

## MEMORANDUM

To: Meg Kinnear, Esq.  
Secretary-General  
ICSID

From: Dentons

Date: 21 December 2018

Subject: Dentons' Comments on the 2018 Proposed Amendments to the ICSID Rules

### GENERAL COMMENT

We commend the Secretariat for the extraordinary effort and thoughtfulness that went into this proposed revision of the rules. We enthusiastically support the revision. The small comments that follow suggest ways in which an excellent work product by the Secretariat might be further improved. That we identify small areas of potential further improvement should in no way be viewed as detracting from our admiration for the revisions prepared by the Secretariat.

### GENDER NEUTRALITY

As a general observation, "Chairperson" should replace "Chairman" throughout the English version of the proposed amendments. This suggestion follows the commendable efforts to make the ICSID Rules gender-neutral, aligns the English version with the French and Spanish versions, and can hardly be seen as inconsistent with the Convention's use of the term "Chairman" to mean the same thing.

### ADMINISTRATIVE AND FINANCIAL REGULATIONS (A&FR)

#### **A&FR 9.2 Acting Secretary-General**

We suggest introducing the following changes:

"The Secretary-General shall designate the member of the staff of the Centre who shall act as Secretary General during the absence or inability to act of both the Secretary-General and the Deputy Secretaries-General. If there should be a simultaneous vacancy in the offices of Secretary-General and Deputy Secretary-General, the Chairperson shall designate the member of the staff who shall act as Secretary-General."

The first suggestion is stylistic. The second suggestion reflects the general observation concerning the word “Chairman.” The third suggestion arises from the fact that a member of staff cannot act “for” the Secretary-General where there is a vacancy in the office of the Secretary-General. It aligns the English version with the French and Spanish versions.

### **A&FR 14.5(a) Costs of Proceedings**

The idea that the claimant(s) pay part of the first advance early in order to cover the estimated costs of the proceeding through the first session is welcome. However, the Secretary-General should be careful not to set this amount too high. One of the advantages ICSID has over other rules is the lesser impact on cashflow compared to upfront payment systems like that of the ICC or SCC. The higher the initial payments required by the claimant(s), the lesser this advantage.

### **A&FR 24 Communications with Contracting States**

It would be helpful to make it clearer to States that they can also ask for requests for institution of proceedings to be sent to the State organ that handles the dispute. This would avoid some of the gamesmanship involved in relying on the claimant to specify the right agency to which requests for arbitration should be sent.

For example, the regulation could be supplemented with a provision that: “A Contracting State may specify that all requests for arbitration or conciliation be communicated to an identified organ responsible for acting for the State in such proceedings.”

## **INSTITUTION RULES (IR)**

### **IR 2.2(a) Contents of the Request**

The text “[...] a statement of the relevant facts, claims, and request for relief [...]” does not accord with the preliminary nature of the request for arbitration, which is not a definitive statement of claim in any international arbitration system (unless the claimant elects to treat it as such or it falls under expedited rules). Consider replacing the word “statement” with the word “**summary**.” Consider, also, whether to include an exception for cases in which the claimant intends to have the Request for arbitration serve as the memorial.

(See Art. 3.1(f) SIAC Investment Arbitration Rules.)

## **ARBITRATION RULES (AR)**

As a general observation, it is presently unclear what provisions of the Arbitration Rules are mandatory and which can be the subject of derogation by agreement of the parties. AR 12.3 (Orders, Decisions and Agreements) seems to allow any derogation by agreement consistent with the Convention and the Arbitration and Financial Regulations – but then some individual rules mention that parties may agree otherwise, which gives rise to ambiguity.

#### AR 5.4 Procedural Languages, Translation and Interpretation

In the penultimate sentence, we suggest adding “**or the other party may provide**” between “the Tribunal may require” and “a fuller or a complete translation.” Many times incompleteness in translations become apparent only later in the proceeding; no due process issues would arise from presenting a more complete translation of a document already of record.

#### AR 6.1 Correction of Errors and Deficiencies

The final part of the sentence should read “with **the** agreement of the other party or with leave of the Tribunal.”

If this suggestion is accepted, conforming changes should be made throughout the English version.

#### AR 8.3 Time Limits Specified by the Convention and these Rules or Fixed by the Secretary-General

We suggest that the wording below be added as an obligation, rather than as an option in a draft procedural order, to reflect the importance of expedition in proceedings, and the accountability of arbitrators.

[...] If special circumstances arise which prevent the Tribunal from complying with a time limit, it shall advise the parties of the reason for delay and the date when it anticipates the order, decision or Award will be delivered. **In such circumstances, and until such time as the order, decision or Award is delivered, the Tribunal shall provide the parties with status updates every month following the expiry of the original time limit.**”

If this proposal is adopted, it would also be desirable for the Secretariat to publish the Tribunal’s status updates in the details section of the Pending Case file on the ICSID website. This practice would encourage arbitrators to deliver the order, decision or Award within the prescribed time limit.

#### AR 12.2 Orders, Decisions and Agreements

Another small linguistic suggestion is to replace the word “taken” with the word “**made**,” as the latter would fit more naturally with both “orders” and “decisions.”

