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Arbitrating Small Value Claims in Investment Arbitration



A report by the Investment Arbitration Subcommittee
of the IBA Arbitration Committee

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Table of Abbreviations

AAA	American Arbitration Association
AIAC	Asian International Arbitration Centre
Canada–Colombia FTA	Free trade agreement between Canada and the Republic of Colombia
Canadian Model FIPA	The Canada Foreign Investments Promotion and Protection Agreement Model 2021
CETA	Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23
CIETAC	China International Economic and Trade Arbitration Commission
CMH	Costs management hearing
CMO	Costs management order
DIS	German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit e.V.)
DR–CAFTA	Dominican Republic–Central America Free Trade Agreement
Dutch Model BIT	The Netherlands Model Investment Agreement
EU–Singapore Investment Protection Agreement	European Commission, ‘Annex 1 to the Proposed for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part’ COM (2018) 194
EU–Vietnam Investment Protection Agreement	European Commission, ‘Annex 1 to the Proposal for a Council Decision on the conclusions of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part’ COM (2018) 693 final
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICC Court	International Court of Arbitration of the ICC
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
ICSID EAR	Expedited arbitration rules issued by ICSID in Chapter XII of its procedural rules, in force as of 1 July 2022
ICSID Rules	ICSID Arbitration Rules of Procedure for Convention Proceedings
IIA	International investment agreement
ISDS	Investor–state dispute settlement

Jackson Report	Report adopted in England and Wales following a review of civil litigation by Lord Justice Jackson
JCAA	Japan Commercial Arbitration Association
LCIA	London Court of International Arbitration
NAFTA	North America Free Trade Agreement
NDP	Non-disputing party
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PO1	Procedural order no. 1 and the procedural calendar
Prague Rules	2018 Rules on the Efficient Conduct of Proceedings in International Arbitration
RAC	Russian Arbitration Centre at the Russian Institute of Modern Arbitration
RCEP	Regional Comprehensive Economic Partnership
SCC	Stockholm Chamber of Commerce
SCC Expedited Rules	SCC Rules for Expedited Arbitrations
SIAC	Singapore International Arbitration Centre
Singapore Convention	United Nations Convention on International Settlement Agreements Resulting from Mediation
SME	Small and medium-sized enterprises
Swiss Centre	Swiss Arbitration Centre
TTIP Textual Proposal on behalf of the EU on Investment Protection	European Union's Textual Proposal on Investment Protection and Resolution of Investment Disputes, Transatlantic Trade and Investment Partnership Negotiations, Chapter 3 Part II
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL EAR	UNCITRAL Expedited Arbitration Rules
UNCITRAL Rules	UNCITRAL Rules
UNCTAD	United Nations Conference on Trade and Development
USMCA	United States–Mexico–Canada Agreement
VIAC	Vienna International Arbitration Centre

I. Preface

This Report of the IBA Investment Arbitration Subcommittee examines the mechanisms and strategies available to the parties to calibrate the time, effort, and financial resources mobilised and invested to arbitrate small value investment claims in a manner that is commensurate with the sums at stake. The Report saw the light under the leadership of the prior co-chairs of the Subcommittee, Noiana Marigo (Freshfields) and Patrick Pearsall (Allen & Overy), who entrusted the current co-chairs, Maxi Scherer (WilmerHale) and Caline Mouawad (Chaffetz Lindsey) with a robust draft from the working group, identified in Annex 1 with an asterisk. The Report was finalised with the invaluable further input from the working group, the Subcommittee membership at large, and the Arbitration Committee officers. The Subcommittee also would like to acknowledge the hard work and dedicated efforts of the following individuals who helped with the preparation of this Report: (1) Hinda Rabkin (Freshfields); (2) Brianna Gorence (Freshfields) (3) Cem Kalelioglu (WilmerHale); and (4) David Hu (WilmerHale).

Noiana Marigo and Patrick Pearsall

Former Co-Chairs, Investment Arbitration Subcommittee

Maxi Scherer and Caline Mouawad

Co-Chairs, Investment Arbitration Subcommittee

II. Introduction

This Report is premised on the empirical evidence that small value claims in investment arbitration exist and represent a sizeable percentage of investment cases – across arbitral institutions, industry sectors, and geographic regions. Underlying this premise is the definition of a small value claim. For purposes of this Report, a small value claim is a case in which the identifiable amount claimed is no greater than US\$50m or €50m. Although SMEs and individuals tend to be the claimants in small value claims, such claims are not the exclusive purview of SMEs or individuals.

Small value claims in investment arbitration are not necessarily simpler, smaller or less complex than large value claims. But the more modest sums at stake militate in favour of a proportioned and tempered approach to resolving such cases. Pursuing claims in a cost-effective and efficient manner is an even greater imperative when small value claims are involved. To be clear, this Report does not take a principled view on whether small value claims are desirable or should be encouraged, but rather investigates the procedural tools available to facilitate a cost-effective resolution of such claims. Most, if not all, of these tools are available for all claims, irrespective of the amounts at stake, but they seem particularly relevant and potentially critical for small value claims.

The sections that follow examine small value claims from three angles.

First, empirical data from leading arbitral institutions in investment arbitration – ICSID, the PCA, and the SCC – reveals the prevalence of small value claims in investment cases registered between 1 January 2010 and 31 December 2021 (Section III). The data shows that small value claims constitute an important segment of the investment arbitration docket.

Second, special procedures for arbitrating small value claims already exist and are readily available to the parties (Section IV). Some of these procedures are found directly in international investment agreements, and encompass, among others, the possibility of remote hearings, the resolution of the dispute by a sole arbitrator, the consolidation of related claims, the application of an expedited arbitral procedure, a compressed procedural schedule, and a limited document production phase. Special procedures, namely expedited rules, also are found in the arbitration rules of various institutions and may apply by way of the parties' express consent, ie by opting in.

Third, even if neither the applicable investment agreement nor the arbitral rules contain special procedures, the parties nonetheless may choose to incorporate various procedural mechanisms into their arbitration and create a bespoke procedure designed to streamline their case and minimise the costs of arbitration (Section V). The parties may inject these mechanisms at various points in the life of an arbitration: (1) from the pre-arbitration phase, through their choice of the arbitral rules, the arbitral institution, the seat, counsel, and the arbitrators, and their possible pursuit of pre-arbitral negotiations or settlement discussions; (2) to the arbitration phase, in terms of, *inter alia*, PO1, the procedural calendar, the possible determination of preliminary issues, and limitations on written submissions, testimonial evidence, third-party interventions and document production; and (3) all the way to the post-arbitration phase by adopting cost-effective strategies in the context of the annulment of awards.

Although these various tools and mechanisms are explored in the context of small value claims, it is the hope of the Subcommittee that this discussion will remind parties, counsel, and arbitrators alike of the value of these tools, irrespective of the amount at stake.

III. Prevalence of small value claims in investment arbitration

While there is growing interest in small value claims,¹ little public data is available on the prevalence of such claims. To guide the discussions in this report, the Investment Arbitration Subcommittee of the IBA sought anonymised data on small value claims from arbitral institutions that, taken together, administer the majority of ISDS proceedings: ICSID, PCA and SCC.² The arbitral institutions’ methodological considerations in gathering the data are set forth in Annex 2.

A. Percentage of small value claims

As set out in Figure 1, of the cases reviewed by ICSID, PCA, and SCC, approximately 20 per cent to 40 per cent were small value claims: ie under US\$50m or €50m.

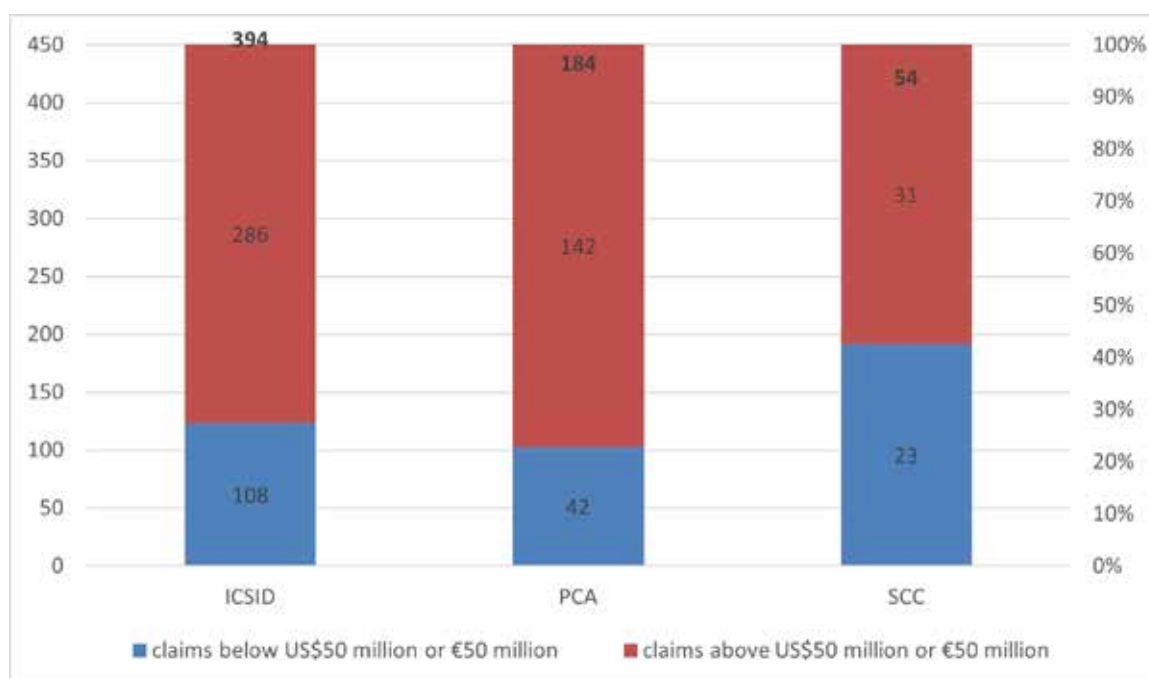


Figure 1: Approximate percentage of small value claims

1 UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 36th Session, Vienna, 29 October–2 November 2018, *Possible reform of investor-state dispute settlement (ISDS) – cost and duration, Note by the Secretariat (Doc No. A/CN.9/WG.III/WP.153)* (United Nations General Assembly, 31 August 2018), available at <https://undocs.org/en/A/CN.9/WG.III/WP.153>, para 99; KE Boon, ‘Investment Treaty Arbitration: Making a Place for Small Claims’ (2018) *Journal of World Investment & Trade*, 667.

2 The Subcommittee reached out to other arbitral institutions that administer investment arbitration proceedings, but did not receive the relevant data.

ICSID reported 394 investment cases³ registered between 1 January 2010 and 31 December 2021, in which the amount claimed could be identified. Of these, 108 cases (approximately 27 per cent) involved claims below US\$50m,⁴ broken down as follows:

- 21 cases (approximately 5 per cent) concerned claims of US\$10m or less;
- 32 cases (approximately 8 per cent) concerned claims between US\$10m and US\$20m; and
- 55 cases (approximately 14 per cent) concerned claims between US\$20m and US\$50m.

The PCA reported 184 investment cases registered between 1 January 2010 and 31 December 2021⁵ in which the amount claimed could be identified. Of these, 42 cases (approximately 23 per cent) involved claims below US\$50m, as follows:

- 17 cases (approximately 9 per cent) concerned claims below US\$10m;
- 9 cases (approximately 5 per cent) concerned claims between US\$10 and US\$25m; and
- 16 cases (approximately 9 per cent) concerned claims between US\$25 and US\$50m.

The SCC reported a total of 54 investment cases⁶ registered between 1 January 2010 and 31 December 2021 in which the amount claimed could be identified. Of these, 23 cases (approximately 43 per cent) involved claims below €50m, as follows:

- 13 cases (24 per cent) concerned claims below €10m;
- 4 cases (7 per cent) concerned claims between €10m and €25m; and
- 6 cases (11 per cent) concerned claims between €25m and €50m.

