

REPORT OF THE STANDING COMMITTEE ON LEGAL QUESTIONS

Introduction

1. The Standing Committee on Legal Questions (SC – see Appendix 1 for participants) met on 14 and 16 December 2020 to address the agenda that it adopted. It elected Shaina Erika Seki (FICSA Intern) as its Rapporteur.

Follow-up from the 73rd Council decisions: legal protection insurance

2. Further to the discussions held at the 72nd and 73rd FICSA councils regarding a collective legal insurance contract for member staff associations/unions and their membership, the FICSA General Secretary (WHO/HQ) presented an overview of the conditions of global insurance that had been negotiated with Fortuna Insurance as a result of decision D/1 from the 73rd FICSA Council ([FICSA/C/73/D/1](#)). The section of the FICSA website on [Legal Protection Insurance](#) contained all relevant information. By virtue of the master contract, all contracts with FICSA member organizations would start from 1 October 2020.

3. Members of the FICSA ExCom stressed that the premium should, in principle, remain the same; nevertheless, Fortuna would regularly review the premium with each of the signatories. The premium should only change if there were a major issue with claims or excess cases, in which case Fortuna should bring that to the signatory's attention. Staff associations should refer to the FICSA webpage, which included information on this issue and manage cases accordingly. Only cases accepted by Fortuna would be counted in calculating the premium. Cases that were withdrawn before reaching a stage where Fortuna incurred costs, or that Fortuna refused to cover would not be counted.

Conclusions

4. Interested member staff associations/unions needed to email the FICSA office (ficsa@un.org) to send the names or numbers of members interested in joining Fortuna insurance.

Recommendations

5. The SC recommended that the FICSA ExCom should send a formal letter to all presidents/chairs of member staff associations/unions, encouraging them to secure legal protection insurance through FICSA.

6. The SC recommended that the FICSA ExCom should ensure that those FICSA members that signed a contract with Fortuna were aware of the need to exercise due diligence in controlling ongoing cases, to ensure that no frivolous cases were filed.

Review of the jurisdictional set-up of the UN common system

7. The Chair described the ongoing review of the jurisdictional set-up of the UN common system, which was decided following UN General Assembly [resolution 74/255](#) – United Nations common system, and encouraged participants to read FICSA’s communications for more details.

8. In the ensuing discussion, a speaker called for the governing bodies of the specialized agencies to be consulted on the review and on any proposals affecting the current jurisdictional set-up of the United Nations common system before the UN General Assembly could make any decisions, as it was important for the governing bodies to assess any alternatives to the current jurisdiction. The best way forward would be to establish a working group to further examine different modalities for the jurisdictional set-up and make a recommendation to the Chief Executives Board for Coordination (CEB) for consideration by the governing bodies of each organization.

9. The FICSA President noted that FICSA had called for staff-association members to comment on the second draft report of the review of the jurisdictional set-up. FICSA had taken account of that input when preparing its review of the second draft report, which had had been sent on 10 December 2020.

10. A speaker called the review of the set-up an important step towards restoring the consistency of the UN jurisdictional system, as long as the objective was to achieve a coherent international jurisprudence. Others thought that harmonizing the two systems would be difficult, due to the important differences between the ILO Administrative Tribunal (ILOAT) and UN Appeals Tribunal (UNAT) systems. The review could result in a solution that was unsatisfactory for staff and would push the agencies dissatisfied with ILOAT rulings towards UNAT, and reduce the legal security of staff members currently under ILOAT.

11. A delegate pointed out that the report on the review of the jurisprudence of ILOAT and UNAT did not provide any clear justification, although, as the report indicated, the review did not reveal divergent case law. The problem lay less with the set-up or ILOAT judgements, than with the International Civil Service Commission (ICSC), which had been found to have acted in breach of its Statute.

12. A further speaker recalled that universal changes to the jurisdictional set-up had previously been considered but were ultimately not pursued, and encouraged FICSA to use the findings of those past reviews to inform comments on the new review as to why changing the status quo was not recommended.

13. The discussion shifted to focus on the question of whether UNAT favoured management while ILOAT tended to rule in favour of staff. Although the UN had

conducted no official comparative study, some external studies had suggested that the UNAT tended to rule in favour of the administration. Several participants pointed to other reasons why management might favour UNAT more. For example, UNAT could not question decisions made by a governing body, and did not explicitly recognize the doctrine of the acquired rights of staff. The exorbitant costs associated with bringing a case before ILOAT, versus the cost-saving package deal of Office of Staff Legal Assistance (OSLA) services under UNAT/the United Nations Dispute Tribunal (UNDT), contributed to some agencies' willingness to move towards UNAT. In addition, OSLA was less willing to entertain cases against organizations.

