

## **ICCA PROPOSALS ON THE REVISION OF THE ICSID RULES<sup>1</sup>**

### **INTRODUCTION**

In drafting its proposals below, ICCA has been mindful that any amendments to the ICSID Rules should take into equal consideration the interests and rights of both investors and States in order to ensure that all parties to ICSID proceedings maintain confidence in the process.

Accordingly, in ICCA's view, one of the paramount objectives for the new rules should be to achieve the correct balance between the different concerns that all users of the ICSID system have expressed.

### **SECTION I: SUGGESTIONS FOR POTENTIAL ICSID RULES AMENDMENTS**

#### **1. Review Procedure for Appointment and Disqualification of Arbitrators, Explore Feasibility of Code of Conduct for Arbitrators**

- ICCA proposes the development by ICSID of a guideline for States as to the qualities required of individuals who are designated to the Panel of Conciliators and Panel of Arbitrators, building on those requirements set out in Article 14(1) of the Convention. The guideline could be published on ICSID's website and sent directly to all ICSID Contracting Parties.
- ICCA suggests that ICSID consider preparing a paper reviewing ICSID practice on dealing with disqualification proposals and provide guidelines based on this practice.
- In order to expedite tribunal appointment in the absence of prior party agreement, ICCA suggests that ICSID Arbitration Rules 2 and 3 be revised as follows:
  - Within 20 days of the registration of a Request for Arbitration, the parties shall seek to reach agreement on the process for appointing the tribunal.
  - If no such agreement is reached in that time, the claimant(s) will then have 20 days to appoint an arbitrator.
  - Following that appointment, the respondent will have 20 days to make its appointment.
  - Following that appointment, the parties have an additional 30 days to agree on a President.
  - If the Parties cannot agree on a President, then, in accordance with Article 38 of the Convention, the Chairman of the Administrative Council will appoint the President.
- In order to discourage frivolous challenges to tribunal members, ICCA proposes that:

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<sup>1</sup> This proposal is presented to ICSID on behalf of ICCA by a Sub-Committee comprised of Loretta Malintoppi, Stanimir Alexandrov and Eduardo Zuleta (as co-chairs), and Mélida Hodgson, Janet Whittaker, Patrick Childress and Naomi Briercliffe.

- the automatic suspension of proceedings upon a challenge application being made in Arbitration Rule 9(6) is deleted. Instead, whether or not suspension is warranted could be decided on by the remaining tribunal members within 15 business days of the challenge being submitted, or any other reasonable period determined by the tribunal that allows the parties to be heard; and
- a new Arbitration Rule is inserted confirming that the truncated tribunal may make an adverse costs award against a party if, in the view of the tribunal, the challenge was frivolous.

## 2. **Clarify Rules on Preliminary Objections and Bifurcation**

- ICCA suggests that the preliminary objection procedure under Arbitration Rule 41(1) to (4) be clarified to remove uncertainty regarding the appropriate timing of preliminary objections and the legal standard that applies to requests for bifurcation. Specifically, ICCA proposes that:
  - in line with existing practice in a number of cases, respondents be required to file standalone jurisdictional objections within 30 days of the claimant filing its Memorial. If respondents wait to file jurisdictional objections until the Counter-Memorial is due, then they must lodge those objections as part of a broader Counter-Memorial addressing both jurisdiction and the merits; and
  - guidance is provided in Arbitration Rule 41 as to when a presumption should/should not exist in respect of bifurcation when a jurisdictional objection is raised.
- ICCA proposes that a review of the practice of tribunals with regard to Arbitration Rule 41(5) is undertaken to assess whether this provision is working effectively and what, if anything, needs to be expanded/refined in light of that review.