The breakdown of the number of cases per institution is set out in Figure 2.

³ Data from ICSID was received on 20 June 2022, reflecting cases registered and concluded between 1 January 2010 and 31 December 2021. The cases include 106 pending ICSID arbitrations and 288 ICSID arbitrations that concluded with an award or that were settled or otherwise discontinued. These figures comprise all ICSID cases registered and concluded during the relevant time period, regardless of their jurisdictional basis.

⁴ Of the number of reported cases with claims below US\$50m, 78 per cent were based on investment treaties, while 15 per cent were based on investment contracts, with the remaining 7 per cent based on investment laws.

⁵ Data from the PCA was received on 17 June 2022, reflecting cases registered between 1 January 2010 and 31 December 2021. The data does not include investment cases in which the PCA Secretary-General only designated an appointing authority or acted as appointing authority. The reported cases were brought under the UNCITRAL Arbitration Rules 1976, 2010, and 2013. These figures exclude contract-based investment cases.

⁶ Data from the SCC was received on 21 June 2022, reflecting cases registered between 1 January 2010 and 31 December 2021. These figures comprise arbitrations instituted under bilateral and multilateral investment treaties as well as investment contracts.

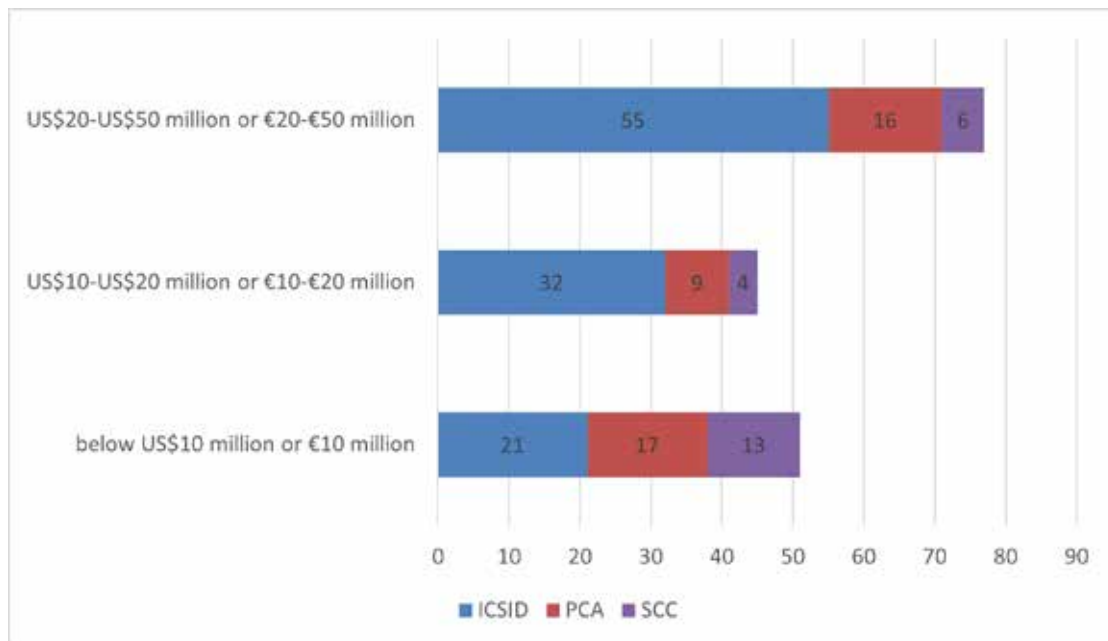


Figure 2: Breakdown of number of small value claims

B. Existence of small value claims across all industries and regions

The cases reviewed by the arbitral institutions do not point to any industry sector or region as more likely to be faced with small value claims.

The data provided by the arbitral institutions suggests that claimants from a variety of sectors have brought small value claims, including electricity and power, construction, extractive industries, agriculture, finance, and transportation. At the same time, these sectors also have generated a significant number of medium and high-value investment claims.

The data also shows that respondent states from all geographic regions have been involved in ISDS proceedings involving claims up to US\$50m, although a large proportion of such claims have concerned state parties from Eastern Europe and Central Asia.

C. Small value claims by SMEs and individual claimants

In compiling the analysis on the prevalence of small value claims in investment arbitration, the arbitral institutions also assessed whether individual claimants or SMEs were more likely to bring such claims.

The arbitral institutions sought to coordinate their analyses by using the same definition for what constitutes an SME.⁷ While no single definition of SMEs has been recognised universally at the international level, according to an analysis conducted by the International Finance Corporation in 2014, SMEs are most commonly defined as companies with: (1) fewer than 250 employees, (2) less than US\$50–

⁷ No standardised definition of SMEs has been universally recognised at the international level (see UNCITRAL Working Group I (Micro, Small and Medium-sized Enterprises), 25th Session, Vienna (19–23 October 2015), *Reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs)*, Note by the Secretariat (Doc No. A/CN.9/WG.I/WP.92) (UN General Assembly, 12 August 2015), available at <https://undocs.org/en/A/CN.9/WG.I/WP.92>, para 11.

70m turnover, and/or (3) US\$50–62m in assets.⁸ Consistent with this definition, the arbitral institutions classified a company as an SME if it met at least one of the following criteria: (1) fewer than 250 employees, (2) less than US\$50m turnover, or (3) less than US\$50m in assets.

However, there was limited availability of data on the size of the claimant in assessing small value claims in investment arbitration. Further methodological issues arose in respect of (1) group companies (eg, if the claimant is a holding company of a group), (2) companies with a small size or low (or negative) turnover/asset due to the subject matter of the dispute, and (3) companies that are investment vehicles.

At the PCA, six cases involving claims below US\$50m were instituted by individuals.⁹ Of the remaining 36 small value claims where data in respect of at least one of the SME criteria was available, 15 claimants qualified as SMEs (approximately 42 per cent). Notably, of the 17 claims brought for less than \$10m, eight cases were brought by investors who qualified as SMEs (approximately 47 per cent).

At ICSID, data as to whether a claimant was an SME was available only for eight cases. Of those, six cases involve companies that can *prima facie* qualify as SMEs, although in two of these cases the claim was also brought by individuals.

At the SCC, six cases involving claims below €50m were filed by individuals, of which one case also involved a co-claimant company. Data on whether the cases with an amount in dispute below €50m involved claimants that qualified as SMEs was not available.

Although further research is required, it appears from the figures provided by ICSID and the PCA that at least half of small value claims are instituted by individuals or SMEs.

8 *MSME Country Indicators 2014: Towards a Better Understanding of Micro, Small, and Medium Enterprises*, (International Finance Corporation, December 2014), available at www.smefinanceforum.org/sites/default/files/analysis_per_cent20note.pdf, 8–9. Another survey by the International Finance Corporation in 2019 confirmed that that SMEs are typically defined by reference to the number of employees, turnover and assets: see *Micro, Small and Medium Enterprises Economic Indicators Analysis Note* (International Finance Corporation, December 2019), available at www.smefinanceforum.org/sites/default/files/MSME-EI_per_cent20Report_FINAL.pdf, 9–10.

9 This figure reflects cases commenced solely by individual claimants. It does not reflect cases commenced by multiple claimants including both individuals and other entities.

IV. Special procedures for arbitrating small value claims

A. In international investment agreements

International investment agreements typically do not provide for special procedures with regard to small value claims. However, in recent years, a number of IIAs have been concluded that do contain provisions concerning claims filed by SMEs or ‘relatively low’ claims for damages.¹⁰

CETA, the EU–Vietnam Investment Protection Agreement,¹¹ the EU–Singapore Investment Protection Agreement,¹² the Dutch Model BIT,¹³ the Canadian Model FIPA¹⁴ and other texts¹⁵ foresee the possibility of applying certain procedural mechanisms when the investor is an SME or, in certain cases, when the damages claimed are ‘relatively low’ (regardless of whether the investor is an SME or an individual claimant):

- The disputing parties holding consultations by videoconference or other means where appropriate instead of in-person hearings, ‘such as in the case where the investor is a small or medium-sized enterprise’.¹⁶
- The claimant investor proposing the nomination of a sole arbitrator or decision-maker when submitting its claim. In such circumstances, the ‘respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low’.¹⁷
- Consolidation of two or more related claims in one proceeding, ‘especially where the claimants are small and medium sized enterprises’.¹⁸

10 CETA (signed on 30 October 2016 and provisionally in force as of 21 September 2017), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A0114\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A0114(01)&from=EN), accessed 5 April 2022, Article 8.23(5). Even when the IIA provides only for specific procedures to be used when claims are initiated by SMEs rather than ‘low value’ claims, the claims initiated by SMEs can relate to smaller scale investments and therefore may also constitute small value claims. See *supra* Section III (The prevalence of small value claims in investment arbitration).

11 Annex 1 to the Proposal for a Council Decision on the conclusion of the EU–Vietnam Investment Protection Agreement (European Commission, signed on 30 June 2019 but not yet in force), available at https://eur-lex.europa.eu/resource.html?uri=cellar:2d9b97ac-d2e7-11e8-9424-01aa75ed71a1.0001.02/DOC_2&format=PDF, accessed 5 April 2022.

12 Annex 1 to the Proposal for a Council Decision on the conclusion of the EU–Singapore Investment Protection Agreement (European Commission, signed on 19 October 2018 but not yet in force), available at https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_2&format=PDF, accessed 5 April 2022.

13 Dutch Model BIT (22 March 2019), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>, accessed 5 April 2022.

14 Canadian Model FIPA 2021 (12 May 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6341/download>, accessed 5 April 2022.

15 TTIP Textual Proposal on behalf of the EU on Investment Protection, Chapter 3 Part II (tabled for discussion but not signed – made public on 12 November 2015), available at https://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf, accessed 5 April 2022.

16 CETA, Article 8.19(3). See also EU–Vietnam Investment Protection Agreement, Article 3.30(3); EU–Singapore Investment Protection Agreement, Article 3.3(7); TTIP Textual Proposal on behalf of the EU on Investment Protection, Article 4.4; Canadian Model FIPA, Article 25(3).

17 CETA, Article 8.23(5). See also EU–Vietnam Investment Protection Agreement, Article 3.38(9); EU–Singapore Investment Protection Agreement, Article 3.9(9); TTIP Textual Proposal on behalf of the EU on Investment Protection, Article 9.9; Dutch Model BIT, Article 20(3).

18 Dutch Model BIT, Article 19(7). See also EU–Vietnam Investment Protection Agreement, Article 3.59; EU–Singapore Investment Protection Agreement, Article 3.24; TTIP Textual Proposal on behalf of the EU on Investment Protection, Article 27; Canadian Model FIPA, Article 34(1) and Article 53.

- Granting the tribunal discretion to not apply the costs-follow-the-event rule when the unsuccessful disputing party is an SME.¹⁹
- The adoption of supplemental rules aimed at reducing the financial burden on claimants who are natural persons or SMEs. These rules, in particular, may take into account the financial resources of such claimants and the amount of compensation sought.²⁰

Furthermore, one IIA, the Canadian Model FIPA, provides that the disputing parties may consent to the application of an expedited arbitral procedure ‘when the damages claimed do not exceed CA\$10m’.²¹ Once applicable, this procedure provides for:

- the possibility for the disputing parties to consent to mediation;²²
- the resolution of the dispute by a sole arbitrator;²³
- a first procedural session within 30 days of the sole arbitrator’s appointment, to be held by videoconference, telephone, or similar means of communication unless the parties and the sole arbitrator agree it should be held in person;²⁴
- a compressed procedural schedule for the written, hearing, and costs phases of the arbitration, and the rendering of the award, with prescribed deadlines and page limits for submissions;²⁵
- a limited document production phase;²⁶
- the sole arbitrator’s discretion to limit the number, length or scope of written submissions, or written fact and expert witness evidence;²⁷
- the sole arbitrator’s power, after consultation with the parties, to decide the dispute without holding an oral hearing and with no or a limited examination of witnesses or experts;²⁸
- a hearing held by videoconference, telephone, or similar means of communication;²⁹

19 Dutch Model BIT, Article 22(5).

20 CETA, Article 8.39(6); EU–Vietnam Investment Protection Agreement, Article 3.53(5); EU–Singapore Investment Protection Agreement, Article 3.21(5); TTIP Textual Proposal on behalf of the EU on Investment Protection, Article 28.5.

