborated over five subclauses, this provision gives autonomy to the parties in determining appointments and prescribes recourse if the parties do not make such a determination.[79] A restriction on appointing an arbitrator who is at risk of being a double-hatter may be an optimum

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[75] *See generally* Dyalá Jiménez-Figueres, *Are We Beyond the Model Law—Or Is It Time For A New One?*, KLUWERARBITRATION.COM (2013), http://arbitrationblog.kluwerarbitration.com/2013/05/24/are-we-beyond-the-model-law-or-is-it-time-for-a-new-one/; *See also* UNCITRAL Model L. on Int'l Arb.: 1985: With Amends. as Adopted in 2006 [hereinafter UNCITRAL Model Law] Art. 11 (U.N. Comm'n on Int'l Trade L. 1985) (amended 2006).
[76] UNCITRAL Model Law, *supra* note 75, at Art. 11.
[77] *Id.*
[78] Draft Code Version Two, *supra* note 53, at 11.
[79] *Id.*

way to proscribe this problem. After a thorough perusal of Article 11, and considering the author's definition of double-hatting, the following presents a possible additional sub-clause to Article 11:

(6) Notwithstanding anything contained in the foregoing provisions of this article, an arbitrator who is simultaneously acting as legal counsel in a similar matter involving either of the parties, including parties with whom there exists business relationships, similar facts, or same lex arbitri, cannot be appointed as an arbitrator until the arbitral award in the other arbitration has been enforced.

This non-obstante clause is important because restrictions on double-hatting can only be tackled by limiting party autonomy.[80] The proposed addition of sub-clause 6 would supersede all other sub-clauses in Article 11, including those that allow alternative methods of arbitrator appointments, such as court appointed arbitrators.[81] Therefore, this sub-clause not only binds the appointed arbitrators who would appoint the presiding arbitrator under Article 11(3)(a), but also binds the national courts or other competent authorities who may be entrusted with the task of appointments under Article 11(5).

In addition to regulating the arbitrator appointments, for effective restriction on double-hatting, it is crucial to enable a mechanism that would provide the parties for a recourse against an arbitral award.[82] When an arbitral tribunal has a double-hatter, a biased award is presumed.[83] Under such circumstances, the party must be empowered to

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[80] Frederick A. Acomb, *The Insider Adversary in International Arbitration*, 27 AM. REV. INT'L ARB. 63, 72 (2016).

[81] *See* DRAFT CODE VERSION TWO, *supra* note 53, at 11.

[82] *See* Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. 576, 584 (2008) (holding that Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. §§ 10–11, are the exclusive grounds for appealing an arbitration award).

[83] Antonia Eliason, *Evident Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISD Awards*, 50 GEO. J. INT'L L. 1, 9 (2018).

apply for the court to set aside the award under Article 34.[84] The author argues that such a watertight mechanism would also discourage the parties to appoint arbitrators who are double-hatters because an award set aside by the court is against the interests of the parties to the dispute. The author suggests an amendment to Article 34(2)(a)(iv), which in its current form implies that an arbitral tribunal constituted in contravention with the proposed Article 11(6) would trigger the application of Article 34(2)(a)(iv).[85] However, the author argues there may be ambiguity as to whether Article 11(6) is subject to the agreement between the parties. To address any such ambiguity, the author suggests inclusion of the following phrase to Article 34(2)(a)(iv):

> . . . [F]ailing such agreement, was not in accordance with this law, or, if, under any circumstance, the arbitral tribunal consisted of an arbitrator who was simultaneously acting as a legal counsel in a similar matter involving either of the parties, including parties with whom there exists business relationships, similar facts, or same lex arbitri; or . . . .

The inclusion of the suggested phrase at the end of the sub-clause clearly demarcates the three instances in which the composition of the tribunal may lead to the award being challenged.[86] The first and second instances, respectively, concern whether the parties' agreement was given primacy and whether the mandatory law provisions have been followed.[87] The third instance overrides any agreement between the parties and provides a mechanism to

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[84] *See* U.N. Comm'n Int'l Trade L., U.N. Model Law on Commercial Arbitration [hereinafter UNCITRAL Model Law on Commercial Arbitration], at 19–20, U.N. Doc. A/40/17, Annex I (2008).
[85] *See id*. at 20.
[86] *See* UNCITRAL Model Law on Commercial Arbitration, *supra* note 84, at 6–9.
[87] *Id*.

apply for challenging an award if an arbitrator was a double-hatter during the entire arbitral proceedings.[88] Such a mechanism addresses concerns of non-disclosure by an arbitrator at the time of appointment.