## 3. **Explore Possible Provisions on Consolidation of Proceedings and Parallel Proceedings**

- Unlike other arbitral rules, the ICSID Arbitration Rules currently do not address consolidation. ICCA suggests that the revised Arbitration Rules include provisions addressing when consolidation is an appropriate measure, as well as issues such as procedural rights and confidentiality when consolidation takes place.
- In particular, ICCA proposes that the revised Arbitration Rules contain provisions:
  - mandating that tribunals “shall” consolidate multiple proceedings if all parties agree; and
  - empowering tribunals to force consolidation of cases if certain criteria are met.
- The more detailed content of the new Arbitration Rules on consolidation should be developed based on provisions in other arbitral rules and the practice of investment tribunals.

4. **Modernize Institution Rules, Means of Communications and Filing of Briefs and Supporting Documentation, and General Functions of the Secretariat**

- ICCA recognises that the ICSID Secretariat will be best placed to comment on revisions that are required to the Arbitration and Institution Rules in order to address this issue. The following proposals are, however, made:
  - in order to increase efficiency and avoid paper wastage, ICCA would support any amendments to the Arbitration and Institution Rules that result in the filing of all documents electronically only. Parties already often submit all submissions and supporting materials by email and by uploading them to the ICSID Box, OneDrive or another platform. If this were to become the only required method of submission, paper copies and USBs could be avoided entirely.
  - Alternatively, at a minimum:
    - ICCA proposes that each tribunal be required to agree on a common format for paper submissions. Arbitrators should not be able to “custom order” printed submissions according to their individual preferences.

5. **Modernize and Simplify Rules concerning the First Session, Procedural Consultation and Pre-Hearing Conference**

- In order to expedite proceedings, ICCA proposes that Arbitration Rule 13 be amended to provide that first sessions are to be held by telephone conference, unless one of the parties makes a request for an in-person meeting and the tribunal considers that request to be justified.
- ICCA suggests that the revised Arbitration Rules provide that the tribunal shall issue the first procedural order in the case, setting out details of the arbitral procedure, within 90 days of the tribunal’s constitution.

6. **Modernize Rules on Witnesses and Experts and Other Evidence**

- ICCA proposes that Arbitration Rule 33 regarding “*Marshalling of Evidence*” be deleted on the basis that that this provision is not followed in practice.
- ICCA suggests Arbitration Rule 35 be expanded to indicate that witness and expert conferencing may be ordered by tribunals in appropriate circumstances. ICSID could issue guidance to tribunals and parties, perhaps in the form of a practice direction supplemental to the Arbitration Rules, on how conferencing is to be carried out and in which circumstances it is appropriate.
- Arbitration Rule 34(1) currently provides that “[t]he Tribunal shall be the judge of admissibility of any evidence adduced and of its probative value.” In order to ensure greater consistency in tribunal practice, ICCA suggests that this Rule be amended to include guidelines/indications pertaining to the admissibility of evidence (for example, limited use of hearsay). Such guidelines could potentially be based on/make reference to the IBA Rules on the Taking of Evidence in International Arbitration.

- ICCA proposes that the ICSID Secretariat provides guidance (in a practice direction or a model procedural order) on how evidence should be produced, i.e. how exhibits should be numbered, whether or not publicly available legal authorities should be annexed, how to deal with electronic documents, meta data, etc. This will encourage greater consistency in the treatment of evidence across ICSID cases and will lead to greater efficiency in the arbitral process.
- The ICCA Sub-Committee also considered the possibility of amending the Arbitration Rules to provide that tribunals may, if they were to consider it appropriate, issue orders/directions regarding the structure and content of expert evidence, or the expert evidence process in general. This proposal was, however, ultimately dropped on the basis of concerns about restricting the ability of parties freely to choose how to present their case. It was noted that tribunals may, however, give directions to parties on the presentation of expert evidence in the tribunal's first session or at the pre-hearing conference.

7. **Explore Possible Provisions for Suspension of Proceedings and Clarify Rules on Discontinuance when Parties Fail to Act**

- ICCA proposes that Arbitration Rule 44 be amended to provide guidance on the time limit that should be set for a party to file an objection to a discontinuance request filed prior to the constitution of the tribunal.
- In order to encourage procedural efficiency, ICCA suggests that the time frame provided in Arbitration Rule 45 be reduced to 3 months.
- ICCA proposes that the revised Arbitration Rules 44 and 45 clarify that tribunals/the Secretary-General (as appropriate) have the power to allocate and award costs as they see fit in the event of the discontinuance of proceedings.

