Kluwer Arbitration Blog

# Arbitrating Small Value Claims in Investment Arbitration

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The International Bar Association ("IBA") Subcommittee on Investment Treaty Arbitration has recently finalized its report titled "Arbitrating Small Value Claims in Investment Arbitration" co-signed by the current co-chairs (Caline Mouawad, Maxi Scherer) and former co-chairs (Noiana Marigo, Patrick Pearsall) ("Report"). The Report was also presented at the 2022 Annual Meeting of the IBA that recently took place in Miami.

The Report explores small value claims in investment arbitrations, where the identifiable amount claimed is no greater than US$50m or €50m. Such claims have come to represent a significant percentage of investment arbitrations across different arbitral institutions, industry sectors and geographic regions. Given their significance, small value claims also present a unique conundrum for the arbitration community: on the one hand, the relatively modest sum at stake calls for a manageable and cost-effective approach so as not to deter parties from bringing such claims and impede the parties' right to have access to justice; on the other, small value claims do not necessarily mean that they are simpler or less complex than large value claims, that may involve high representation fees if not managed right. With these key considerations in mind, the Report examines the available procedural tools to minimize costs in such cases while ensuring that parties achieve swift and fair resolution of their disputes.

The Report approaches the issue of small value claims mainly from three angles: (1) the Report examines the available empirical data from major arbitral institutions, reinforcing the view that small value claims are statistically prevalent in international investment arbitration; (2) the Report explores the special procedures that are already available in international investment agreements ("IIAs") and arbitral rules to manage costs in small value claims; and (3) the Report proposes procedural measures that can be adopted at different stages of the proceedings to achieve an efficient resolution of small value disputes. This blog post highlights the Report's key findings on each of these issues in turn.

## I. PREVALENCE OF SMALL CLAIMS IN INVESTMENT ARBITRATION

The empirical data obtained from major arbitral investment arbitration institutions demonstrates the prevalence of small value claims in investment arbitration cases in the past decade.

Of the cases administered by ICSID, the PCA, and the SCC between 1 January 2010 and 31

December 2021, approximately 20 percent to 40 percent were small value claims under US$50m or €50m. For ICSID, 108 cases (approximately 27 per cent) involved claims below US$50m. For the PCA, 42 cases (approximately 23 per cent) were small claims. The SCC saw the highest percentage of small claims, with 23 cases (approximately 43 per cent).

There is no one industry sector or region which is more likely to face small value claims. Statistics indicate that small value claims are prevalent in all sectors, including electricity and power, construction, extractive industries, agriculture, finance, and transportation. Respondent states from all geographical regions have seen their fair share of small value claims.

Maybe unsurprisingly, empirical data also confirms that a majority of small value claims are brought by individuals or small and medium-sized enterprises ("SMEs"). Based on the figures provided by ICSID, the PCA, and the SCC, at least half of small value claims were instituted by individuals or SMEs. The only caveat to this view is that there was limited data available on the size of the claimants bringing small value claims.

## II. SPECIAL PROCEDURES FOR ARBITRATING SMALL VALUE CLAIMS

Potential claimants considering bringing small value claims can take comfort in the wide range of special procedures already available. In this respect, the Report examines measures in IIAs and arbitral rules that can reduce the time and resources required to arbitrate such claims. While these tools are available for all claims, irrespective of the amount at stake, they are particularly well-suited and (in many instances) essential for small value claims.

Generally speaking, IIAs do not provide for special procedures with regard to small value claims. In recent years, however, a number of IIAs have included provisions concerning claims filed by SMEs or 'relatively low' claims for damages. This includes, for example, Comprehensive Economic and Trade Agreement ("CETA") which encourages the nomination of a sole arbitrator where the investor is a SME or the monetary amount sought against the state is relatively low. Indeed, Article 8.23(5) of the CETA provides that "[t]he investor may, when submitting its claim, propose that a sole Member of the Tribunal should hear the claim. The respondent shall give sympethatic consideration to that request, in particular if the investor is small or medium-sized enterprise or the compensation or damages claimed are relatively low." These IIAs also include procedural measures to accommodate such claims, including through: (a) increased use of videoconferencing (see, e.g., CETA, Article 8.19(3)), (b) consolidation of related claims (see, e.g., Dutch Model BIT, Article 19(7)), (c) tribunal's discretion not to apply the costs-follow-the-event rule when the unsuccessful party is an SME (see, e.g., Dutch Model BIT, Article 22(5)), (d) supplemental rules to reduce a claimant's financial burden (see, e.g., EU-Vietnam Investment Protection Agreement, Article 3.53(5)).

In particular, one IIA provides that the disputing parties may consent to the application of an expedited arbitral procedure "when the damages claimed do not exceed CA$10m". To the extent this IIA applies, the parties typically have the option to: (a) take recourse to mediation, (b) appoint a sole arbitrator, (c) agree on a compressed procedural schedule, (d) agree on a limited document production phase, and (e) agree on streamlined written submissions, among others.

Arbitral rules also provide for expedited rules or fast-track procedures, if agreed between the parties, including the ICSID Expedited Arbitration Rules, or automatic for low-value disputes,

such as the UNCITRAL Expedited Arbitration Rules. As the Report explores (pp. 16-24), expedited rules are especially suitable for parties with limited means, which require a quick resolution of their dispute, or for disputes over smaller sums at stake. Typical features of an expedited procedure include: (a) sole arbitrator by default, (b) time limits for filing, (c) limited number of filings, (d) limitation on document production and evidence, (e) documents-only arbitration, (f) time limits to render award, and (g) awards with no reasons or with summary reasons. However, such procedures often allow to revert to non-expedited procedures when necessary.

## III. ADDITIONAL PROCEDURAL MECHANISMS AVAILABLE FOR ARBITRATING SMALL VALUE CLAIMS

The Report at pp. 25-53 suggests several techniques and procedures which the parties may adopt even when the applicable IIAs or arbitral rules have not set out relevant special procedures. These measures may be adopted at various stages of the arbitration:

1. At the pre-arbitration phase, parties may increase cost-efficiency through calibrating their choice of arbitral rules, the arbitral institution, the seat, counsels, and arbitrators. Parties are also encouraged to engage in pre-arbitration settlement negotiations or mediations to either avoid the arbitration altogether or streamline the process and narrow down the disputed issues.
2. At the arbitration phase, parties may, among others, (a) negotiate their Procedural Order No.1 from model agreements, (b) empower the tribunal to adopt cost-saving procedural measures, (c) agree on costs budgets, (d) limit written submissions, (e) agree to manage witness and expert evidence in a cost-efficient manner, (f) limit third-party intervention and *amicus curiae*, and (g) limit the scope of the document production phase. Parties also may opt for documents-only arbitration and remove the need for hearings altogether or propose to adopt remote hearings with technology-powered transcription services and limited post-hearing phase.
3. At the post-arbitration stage, parties may restrain the ability to apply for annulments, reduce the length of such proceedings, or altogether waive the right to dispute the awards.

These procedural mechanisms and strategies available to the parties for consideration are summarized in a checklist annexed to the Report.

### *Conclusion*

The rise of small value claims in investment arbitration presents a new opportunity to explore cost-saving mechanisms that can be more broadly adopted in investment arbitration to promote a more efficient and cost-effective process overall. The Report contains an invaluable toolkit for disputing parties in investment arbitration to consider when designing an efficient process to resolve their differences.

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