21 Canadian Model FIPA, Article 47(1). The expedited procedure shall no longer apply if the parties jointly so request (Article 54(7)), or if the sole arbitrator so decides following the request of a disputing party (Article 54(8)). In both cases, the time limit for requesting the disapplication of the expedited procedure is no later than the date of filing of the respondent party’s principal submission on the merits. The expedited procedure does not apply to preliminary objections under Article 33 of the Canadian Model FIPA (Article 47(3)).

22 Canadian Model FIPA, Article 48.

23 Canadian Model FIPA, Article 49(1) and 50(1).

24 Canadian Model FIPA, Article 51.

25 Canadian Model FIPA, Article 52(1).

26 At the request of a disputing party, the sole arbitrator may grant limited requests for specifically identifiable documents that the requesting disputing party knows, or has good cause to believe, exist and are in the possession, custody or control of the other disputing party, and shall adjust the schedule under [Article 52(1)] as appropriate’. Canadian Model FIPA, Article 52(4).

27 Canadian Model FIPA, Article 52(5).

28 Canadian Model FIPA, Article 52(6).

29 Canadian Model FIPA, Article 52(6).

- consolidation of one or more claims falling under the expedited procedure into a single arbitration.³⁰

It is also likely that CETA soon will include additional rules that adapt the procedure for cases involving individuals or SMEs.³¹

Some IIAs recognise the role that SMEs play in contributing to economic growth and that they should be encouraged to benefit from IIAs to promote investment, including having access to the dispute resolution mechanisms in the IIAs.³² However, the vast majority of IIAs do not provide for a special procedure for SMEs or small value claims, although this may well change in the future.

B. In arbitration rules

The arbitration rules to which dispute resolution clauses in IIAs most frequently refer are the ICSID Rules³³ and the UNCITRAL Rules.³⁴ Some treaties also refer to ICC, SCC, or PCA Arbitration Rules.³⁵

Other arbitration rules that primarily cater to commercial arbitration – eg, the arbitration rules of the LCIA and the HKIAC – also can be used for investor–state disputes, although this would likely be on the basis of a consent clause in an investment contract. CIETAC,³⁶ VIAC, SCC, and SIAC have adopted special rules for investor–state arbitration.³⁷

To address time and cost efficiency, many arbitral institutions have adopted expedited rules or fast-track procedures, often in a commercial arbitration context.³⁸ These rules are designed to apply to disputes

30 Canadian Model FIPA, Article 53.

31 The EU Commission and Council has stated that: ‘The adoption by the Joint Committee of additional rules, provided for in Article 8.39.6 of the CETA, intended to reduce the financial burden imposed on applicants who are natural persons or small and medium-sized enterprises, will be expedited so that these additional rules can be adopted as soon as possible;’ *Statement No. 36 on investment protection and the Investment Court System* (European Commission), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:011:FULL&from=CS>, accessed 5 April 2022.

32 RCEP, Article 14.1, Agreement establishing an Economic Partnership Agreement between the Eastern and Southern Africa States and the United Kingdom of Great Britain and Northern Ireland, Article 41; Canadian Model FIPA, Preamble, Second Recital.

33 The references to the ICSID Rules in this report refer to the updated rules in force as of 1 July 2022.

34 Annex 14-D of the USMCA and Chapter 11 of NAFTA; Chapter 10 of DR–CAFTA; Chapter 11 of the ASEAN–Australia–New Zealand Agreement; Chapter 9 of the Trans-Pacific Partnership Agreement; Article 26 of the ECT; Article 24(3) of the 2012 US Model BIT; Article 7 of the 2006 France Model BIT.

35 Energy Charter Treaty, Article 26(4), referring disputes to the SCC; the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments of 10 February 1993, Article 8(b), referring disputes to the ICC; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments of 12 May 2006, Article 11(4)(c), referring disputes to the PCA Optional Rules for Arbitrating Disputes between two Parties of which only one is a State.

36 Also known as the Arbitration Court of the China Chamber of International Commerce.

37 CIETAC International Investment Arbitration Rules, in force as of 1 October 2017; VIAC Rules of Investment Arbitration, in force as of 1 July 2021; Appendix III of the SCC Arbitration Rules, in force as of 1 January 2017; SIAC Investment Rules, in force as of 1 January 2017.

38 See the ICC; the SCC; the Swiss Centre; the CIETAC; the SIAC; the HKIAC; the ICDR of the AAA; the DIS; the VIAC; the JCAA; the RAC; the AIAC; ICSID. See also UNCITRAL EAR.

that involve a distinct subject matter,³⁹ are of a simple nature,⁴⁰ or concern small value claims.⁴¹ These expedited procedures can apply by way of express consent of the parties (so called ‘opt-in’)⁴² or can be triggered automatically or upon approval of the administering institution when the amount in dispute does not exceed a certain value,⁴³ or in cases of urgency.⁴⁴ While some expedited procedures take the form of a special section, chapter, or annex incorporated into the rules,⁴⁵ others are separate, stand-alone sets of rules.⁴⁶

1. Application to investment disputes

The application of expedited rules to claims below a certain value is an approach commonly adopted in arbitration rules applicable to commercial claims.⁴⁷ However, the application of expedited procedures in the arbitration rules most often used in investment arbitration is on an opt-in basis. For example, the UNCITRAL EAR developed by the UNCITRAL Working Group II apply on an opt-in basis and are not

39 Eg, domain name disputes, construction disputes, or sports arbitration.

40 Eg, unpaid invoices, breach of a supply or a sales agreement. See *AQZ v ARA* [2015] SGHC 49, available at www.uncitral.org/docs/clout/SGP/SGP_130215_FT.pdf, accessed 5 April 2022, in which Prakash J of the Singapore High Court affirmed an award obtained using SIAC’s fast-track arbitration procedure, where the underlying dispute concerned the existence of a contract for the supply of coal.

41 Appendix VI (Expedited Procedure Rules) of the ICC Rules, Article 1(2).

42 Preamble of the SCC Expedited Rules; UNCITRAL EAR, Article 1.

43 ICC Rules, Article 30(2); HKIAC Rules, Article 41; Swiss Rules, Articles 6(4) and 42(2); SIAC Rules, Rule 5; CIETAC Rules, Article 56(1).

44 Article 42.1(c) of the HKIAC Rules and Rule 5.1c. of the SIAC Rules permit a party to request the application of expedited proceedings ‘in cases of exceptional urgency’. The UNCITRAL EAR also allows parties to refer their dispute to the expedited rules after they have initiated arbitration, which may be relevant in unforeseen cases of urgency (see UNCITRAL Working Group II (Dispute Settlement), 74th Session, Vienna (27 September–1 October 2021), ‘Draft Explanatory Note to the UNCITRAL Expedited Arbitration Rules, Note by the Secretariat (Doc No. A/CN.9/WG.II/WP.219)’ (UN General Assembly, 28 July 2021) available at <https://undocs.org/A/CN.9/WG.II/WP.219>, accessed 5 April 2022, para 5.

45 Appendix VI (Expedited Procedure Rules) of the ICC Rules; Section V, Article 42 (Expedited Procedure) of the Swiss Rules; International Expedited Procedures (Article E-1 through E-10) of the ICDR International Arbitration Rules; Chapter IV Summary Procedure of the CIETAC Rules; Section VI, Article 42 (Expedited Procedure) of the HKIAC Rules; Rule 5 (Expedited Procedure) of the SIAC Rules; UNCITRAL Expedited Arbitration Rules and text of the additional paragraph in Article 1 of the UNCITRAL Rules; Chapter XII of the ICSID Rules.

46 SCC Expedited Rules; Rules for Expedited Arbitration of the Finland Chamber of Commerce.

47 For example, under Article 1(2) of Appendix VI of the ICC Rules, the Expedited Procedure Rules apply when the amount in dispute does not exceed US\$2m (for agreements concluded on or after 1 March 2017, but before 1 January 2021) or US\$3m (for agreements concluded on or after 1 January 2021). Similarly, under Article 42.1(a) of the HKIAC Rules, a party may apply to HKIAC for the arbitration to be conducted under an expedited procedure where the amount in dispute does not exceed the amount set by HKIAC, as stated on HKIAC’s website on the date of submission of the Notice of Arbitration (which at the date of this report [October 2022] was HK\$25m). And, under Article 6(4) of the Swiss Rules, where the amount in dispute does not exceed CHF 1m, the Expedited Procedure shall apply. The aggregated value of the claims and counterclaims serves to determine the amount in dispute and whether the expedited procedure will apply.

contingent on any monetary value.⁴⁸ When the parties agree, the UNCITRAL EAR modify the UNCITRAL Rules for all disputes ‘in respect of a defined legal relationship, whether contractual or not’.⁴⁹ They thus could apply to investor–state disputes based on treaties.⁵⁰

The ICSID EAR are also ‘opt-in’.⁵¹ Parties may consent in writing to have the ICSID EAR apply to any dispute that qualifies under the ICSID Convention or the Additional Facility, and they may do so at any time (whether before or after registration of the case). In discussions on the application of the expedited rules, there was limited support for the *automatic* application of the ICSID EAR to small value claims and a consent-based mechanism was preferred.⁵² One reason given was that investment arbitrations can have the same level of complexity, regardless of the amount in dispute.⁵³ Nevertheless, it was also noted that the ICSID EAR could be useful in specific cases, for example for cases proceeding under investment contracts, or treaty cases with few disputed facts. In addition, in the sixth Working Paper on the amendments to the expedited rules, one state proposed that the ICSID Secretariat draw the parties’ attention to the possibility of expedited arbitration for ‘low value claims’. The ICSID Secretariat agreed to adopt this suggestion as a matter of administrative practice.⁵⁴

In recent years, international stakeholders have identified the need to adapt investment treaty arbitration proceedings to account for the nature of claims and the profile of the investor, including small value claims. The UNCITRAL Working Group III is discussing a wide range of mechanisms aimed at improving the efficiency of investor–state arbitration, and reducing costs and duration. These discussions concern,

48 The UNCITRAL EAR and the new Article 1, paragraph 5 of the UNCITRAL Rules, prepared by the UNCITRAL Working Group II, were adopted by the UNCITRAL at its 54th session in 2021. The UNCITRAL EAR came into effect on 19 September 2021 (see UNCITRAL Working Group II (Dispute Settlement), 74th Session, Vienna (27 September–1 October 2021), Report (Doc No. A/CN.9/1085) (UN General Assembly, 5 October 2021), available at <https://undocs.org/A/CN.9/1085>, accessed 5 April 2022, para 2). This is also the approach of the SCC Expedited Rules whose application is not contingent on any monetary value (see Preamble of the SCC Expedited Rules). To indicate that the SCC Expedited Rules are designed to apply to low value disputes, the SCC modified the costs schedule to calculate arbitration costs for cases conducted under the SCC Expedited Rules in 2017. Prior to the 2017 SCC Expedited Rules, the costs schedule reflected arbitrator fees for cases with amounts in dispute of up to €75m (see Appendix III (Schedule of Costs) of the 2010 SCC Expedited Rules). The costs schedule now reflects arbitrator fees for cases with amounts in dispute of up to €5m and the costs of cases with amounts in dispute exceeding that threshold are calculated by the SCC Board on case-by-case basis (see Appendix III (Schedule of Costs) of the 2017 SCC Expedited Rules).

49 ‘Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Expedited Arbitration Provisions, then such disputes shall be settled in accordance with the UNCITRAL Arbitration Rules as modified by these Provisions and subject to such modification as the parties may agree’. UNCITRAL EAR, Article 1 (Scope of application).

