

ICSID Rules Amendments Proposals from the State of Qatar

The following proposals are made by the State of Qatar (Qatar) in response to the invitation from the ICSID Secretary General, dated 2 August 2018, to provide comments on the proposed amendments to the ICSID Rules. Qatar welcomes this opportunity and is pleased to provide its comments below.

The proposed amendments deal with Administrative and Financial Regulations (AFR), Rules of Procedure for the Institution of Conciliation and Arbitration proceedings (Institution Rules) (IR), Conciliation Rules (CR), and Arbitration Rules (AR).

They also address the Additional Facility Rules (AF Rules), and proceedings under those rules – namely arbitration (AF)AR, conciliation (AF)CR, fact-finding (AF)FFR – and a new set of mediation rules (AF)MR, with a set of administrative and financial regulations for all AF proceedings (AF)AFR.

Qatar welcomes the proposed reforms addressing the following:

- (a) New rules regarding emergency arbitration;
- (b) New rules regarding disclosure by the parties of third-party funding
- (c) Reduction in the time and cost of arbitration through electronic filing (unless there are special reasons to maintain paper filing).
- (d) Set time lines which have been specified for numerous procedures (and in many cases, reduced).
- (e) The rules have been fully redrafted in plain language.
- (f) Clarity in relation to Preliminary Objections and Bifurcation;
- (g) Enhanced disclosure of potential conflicts of interest by arbitrators;
- (h) Abolition of the automatic suspension of proceedings upon the filing of an arbitrator challenge and continuation of the proceedings to the extent the parties agree in order to avoid delaying the proceedings.

However, Qatar has identified a number of areas in which amendments could be made to the ICSID Rules in order to enhance their effectiveness and efficiency. Qatar has focused on amendments that could be made to the ICSID Rules and Regulations as opposed to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). While Qatar has focused on recommending amendments to the ICSID Rules, we understand that a number of the most significant challenges facing the ICSID system i.e jurisdiction and definition of the term “investment”, could only be remediated through amendments of the ICSID Convention itself, rather than to the Rules.

Qatar recommended amendments include the following:

Rules of Procedures for Arbitration Proceedings (Arbitration Rules)

1. Method of Filing (Arbitration Rule 3(1))

AR 3(1) provides that *“Written submissions, observations, supporting documents and communications shall be filed electronically, unless the parties agree or the Tribunal orders otherwise.*

They shall be introduced into the proceeding by filing them with the Secretariat, which shall acknowledge receipt and distribute them in accordance with Rule 4”.

In ICSID’s annotation 145, which states that proposed AR 3(1) requires electronic filing, the parties are permitted to agree otherwise and the Tribunal can order the production of hard copies only if necessary. Departure from the default of electronic filing should be exceptional and for good cause; Tribunals should not order the production of hard copies merely for convenience. Moreover, if hard copies are required, it is recommended that a single format be used for all sets of submissions.

Qatar takes the view that the proposed AR 3(1) does not reflect what has been stated in the annotation; namely that the filing of the said hard copies should be ordered by the tribunal only if it is necessary.

Qatar recommends amending AR 3(1) as follows:

“Written submissions, observations, supporting documents and communications shall be filed electronically, unless the parties agree or the Tribunal orders otherwise for necessity”.

2. Procedural Languages, Translation and Interpretation (Arbitration Rule 5(4))

AR 5(4) states, *“A document in a language other than a procedural language shall be accompanied by a translation into a procedural language. In a proceeding with two procedural languages, the Tribunal may require a party to translate any document into both procedural languages. Translation of only the relevant part of a document is sufficient, provided that the Tribunal may require a fuller or a complete translation.*

*If the translation is disputed, **the Tribunal may require a certified translation**”.*

ICSID’s annotation 165 states that *“if a document filed in the proceeding is not in a procedural language, it must be accompanied by a translation to a procedural language, and translated into both procedural languages if the Tribunal so requires. However, the parties need not translate the full document and the translation need not be certified, unless the Tribunal orders otherwise. This typically occurs when the other party disputes the translation or claims that the translated part is misleading given the contents of the remaining part of the document”.*

Qatar takes the view that in respect of certified translation there is a great deal of confusion regarding what is considered to be a certified translation.

The translation industry is unregulated in many countries. For example, in many countries a certified translation consists of the translation itself accompanied by a signed statement by the translator or translation company affirming that the translated text is an accurate and complete rendering of the original document, however, this certification in and of itself does not prove that the translation is

accurate, nor does it mean that the translator who prepared it is certified. This brings into question the authenticity and accuracy of a particular translation.

Qatar takes the view that there should be an accreditation process so that the integrity of the translation process is above reproach and accurate according to accepted standards.

Qatar takes the view that the ICSID should establish guidelines for the certification and recognition of translations submitted before the tribunal.

3. Written Submissions and Observations (Arbitration Rule 13(2))

AR 13(2) provides that *“the requesting party may elect to have the Request for arbitration considered as the memorial”*.

ICSID’s annotation 195 states that *“proposed AR 13(2) allows a requesting party filing a Request for arbitration to consider that pleading as the memorial for the purposes of proposed AR 13(1)(a). A requesting party may thus elect to file a Request for arbitration as a full memorial, which would reduce the time in the procedural calendar”*.

Qatar takes the view that if a party elects to have the Request for arbitration considered as the memorial, the tribunal should be allowed to require further information to be included in the Request for arbitration. The current Rule does not state this clearly enough.

Qatar recommends amending AR 13(2) to read as follows:

“The requesting party may elect to have the Request for arbitration considered as the memorial. The Tribunal may require further information to be included in the Request for arbitration to ensure that the Request contains necessary substantive information”.