In conclusion, the proposed amendments to the text of Articles 11 and 34 would serve as an effective tool to implement restrictions on double-hatting. The roadmap for implementation would be quicker and smoother in those commercial contracts where the Model Law itself has been agreed upon by the parties as the proper law of the arbitration. In the alternative, if the parties agree on a particular jurisdiction's law, implementing the proposed manner of restriction could be a long-drawn process as the domestic legislation must first be amended per the proposed amendments to the Model Law. Either way, restricted double-hatting would eventually become the norm.

B. IBA Guidelines on Conflicts of Interest in International Commercial Arbitrations

Albeit a soft law, the IBA Guidelines on Conflicts of Interest in International Commercial Arbitrations ("IBA Guidelines") is perhaps the only legal instrument which has come close to addressing the issue of double-hatting.[89] Introduced in 2004, the IBA Guidelines are often consulted by parties during the evaluation of arbitrators prior to their appointment.[90] The IBA Guidelines prescribe the coveted "test of independence and impartiality" of an arbitrator.[91] To ensure a fair resolution of the dispute to the parties, the test of the independence and impartiality of an arbitrator is quintessential. The standard for this test is of more

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[88] *Id.*

[89] INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION i (2014), https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 [hereinafter IBA Guidelines].

[90] IBA Guidelines, *supra* note 89.

[91] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1817 (2d ed., 2014).

importance because the arbitrators are appointed by the parties themselves.[92] At the stage of appointment, the parties evaluate the arbitrators' profiles and raise objections they believe the arbitrators might not be independent or impartial.[93] Therefore, it is essential to ensure that the appointment of a party-appointed arbitrator is not objected to by the opposite party.[94] The parties in this regard often resort to the IBA Guidelines.[95]

The IBA Guidelines' 2014 revisions introduced sweeping changes, reflecting their evolving nature.[96] Initially introduced to govern both forms of arbitrations, the lingering uncertainty with respect to its application on international investment arbitrations was resolved with the emergence of a general consensus amongst the members of the IBA Review Committee that these guidelines apply to both the arbitrations alike.[97] Amongst the slew of changes introduced via the 2014 revision, the introduction of "advanced waivers" stands out.[98] General Standard 3(b), requiring the arbitrators to declare or waive off any potential future conflict of interest in advance, indirectly touches upon the issue of double-hatting.[99] A conjoint reading of entry 2.1.1 in the Non-Waivable Red List and entries 3.1.1 and 3.1.2 in the Orange List in Part II of the IBA Guidelines can

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[92] *Id*.
[93] IBA Guidelines, *supra* note 89 at 9.
[94] *Id*.
[95] *Id*. at i.
[96] Megan K. Niedermeyer, *Ethics for Arbitrators at the International Level: Who Writes the Rules of the Game?* 25 AM. REV. INT'L ARB. 481, 481 (2014) (discussing the 2014 updates to the IBA Guidelines); *see also* IBA Guidelines, *supra* note 89.
[97] *Id*. at 489–90, 495.
[98] *Compare* IBA Guidelines, *supra* note 89, at 7–9, *with* INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2004), https://sccinstitute.com/media/37100/iba_publications_arbitration_guidelines_2004.pdf.
[99] IBA Guidelines*, supra* note 89, at 8–9.

be understood as limiting restrictions on double-hatting.[100] Although this inclusion in Part II of the IBA Guidelines would perhaps suffice, the author argues in favor of restricting double-hatting in Part I of the IBA Guidelines as well. The 2014 revised General Standard 3(b) reads: "[a]n advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a)."[101]

Perhaps the general lack of discourse regarding the importance of restricting double-hatting in the international commercial arbitration arena is the reason for the lack of explicit wording regarding double-hatting.[102] Considering the foregone discussion with regard to the importance of the restriction on double-hatting in both the forms of arbitrations alike, the author proposes the inclusion of the following terms to the text of General Standard 3(b) [103]:

> " . . . facts and circumstances that may arise in the future, including the possibility of the arbitrator agreeing to play the role of a legal counsel in an arbitration involving either of the parties, including parties with whom there exists business relationships, similar facts, or same lex arbitri, does not discharge the arbitrator's ongoing duty of disclosure . . . ."