If this suggestion is accepted, conforming changes will have to be made throughout the document – see, for example, revised CR 24.3 (Orders, Decisions and Procedural Agreements) and (AF)AR 21.2 (Orders, Decisions and Agreements).

#### AR 13 Written Submissions and Observations

ICSID is one of the few arbitral institutions that do not require the respondent to file an Answer. While we are cognizant that the ICSID procedure is based on that of the International Court of Justice, this peculiarity means that the claimant may have filed two substantive submissions (the Request for arbitration and the memorial) before it is informed of the respondent’s defenses. Requiring the respondent to file an Answer would promote a level playing field because both parties would have to disclose their claims and defenses

early in the process. Furthermore, in its Answer, the respondent would be required to indicate if it has any counterclaims. This would, in turn, give the parties and the Tribunal a better sense of the appropriate parameters of the schedule and the sequence of submissions.

(See Art. 5(1) ICC Rules; Art. 4.1 SIAC Investment Arbitration Rules.)

As an alternative to a rule requiring that an Answer be filed, a timeline could be built into the Rules for the respondent to file an Answer, if it wishes to do so.

### **AR 15.3 Hearings**

This proposed amendment does not seem fully to square with Article 63(b) of the Convention, which requires the consent of the Commission or Tribunal to conciliation and arbitration proceedings being held outside an appropriate institution – even where the parties agree.

If the idea is to address hearings being held outside the place of proceedings, then the default in absence of agreement should be the place of proceedings rather than the seat of the Centre.

### **AR 16.4 Deliberations**

The proposed amendment currently provides that the Tribunal shall deliberate on any matter for decision immediately after the last written or oral submission on that matter. While we agree with this provision, we also believe that it would be helpful expressly to state that it does not prevent the Tribunal from discussing the case at an earlier stage.

For example, the Tribunal may wish to convene a “Reed retreat” in advance of the hearing or during hearing breaks, in order to brainstorm about open issues and identify questions for counsel and witnesses.

### **AR 26 Acceptance of Appointment**

The proposed amendment currently requires prospective arbitrators to provide disclosure, if any, at the time of their acceptance of the appointment. We believe it would be advantageous to require that disclosure be provided in advance of the arbitrator’s acceptance of the appointment and, where a disclosure is made, that it be sent to the parties for comments. This approach would enable the parties to make a better-informed decision on a candidate and, as a result, would reduce arbitrator challenges.

If this proposal is accepted, a conforming change should be made to AR 65 (Annulment: Appointment of ad hoc Committee).

(See ICC Rules, Art. 11(2); Art. 10.4 SIAC Investment Arbitration Rules; Art. 18(2) SCC Rules.)

## **AR 28.2 Constitution of the Tribunal**

Obtaining reliable information about the persons with a financial interest in the arbitration is a challenge for prospective arbitrators. While the Secretariat prepares helpful summaries about the dispute and the interests involved, it does so on the basis of the limited information available to it. The Request for arbitration, which serves as the key source of relevant information for these summaries, often lacks important details that should ordinarily be part of any diligent conflicts check – such as the identity of the ultimate parent company, the ultimate beneficial owner, and other persons with a financial interest in the arbitration. At present, Requests for arbitration may present the information in a manner that disguises, whether intentionally or inadvertently, the relevance of a particular interest.

Accordingly, we believe that it would be useful (a) for the Request for arbitration to be provided to candidates so that they can assess potential conflicts of interest based on a first-hand review of the relevant documents, and (b) for the parties themselves to identify any persons with a financial interest in the case, and to explain their involvement. In other words, the rationale that applies to the disclosure of third party funding should be extended to this context.

## **AR 33.2 & 32.4 Vacancy on the Tribunal**

### **AR 33.2**

We consider that the automatic suspension of proceedings upon a vacancy should be revisited. Vacancies often occur at times in the proceedings when no action by the Tribunal is required. In such cases, there is no good reason why the workflow of an arbitration should be interrupted due to, for example, an arbitrator's decision to resign. Workable solutions can be devised to allow the proceeding to continue. For example, if a party requires an adjustment to the schedule because of the need to identify a replacement arbitrator, such adjustment is not likely to be substantial, and the remaining two members of the Tribunal should be in a position to grant it.

(Art.21(2) SCC Rules.)

If this comment is accepted, conforming changes will also be required to AR 54.5 (Suspension), AR 55.3 (Settlement and Discontinuance), AR 56.2 (Discontinuance at Request of a Party) and AR 57.4 (Discontinuance for Failure of Parties to Act).

### **AR 33.4**

Consider aligning the Spanish “solicitar” with the English word “require” and the French word “requérir.” The Spanish verb “solicitar” does not clearly reflect the right of an arbitrator to “require” the recommencement of any portion of a hearing.

Note, also, the incorrect numbering at subparagraphs (3) and (4) of the French version.

