

# ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them

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On 13 November 2018, ICSID will present its new proposed amendments at a [major conference](#) in London. This round of amendments aims, among other things, to modernize the ICSID procedure based on case experience, simplify the rules, and make the process increasingly time and cost effective while maintaining due process and a balance between investors and States.

On the basis of surveying members of the [Investment Treaty Forum](#) and the broader community of investment lawyers, this blog post makes suggestions for further improvement. A [comparison](#) of the ICSID Arbitration Rules with UNCITRAL Arbitration Rules and the Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules (SCC Rules) shows that the amended rules will allow ICSID to catch up with those institutions in some areas and lead on introducing progressive developments in other areas.

### **How changes of ICSID procedure can be achieved?**

The ICSID Convention itself contains several procedural rules which regulate the conduct of arbitral proceedings. Amendment of these rules is, however, difficult as a matter of public international law. However, ICSID Rules of Procedure for Arbitration Proceedings, which are incorporated by parties into their arbitration clauses by reference, can be amended more easily, upon the approval of a majority of two-thirds of the Member States. This seems to be the approach preferred by the ICSID Secretariat.

Other options, which ICSID may consider include adopting agreed the State Parties interpretation of certain provisions of the ICSID Convention, publishing guidance or best practice notes on various procedural aspects of proceedings. Any of the State Parties to the ICSID Convention can make a unilateral interpretative statement. Such statement would then be binding on the State making the declaration, as well as on the States that have clearly accepted such a declaration.

Key concerns, raised in a survey of the members of the investment community relate to timely appointment of arbitrators and its challenges, over-committed arbitrators and their conflicts of interest. Also, some hope to see access to emergency arbitrators and fast-track arbitration procedure, as well as a procedure for summary rejection of claims. The current rules and practice of the ICSID Secretariat can do more to facilitate amicable settlement of disputes, consolidation of proceedings, allocation of costs and security for costs, timely rendering of awards and consistency of ICSID annulment decisions. The proposed amendments help to address most of these issues, but there is still room for further improvement as discussed in more detail below.

## **Timely appointment of arbitrators and challenges**

The timeframe currently laid out in ICSID rules is longer than what envisaged in arbitration rules of other leading arbitral institutions. Moreover, currently the ICSID Arbitration Rules and Institution Rules do not require the nomination of arbitrators in the absence of an agreement or the proposition of a method for nomination. This lacuna causes additional delays and costs to the detriment of the parties.

ICSID Rules can be amended so as to require the claimant to nominate an arbitrator in the Request for Arbitration and to propose a method for constituting the Tribunal in the absence of a previous agreement. In addition, the Rules can be amended to include specific timelines for the nomination of arbitrators by the parties. This could be a process whereby nomination by the requesting party must be within 10 days of the notice of registration; the other party must then make their nomination proposal within 20 days of receipt of the requesting party's proposal; and the requesting party must then make any counter-proposal within 20 days of receipt of the other party's proposal.

Tribunals should also be encouraged to reflect the costs of the delay incurred by a challenge in the costs awards, so that the costs of delay can be borne by the party making an unsuccessful challenge. The standards of challenges should be aligned with those adopted by other leading arbitration institutions. Moreover, ICSID can publish its own guidelines or best practices in this area.

## **Over-committed arbitrators**

Highly qualified arbitrators may find it difficult to deal with their responsibilities in a timely fashion because they may have committed themselves to too many proceedings within a limited timeframe. The ICSID can require arbitrators to confirm under the Arbitrator Declaration the days or weeks that the arbitrator has already committed to his/her other undertakings over the next two years. The ICSID can also require tribunals to provide the parties and the ICSID with regular reports on progress towards an award, for instance, in every three months after the end of the hearing or, if any, following the submission of post-hearing briefs.

## **Arbitrators' conflicts of interest**

Neither the ICSID Convention nor the Arbitration Rules in their current form help in addressing potential conflicts of interest among arbitrators. This might cause an issue particularly in cases where arbitrators act as counsel in other cases which touch upon related issues that they may decide or take a position on. This also leads to a higher number of challenges which slow down arbitration proceedings and increase the costs.

Arbitrators can also be required to routinely disclose in the Arbitrator Declaration all other cases in which they are sitting. In addition, ICSID Arbitration Rules should include an explicit provision that would allow the parties to modify by agreement the test under Article 57 of the ICSID Convention which deals with disqualification of arbitrators. For example, the parties can agree that challenges will be decided in accordance with the International Bar Association's Guidelines. ICSID can also provide further guidance on the interpretation of Article 57 by publishing a summary of decisions or best practices to achieve the development of a uniform and consistent application of principles.

## **Amicable settlement of disputes**

A significant number of investor-State disputes result in settlement. This helps the parties reduce unnecessary costs and delays as well as preserve their relations. Yet, the ICSID Convention Conciliation Rules are not used very often. This may be because parties fail to see the benefits of the procedure specifically tailored to their needs in seeking an amicable settlement.

ICSID tribunals and the ICSID Secretariat should actively promote the use of ICSID Conciliation Rules. Although the current Arbitration Rules provide for the consideration of issues in dispute with a view to reaching an amicable settlement at the pre-hearing conference, it would make sense to urge tribunals to encourage parties to resolve their disputes amicably. The parties should be asked to express their views on the possibility of an amicable settlement.

### **Allocation of costs**

Current ICSID Arbitration Rules do not provide guidance on allocation of costs, thereby incentivizing parties to file challenges based on weak merits. ICSID proceedings remain notoriously expensive. This is partly due to the lack of effective mechanisms that would discourage parties from adopting procedural tactics to delay proceedings and from putting financial pressure on the opposing party.

The Tribunals could be encouraged by an express provision to include a breakdown of costs for various procedural steps. This would not only help in raising the parties' cost awareness, but also enhance the transparency and quality of the reasoning of decisions on costs.

In order to maximise effectiveness and minimise the costs of proceedings, tribunals can be encouraged explicitly to consider bifurcation between the phases of merits and quantum, which would save the parties from making detailed pleadings on the quantum before liability is established.

Moreover, the proposed amendments could introduce a rule that would require the parties to prepare short summaries of the main submissions to be included in the award. This would reduce the time and cost of rendering awards.

### **Consistency of ICSID annulment decisions**

The ICSID Secretariat has complete responsibility for the appointment of annulment committees, constituted for each case. As a result, the approach of annulment committees is not always consistent. ICSID *ad hoc* Committees deciding on annulment applications find it difficult at times to distinguish between the appeal of awards and the application of the ICSID Convention's provisions on annulment. Inconsistent decisions and confusion with respect to the role of ICSID *ad hoc* Committees create incentives for unsuccessful parties to launch annulment proceedings as a delaying tactic.

To address the concerns about the current annulment mechanism, one solution to consider would be the introduction of a standing annulment committee. The Chairman of the Administrative Council would seek to appoint three persons from a selected pool of arbitrators from the Panel of Arbitrators (e.g. the same twelve individuals) to form *ad hoc* committees to decide on annulment applications. This would not require making changes in the ICSID Convention and would help ensure the coherency and predictability of the decision-making process at the annulment stage.

The ICSID may consider convening informal meetings with members of the Panel of Arbitrators to discuss select controversial issues, and to see if there is a consensus in favour of a particular solution, or to better understand the different views on these issues. That could be followed by publication of guidance or best practice notes.

- For the full analysis please see [Yarik Kryvoi, ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them \(BIICL, 8 November 2018\)](#).