

ICSID Rules Amendments

Proposals from Freshfields Bruckhaus Deringer LLP (International Arbitration Group)

The following proposals are made in response to the communication from the ICSID Secretariat, dated 25 January 2017, to contribute suggestions for amendments to the ICSID rules.

Appointment of arbitrators (Arbitration Rules 1-4, Institution Rules 2 and 3)

To allow for a speedier constitution of arbitral tribunals, consider:

- Requiring claimant, in the Request for Arbitration, to (i) nominate arbitrators and (ii) propose a method for constituting the Tribunal if no previous agreement exists; and
- Shortening the time-limits and simplifying the procedure applicable under Rule 2 (agreement by the parties on the method of appointment).

Disqualification of arbitrators (Arbitration Rule 9)

To improve efficiency and fairness in the conduct of proceedings, consider:

- Abolishing the mandatory suspension of proceedings following an arbitrator challenge, to discourage parties from filing strategic challenges in order to delay proceedings (for instance, the SIAC Investment Arbitration Rules provide that the SIAC Registrar *may* order a suspension of the proceedings until a challenge is resolved; see Rule 12.4). In those circumstances, the impact on Arbitration Rule 8 concerning the Incapacity and Resignation of the Arbitrators should also be considered; and
- Setting a strict time-limit for challenging the arbitrator(s) and deciding on a challenge, *eg*, 30 days.

Copies of instruments (Arbitration Rule 23)

- Consider simplifying Arbitration Rule 23 (requiring filing of hard copies of materials) by providing for the electronic filing of documents as a default, unless otherwise agreed by the tribunal and the parties.

Counter-claims (Arbitration Rule 31)

- Consider amending Arbitration Rule 31 (Written Procedure) to reflect the possibility of counterclaims, which may require additional briefing.

Provisional measures (Arbitration Rule 39)

To improve legal certainty, consider:

- Explaining the categories of provisional measures that may be ordered (*eg*, through a non-exhaustive list as in Article 26.2 of the UNCITRAL Arbitration Rules);
- Setting a standard for the award of provisional measures (see, *eg*, Article 26.3 of the UNCITRAL Arbitration Rules);
- Clarifying the availability of orders for security for costs and the criteria for making such orders (see, *eg*, LCIA Arbitration Rule 25.2);
- Amending Arbitration Rule 39 to provide content to the term “recommend” provisional measures, *ie*, by specifying the consequences of any default (*eg*, the possibility of drawing appropriate inferences and taking any actions the Tribunal deems appropriate);
- Including provisions for the appointment of an emergency arbitrator (in light of concerns regarding compressed timelines in investor-State arbitrations and the interaction of emergency relief with cooling-off periods, an opt-in framework may be preferable – see, *eg*, Rule 27.4 and Schedule 1 of the SIAC Investment Arbitration Rules; see also ICC Arbitration Rule 29(5) and LCIA Arbitration Rules Article 9.B, para 9.14).

Preliminary objections (Arbitration Rule 41(5))

To improve the efficiency of proceedings in general and the usefulness of the preliminary objections procedure under Rule 41(5), consider:

- Setting a time limit for the decision on the preliminary objections (see, *eg*, Rule 26 of the SIAC Investment Arbitration Rules); and
- Extending the preliminary objections procedure to defences which are manifestly without legal merit (see, *eg*, Rule 26 of the SIAC Investment Arbitration Rules).

Time limit for the rendering of the Award (Arbitration Rules 38 and 46)

To improve the efficiency of proceedings, consider:

- Making Rules 38 and 46 into a meaningful time limit for the rendering of the Award (with extensions to be granted by the ICSID Secretariat on good grounds), *eg*, by linking the close of proceedings to the submission of the last post-hearing briefs, rather than leaving the step entirely to the discretion of the Tribunal; and
- Imposing an absolute time limit for rendering the Award beyond which any delay would result in the withholding of a percentage of arbitrators’ fees (see ICC policy on efficiency of proceedings launched in early 2016).

Annulment proceedings

To improve the efficiency of annulment proceedings, consider providing expressly for the possibility of a summary procedure (as in Article Rule 41(5)) on the ground that a request for annulment is manifestly without legal merit.

Consolidation of proceedings

To improve the efficiency of proceedings, consider allowing consolidation of closely-related cases or claims, based on specified criteria (see, *eg*, NAFTA Art. 1126(2), ICC Article 10).

Requirement of Efficient Administration

Inclusion in the Arbitration Rules of a general provision requiring the Tribunal to conduct the proceedings in a fair and efficient manner (see, *eg*, UNCITRAL Rules, Article 17(1)). This could be added as a new provision preceding current Arbitration Rule 13, at the start of Chapter II of the Arbitration Rules (“Working of the Tribunal”).

Payment of Arbitrators

The ICSID Administrative and Financial Regulations do not provide for a pre-determined payment schedule for the payment of arbitrators. In practice, arbitrators are paid on an ongoing basis with the advances of the parties covering 3 to 6 month periods.

Providing for the payment either after specific milestones are reached, or for 50 percent of fees during the proceedings, and 50 percent upon issuance of the award, could encourage a more efficient administration of the case.

Additional Facility Rules

Article 4(2) Additional Facility Rules

This article provides that in the event of an application for approval of access to the AF under Article 2(a) (*ie.* conciliation/arbitration proceedings which are not within the jurisdiction of [ICSID] because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State), the Secretary-General shall give her approval only if “(a) [she] is satisfied that the requirements of that provision are fulfilled at the time”, and (b) the parties consent to the jurisdiction of [ICSID] in the event the jurisdictional requirements under Article 2(a) shall have been met when proceedings are instituted.

The reference to “at the time” in the English version of Article 4(2)(a) creates ambiguity with respect to the moment when the assessment by the Secretary-General of the *ratione personae* requirements of Article 2(a) must take place – *ie.* on the date of filing of the application for approval of access, or on the date the Secretary-General effectively approves access to the Additional Facility. This issue became relevant in the context of Venezuela’s withdrawal from the ICSID Convention in 2012, when at least one request for approval of access to the Additional Facility (together with a Request for Arbitration against Venezuela), was submitted to ICSID *before* the

denunciation took effect, but was approved (and the underlying case registered) by the Secretary-General *after* denunciation took effect. As it was later confirmed by the Tribunal in the case in question (*Rusoro v Venezuela*, Award, paras. 241-268), the reference to “at the time” in Article 4(2)(a) must be understood as referring to the date when approval of access is requested. It is therefore suggested that the wording in Article 4(2)(a) be amended to read “(a) he is satisfied that the requirements of that provision are fulfilled at the time **the application is made**”. This amendment will also bring the English version of Article 4(2)(a) in line with its French and Spanish versions.