

ICSID Rules Proposed Amendments

Comments from Freshfields Bruckhaus Deringer LLP (International Arbitration Group)

The following comments are made in response to the comprehensive proposals for rule amendments published by the ICSID Secretariat on August 3, 2018, to contribute suggestions for amendments to the ICSID rules. The comments are applicable to the ICSID Convention Arbitration Rules (“AR”), and the Additional Facility Arbitration Rules (“AF(AR)”), respectively.

Constitution of Tribunal (Proposed AR 22(2) / Proposed AF(AR) 33(2))

In order to increase efficiency and to accelerate the constitution of tribunals, consider:

- Reducing the time limit for the parties to advise the Secretary-General of an agreement on the number of arbitrators and the method of their appointment to 30 days after the date of registration (instead of 60 days). Considering that the registration of a request for arbitration takes approximately 21 days on average, the parties would have approximately seven weeks from the date on which a request for arbitration is filed to consider whether the number of arbitrators or the method of their appointment should be different from the default number and method set out in Article 37(2)(b) of the Convention. This is a sufficient period, particularly considering that, in our experience, the default number of arbitrators and appointment method applies in the vast majority of cases.

Constitution of Tribunal (Proposed AF(AR) 35(1))

In order to increase efficiency and taking into account the above proposal, consider:

- Allowing parties to request that the Secretary-General appoint the arbitrator(s) that have not yet been appointed 60 days after the date of registration (instead of 90 days), as this is a sufficient period for the parties to appoint their respective arbitrators following the filing of a request for arbitration.

Security for Costs (Proposed AR 51(4) / Proposed AF(AR) 60(4))

In order to ensure fairness in the conduct of proceedings, consider:

- Increasing the number of days before a Tribunal may order the discontinuance of an arbitral proceeding for failure to provide security for costs to 180 days (instead of 90 days). In circumstances where a claimant is under financial distress as a result of State measures that are the object of an arbitration claim, and where the claim itself is the only collateral that can be provided as a guarantee for security, it may take financial institutions more than 90 days in order to assess a claim and process a request for security.

Payment of Arbitrators (Proposed Administrative and Financial Regulation 14(4))

In order to provide incentives for the timely issuance of decisions and awards, consider:

- Amending the Administrative and Financial Regulations to enable the Centre to withhold a portion of the fees of arbitrators, committee members and their assistants until the rendering of a final award or decision (or any other substantive interim decision) in the context of a proceeding. This proposal does not necessarily require an amendment to the Administrative and Financial Regulations, as these Regulations do not require the payment of fees within a specified period. However, a Regulation (or alternatively a practice of the ICSID Secretariat) enabling the Centre, in its discretion, to withhold the payment of a significant portion of the fees of decision-makers and their assistants until such time as an award or decision is rendered, may provide an incentive for the timely completion of arbitral proceedings. Indeed, other arbitral institutions have linked the payment of arbitrator fees to the achievement of certain milestones in the arbitration, which has coincided with a measurable reduction in the length of those institutions' proceedings.

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