50 However, some states have noted that the UNCITRAL Working Group II did not account for ‘the particularities of investment arbitration’ in the elaboration of the UNCITRAL EAR and did not analyse their suitability for investment disputes, and that disputing parties must do so in each individual case. See *Comments by the Republic of Chile regarding Provision 1 (Scope of Application) of the Draft Expedited Arbitration Provisions* (UNCITRAL), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/submission_by_chile_eng.pdf, accessed 5 April 2022.

51 ICSID EAR, Rule 75(1).

52 ICSID Rules Amendment Project – Member State & Public Comments on WP # 1 of August 3, 2018’ (ICSID), available at https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf, accessed 5 April 2022.

53 ‘WP # 1, Schedule 9: Addressing Time and Cost in ICSID Arbitration’ (ICSID), available at https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf, accessed 5 April 2022,

54 ‘ICSID Working Paper #6’ (ICSID), 44.

inter alia, the adoption of expedited procedures for low value claims and the availability of third-party funding for claims brought by SMEs.⁵⁵

2. Typical features of an expedited arbitration

Given their potential for reducing the time and costs of arbitral proceedings, expedited rules may be especially useful to parties with limited means, who require a quick resolution of their dispute or whose dispute concerns a small value claim. These considerations could be equally relevant to investor–state disputes. The parties may agree to apply the entire set of expedited rules, or they may select certain provisions to replace provisions in the applicable non-expedited procedural rules.⁵⁶

We set out below an overview of the typical features of an expedited arbitration. Annex 5 to this Report includes a table comparing the features of the various expedited arbitration rules.

MONETARY THRESHOLD FOR SMALL VALUE CLAIMS

Most expedited rules are designed to apply automatically to low value disputes or upon approval by the administering institution.⁵⁷ The monetary thresholds span between US\$500,000 (ICDR) to SG\$6m (SIAC) (approximately US\$4.5m).

OPT-IN WITH QUALIFIERS

In their arbitration agreement, parties may subject their dispute to expedited rules and agree on different qualifiers. For example, they may agree to grant discretion to the arbitral institution to decide whether the expedited rules should apply, taking into account certain circumstances.⁵⁸ They also may agree to apply the

55 UNCITRAL Working Group III (ISDS Reform), 40th Session, Vienna (8–12 February 2021), *Report (Doc No. A/CN.9/1050)* (UN General Assembly, 17 March 2021), available at <http://undocs.org/en/A/CN.9/1050>, accessed 5 April 2022, para 22; UNCITRAL Working Group III (ISDS Reform), 39th Session, Vienna (5–9 October 2020), *Report (Doc No. A/CN.9/1044)* (UN General Assembly, 10 November 2020), available at <http://undocs.org/en/A/CN.9/1044>, accessed 5 April 2022, para 64; UNCITRAL Working Group III (ISDS Reform), Resumed 38th Session, Vienna (20–24 January 2020), *Report (Doc No. A/CN.9/1004/Add.1)* (UN General Assembly, 28 January 2020), available at <https://undocs.org/en/A/CN.9/1004/add.1>, accessed 5 April 2022, para 90; UNCITRAL Working Group III (ISDS Reform), 38th Session, Vienna (14–18 October 2019), *Report (Doc No. A/CN.9/1004)* (UN General Assembly, 23 October 2019), available at <http://undocs.org/en/A/CN.9/1004>, accessed 5 April 2022, paras 30 and 81; UNCITRAL Working Group III (ISDS Reform), 37th Session, New York (1–5 April 2019), *Report (Doc No. A/CN.9/970)* (UN General Assembly, 9 April 2019), available at <http://undocs.org/en/A/CN.9/970>, accessed 5 April 2022, para 22; UNCITRAL Working Group III (ISDS Reform), 36th Session, Vienna (29 October–2 November 2018), *Report (Doc No. A/CN.9/964)* (UN General Assembly, 6 November 2018), available at <http://undocs.org/en/A/CN.9/964>, accessed 5 April 2022, paras 111, 118 and 131; UNCITRAL Working Group III (ISDS Reform), 35th Session, New York (23–27 April 2018), *Report (Doc No. A/CN.9/935)* (UN General Assembly, 14 May 2018), available at <https://undocs.org/en/A/CN.9/935>, accessed 5 April 2022, para 91; UNCITRAL Working Group III (ISDS Reform), 34th Session, Vienna (27 November–1 December 2017), *Report (Part I) (Doc No. A/CN.9/930/Rev.1)* (UN General Assembly, 19 December 2017), available at <https://undocs.org/en/A/CN.9/930/Rev.1>, accessed 5 April 2022, paras 41 and 64.

56 Most arbitration rules allow the parties to apply any agreement on procedural matters to the extent it does not conflict with any mandatory laws or treaty provisions.

57 ICC Rules, Article 30; HKIAC Rules, Article 42.1(a); Swiss Rules, Article 6(4); SIAC Rules, Rule 5; UNCITRAL EAR, Article 1.

58 SCC Combined [model] clause – Rules for Expedited Arbitrations as first choice: ‘The Rules for Expedited Arbitrations shall apply, unless the SCC in its discretion determines, taking into account the complexity of the case, the amount in dispute and other circumstances, that the Arbitration Rules [of the SCC] shall apply. In the latter case, the SCC shall also decide whether the Arbitral Tribunal shall be composed of one or three arbitrators’. Available at <https://sccinstitute.com/our-services/model-clauses/english>, accessed 5 April 2022.

expedited rules irrespective of the amount in dispute⁵⁹ or agree on a small value claim threshold between themselves.⁶⁰ This is possible under a variety of arbitration rules,⁶¹ and also would be possible under the ICSID EAR if the parties specifically agree to such threshold, eg, in their investment contract.

A SOLE ARBITRATOR BY DEFAULT

Expedited arbitration rules typically provide for the appointment of a sole arbitrator. For example, some expedited rules leave no room for party autonomy and provide for the appointment of a sole arbitrator in all cases.⁶² Other rules allow the parties to agree on more than one arbitrator, although the default is typically a sole arbitrator.⁶³ Some expedited rules that foresee a default provision in favour of a sole arbitrator also provide that, when the arbitration agreement provides for three arbitrators, the institution may invite the parties to agree to refer the case to a sole arbitrator.⁶⁴

TIME LIMITS FOR FILINGS

Expedited rules usually set out shorter time limits for the exchange of submissions than those established in 'standard arbitration rules,' which typically give the parties the opportunity to agree or the tribunal the discretion to decide the time limits for filings.⁶⁵ Time limits for the filing of submissions can span from 20 days (CIETAC),⁶⁶ to 15 days (SCC Expedited Rules or UNCITRAL EAR),⁶⁷ or up to 60 days for the memorial and counter-memorial and 40 days for the reply and rejoinder (ICSID EAR).⁶⁸

59 ICC model clauses for Expedited Arbitration: 'The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply irrespective of the amount in dispute'; 'The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply, provided the amount in dispute does not exceed US\$ [specify amount] at the time of the communication referred to in Article 1(3) of the Expedited Procedure Rules'.

60 SCC Combined [Model] clause – value based: 'The Rules for Expedited Arbitrations shall apply where the amount in dispute does not exceed €100,000. Where the amount in dispute exceeds €100,000 the Arbitration Rules shall apply. The Arbitral Tribunal shall be composed of a sole arbitrator where the amount in dispute exceeds €100,000 but not €1,000,000. Where the amount in dispute exceeds €1,000,000, the Arbitral Tribunal shall be composed of three arbitrators. The amount in dispute includes the claims made in the Request for Arbitration and any counterclaims made in the Answer to the Request for Arbitration'. Available at <https://sccinstitute.com/our-services/model-clauses/english/>, accessed 5 April 2022.

61 UNCITRAL EAR, Article 1, allowing parties to agree to settle their disputes in accordance with the UNCITRAL Rules as amended by the Expedited Arbitration Rules and 'subject to such modification as the parties may agree'. Such qualifiers as the parties may agree are not, however, mandatory and the parties may also opt-in without qualifiers.

62 SCC Expedited Rules, Article 17: 'The arbitration shall be decided by a sole arbitrator'. Notably, the ICC Rules go one step further and provide that '[t]he Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator' (see Appendix VI of the ICC Rules, Article 2(1)).

63 ICSID EAR, Rule 76; UNCITRAL EAR, Article 7; Swiss Rules, Article 42(2)(b); CIETAC Rules, Article 58; HKIAC Rules, Article 42.2(a). In some instances, the arbitral institution can determine that there will be more than one arbitrator (See SIAC Rules, Rule 5.2b.)

64 HKIAC Rules, Article 42.2 (b); Swiss Rules, Article 42(2)(c).

65 ICSID Rules, Rule 11.

66 'The Respondent shall submit its Statement of Defense [...] within twenty (20) days of its receipt of the Notice of Arbitration [...] 2. The Claimant shall file its Statement of Defense to the Respondent's counterclaim within 20 days of its receipt of the counterclaim [...]'. CIETAC Rules, Article 59.

67 'Written submissions shall be brief and the time limits for the filing of submissions may not exceed 15 working days, subject to any other time limit that the Arbitrator, for compelling reasons, may determine'. Article 30(2) of the SCC Expedited Rules. 'Within 15 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration [...] [and] [w]ithin 15 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration'. UNCITRAL EAR, Article 5(1)–(2).

68 ICSID EAR, Rule 81(1).

In addition to shortening time limits for submissions, some expedited rules specifically empower the tribunal or the arbitration institution to further shorten the time limits that are generally provided for in their non-expedited rules.⁶⁹

LIMITED NUMBER OF FILINGS

Another typical feature of expedited rules is the limitation on the number of submissions the parties may file. The limitation may be explicit in the rules or follow from the express authority granted to the sole arbitrator.⁷⁰ Many expedited rules provide for a single round of pleadings, with any subsequent filings being exceptional.⁷¹ The ICSID EAR streamline the written procedures but provide for two rounds of pleadings after the request for arbitration.⁷² There is no possibility to bifurcate any objections or claims,⁷³ which are joined to the main schedule.⁷⁴

POSSIBILITY TO LIMIT DOCUMENT PRODUCTION AND EVIDENCE

The ICC Expedited Procedure Rules empower the arbitrator to ‘decide not to allow requests for document production or to limit [...] written witness evidence (both fact witnesses and experts)’.⁷⁵

Under the ICSID EAR, possible requests for production of documents and interim measures are not excluded from the written process, but run in parallel with the main schedule, unless the tribunal determines that special circumstances justify the suspension of the main schedule.⁷⁶ Similarly, while document production is not excluded from the UNCITRAL EAR, Article 15(1) allows the tribunal to impose limitations on the parties regarding the taking of evidence and requests for document production.⁷⁷

69 ‘HKIAC may shorten the time limits provided for in the Rules, as well as any time limits that it has set’, HKIAC Rules, Article 42.2(c); ‘The Registrar may abbreviate any time limits under these Rules’, SIAC Rules, Rule 5.2a.; ‘Subject to article 16 of the Expedited Rules, the arbitral tribunal may at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under the UNCITRAL Arbitration Rules and the Expedited Rules or agreed by the parties’, UNCITRAL EAR, Article 10. See also Appendix VI of the ICC Rules, Article 3(4).

70 ‘The arbitral tribunal may [...] decide [...] to limit the number, length and scope of written submissions [...]’, Appendix VI of the ICC Rules, Article 3(4); ‘When communicating its notice of arbitration to the respondent, the claimant shall also communicate its statement of claim’, UNCITRAL EAR, Article 4(2).

71 ‘The parties may make one supplementary written submission in addition to the Request for Arbitration and the Answer. In circumstances that the Arbitrator deems to be compelling, the Arbitrator may allow the parties to make further written submissions’, SCC Expedited Rules, Article 30(1).

72 Rule 81 of ICSID EAR provides that ‘(a) the claimant shall file a memorial within 60 days after the first session; (b) the respondent shall file the counter-memorial within 60 days after the date of the filing of the memorial; [...] (d) [...] a reply shall be filed within 40 days after the date of filing the counter-memorial [and] (e) [...] a rejoinder within 40 days after the date of filing the reply’. The memorial and counter-memorial shall not exceed 200 pages each and the reply and rejoinder shall not exceed 100 pages each.