8. **Reflect Best Practices for Preparation of Award, Separate and Dissenting Opinions**

- ICCA suggests that ICSID considers developing best practice guidelines on the preparation of awards.
- ICCA suggests that the revised Arbitration Rules:
  - permit tribunals to sign awards in counterparts and/or using electronic signatures; and
  - provide that all awards will be deemed to have been signed "*at the place where the proceedings are held*", regardless of the actual location of the arbitrators when they sign the award.
- ICCA proposes that Arbitration Rule 47 be amended to clarify that tribunals must "address" every question submitted by the parties, but need not reach a "decision" on questions that will not be determinative of the tribunal's award. This would allow tribunals the discretion to skip aspects of the legal analysis if, for reasons of judicial

economy, they believe that is the most appropriate approach (provided that sufficient reasons are provided to satisfy the requirements of Article 48(3) of the ICSID Convention).

9. **Explore Presumption in Favor of Allocating Costs to the Prevailing Party, Possible Provisions on Security for Costs and Security for Stay of Enforcement of Awards**

- ICCA supports the inclusion in the revised Arbitration Rules of a rebuttable presumption that costs are allocated in favor of the prevailing party on specific claims, but would encourage the inclusion of examples of circumstances in which applying the “loser pays” principle may not be appropriate. Tribunals should retain discretion to award costs as they deem appropriate if a party prevails on some, but not all, claims.
- ICCA proposes that the new Arbitration Rules envisage the ability of tribunals to order the payment of costs before the award for situations such as frivolous submissions and rejection for irrelevance or immateriality of a significant number of document requests.
- ICCA supports the inclusion in the revised Arbitration Rules of a requirement for a party who applies for the annulment of an ICSID award to provide security for payment of that award if it wishes to benefit from a stay of enforcement (Arbitration Rule 54).

10. **Review Provisions on Provisional Measures**

- ICCA proposes that Arbitration Rule 39 be amended to:
  - include guidance as to the circumstances in which provisional measures may be issued. In developing such guidance, ICCA recommends that the approach of other arbitral rules (such as the UNCITRAL Rules) on provisional measures and the current practice of tribunals is considered; and
  - specify explicitly that security for costs may be ordered as a provisional measure.
- In addition, ICCA suggests that the following be considered:
  - the feasibility of simplifying/abbreviating the provisional measure application process;
  - whether a presumption should be adopted that costs relating to the application are awarded in the decision regarding provisional measures; and
  - the development of a procedure for appointing emergency arbitrators along the lines of the system that the Stockholm Chamber of Commerce has adopted.

11. **Clarify and Streamline Procedure in Annulment Proceedings**

- In order to expedite annulment proceedings, ICCA suggests that the revised Arbitration Rules include a presumption that there will be no post-hearing submissions in annulment proceedings.

- The ICCA Sub-Committee considered a suggestion that ICSID considers whether Arbitration Rule 52(1) should be revised to impose restrictions on who may be appointed as *ad hoc* committee members. Members of the Sub-Committee were, in particular, concerned that an individual should not be appointed to an *ad hoc* annulment committee if that individual has any interest in the outcome of the annulment proceedings. A view was expressed, however, that the requirements for appointments to an annulment committee should not differ from those for appointments to a tribunal.