14. A delegate recalled that some organizations that had moved to UNAT had decided to keep their joint appeals boards; while UNAT considered such boards as a first judicial instance, practices such as having no oral hearings significantly weakened them, to the detriment of staff. A discussion ensued on the importance of accepting UNDT as a neutral appeal of first instance. OSLA services could not be leveraged without the organization being part of UNDT. Unlike ILOAT, UNAT would not award legal fees, as it assumed staff members had access to OSLA services. Nevertheless, various specialized agencies that were not part of UNDT did not have access to OSLA. Other protections available under UNAT, such as interim measures, were not available to staff of organizations that were not part of UNDT.

15. FICSA had worked to increase the awareness of staff associations of organizations that were considering adhering to UNAT, of the requirement of a proper neutral first instance in the appeal process. It had issued guidelines for staff representatives to defend the legal requirement of a neutral appeal instance process within the internal justice system ([FICSA/C/73/D/2](#), communicated on 21 October 2020). That included a recommendation for staff representatives to include UNDT as the most appropriate intermediary instance in case an organization were or would become part of the UNAT two-tiered system of justice.

Conclusions

16. Staff associations needed to become familiar with the issues at stake in the review of the jurisdictional set-up of the UN common system, and particularly take note of FICSA's communications on the subject: FICSA Communications [64/20](#), [68/20](#), [82/20](#)) and FICSA/C/73/D/2 on the FICSA ExCom's guidelines on neutral appeal instance process within the internal justice system.

17. Closer involvement by staff associations was necessary to ensure that staff's interests were known and protected at every step of the process of the review. FICSA's communications on the review of the jurisdictional set-up may not be enough for staff associations to become well-acquainted with the process. Designating a formal focal point in each staff association would enable such people to follow the process of the review closely and ensure that staff voices are included in the process by keeping in touch with the FICSA ExCom, which was involved in high-level meetings on the review of the jurisdictional set-up.

18. FICSA ExCom opposed so-called forum-shopping by organizations, but stressed, to staff associations of organizations that sought to move under UNAT jurisdiction, the importance of ensuring that they had a proper neutral first instance. In that sense, UNDT appeared to be the most established option for providing a neutral first instance, and would allow staff members access to OSLA services.

Recommendations

19. The SC recommended that the FICSA ExCom should prepare an updated list of organizations and agencies under the jurisdictions of ILOAT or UNDT/UNAT and send it to staff representatives.

20. The SC recommended that the FICSA ExCom should prepare a letter encouraging staff associations to designate formal focal points to follow up matters relating to the report on the review of the jurisdictional set-up of the UN common system, decided following UNGA Resolution 74/255 – United Nations common system.

21. The SC recommended that staff associations should become familiar with the issues at stake and should take note of relevant FICSA communications on the subjects discussed (e.g. FICSA/C/73/D/2 on FICSA ExCom's guidelines on neutral appeal instance process within the internal justice system).

22. The SC recommended that staff associations should insist that staff members have access to full OSLA services when their organizations moved under UNAT jurisdiction, such that OSLA prepares their case preparations and pleadings for UNAT.

UN Code of Conduct for Legal Representatives and Litigants in Person

23. The SC Vice-Chair presented the [UN Code of Conduct for Legal Representatives and Litigants in Person](#). An important element of the Code permitted staff members to choose to be represented by an external lawyer or a person not otherwise licensed to practice law, rather than using OSLA services, and set standards and ethics by which those legal representatives must abide.

24. As a specialized agency and thus not directly subject to the UN Code of Conduct, WHO was attempting to introduce its own code of conduct for legal representatives. WHO's draft code contained several onerous provisions that were absent from the UN Code of Conduct.

- (a) The cumbersome approval process required the responsible official of the relevant body within WHO's internal justice system to recognize all representatives separately before proceedings could take place.
- (b) The authorization procedure prevented staff representatives from accompanying staff members during the investigative process.
- (c) Legal representatives could not previously have been employed by WHO before, on the claim of an apparent conflict of interest.
- (d) People who were not legal or paralegal professionals could not represent staff members.

25. Those provisions effectively limited staff's choice of representative. People not licensed to practice law may nevertheless be competent to represent staff on certain issues. Such people charged comparatively lower rates than legal and paralegal professionals; the former were more tenable for staff. Lawyers often had larger case-loads and therefore might be unwilling to take on cases. Finally, legal representatives previously employed by WHO could be desirable for staff, because they were the most

familiar with its policies and processes. For those reasons, WHO staff associations were attempting to push back against the draft code of conduct, as it impinged on staff's rights to legal representation and freedom of association.