73 ICSID EAR, Rule 75(2).

74 ICSID EAR, Rule 81(2).

75 Appendix VI of the ICC Rules, Article 3(4).

76 ICSID EAR, Rule 81(4).

77 ‘The arbitral tribunal may reject any request, unless made by all parties, to establish a procedure whereby each party can request another party to produce documents’, UNCITRAL EAR, Article 15(1).

NO HEARING, DECIDING THE CASE ON THE DOCUMENTS

Many expedited rules permit having a documents-only arbitration. Again, the formula adopted in different rules varies: from provisions expressly empowering tribunals to consult the parties to determine if the dispute is to be decided on the documents only⁷⁸ to stricter formulas where a hearing shall be held only at the request of a party and if the party has given reasons the arbitrator considers compelling.⁷⁹

The ICSID EAR provide that, unless the parties agree otherwise, a hearing is to be held within 60 days after the last submission is filed.⁸⁰ In contrast, Article 11 of the UNCITRAL EAR empowers the tribunal to decide that, if no party has requested a hearing, hearings shall not be held.⁸¹

TIME LIMIT TO RENDER THE AWARD

Many expedited arbitration rules provide for a time limit for the issuance of the award.⁸² This ranges from a time limit of six months from the date of constitution of the tribunal, with an option to extend that period to nine months (UNCITRAL EAR)⁸³ to 120 days after the hearing (ICSID EAR).⁸⁴ Under

78 ‘The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts’, Appendix VI of the ICC Rules, Article 3(5); ‘[T]he Tribunal may, in consultation with the parties, decide if the dispute is to be decided on the basis of documentary evidence only, or if a hearing is required for the examination of any witness and expert witness as well as for any oral argument’, SIAC Rules, Rule 5.2c.; ‘The arbitral tribunal may decide whether to examine the case solely on the basis of the written materials and evidence submitted by the parties or to hold an oral hearing after hearing from the parties of their opinions’, CIETAC Rules, Article 60.

79 ‘A hearing shall be held only at the request of a party and if the Arbitrator considers the reasons for the request to be compelling’, SCC Expedited Rules, Article 33(1).

80 ‘[T]he hearing shall be held within 60 days after the last written submission is filed’, ICSID Rules, Rules 29 and 32, as modified by ICSID EAR, Rule 81(1)(g).

81 ‘The arbitral tribunal may, after inviting the parties to express their views and in the absence of a request to hold hearings, decide that hearings shall not be held’, UNCITRAL EAR, Article 11 (Hearings).

82 Time limits for the issuance of awards are typically triggered by the referral of the case or transmittal of the file to the tribunal (see SCC Expedited Rules, Article 43), the constitution of the tribunal (see UNCITRAL EAR, Article 16(1)), the holding of the case management conference (see Appendix VI of the ICC Rules, Article 4(1)), the hearing (see ICSID Rules, Rule 81(1)(i)), or the last filing (see ICDR International Arbitration Rules, Article E-10).

83 ‘If the arbitral tribunal concludes that it is at risk of not rendering an award within nine months from the date of the constitution of the arbitral tribunal, it shall propose a final extended time limit [...] The extension shall be adopted only if all parties express their agreement to the proposal within the fixed period of time’, UNCITRAL EAR, Article 16(1)-(3). Parties should be mindful of the consequences of allowing the nine-month time frame to lapse: the proceeding could be terminated; the subsequent award rendered could be subject to annulment or refused enforcement, depending on the applicable law (see UNCITRAL Working Group II (Dispute Settlement), *supra* n.44, para 88).

84 Under Rule 81(1)(i) and (g) of the ICSID EAR, the award shall be made no later than 120 days after the hearing, and the hearing shall be held within 60 days after the last written submission is filed. Importantly, Rule 12 of the ICSID Rules requires tribunals to use best efforts to meet time limits to issue orders, decisions, and the award. If the tribunal fails to meet a time limit, it shall advise the parties of the special circumstances justifying the delay and indicate the date when it anticipates rendering the order, decision, or award.

many rules, the power to extend the time limit for the issuance of the award lies in the hands of the administering institution, which allows it to control the duration of the proceeding.⁸⁵

AWARDS WITHOUT REASONS OR WITH SUMMARY REASONS

Some expedited rules do not require the issuance of a reasoned award or permit the issuance of an award with summary reasons. For example, under Article 42(1) of the SCC Expedited Rules the award shall be reasoned only upon the request of a party.⁸⁶ Under the HKIAC and the SIAC Rules, the reasons are to be provided in a summary fashion, unless the parties agree that no reasons are to be given.⁸⁷ Under Article 16 of the UNCITRAL EAR, when read together with Article 34(3) of the UNCITRAL Rules, the parties can agree that the award need not be reasoned.⁸⁸ The ICC Rules do not include special provisions on the reasoning of awards with regard to the expedited procedure, and the award must therefore ‘state the reasons upon which it is based’.⁸⁹ In line with the provisions of the ICSID Convention,⁹⁰ awards rendered in an arbitration conducted under the ICSID EAR also must be reasoned.

POSSIBILITY TO REVERT TO A NON-EXPEDITED PROCEDURE

Some expedited rules permit parties to revert to ‘standard proceedings’ and agree that their arbitration shall no longer be conducted on an expedited basis.⁹¹ For example, the ICSID EAR allow the parties to agree that Chapter XII shall no longer apply,⁹² or the tribunal may so determine at the request of a party, having regard to the stage of the proceeding, the complexity of the dispute, and other relevant circumstances.⁹³ The UNCITRAL EAR contain a similar provision, according to which the expedited

85 ‘The award shall be communicated to the parties within six months from the date when HKIAC transmitted the file to the arbitral tribunal. In exceptional circumstances, HKIAC may extend this time limit’, HKIAC Rules, Article 42.2(f); ‘The final award shall be made no later than three months from the date the case was referred to the Arbitrator [...] The Board may extend this time limit upon a reasoned request from the Arbitrator, or if otherwise deemed necessary, having due regard to the expedited nature of the proceedings’, SCC Expedited Rules, Article 43; ‘The time limit within which the arbitral tribunal must render its final award is six months from the date of the case management conference’, Appendix VI of the ICC Rules, Article 4 and Appendix III of the ICC Rules, Article 2(2); ‘the final Award shall be made within six months from the date when the Tribunal is constituted, unless in exceptional circumstances, the Registrar extends the time for making such final Award’, SIAC Rules, Rule 5(2)d.; ‘The award shall be made within six months from the date on which the Secretariat transmitted the file to the arbitral tribunal. In exceptional circumstances, the Court may extend this time-limit’, Swiss Rules, Article 42(1)(d).

86 ‘The Arbitrator shall make the award in writing and sign the award. A party may request a reasoned award no later than at the closing statement’, SCC Expedited Rules, Article 42.

87 ‘[T]he arbitral tribunal may state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given’, HKIAC Rules, Article 42.2(g); ‘[T]he Tribunal may state the reasons upon which the final Award is based in summary form, unless the parties have agreed that no reasons are to be given’, SIAC Rules, Rule 5.2e.

88 ‘The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given’, UNCITRAL Rules, Article 34(3). See UNCITRAL EAR, Article 16. See also UNCITRAL Working Group II (Dispute Settlement), *supra* n.44, para 94.

89 ICC Rules, Article 32(2).

90 ICSID Convention, Article 48(3).

91 ‘After receiving the Answer, and prior to the appointment of the Arbitrator, the SCC may invite the parties to agree to apply the Arbitration Rules with either a sole or three arbitrator(s), having regard to the complexity of the case, the amount in dispute and any other relevant circumstances’, SCC Expedited Rules, Article 11.

92 ICSID EAR, Rule 86(1).

93 ICSID EAR, Rule 86(2).

procedure no longer applies if the parties so agree or if the tribunal so decides at the request of a party.⁹⁴ Alternatively, the rules can empower the administering institution or the tribunal to determine that the expedited procedures shall no longer apply.⁹⁵ This possibility to opt out recognises the fact that the dispute may become more complex than originally anticipated.⁹⁶

94 UNCITRAL EAR, Article 2. The tribunal may consider elements such as the urgency of resolving the dispute, the stage of the proceeding, the complexity of the dispute, the anticipated amount in dispute, whether the current circumstances could have been foreseeable at the time of the parties' agreement to apply expedited procedure provisions, and the consequences of such determination on the proceedings. The UNCITRAL Working Group II decided that the elements to be taken into account by the tribunal when making the determination that the expedited arbitration procedure shall no longer apply are to be included in a separate explanatory note, and not in the UNCITRAL EAR (see UNCITRAL Working Group II (Dispute Settlement), *supra* n.44, para 13).

95 'The Court may, at any time during the arbitral proceedings, on its own motion or upon the request of a party, and after consultation with the arbitral tribunal and the parties, decide that the Expedited Procedure Provisions shall no longer apply to the case. In such case, unless the Court considers that it is appropriate to replace and/or reconstitute the arbitral tribunal, the arbitral tribunal shall remain in place', ICC Rules, Article 1(4); 'Upon the request of any party and after consulting with the parties and any confirmed or appointed arbitrators, HKIAC may, having regard to any new circumstances that have arisen, decide that the Expedited Procedure under Article 42 shall no longer apply to the case. Unless HKIAC considers that it is appropriate to revoke the confirmation or appointment of any arbitrator, the arbitral tribunal shall remain in place', HKIAC Rules, Article 42.3; 'Upon application by a party, and after giving the parties the opportunity to be heard, the Tribunal may, having regard to any further information as may subsequently become available, and in consultation with the Registrar, order that the arbitral proceedings shall no longer be conducted in accordance with the Expedited Procedure. Where the Tribunal decides to grant an application under this Rule 5.4, the arbitration shall continue to be conducted by the same Tribunal that was constituted to conduct the arbitration in accordance with the Expedited Procedure', SIAC Rules, Rule 5.4.

96 The possibility that parties have under some rules to agree *during the arbitration* to no longer apply the expedited procedure should not be confused with the possibility that parties have to opt-out in their arbitration agreement or at any time thereafter from applying the expedited rules altogether (see ICC Rules, Article 30(3)).

V. Additional procedural mechanisms available for arbitrating small value claims

Concerns about the costs and duration of arbitration are present in every arbitration proceeding, but these concerns are particularly pronounced in the case of small value claims. However, efforts aimed at reducing time and costs may need to be carefully tailored in the investment arbitration sphere. For example, an accelerated schedule may not be appropriate in certain cases with complex factual or legal issues in dispute or when multiple government agencies are involved and need to be consulted.

In addition, certain procedural features typically found only in investment arbitration for public policy reasons, such as increased transparency obligations and *amicus curiae* submissions, may make the arbitration proceeding more costly. Thus, in the case of small value claims, a balance must be struck between giving effect to public interest considerations underpinning these procedural mechanisms and the need to ensure that the process is not unduly burdened, which otherwise could deter the bringing of small value claims.⁹⁷ For example, it may well be that the parties agree to limit the length or scope of *amicus curiae* submissions.

The following section discusses procedural mechanisms that could be adopted in the context of small value claims to minimise the costs of arbitration, depending on the circumstances of the case. However, whether parties may adopt these procedural mechanisms will depend on the instrument setting out the arbitration agreement as well as the arbitration rules. For ease of reference, these mechanisms and strategies are summarised in Annex 4 in the form of a checklist of issues to consider.

A. Pre-arbitration phase

In principle, a number of features of arbitration proceedings that influence costs can be addressed before the dispute exists by including cost-saving procedural features into the arbitration clause. However, the vast number of investment arbitrations proceed under IIAs concluded by the contracting states without the input of the claimant/investor. Nevertheless, the parties to a dispute may try reaching agreement on certain cost-cutting procedural issues prior to the initiation of arbitration.⁹⁸

This section focuses on procedural mechanisms in the pre-arbitration phase.