12. **Explore Possible Provisions on Transparency, Clarify Rules on Non-Disputing Party Participation**

- ICCA would support the alignment of the transparency provisions in the ICSID Rules more closely with more recently-adopted rules (e.g. UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration).
- ICCA would encourage the inclusion in the Arbitration Rules of a provision stating that, unless otherwise agreed by the parties (including in the relevant arbitration agreement), all submissions and decisions (pleadings, witness statements, expert reports, amicus briefs, and decisions from the tribunal) will be public, except for redactions that a party affirmatively requests on grounds of confidentiality.
- ICCA proposes that the Arbitration Rules provide that, unless otherwise agreed by the parties (including in the relevant arbitration agreement), and subject to confidentiality issues being appropriately addressed, all hearings are to be open to the public and, provided the costs involved are not significant, broadcast publicly via webcast.
- ICCA proposes the revision of Arbitration Rule 48(4) to mandate the publication of legal excerpts of the legal reasoning of the tribunal within 60 days (rather than “promptly”).

13. **Improve Time and Cost Efficiency and Explore Feasibility of Guide for Efficient Conduct of Process**

- ICCA proposes that ICSID considers issuing guidelines for limiting submission length, volume of document production, and frivolous applications.
- ICCA notes that the 6-month time limit for preparing an award in Arbitration Rule 46 is not realistic and not generally observed. In order to encourage tribunals to be more expeditious in their issuing of awards, ICCA proposes as follows:
  - that Arbitration Rule 46 be revised to:
    - provide that tribunals must issue awards as soon as possible after the final hearing (or the submission of final post-hearing briefs); and
    - require tribunals to provide the parties with an update on the status of the preparation of an award six months after the final hearing (or the submission of final post-hearing briefs), and then again every three months thereafter until the award is issued; and

- that Arbitration Rule 38(1) be modified so that tribunals must declare the proceedings closed within 20 or 30 days from the end of the hearing, or the last exchange of post-hearing briefs.
- The ICCA Sub-Committee considered a proposal that a one-year deadline be imposed for the issue of awards, but no agreement on this was reached. The concern from those against the proposal was that the inclusion of such a deadline may send the wrong message to tribunals, which should be encouraged to issue awards as soon as possible.
- ICCA suggests that Arbitration Rules 31 and 32 be updated to note that a further written phase (i.e. post-hearing submissions) may follow the oral phase of any proceedings. ICCA proposes, however, that the Arbitration Rules include a prohibition on more than one round of post-hearing submissions.
- ICCA notes that Arbitration Rule 23 regarding “Copies of Instruments” is out of date. If all filings are to be electronic (in line with ICCA’s proposal above), this Rule will become superfluous. If not, ICCA proposes that parties should be required to provide only one hard copy of documents per tribunal member. ICSID may be provided with a copy on request.
- ICCA suggests the inclusion of an Arbitration Rule that provides that there will be no post-hearing submissions unless requested by a party, and in which case the tribunal shall decide on the merits of that request.
- The ICCA Sub-Committee considered a proposal that the Arbitration Rules should be amended to provide that submissions on costs should include costs figures only (i.e. there will be no substantive argument on how the tribunal should apportion costs). No agreement was, however, reached on this suggestion. The concern from those who did not agree with the proposal was that parties should be entitled to make submissions on how costs should be apportioned, in particular if the Arbitration Rules are amended to include a presumption that costs will follow the event (as proposed above).

#### 14. **Explore Possible Provisions on Third Party Funding**

- ICCA proposes that issues such as transparency (in particular imposing disclosure of third party funding arrangements), conflicts of interest, and security for costs be addressed in new provisions in the revised Arbitration Rules.

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**SECTION II: SUGGESTIONS FOR CHANGES TO ICSID ADDITIONAL FACILITY RULES AND SUGGESTIONS FOR NEW ICSID-AFFILIATED RULES**

1. Potential changes to ICSID Additional Facility Rules
  - a. The suggestions for ICSID Rule amendments are also suggested *mutatis mutandis* for the ICSID Additional Facility Rules.
2. ICCA proposes the following new ICSID-affiliated rules could be developed for cases to be administered by the ICSID Secretariat:
  - a. Rules for contractual disputes between private parties;
  - b. Rules for disputes between State-owned entities and private parties; and
  - c. Rules for disputes between private parties and States, which do not involve an investment.