4. Method of Constituting the Tribunal (Arbitration Rules 22(2))

AR 22(2) provides that “*the parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 60 days after the date of registration, the Tribunal shall be constituted in accordance with Article 37(2)(b) of the Convention*”.

Qatar takes the view that the time limits in AR 22(2) should be shortened to a period within 45 days.

Qatar recommends amending AR 22(2) to read as follows:

“The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 45 days after the date of registration, the Tribunal shall be constituted in accordance with Article 37(2)(b) of the Convention”.

5. Appointing authority (Arbitration Rule 25(2))

According to AR 25(2), the Chairman of the Administrative Council (who is the President of the World Bank) shall appoint the President and any arbitrator or arbitrators that have not been appointed.

In addition, AR 25(3) provides that the Chairman shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.

Qatar takes the view that for improved transparency, there should be an independent committee within the Secretariat in order to provide further consultation to the Chairman when he appoints the arbitrator or arbitrators.

Qatar takes the view that there is a clear need for ICSID to establish such a committee to further assist the Chairman when he appoints the arbitrator or arbitrators.

Qatar recommends amending AR 22(2) to read as follows:

“The Chairman shall consult with the parties and the ad hoc independent committee within the Secretariat as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint”.

6. Acceptance of Appointment (Arbitration Rule (26))

AR 26(1) provides that *“A party appointing an arbitrator shall notify the Secretariat of the appointment and provide the appointee’s name, nationality(ies) and contact information”.*

Qatar takes the view that in order to ensure quality arbitrations, it is recommended that a Code of Conduct for Arbitrators should be introduced and implemented. This will address issues that have been raised with respect to arbitrators, such as conflicts of interest and the availability of arbitrators. The Code of Conduct would be an important tool to maintain the quality of arbitration. This would provide a set of guidelines to encourage adopting international best practices among arbitrators.

7. First session (Arbitration Rule 34(2))

AR 34(2) provides that *“The first session shall be held within 60 days after the Tribunal’s constitution or such other period as the parties may agree. If the President of the Tribunal determines that it is not possible to convene the parties and the other members within this period, the first session shall be held solely among the Tribunal members after consulting with the parties in writing on the matters listed in paragraph (4)”.*

Qatar takes the view that in order to enhance the efficiency of the arbitration process; the time limits in AR 34(2) should be shortened to be within a period not exceeding 30 days.

Qatar recommends amending AR 34 to read as follows:

“The first session shall be held within 30 days after the Tribunal’s constitution or such other period as the parties may agree. If the President of the Tribunal determines that it is not possible to convene the parties and the other members within this period, the first session shall be held solely among the Tribunal members after consulting the parties in writing, on the matters listed in paragraph (4)”.

In addition, according to AR 34(3) which provides that *“The first session may be held in person or remotely, by any means that the Tribunal deems appropriate. The agenda, method and date of the first session shall be determined by the President of the Tribunal after consulting with the other members and the parties”*.

ICSID’s annotation 354 states that *“the Secretariat encourages holding the first session by video or telephone conference”*.

Qatar takes the view that the first session should be held in-person in order to encourage in-depth discussion and pro-active case management.

8. Resignation (Arbitration Rule 32(1))

AR 32(1) provides that *“An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal and providing reasons for the resignation”*.

ICSID’s annotation 343 states, *“Proposed AR 32(1) requires that reasons be provided for the resignation, regardless of how the resigning arbitrator was appointed and, consequently, regardless of whether the resignation requires the consent of the other members of the Tribunal”*.

Qatar takes the view that an arbitrator may resign but only for justifiable reasons.

Qatar recommends amending 32(1) to read as follows:

“An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal and providing justifiable reasons for the resignation”.

9. Preliminary objections (Arbitration Rule 36(6))

AR 36(6) provides that *“The Tribunal shall issue its decision on the preliminary objection within 180 days after the last written or oral submission on the objection”.*

Qatar takes the view that in order to avoid unnecessary delay in the proceedings because of jurisdictional objections, the time limits in AR 36(6) should be shortened to a period not exceeding 90 days. This will expedite the arbitration process.

Qatar recommends amending AR 36(6) to read as follows:

“The Tribunal shall issue its decision on the preliminary objection within 90 days after the last written or oral submission on the objection”.

10. Bifurcation (Arbitration Rule 37)

Qatar takes the view that the current rule does not provide any further details if the parties agree to bifurcate.

Qatar takes the view that AR 37 should be amended to provide that if both parties agree to bifurcate, then the tribunal should respect and implement the said agreement of the parties.

11. Expert Evidence (Arbitration Rule 41(3))

AR 41(3) provides that “*The Tribunal shall determine the manner in which the examination is conducted*”.

Further, AR 41(4) provides that “*a witness shall be examined before the Tribunal, by the parties, and under the control of the President. Any member of the Tribunal may put questions to the witness*”. In addition, Rule 41(5) states, “*a witness shall be examined in person unless the Tribunal determines that another means of examination is appropriate in the circumstances*”. Furthermore, AR 41(6) stipulates that “*Paragraphs (1)-(5) shall apply, with necessary modifications, to evidence given by an expert*”.

Qatar takes the view that the proposed rules should be amended to encourage tribunals to adopt procedures for examining witnesses and experts at the hearing to ensure the most efficient resolution of the issues, including the use of (i) written witness statements as direct testimony, and (ii) conferencing/ debate among experts.

12. Security for Costs (Arbitration Rule 51)

Qatar welcomes AR 51 in order to avoid vexatious and frivolous claims.

General Observation

Qatar takes the view that in terms of timelines in the ICSID Rules Amendment, these should be restricted to multiples of 7 days.

This is to create a uniform timelines, which will assist the parties in their proceedings.

Final remarks

In closing, Qatar would like to congratulate the ICSID for this massive effort to modernize the ICSID Rules and Regulations.