97 The terms of the treaty and the arbitral rules will govern the applicability of transparency provisions. For example, ICSID Rule 62(1) provides that '[w]ith consent of the parties, the Centre shall publish every Award, supplementary decision on an Award, rectification, interpretation, and revision of an Award, and decision on annulment'. Such consent will be deemed given 'if no party objects in writing to such publication within 60 days after the dispatch of the document', *ibid*, Rule 62(3). Without party consent, ICSID nonetheless 'shall publish excerpts' of awards following a specific procedure. *ibid*, Rule 62(4). In contrast, Article 1 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration – which apply (1) to any treaties concluded on or after 1 April 2014 unless the parties to the treaty have agreed otherwise; (2) where the parties to the arbitration agree to their application; or (3) where the parties to the treaty have agreed to their application after 1 April 2014 – provides that 'the disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty'.

98 In many cases, states rely on external counsel to represent them in investment arbitration proceedings, but only start their selection process after an arbitration has been initiated. States therefore may be hesitant to enter into any cost agreement about upcoming arbitral proceedings before lead counsel is retained. It is therefore more likely that states will be able to agree on cost-saving procedural mechanisms after the arbitration has begun.

1. Choice of arbitral rules and institution

Most IIAs refer an investor and the respondent state to arbitration under the UNCITRAL Rules or the ICSID Rules (or ICSID Additional Facility Rules, if either the respondent state or the state of the disputing investor are not members of the ICSID Convention), usually at the choice of the investor. As mentioned above, some IIAs also refer to arbitration under the ICC Rules, the SCC Rules or the PCA Rules.⁹⁹ Some IIAs further allow the parties to agree to any arbitration rules.¹⁰⁰ Thus, parties have some degree of flexibility to agree on the institutional rules (or administering institution) that they deem most suitable for a cost-efficient settlement of their dispute. The paragraphs below outline some factors that could influence the relative convenience of one set of arbitral rules (or administering institution) over others.

NUMBER OF ARBITRATORS AND THEIR FEES

As further explained below, arbitration rules typically allow the parties to decide the number of arbitrators that will hear a dispute.¹⁰¹ Under the ICSID and UNCITRAL Rules, the default number of arbitrators is three.¹⁰² As also further explained below, the method for calculating arbitrator fees differs across rules.¹⁰³ In the ICSID system, arbitrator fees are calculated on the basis of ‘the equivalent of each eight-hour day’ to be determined from time to time by the ICSID Secretary General.¹⁰⁴ The ICC Rules establish a range of total fees for each arbitrator on the basis of the amount in dispute.¹⁰⁵ In contrast, the UNCITRAL Rules allow for flexibility in the determination of arbitrator fees, which can be tailored to the parties’ preferences.¹⁰⁶

AVAILABILITY OF EXPEDITED PROCEDURES

As discussed above, expedited procedures are already available under some rules (ICC, LCIA, UNCITRAL, and ICSID).¹⁰⁷ Some expedited rules may be better tailored to investor–state disputes than others, including because of monetary limitations on claims that may be subject to those rules.¹⁰⁸ For example, parties could agree to opt in to the expedited procedures available under the UNCITRAL Rules and the ICSID Rules when the amount in dispute cannot clearly be quantified at the outset of the proceedings, given that those rules do not limit the availability of expedited rules to certain monetary claims.¹⁰⁹

INSTITUTIONAL/ADMINISTRATIVE FEES

Institutional fees are generally assessed on the basis of three criteria (alone or in some combination): (1) the duration of the arbitration; (2) the amount in dispute; and (3) the amount of work actually performed

99 *Supra* p. 10. The LCIA Rules have also occasionally been referred to as an option (see Germany Model BIT 2008, Article 10).

100 Mexico–US BIT, Article 11.

101 *Infra* pp. 31 *et seq.*

102 ICSID Convention, Article 37(2)(b) and UNCITRAL Rules, Article 7(1).

103 *Infra* pp. 32 *et seq.*

104 ICSID Administrative and Financial Regulations, Article 14(1)(b).

105 Appendix III of the ICC Rules, Article 3.

106 UNCITRAL Rules, Article 41.

107 *Supra* pp. 9 *et seq.*

108 Annex 5.

109 *Supra* pp. 10-19.

by the institution. In addition, some institutions charge registration or lodging fees at the outset of the case. While none of these arrangements are necessarily superior in the abstract, the consequences for prosecuting small value claims may be significant. Claimants are therefore well-advised to consider the implications of an institution's system of remuneration for its case. For example:

- ICSID requires payment of US\$25,000 to request the institution of proceedings. Once a request for arbitration is registered, ICSID charges an annual flat administrative charge, which is currently at US\$42,000.¹¹⁰ These charges are independent of the size and complexity of a claim or the amount of work performed by ICSID.
- The PCA charges for its services solely on the basis of the number of hours of work performed, with distinct hourly rates for legal staff, assistant legal staff, and secretarial staff.¹¹¹
- The ICC requires payment of a lodging fee of US\$5,000, which is paid when the claimant files a request for arbitration. Thereafter, it charges administrative fees on the basis of the amount in dispute, independent of the amount of work performed by the ICC.¹¹²
- The SCC requires payment of a €3,000 as a registration fee. Thereafter it charges administrative fees based on the amount in dispute.¹¹³
- The LCIA requires a registration fee of £1,950 and additionally charges for the administrative work performed by its team on the basis of hourly rates.¹¹⁴
- Due to the non-institutional nature of the UNCITRAL Rules, no institutional/administrative fees apply to UNCITRAL cases as such. This grants the parties the flexibility to choose whether to appoint an institution (often the PCA or ICSID) to administer the proceedings.

In some cases, the payment of administrative fees allows the parties to use the administering institution's hearing venues for free (eg, ICSID and PCA-administered cases).

110 ICSID Schedule of Fees, effective 1 July 2020, available at <https://icsid.worldbank.org/services/content/schedule-fees>, accessed 5 April 2022.

111 PCA Schedule of Fees and Costs, available at <https://pca-cpa.org/fees-and-costs/>, accessed 5 April 2022.

112 Appendix III of the ICC Rules, Article 2(2), which provides that, in setting the fees of the arbitral tribunal, the ICC Court may take into consideration, among other things, the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award.

113 Appendix IV of the SCC Rules, Article 2, which provides that the board shall determine the arbitrators' fees in accordance with the table included therein and may deviate from such amounts in exceptional circumstances.

114 LCIA Schedule of Arbitration Costs, effective 1 October 2020, available at www.lcia.org/Dispute_Resolution_Services/schedule-of-costs-lcia-arbitration-2020.aspx, accessed 5 April 2022.

Some sets of rules include economic disincentives aimed at minimising delays in the issuance of awards, such as the threat of a reduction in arbitrator fees (eg, the ICC),¹¹⁵ which may result in shorter deliberation periods and overall speed in more expedited procedures.

ANNULMENT AND ENFORCEMENT PROCEDURES

Under all non-ICSID cases, challenge and enforcement procedures are governed by the relevant domestic laws (ie, the law of the seat of the arbitration and the law of the place where enforcement is sought), and any international treaties (like the New York Convention) that may apply. In contrast, the ICSID Convention provides for a self-contained annulment procedure,¹¹⁶ and includes special rules on recognition and enforcement that may reduce the risk of potentially lengthy court proceedings.¹¹⁷

2. *Choice of the seat for non-ICSID cases*

The choice of the legal seat of the arbitration has important legal and practical implications for non-ICSID investor–state arbitrations. Unlike ICSID arbitral proceedings, which take place on a supra-national level beyond the control of any national court, investment arbitrations conducted under other institutional or non-institutional rules must have a seat of the proceedings that would connect the parties to the law of a state (also commonly known as *lex arbitri*).

Although the majority of IIAs are silent as to the seat of the arbitral proceedings, some IIAs expressly provide that the seat of arbitration must be one of the signatory states to the New York Convention¹¹⁸ or a specific location such as The Hague,¹¹⁹ Paris,¹²⁰ or Stockholm.¹²¹

115 For example, the ICC Court may reduce arbitrator fees by 5 per cent to 20 per cent where there are delays in submitting draft awards (regardless of whether the arbitration is expedited), unless the ICC Court is satisfied that the delays are attributable to factors outside the arbitrators' control or exceptional circumstances (see 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration' (ICC, 2021), available at <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf>, accessed 7 April 2022, paras 155 and 161).

116 ICSID Convention, Article 52.

117 ICSID Convention, Articles 53 and 54.

118 Agreement between the Government of the United Mexican States and the Government of the Republic of Belarus on the Promotion and Reciprocal Protection of Investments (2008), Article 17; Agreement between the Government of the Kingdom of Sweden and the Government of Ukraine on the Promotion and Reciprocal Protection of Investments (1995), Article 8(4).

119 Agreement between the Swiss Federal Council and the Government of the State of Qatar on the Promotion and Reciprocal Protection (2001), Article 8(3); Agreement between the Federal Republic of Germany and the State of Qatar (1996), Article 11(4); Agreement between the Government of the Republic of Korea and the Government of the State of Qatar for the Promotion and Protection of Investments (1999), Article 8(3).

120 Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Republic of Kazakhstan and the Government of the Islamic Republic of Iran (1996), Article 11(6); Agreement between the Government of the Republic of Congo and the Republic of Italy (2006), Article X(4)(a).

121 Agreement between Bosnia and Herzegovina and the Government of the Italian Republic on the Promotion and Protection of Investments, (2000), Article 9(3)(b)(1); Agreement between the Government of the United Republic of Tanzania and the Government of the Italian Republic on the Promotion and Protection of Investments, (2001), Article 9(3)(b)(1).

Most fundamentally, the courts of the seat have a role and duty to control arbitral awards and accordingly have the power to set aside such awards.¹²² The courts of the seat also exercise other supervisory powers in support of the arbitration, including assistance to the tribunal in the taking of evidence or other provisional measures, as well as reviewing arbitrator challenges (albeit rarely).¹²³ In the absence of the parties' agreement with respect to the seat, some tribunals have referred to the UNCITRAL Notes on Organizing Arbitral Proceedings for guidance when deciding on the seat.¹²⁴ The paragraphs below outline some factors that could influence the selection of the seat by the parties.

SUITABILITY OF THE ARBITRATION LAW AT THE SEAT OF THE ARBITRATION

The parties may want to consider whether the law of the seat has suitable arbitration laws. It is also critical to consider whether the seat has an efficient and legally secure judicial system, including whether the courts of the state can act as neutral venues when the interests of the state against which the investor initiated the proceedings are at stake.¹²⁵ Although most tribunals have been reluctant to conduct a detailed comparison of arbitration laws of different states,¹²⁶ the laws of the most commonly-used seats would likely satisfy this condition.¹²⁷

COURTS' FAMILIARITY WITH SET-ASIDE PROCEEDINGS

Whether the specific courts of the seat are familiar with challenges against awards rendered in investor-state arbitrations may be an important factor to consider.¹²⁸ It is also important to consider whether the seat of arbitration has a specially-designated court whose decisions on potential set-aside applications are final (eg, Switzerland) or whether the court's decisions are otherwise appealable (eg, France, Sweden, Singapore).

122 'Unlike arbitration under the ICSID Convention, arbitration under the Arbitration (Additional Facility) Rules is not quarantined from legal supervision under the law of the place of arbitration [...] Thus the determination of the place of an Additional Facility arbitration can have important consequences in terms of the applicability of the arbitration law of that place'. *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Decision on Venue of the Arbitration, 26 September 2001, para 5.

123 *Telekom Malaysia Berhad v. The Republic of Ghana*, Decision, District Court of The Hague, 18 October 2004 and 5 November 2004.

124 *Ethyl Corporation v. Government of Canada*, UNCITRAL, Decision Regarding the Place of Arbitration, 28 November 1997, para 6; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Procedural Order No. 1, 7 October 2009, para 24; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Procedural Order No. 2: Concerning the Place of Arbitration, 9 January 2003, para 7.

125 *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on the Place of Arbitration, 17 October 2001, para 16.