## **AR 34.4 First Session**

### **AR 34.4(b)**

We consider that this provision should be omitted. Most, if not all, other international arbitration rules provide for a quorum of two arbitrators (including the default rule in current

ICSID Arbitration Rule 14(2) (Sittings of the Tribunal)), which allows the proceeding to move forward with a truncated Tribunal. Requiring the parties to discuss the quorum at the first session incentivizes poorly represented parties to agree to a rule on quorum that can result in unnecessary delay in the proceedings. If the parties want to agree to a different rule, they should be free to do so, but there is no reason to encourage them to do so.

(See Art. 41(1) SCC Rules; Art.30.7 SIAC Investment Arbitration Rules.)

#### **AR 34.4(f)**

Consider adding a discussion of page or word limits for submissions. We have seen an escalation in recent years of the length of submissions that materially add to the work of Tribunals and parties, and thus dramatically increase the cost of arbitration. If arbitration is to remain (or, depending on one's view of the current state of affairs, become) a cost-effective dispute resolution mechanism, it is incumbent on the arbitrators and the parties to create an environment where this goal would be attainable.

#### **AR 40.1 Tribunal Order to Produce Documents or Other Evidence**

Consider adding the word "other" in the second sentence so that it reads, in relevant part, as follows: "[...] the relevance of the documents and other evidence requested, the time [...]"

#### **AR 44.3(c) Publication of Awards and Decisions on Annulment**

Consider whether the procedure governing the publication of excerpts, where the parties provide substantive comments, should be clarified. Specifically, will ICSID adopt all comments made by the parties? What happens if the parties give conflicting comments? A clear process for the resolution of similar issues is set out in AR 45(2) (Publication of Orders and Decisions). We suggest that an analogous protocol be adopted for resolving issues relating to the publication of excerpts.

#### **AR 49 Participation of Non-disputing Treaty Party**

The proposed rule imposes an obligation on the Tribunal to allow an interested non-disputing Treaty Party to make a submission. We believe the Tribunal should be able to impose on non-disputing Treaty Parties the same conditions available to it under AR 48.4 (Submission of Non-disputing Parties) with respect to other non-disputing parties. This would protect the integrity of the process. ICSID experience is that non-disputing Treaty Parties can abuse the right to make such submissions by disregarding deadlines set by the Tribunal, filing the submissions at a disruptive time in the proceedings, or making excessively long submissions that impose a burden on the Tribunal and the parties. While the value of such submissions may be higher than that of other non-disputing party submissions, it is not higher than that of party submissions. The ICSID rules should not remove from Tribunals their duty and right to control the process before them.

(See Arts. 29.5 and 29.9 SIAC Investment Arbitration Rules. Note that the SIAC Investment Arbitration Rules draw a distinction between written submissions of Non-disputing

Contracting Parties on a “question of treaty interpretation that is directly relevant to the dispute,” which the Tribunal must allow, and other written submissions, which are subject to the Tribunal’s control pursuant to Article 29.3 of the Rules. See Art. 29.1 SIAC Investment Arbitration Rules.)

### **AR 50 Provisional Measures**

Note the incorrect numbering in the Spanish version.

### **AR 63 The Application**

#### **AR 63.1 and 63.2**

Note the incorrect numbering in the French version.

#### **AR 63.8**

Consider removing the word “from” in the first sentence of paragraph (8): “An applicant may **withdraw its application** before it has been registered by filing a written notice of withdrawal with the Secretary General.”

The second sentence of paragraph (8) should read “[...] unless the application has not yet been transmitted to the other party pursuant to **paragraph (6)(a)**.”

### **AR 68.2(d) Resubmission of Dispute after an Annulment**

While we agree that typically the parties will wish to appoint the resubmission Tribunal using the same method as was used to appoint the original Tribunal, we believe they should also have the option of using a different method, if they so wish.

## **ADDITIONAL FACILITY RULES (AF Rules)**

In general terms, consider adding a provision that would allow for conversion of a Convention arbitration to an Additional Facility Rules arbitration (or potentially vice versa) if the requirements of consent for the Convention are not met (or for the Additional Facility Rules) but those of the Additional Facility Rules are (or the Convention). This is a real possibility, given that a number of treaties provide consent both to Convention arbitration as well as to Additional Facility Rules arbitration.

### **AF Rule 2.1(a) Additional Facility Proceedings**

The revised Additional Facility Rules continue to exclude cases involving dual nationals. However, there are no policy reasons for ICSID to exclude administering arbitrations involving dual nationals. Yes, the Convention draws that policy distinction, but there is no principled reason for it to be extended to the Additional Facility. In fact, many investment treaties explicitly cover dual nationals (and even permanent residents) and include references to other arbitration rules *only because ICSID Additional Facility does not cover dual nationals*. ICSID could reinforce its position as the preeminent set of rules for

investment treaty arbitration by allowing States that want to cover dual nationals an ICSID option.

It may also be useful to clarify that for Additional Facility proceedings States may specify in their investment treaties (or contracts) what are “investments” intended to be covered. Again, there is no reason in the Additional Facility context to bring in the divergent jurisprudence on the content of the word “investment” under the ICSID Convention.

#### **AF Rule 4 Final provisions**

Consider adding a grandfathering provision for cases based on consent given at a time when the scope of arbitration was broader than what is provided in the revised Additional Facility Rules.