Conclusion

26. Consultation with SC could help staff representatives if the administrations of specialized agencies attempted to implement a code of conduct that was as onerous as WHO's draft code or that represented a significant departure from the UN Code of Conduct. SC would aid staff associations in raising objections against the implementation of such codes of conduct. At minimum, staff associations of specialized agencies needed to accept codes of conduct that were similar to the UN Code of Conduct, as its provisions were even-handed and did not impinge on staff's rights.

Recommendation

27. The SC recommended that staff associations should ensure that the UN Code of Conduct for Legal Representatives and Litigants in Person was used as a basis for their organizations' codes of conduct. Should an organization seek to introduce an onerous code of conduct that departed significantly from the UN Code of Conduct, staff associations should consult SC, through the FICSA Secretariat, for assistance in raising objections against it.

Organizational rules on outside activities of staff

28. After the presentation of a sample WHO policy on staff's engagement in outside employment or occupations, SC discussed the policies and procedures for requesting approval of outside activities in various UN organizations. The discussion raised several general issues, including the following.

29. The approval process for outside activities included assessment of requests to determine whether the outside activity were compatible with the staff member's employment with the organization and organization's interests and principles. What activities were considered incompatible was still subject to interpretation. This might prevent staff from employment in a personal capacity if the activity did not relate to their professional and technical competencies under the organization, and inhibit staff from taking on activities that would allow them to develop marketable skills or provide opportunities for career advancement. The approval process was often cumbersome or slow in handling requests, which could lead to lost opportunities.

30. The policies applied to all staff, including those employed under part-time or 50% contracts with their organizations. The latter must seek approval from their organizations to take on other employment. Nevertheless, it was not clear when staff members could accept remuneration from outside activities, or when remuneration would be approved by top management or be considered incompatible with staff's status as employees of their organization and as international civil servants.

Conclusions

31. While staff had no explicit right to take on outside activities, the approval process needed improvement: for example, by implementing a time frame for approval, and clarifying what outside activities were incompatible with organizations' interests and principles, to prevent arbitrary decision-making.

32. The issues presented were intrinsically linked with the future of work at the UN; as growing numbers of staff had flexible or part-time working arrangements and as more were searching for job security. Staff representatives needed to establish communication with those in charge of the approval process for outside activities, and take note of the global framework on outside employment and activities in ICSC's [Standards of Conduct for the International Civil Service](#).

Recommendation

33. The SC recommended that staff representatives should be aware of their organizations' policies on outside activities of staff members, ask for clarification on the criteria for the process of timely review and approval of those activities, and insist on transparent and consistent application of those criteria.

Remote work from a legal perspective

34. The Chair reviewed working remotely from a legal perspective, pointing out a study showing the gradually increases in the number of people teleworking over the years, and the importance of the global COVID-19 pandemic in prompting employers to fast-track the adoption of teleworking modalities. Organizations such as ILO had issued recent guidelines on remote working, provided to staff and management in 2020 in the context of COVID-19. In addition, service notes and specific instructions issued to agencies and organizations during the pandemic acted as temporary and emergency regulatory frameworks. Such rules and regulations had not been sufficient to cover all the situations that had arisen.

35. In the discussion that ensued, participants indicated several pending legal and contractual issues related to working remotely during the COVID-19 pandemic. These included:

- (a) whether staff were allowed to telework away from their duty stations and what criteria organizations used to permit that;
- (b) what were the implications regarding income tax and social security payments when staff teleworked from a different country than that in which the employer was located;
- (c) how to request work visas and residency permits for staff teleworking outside their country of origin;
- (d) whether employees' terms and conditions of employment would remain the same while teleworking and whether their overall salary and benefit packages would remain at the same level as before the pandemic;
- (e) whether organizations would reimburse their staff's utility costs;
- (f) whether ergonomic equipment such as chairs should be considered work equipment and therefore reimbursable;
- (g) whether accidents while teleworking should be considered work related, or whether illnesses should be considered service incurred, and how insurance premiums would change to reflect that; and

(h) whether some entitlements (e.g. post adjustment) would need to be adjusted after a cumulative period of full-time remote work outside the duty station.

36. FICSA had raised many of these issues in its discussions with CEB when consulted on the drafting of CEB's [Administrative Guidelines for Offices on the Novel Coronavirus \(COVID-19\) pandemic: framework for the management of staff members in United Nations Common System Headquarters and Field Duty Stations](#).