The proposed inclusion touches upon one of the most crucial flipside aspects of double-hatting.[104] Restriction on appointment of arbitrators who are double-hatters would only restrict legal counsel from becoming arbitrators under the discussed circumstances.[105] It is,

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[100] *Id*. at 20, 22.
[101] IBA Guidelines*, supra* note 89, at 8.
[102] *Cf.* IBA Guidelines, *supra* note 89.
[103] *Id*. at 8.
[104] *See* IBA Guidelines, *supra* note 89.
[105] *Cf.* Langford et al., *supra* note 4.

however, possible for an arbitrator to become a double-hatter upon appointment.[106] The proposed inclusion to the General Standard 3(b) would now necessitate the arbitrator to declare that they would not, in the future, agree to double-hat.

As earlier noted, the entries in Part II are "non-exhaustive," and the already-existing entries (2.1.1, 3.1.1, and 3.1.2) would sufficiently govern the restriction on double-hatting.[107] Considering the proposed inclusion to General Standard 3(b), the author suggests including a separate entry clarifying the precise nature of the potential impartiality that the guidelines seek to arrest.[108] Part II contains three different lists—the Red List, Orange List, and Green List—and classifies four instances of potential conflict in the decreasing order of their severity: Non-Waivable Red List, Waivable Red List, Orange List, and Green List.[109] It is crucial to categorize an entry specifying the restriction on double-hatting into one of these lists. Entry 2.1.1 in the Waivable Red List and entries 3.1.1 and 3.1.2 in the Orange List could be relevant in ascertaining placement in the appropriate list.[110] The Waivable Red List provides instances of disclosures of conflict which would raise "justifiable doubt[s]" related to independence and impartiality but may be expressly waived by an agreement between the parties.[111] On the other hand, the instances elucidated in the Orange List create a legal fiction.[112] Additionally, "[i]f, following [the arbitrator's conflict disclosures,] the parties fail to raise any timely objections,

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[106] *Cf. id*.
[107] ICSID DOUBLE-HATTING, *supra* note 18; *See also* IBA Guidelines, *supra* note 89.
[108] IBA Guidelines, *supra* note 89, at 20, 22.
[109] *Id*. at 17–27.
[110] *Id*. at 20, 22.
[111] *See* ARIF HYDER ALI, JANE WESSEL, ALEXANDRE DE GRAMONT, & RYAN MELLSKE, THE INTERNATIONAL ARBITRATION RULEBOOK: A GUIDE TO ARBITRATION REGIMES 287 (Kluwer L. Int'l 2019).
[112] *Id*. at 287–88.

the parties are deemed to have accepted the arbitrator."[113] The vital distinction between the two lists is of paramount importance because disclosure of double-hatting is continuous (i.e., the arbitrator may disclose an instance of double-hatting at any time during the arbitral process).[114] If the disclosure of an instance of double-hatting by the arbitrator during the proceedings is categorized in the Waivable Red List, the parties would be compelled to either agree to waive off the disclosed conflict or risk the termination of the arbitral proceedings—leading to reappointment of a new arbitrator or reconstitution of the arbitral tribunal itself.[115] If a disclosed instance is categorized in the Orange List, the arbitration proceedings would be preserved unless the parties choose to raise a timely objection.[116] The author argues in favor of the latter approach in the interest of pro-arbitration principles. Unless grave circumstances warrant a premature termination, it is pivotal to ensure that the arbitration proceedings go on.[117] Therefore, the author proposes the following entry as an amendment to the Orange List:

3.1 Previous services for one of the parties or other involvement in the case . . . .[118]

3.1.6 The arbitrator is currently acting as a legal counsel in an arbitration involving either of the parties, including parties with whom there exists business relationships, similar facts, or same lex arbitri.

Since the IBA guidelines are soft law provisions, their lack of binding nature on the parties would impede the full-fledged implementation of the proposed restriction on

[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 287.
[117] IBA Guidelines, *supra* note 89, at 1–2.
[118] *Id.* at 22–23.

double-hatting unless the guidelines are expressly agreed upon, or, in the alternative, actively resorted to by the tribunal.[119] Therefore, the author argues for a synchronous shift in approach to arbitrator appointments with the proposed institutional reforms.

C. Reforms by Arbitral Institutions

Many commercial arbitrations take place with the aid and assistance of arbitral institutions.[120] These institutions are self-regulated, autonomous bodies that facilitate the arbitrations conducted under their aegis.[121] Parties (either via an arbitration clause in their commercial contracts or in agreements to arbitrate the dispute) agree on applying the arbitral rules of any of these institutions.[122] These rules form a part of governing the procedural aspects of the arbitration.[123] The author argues that these institutions must undertake the responsibility of ensuring the best practices and suitably ensure that the arbitrator appointments, either via the institution's panel of arbitrators or via the parties who are arbitrating their dispute under the institution, must not lead to double-hatting.

