



ICSID Rules Amendment Comments from the Federal Republic of Somalia

Introduction

The Federal Republic of Somalia (Somalia) begins its comments by thanking the ICSID Secretariat for the sterling effort it has made on behalf of Contracting States and users of the ICSID Convention in seeking to modernize its Rules. While ICSID arbitration itself tends to be a slow process, the trends in international practice can move quickly. The aim, therefore, is to amend the rules not just reactively but also proactively to manage the issues anticipated in the near and long-term future. Somalia believes that the ICSID Secretariat has accomplished that purpose for the most part in this most recent amendment. For that, the ICSID Secretariat – and the Secretary-General personally – are to be congratulated.

Below, Somalia provides a few overarching comments on the Amendment Proposals. In doing so, Somalia does not provide line edits of its own. Rather, it will provide its views in general on the proposed amendments and leave it to the ICSID Secretariat to consider whether those views are worthy of line edit revisions.

Electronic Filing

Somalia welcomes the Centre's move to electronic filing. The printing costs alone of each proceeding are astronomical. At the same time, most arbitrators and counsel employ electronic means of document review making much of that printing redundant. However, Somalia takes the position that the Centre should adopt an all-in-one electronic cloud-based system that can be utilized in each proceeding, rather than continuing to rely so heavily on emails. This should be for all submissions and routine correspondence with the Secretariat (such as confirmation of receipt and transmission to the Tribunal). The current file-sharing system is a "housing-only" product; technology presently exists that is far more sophisticated which can integrate the entire process into a single seamless solution. In light of data privacy and security concerns over email, and the ease with which correspondence can be accidentally sent or forwarded to the wrong recipient, such a solution is to be preferred.

Third Party Funding

Somalia recognizes on behalf of its national investors that third party funding can provide access to justice for those of its investors with genuine grievances that would otherwise not have the financial means to bring suit at ICSID. However, equally Somalia shares the serious concerns of other States that unregulated third party funding has spawned a host of arbitrations at ICSID that have frivolous origins and vexatious objectives. Just as importantly, third party funders have all the benefit of the upside in case of success, but consider themselves immune from the costs that are imposed on an unsuccessful claimant. This leaves an imbalance between the State and the third party funder. The only way this can be addressed is both transparency vis-à-vis the funder, as well as amendment to the manner in which security for costs are handled. In relation to third-party funding, Somalia takes the position that the contents of the funding agreement are just as pertinent to the nature of the claimant's case as simply the name and source of the funder. In particular, frivolous or vexatious suits are more likely to demonstrate an unreasonable bias in favor of the third party funder in the waterfall return. A compromise solution to the current amendment may be that information on the contents of the third party funding be provided only to the Tribunal.

Security for Costs

The previous requirement for security for costs to be intertwined with a provisional measure standard was – as the empirical evidence demonstrates – unworkable. Hence, the standalone rule is welcome. However, the presence of third party funding must be an enumerated criterion for the Tribunal to consider in deciding whether to grant security for costs. As an alternative, a party that has third party funding should demonstrate either the presence of an insurance policy designed to provide for an adverse costs award or an undertaking directly by the third party funder that it will be responsible for such an award. Without such direct guidance to tribunals, the imbalance between State and third party funder may remain unchecked.

Contact: Maryan Hassan, Office of the President (Somalia's Delegate to ICSID)