37. The FICSA President and General Secretary reiterated that FICSA had sought to ensure that the CEB guidelines included these issues, but noted that the current version did not address some critical issues, such as whether accidents at home should be considered work related.

38. The FICSA President noted that such issues, particularly post adjustment, were intrinsically linked to the future of work in the UN. The High-Level Committee on Management (HLCM) Task Force on the Future of the UN Workforce was reviewing the contractual modalities of the UN system and considering flexible working arrangements in response to the COVID-19 pandemic. HLCM had identified several elements that would need to be considered when developing the new model contract, such as whether entitlements may need to be adjusted for remote work outside the duty station. FICSA would raise those issues be brought up during the Council's joint session on the future of work.

Conclusions

39. The COVID-19 pandemic had ignited a large-scale movement of the UN global workforce to start working remotely, and these exceptional circumstances had caused various related technical, financial, occupational health and safety, and legal issues to become apparent.

40. Neither the general rules of the UN system nor the specific regulations of each organization or agency covering remote work covered all the situations that had arisen during the global health crisis, so an adequate legal framework needed to be established to cover those situations in a consistent manner during and beyond the pandemic.

Recommendation

41. The SC recommended that the FICSA ExCom should consistently advocate overall administrative guidelines on arrangements for remote working, to cover issues relating to, for example, occupational health and safety, teleworking away from the duty station, changes in the terms and conditions of the employment contract, reimbursement of staff expenditures, insurance and post adjustment.

Other business

42. The Ad-hoc Committee on Administrative and Budgetary Questions sought SC's comments on proposals to update FICSA's Financial Rules ([FICSA Statutes](#), pp. 21–22) regarding the establishment of new funds as per 73rd FICSA Council decisions FICSA/C/73/D/33 (Training funds) and FICSA/C73/D/34 (Reserve funds), and regarding the use of rebates/discounts as per 73rd FICSA Council decision FICSA/C/73/D/35.

43. In commenting on the proposed amendments, SC rejected the deletion of Article 10 regarding emergency funds. The Ad-hoc Committee on Administrative and

Budgetary Questions considered and later approved those comments during its Council sessions. That was reflected in its Conference Room Paper ([FICSA/C/74/A&B/CRP.2](#)).

Nomination of SC officers and core group members

44. The following delegates were nominated as SC officers:

- Gemma Vestal (WHO/HQ) as Chair
- Andres Orias-Bleichner (WMO) as first Vice-Chair
- Jakob Skoet (AP-in-FAO) as second Vice-Chair
- Charles Forrest (IFAD) as third Vice-Chair.

45. The following participants in the SC were nominated as members of the core group:

- Susan Murray (FAO/WFP-UGSS)
- Viera Seben (ICAO)
- Birahim Fall (UPU)
- Christine Tretter (WHO/HQ).

Appendix 1. Participants

Chair/Coordinator	Andres Orias-Bleichner (WMO)
Vice-Chair/Vice-Coordinator	Gemma Vestal (WHO/HQ)
Rapporteur	Shaina Erika Seki (FICSA Intern)
FICSA President	Tanya Quinn-Maguire (UNAIDS)
FICSA General Secretary	Evelyn Kortum (WHO/HQ)
FICSA ExCom Member	Véronique Allain (SCBD)
Staff associations/unions	
AP-in-FAO	Line Kaspersen, Jakob Skoet, Ny You
FAO/WFP-UGSS	Paola Franceschelli, Dina Franchi, Silvia Mariangeloni, Susan Murray
IAEA	Lydia Baden
ICAO	Sanya Dehinde, Andrew Brown, Viera Seben
IFAD	Charles Forrest
IMO	Nowsheen Bhatti, Juan Lyu
OSCE	Nizar Zaher
SCBD	Lisa Pedicelli
UNAIDS	Mar Angelo Mendoza
UNFCCC	Mary Jean Abrazado, Ambretta Perrino, Tracy Tollmann
UNIDO	Osadolor Akpata, Steve Eales
UNGSC	Cosimo Melpignano
UPU	Birahim Fall
WHO/AFRO	Hamidou Bague
WHO/EURO	Antonella Biasiotto
WHO/HQ	Christine Tretter
WHO/SEARO	Ritesh Singh
WHO/WPRO	Huajing Liang
WMO	Jalil Housni
Members with associate status	
CTBTO	Michelle Delinde
IOM	Deborah Fanin

ITER

Sophie Miras

OPCW

Alberto Fernandez

Associations with consultative status

EMBL

Maria Cerezo

UNFCU

Elizabeth Philippe