Under the Singapore International Arbitration Centre ("SIAC"), for instance, amendments may be made to Clauses 2 and 3 of the Code of Ethics for an Arbitrator governing disclosure and bias, respectively.[124] In the same vein, provisions restricting double-hatting may be introduced to Article 16(4) of the Vienna Rules of Arbitration and Mediation 2018 of the Vienna International Arbitration Centre ("VIAC")[125] and Section 2 of London

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[119] *Id.* at 3.
[120] ALI ET AL., *supra* note 111, at 122–24.
[121] Margaret M. Harding, *The Limits of the Due Process Protocols*, OHIO STATE J. ON DISP. RESOL. 369, 371 (2004).
[122] ALI ET AL., *supra* note 111, at 123.
[123] *Id.*
[124] SING. INT'L ARB. CTR., CODE OF ETHICS FOR AN ARBITRATOR, cl. 2, 3 (2015).
[125] VIENNA INT'L ARB. CTR., ARBITRATION AND MEDIATION RULES, art. 16(4) (2018).

Court of International Arbitration ("LCIA") Notes for Arbitrators.[126] These clauses govern the aspects of independence and impartiality of an arbitrator and may be suitable for introducing such an amendment.[127] The author refrains from delving into the precise nature and wording of the amendments to these institutional rules because, first, these rules are tailor-made to meet the needs and demands of the institutions' clients. Second, the rules are specific to the jurisdiction in which the arbitral institution is located.[128] The arbitral rules of SIAC, VIAC, and LCIA, for instance, are in synergy with the domestic legislations in Singapore, Vienna, and London, respectively.[129] Irrespective of the manner, method, and extent of incorporation, the role of the arbitral institutions in realizing the successful implementation of the restriction on double-hatting is unparalleled.

Thus, the cumulative effect of the suggested framework would eventually lead to the implementation of a restriction on double-hatting, which has been a cog in the wheel of the institutional efficiency in international arbitrations.

V. Conclusion

With the advent of modern means of efficient dispute resolution processes, the popularity of international arbitration has skyrocketed.[130] This rise also demands for

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[126] LONDON COURT INT'L ARB., NOTES FOR ARBS. at sec. 2 (2017).
[127] *Id. See also* SING. INT'L ARB. CTR., CODE OF ETHICS FOR AN ARBITRATOR, cl. 2, 3 (2015); VIENNA INT'L ARB. CTR., ARBITRATION AND MEDIATION RULES, art. 16(4) (2018).
[128] *See* Mark Lakin & Nicholas Sharratt, *Dispute resolution clauses: Drafting Principles and Concepts,* STEPHENSON HARWOOD (Dec. 7, 2020), https://www.shlegal.com/news/dispute-resolution-clauses-drafting-principles-and-concepts.
[129] *See* SING. INT'L ARB. CTR., CODE OF ETHICS FOR AN ARBITRATOR (2015); VIENNA INT'L ARB. CENTRE, ARBITRATION AND MEDIATION RULES (2018); LONDON COURT INT'L ARB., NOTES FOR ARBS. (2017).
[130] *See* Gary Born & Wendy Miles, *Global Trends in International Arbitration,* WILMER CUTLER PICKERING HALE AND DORR LLP: SPECIAL ADVERTISING SECTION,

the arbitration process to remain legitimate and impartial. Presently, the practice of double-hatting, in the absence of adequate safeguards, is permeating the institution of arbitration, infesting the arbitral process, and giving rise to procedural injustice ultimately plaguing the international justice system.

A ubiquitous effort to weed out double-hatting fell short of its desired objective.[131] Because the proposed draft code is in its nascent stage, with comments and suggestions from the arbitration community yet awaited, there is scope for revisiting the discourse and revising Article 4. The author emphasises the need to adopt a dynamic approach, such as the one suggested, in this regard.

Separately, the lack of any effort to concurrently address the same issue in international commercial arbitrations is appalling. The IBA guidelines are the only soft law instrument that tackle the issue of double-hatting, albeit inadequately.[132] The suggested comprehensive framework for the implementation of a restriction on double-hatting in international commercial arbitrations would be a welcomed step toward a slow, yet steady process of ensuring a well, safeguarded method of double-hatting that patches its draw backs. Concomitant amendments to the UNCITRAL Model Law and IBA Guidelines, along with synchronous institutional reforms, present an optimal solution and is the way forward.

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https://biblioteca.cejamericas.org/bitstream/handle/2015/812/Global-Trends-in-International-Arbitration.pdf?sequence=1&isAllowed=y.

[131] Tayar, *supra* note 7, at 111–13.

[132] *Id*. at 117.

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