126 *Ethyl Corporation v. Government of Canada*, UNCITRAL, Decision Regarding the Place of Arbitration, 28 November 1997, para 10; *Methanex Corporation v. United States of America*, UNCITRAL, the Written Reason for the Tribunal's Decision of 7 September 2000 on the Place of the Arbitration, 21 December 2000, para 26.

127 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, paras A.36–A.39.

128 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, paras A.36–A.39.

Standards of review of non-ICSID investment arbitral awards may vary depending on the jurisdiction. The standard may range from a *de novo* hearing (eg, England, Singapore) to a high standard of deference to the arbitral tribunal's findings (eg, Switzerland). Although these standards may lead to similar results in theory, practically speaking, a *de novo* hearing may result in lengthy hearings with potentially new evidence, entailing further costs and delay to the parties.

ENFORCEABILITY OF THE AWARD

It is important to consider whether there is a multilateral or bilateral treaty on enforcement of awards between the state in which the arbitration takes place and the state(s) where the award may be enforced. In any event, the seat preferably should be in a state that is a signatory to the New York Convention, so as to take advantage of the Convention's global reach.

POSSIBILITY TO WAIVE THE RIGHT TO SEEK ANNULMENT

Through waiver of annulment proceedings, the parties may avoid lengthy and costly challenges to awards before the courts of the seat. Although some national courts are sympathetic towards the parties' right to waive annulment, subject to certain conditions (eg, France, Switzerland, Sweden, Belgium), some other jurisdictions do not allow such waivers (eg, England and Wales).

3. *Pre-arbitral settlement negotiations*

Once a dispute arises, numerous IIAs have pre-arbitration procedures that encourage the negotiation and amicable settlement of the dispute without recourse to arbitration.¹²⁹ Generally, IIAs require negotiation to occur within a one to six-month 'cooling-off' period before arbitration is commenced.¹³⁰ The cooling-off period prior to arbitration usually starts to run after the investor sends a 'trigger letter' to the host state, setting out information about the dispute.¹³¹

Pre-arbitration cooling-off periods can provide the opportunity to either settle the dispute or clarify the areas of difference. By narrowing the issues in dispute before arbitration is commenced, submissions, evidence, and document production may be streamlined during the arbitration to focus on the most

129 UNCTAD, *Series on Issues in International Investment Agreements II* (2016), 56. Almost 90 per cent of all investment treaties contain cooling-off periods for parties to engage in amicable settlement, OECD, *Investor-State Dispute Settlement Public Consultation: 16 May – 23 July 2012*, 15. 'The parties concerned shall endeavour to settle their disputes amicably through negotiations', Article 10(1) of the Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments, 17 March 2009; 'Investor-State Disputes shall be subject to amicable consultations', Article 8(1) of the Agreement between the Lebanese Republic and the Slovak Republic for the Promotion and Reciprocal Protection of Investments, 20 February 2009.

130 'Consultations shall be held within 30 days of the submission of the Notice of Intent [...] unless otherwise agree[d]', Article 821 of the Canada-Colombia FTA.

131 Depending on the specific terms of the IIA, compliance with and expiry of the pre-arbitration settlement negotiation period may or may not be mandatory. As a matter of practical consideration, and depending on the terms of the applicable IIA, there is a risk that a tribunal may either decline jurisdiction or stay subsequent arbitration on the basis that the investor failed to comply with the cooling off period. See *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, para 157; *Burlington Resources v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para 312.

relevant and material issues.¹³² In the context of small value claims, the cooling-off periods may be used by investors and states more effectively to engage in effective consultations or negotiations beyond merely satisfying a procedural requirement under an investment treaty.¹³³

4. *Pre-arbitral mediation*

As an ancillary dispute resolution mechanism prior to formal proceedings under an investment treaty, parties may agree to resolve all or some part of their dispute through mediation.

Mediation refers to a method of alternative dispute resolution that employs a neutral third party who assists the parties in reaching a mutually agreeable solution. Contrary to arbitral tribunals, mediators are not adjudicators who decide cases for the parties. Rather, they ease the resolution of the dispute by facilitating and moving along the discussion about the issues in dispute between the parties.¹³⁴

In the context of small value claims, mediation may prove to be a realistic option to resolve disputes more effectively without having to initiate arbitral proceedings. In particular, settlement through mediation often can be concluded within a much shorter timeframe than investor–state arbitrations.¹³⁵ The expedited resolution of the dispute through mediation would spare the parties the legal representation fees as well as administrative and arbitrator costs that otherwise they would incur if the investor were to initiate arbitration.

Reportedly, a high number of mediated disputes result in successful settlements because the parties feel more confident in fulfilling the solution they mutually found with the help of a neutral third party, rather than an adjudicatory authority imposing a solution.¹³⁶ Even if the mediation process proves to be unsuccessful, the parties' discussions throughout the process likely will eliminate a number of issues, thus narrowing down the disputed areas between the parties.

While mediation may offer a cost-efficient and effective resolution of the dispute, the mediated dispute may face a number of obstacles. For example, a host state may feel that, regardless of the value of the claim at issue, such claim is a direct attack on the rights and privileges of its sovereign and regulatory powers, and may therefore be unwilling to settle the dispute as a result.

132 If the number and/or scope of the claims and defences can be reduced through pre-arbitral settlement negotiations, timelines and the format of the hearing may be expedited. 'Proposed Amendments to 2006 ICSID Rules' (Debevoise & Plimpton, 2017) 1, 5.

133 A number of recent investor–state arbitrations have been withdrawn following the investors' consultations or negotiations with the respective host states. See *APM Terminals Callao S.A. v. Republic of Peru*, ICSID Case No. ARB/16/33, Resolution of the Secretary General Noting the Termination of the Procedure, 14 November 2017; *OmniTRAX Enterprises v. Canada*; *L.Ibre v. Mexico*, ICSID Case No. ARB/21/55.

134 S. Franck, 'Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide' (2014) ICSID Review – Foreign Investment Law Journal, 67.

135 E. Sussman, 'The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes' (2010) vol. VII (27) *Revista Brasileira de Arbitragem*, 59-60.

136 'It is generally accepted that about 80 per cent of the mediated disputes settle in mediation [...] These figures suggest that if there is merit in the concept of mediation for investor state disputes, there is much room for increasing the number of settlements'. E. Sussman, 'The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes' (2010) Vol VII (27) *Revista Brasileira de Arbitragem*, 2010, 64.

Finally, there may be enforceability issues even after a successful mediation process. A settlement agreement concluded as a result of a successful mediation process is not enforceable under the New York Convention. Although a number of countries have already acceded to the Singapore Convention, the convention is yet to be ratified by a number of jurisdictions.¹³⁷ Even in jurisdictions where the convention entered into force, it is not clear how national courts or authorities will treat enforcement proceedings under the Singapore Convention in the absence of *jurisprudence constante* or *stare decisis* to that effect, and thus there still may be obstacles regarding the enforceability of such settlement agreements.

The advantages of mediation arguably outweigh these obstacles, however, especially for small value claims. Given the magnitude of fees and costs of investor–state arbitrations in the millions of dollars, mediation can play an important role in resolving small value disputes in a more cost-efficient manner or in narrowing the number of issues in dispute, resulting in a more streamlined and cheaper arbitral process.

The potential for mediation to resolve such disputes is arguably reflected in ICSID’s introduction of its own mediation rules and in the UNCITRAL Working Group III’s studies to promote the use of mediation in investor–state disputes.¹³⁸ Similarly, the host states’ willingness to mediate investor–state disputes is also evident in a number of recent IIAs encouraging¹³⁹ or even mandating the use of mediation (or other amicable dispute resolution procedures) prior to any arbitration between the host state and investors subject to the IIA at issue.¹⁴⁰

137 At the time of writing, 55 states have signed the Singapore Convention, but only nine of them have ratified the Convention. Singapore Convention on Mediation, Signatory Member States, available at www.singaporeconvention.org/jurisdictions, accessed 5 April 2022.

138 ICSID Mediation Rules; UNCITRAL Working Group III (ISDS Reform), ‘Webinar on the Role of Mediation in ISDS’, available at <https://uncitral.un.org/en/mediationwebinar>, accessed 5 April 2022.

139 ‘In case a dispute related to an investment arises, to the extent possible, will be settled amicably through consultation and negotiation which it may include the utilization of non-binding proceedings, such as mediation and conciliation’, Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates, 2018, Article 20(1); ‘In the event of an investment dispute, the claimant and the respondent shall initially seek to resolve the investment dispute through consultations, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation’, Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China, 2019, Article 23(1); ‘Any legal dispute arising under this Chapter between an investor of one Party and the other Party, directly concerning an investment by that investor in the territory of that other Party, shall, as far as possible, be settled amicably through consultations and negotiations between the investor and that other Party, which may include the use of non-binding third-party procedures, where this is acceptable to both parties to the dispute. A request for consultations and negotiations shall be made in writing and shall state the nature of the dispute’, Free Trade Agreement between the Government of New Zealand and the Government of New Zealand and the Government of the People’s Republic of China, 2008, Article 152. See also ‘The disputing parties may at any time, be it after notice of intent to submit a claim to arbitration has been given or after a claim has been submitted to arbitration, agree to mediation’, Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, 2015, Article 23(1); ‘The disputing parties may at any time agree to have recourse to mediation’, CETA, Article 8.20.

140 ‘In the event that an investment dispute cannot be resolved through consultations and negotiations in accordance with paragraph 1, within three months after the respondent receives notification of the dispute, it must submit to a third-party procedure such as conciliation or mediation before an authorized center of the Party complained against in the dispute’, Agreement between the Government of the United Arab Emirates and the Government of the Republic of Costa Rica for the Reciprocal Promotion and Protection of Investments, 2017, Article 14(3); ‘When required by the Contracting Party, if the dispute cannot be settled amicably within three months from the date of receipt of the written notice, it shall be submitted to the competent authority of that Contracting Party or arbitration centers thereof, for conciliation and mediation’, Agreement between the Government of the United Arab Emirates and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments, 2015, Article 10(3).

5. Possibility of coordinating claims or bringing mass claims

The option of bringing one arbitration with numerous investors pursuing similar small value claims – where appropriate – is one way in which a small value claim can be arbitrated when it otherwise would be cost-prohibitive to bring it on its own. For instance, after the Argentine economic crisis of 2001, three arbitrations were initiated against Argentina that may be characterised as ‘mass claims’ by multiple small value investors seeking similar relief with nearly identical factual backgrounds – namely, Argentina’s default on sovereign bonds.¹⁴¹ The individual claims ranged from US\$50,000 to US\$78,000, but in the aggregate, mass claims brought collectively by individual investors amounted to several million, or up to over US\$3bn in damages claimed.¹⁴²

While the advantage of bringing similar claims in one arbitration is that it may decrease the cost and time of arbitral proceedings overall,¹⁴³ there may also be certain disadvantages to consider. States might prefer keeping claims separate to deal with different issues in different proceedings. Investors may not wish to bring claims together if they are competitors in the relevant market (since they may be required to disclose sensitive business information to co-claimants). Moreover, aggregating claims would require the investors to agree on the strategy of the arbitration together, which may not always be straightforward. Finally, bringing a mass claim may lead to the bifurcation of the proceeding for the tribunal to rule on the jurisdiction and admissibility of the claims,¹⁴⁴ which ultimately may increase costs.

There is no uniform practice to bringing mass claims in investor–state arbitration. For instance, neither the ICSID Convention nor the UNCITRAL Rules explicitly address this possibility. Some tribunals have accepted mass claims when they were considered to be ‘identical or sufficiently homogenous’ to ensure that deciding on them would not raise due process concerns.¹⁴⁵ However, a number of tribunals ruling on the admissibility of mass claims have expressed concern about the manageability of mass claims within the ICSID framework.¹⁴⁶

6. Selection of counsel

Legal fees reportedly comprise nearly 80 per cent of total arbitration costs.¹⁴⁷

141 In *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, there were over 60,000 claimants for total US\$3bn damages (approximately US\$50,000 each claimant); in *Ambiente Ufficio and Others v. Argentina*, ICSID Case No. ARB/08/9, there were over 90 claimants for total €6.8m damages (approximately €76,000 each claimant); and in *Alemanni and Others v. Argentine Republic*, ICSID Case No. ARB/07/8, there were over 180 initial claimants for total US\$14m damages (approximately US\$78,000 each claimant).

142 *Ibid.*

143 UNCTAD, *supra* n.129, 111.

144 *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para 127; *Ambiente Ufficio and Others v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para 3; *Alemanni and Others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014, para 11; *Adamakopoulos and others v. Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, para 20.

145 *Abaclat*, *supra* n.144, paras 540-547.

146 *Abaclat*, *supra* n.144, paras 296-298; *Alemanni and Others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014, para 335; *Adamakopoulos*, *supra* n.144, paras 247-259.

147 Celeste Salinas Quero, *Costs of Arbitration and Apportionment of Costs under the SCC Rules* (SCC, February 2016), available at https://sccinstitute.com/media/93440/costs-of-arbitration_scc-report_2016.pdf, accessed on 8 July 2022.

In selecting counsel, parties may bear in mind two key points. First, rates of law firms may vary considerably, depending on experience, structure, and location. Parties may want to consider the spectrum of rates and possible fee arrangements available and to assess carefully which counsel is best positioned to assist on each case in a cost-effective manner. It is good practice to consider how the size and complexity of the case may affect the pool of prospective counsel capable of taking on the case – and available to pursue it swiftly – and to request proposals from different counsel before committing to one. Indeed, many states engage in a procurement process and solicit competitive bids from various law firms before retaining counsel at the crossroad of experience and affordability.

Second, fee arrangements are not one-size-fits-all. There exist different types of fee arrangements that could be considered by parties and counsel. Fee arrangements can combine different pricing mechanisms, such as: hourly rates (with and without caps); fixed fees; fixed or capped fees associated with different procedural stages of the arbitration; discounts with a success fee component; and contingency fees payable upon success at the end of the proceeding. Third-party funders also can help shoulder all or part of the financial cost of the legal fees during the arbitration. Parties may need to form a realistic view of their financial capacity to bear the costs of the entire process (including a contingency for unforeseen procedural developments and additional expenses) and, in light of such view, should consider how different fee arrangements and resorting to third-party funders may bridge the parties' and counsel's needs in a particular case.

7. Selection of arbitrators

The selection of arbitrators to constitute an investment treaty tribunal involves a number of considerations.¹⁴⁸ The paragraphs below outline some pragmatic considerations that may assist parties in reaching cost-efficient and less time-consuming outcomes.

THREE-MEMBER TRIBUNAL VERSUS SOLE ARBITRATOR

As explained above, neither the ICSID Convention nor the UNCITRAL Rules require that a three-member tribunal be appointed in investor–state disputes, although it is the default rule in the absence of party agreement.¹⁴⁹ Thus, parties could agree to appoint a sole arbitrator to hear the dispute and thereby decrease the costs incurred during the arbitrator appointment process and during the proceeding.¹⁵⁰

148 This report does not deal with considerations about appointing authorities.

149 ICSID Convention, Article 37(2)(b) and UNCITRAL Rules, Article 9(1).

150 In *Pantechniki v. Albania*, the sole arbitrator noted that '[t]his case shows that competent lawyers on both sides of an investor–state dispute are able to represent their claims ably and efficiently without incurring vast expense. The Claimant seeks reimbursement of €154,523; Albania's corresponding claim is €269,657. These amounts are but fractions of cost claims submitted in other ICSID cases. Yet the written and oral presentations were highly competent. Counsel are to be commended for setting such an example'. See *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, paras 8, 103. See also *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, Arbitral Award, 22 September 2005.

Having the dispute heard by a sole arbitrator also may lead to a quicker proceeding.¹⁵¹ However, three-member tribunals are generally the norm. This may be so because investors and host states are less likely to find common ground in respect of (the profile of) a sole arbitrator. Nevertheless, given that the UNCITRAL and ICSID EAR, and the expedited procedure under the Canadian Model FIPA, foresee the appointment of a sole arbitrator, this may change going forward for small value disputes.

ARBITRATOR FEES

Arbitrator fees represent about one-fifth of the total cost of an arbitration (the largest cost component being counsel fees).¹⁵² Nevertheless, the section below sets out possible mechanisms to assist in reducing arbitrator fees.

Certain arbitration rules applied in investor–state arbitrations – eg, the ICC and SCC Rules – fix arbitrator fees by reference to the amount in dispute on the basis of an *ad valorem* sliding scale. Particularly in small value claims, where the factual and/or legal issues may be more straightforward, determining arbitrator fees based on the amount in dispute can provide more predictability and certainty in respect of these costs – and also can act effectively as a cap.

Other arbitration rules more commonly used in investor–state arbitrations, in particular the ICSID and the UNCITRAL Rules, remunerate arbitrators based on an hourly rate. Under the UNCITRAL Rules, the hourly rate is agreed between the arbitrator(s) and the parties, although the arbitrator(s) is required to ‘take into account the amount in dispute’.¹⁵³ At ICSID, the hourly rate is capped.¹⁵⁴

ENSURING ARBITRATOR AVAILABILITY

There are increasing concerns that the pool of international arbitrators is not diverse and that arbitrators in ISDS disputes are often ‘repeat players’.¹⁵⁵ Well-known arbitrators may have the experience – but often may have lesser availability – to proceed quickly and efficiently. Limited availability may inhibit the timely

151 The average duration of 17 publicly available investor–state arbitrations that were subjected to a sole arbitrator and resulted in awards was 23.7 months (from request of arbitration to award). This suggests that sole arbitrators decide cases more quickly than three-member tribunals, given that the average is more than four years for investor–state cases overall. See *NEPC Consortium v. Bangladesh Power Development Board*, ICSID Case No. ARB/18/15; *Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v. Kingdom of Spain*, ICSID Case No. ARB/12/17; *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4; *Astaldi S.p.A. v. Republic of Honduras*, ICSID Case No. ARB/07/32; *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10; *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14; *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3; *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC Case No. 093/2004; *Iurii Bogdanov v. Republic of Moldova (III)*, SCC Case No. 114/2009; *Yuri Bogdanov and Yulia Bogdanova v. Republic of Moldova*, SCC Case No. V091/2012; *Booker plc v. Co-operative Republic of Guyana*, ICSID Case No. ARB/01/9; *Sterling Merchant Finance Ltd v. Government of the Republic of Cabo Verde*, PCA Case No. 2014-33; *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*; *Sapphire International Petroleum Ltd National v. Iranian Oil Company*; *Libyan American Oil Company v. The Government of the Libyan Arab Republic*; *Peter de Sutter and others v. Madagascar (I)*, ICC.

152 OECD, *supra* n.129, 18. See also S. D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*, (OUP, 2019), 184–186.

153 See UNCITRAL Rules, Article 41.

154 Pursuant to the ICSID Schedule of Fees (Effective 1 July 2020), an arbitrator’s remuneration rate is capped at US\$3,000 per day per arbitrator subject to the permission of the Secretary General to increase the rate otherwise.

155 OECD, *supra* n.129, 44; L. Malintoppi and A. Yap, ‘Challenges of Arbitrators in Investment Arbitration,’ (2013) 7(2) *World Arbitration & Mediation Review* 153, 161.

holding of hearings and delay the issuance of the award. The availability of an arbitrator is a consideration to keep in mind when looking for arbitrator candidates to rule on small value claim disputes.¹⁵⁶

An example of how this could be managed in small value investor–state arbitrator appointments is the use of statements of availability pursuant to which the prospective arbitrator lists the number of cases they are arbitrating.¹⁵⁷ ICSID,¹⁵⁸ the PCA, and the ICC similarly check whether an arbitrator has the requisite availability prior to appointment. The SCC requires arbitrators to submit a signed statement of acceptance, availability, impartiality and independence once appointed.¹⁵⁹

B. Arbitration phase

1. Procedural order no. 1 and procedural calendar

Once a tribunal is constituted, the first milestone in the proceeding is for the tribunal to hold a procedural call or case management conference, prior to which the parties attempt to negotiate and agree on a first procedural order and a procedural calendar. ICSID, for example, requires that a first session with the tribunal and the parties be held within 60 days from the tribunal’s constitution (unless the parties agree otherwise).¹⁶⁰

The following three suggestions may assist in streamlining the negotiation of PO1.

WORK FROM A MODEL PO1

The topics that must be addressed in PO1 are relevant no matter the size of the claims: communications, written submissions, written and expert evidence, document disclosure, hearings, transparency, and third-party submissions. Working from a model PO1 allows the parties to narrow their areas of disagreement relatively quickly. Either the tribunal may propose a model PO1 or the parties may resort to an ‘off-the-shelf’ model PO1.¹⁶¹ ICSID has published a model PO1 for this purpose. The PCA International Bureau typically supports the members of the tribunal in preparing a draft PO1 on the basis of the PCA’s model provisions. If the arbitration is ad hoc, parties could refer to a publicly available PO1 used in an investment arbitration as a template to adapt. Moreover, ICCA has published a Drafting Sourcebook for Logistical Matters in Procedural Orders, which contains model provisions suitable for both commercial and investment arbitration.¹⁶²

156 M. Buckle, ‘The Investment Treaty Arbitration Review: Selection of Arbitrators in Investment Arbitration,’ *The Law Reviews* (2021).

157 2021 ICC Rules, Article 11(2).

158 ICSID Rules, Rule 19(3)(b).

159 SCC Arbitration Rules, Article 18(3) and SCC Expedited Rules, Article 19(3).

160 ICSID Rules, Rule 29(3).

160 ICSID Draft Procedural Order No. 1 (ICSID) available at <https://icsid.worldbank.org/sites/default/files/Draft%20Procedural%20Order%20No%201.pdf>, accessed on 5 April 2022.

162 *ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders* (ICCA), available at www.arbitration-icca-org/icca-reports-no-2-icca-drafting-sourcebook-logistical-matters-procedural-orders, accessed on 5 April 2022.

Setting a timeframe within which to organise the proceeding will require all involved (the parties and the tribunal) to hold the procedural conference and issue the PO1 swiftly. As explained above, the ICSID rules require that a first session be held within 60 days of the tribunal's constitution (unless the parties agree otherwise). The UNCITRAL EAR set out a time limit of 15 days.¹⁶³ If the applicable rules do not have a time limit, the parties could be encouraged to agree to one and the tribunal also may impose such a time limit as an exercise of its powers to conduct the arbitration efficiently. It is recommended that, once constituted, the tribunal reaches out to the parties promptly so as (1) to fix a date for the case management conference, and (2) set a schedule for the parties to revert on a joint PO1 prior to the case management conference. As explained above, it is useful if the tribunal provides a model PO1 for the parties to complete.

HOLD A REMOTE CASE MANAGEMENT CONFERENCE

Prior to the Covid-19 pandemic, case management conferences sometimes occurred in person (which often would delay the date of such conference due to scheduling conflicts). Today, it is significantly more common for the case management conference to be held by telephone or video conference. Holding the case management conference remotely (either by video or telephone) allows for scheduling the case management conference more quickly and without incurring travel costs.

2. *The tribunal's inner workings*

All major arbitral rules provide that tribunals may conduct an arbitration and adopt procedural measures as they deem appropriate, so long as the parties have an equal and full opportunity to present their case.¹⁶⁴ Many rules further require tribunals to conduct proceedings in an 'expeditious and cost-effective manner, having regard to the complexity and value of the dispute'.¹⁶⁵ To encourage tribunals to exercise their discretion in accordance with these goals, the parties may opt to expressly empower their tribunal on certain issues and to hold the tribunal accountable on certain deliverables. Put differently, the parties may consider a 'carrot and stick' approach in PO1 as further detailed below.

EMPOWER THE PRESIDING ARBITRATOR ON A THREE-MEMBER TRIBUNAL TO EXTEND TIME LIMITS WITHOUT CONSULTING THE CO-ARBITRATORS

Traditionally, PO1 empowers the presiding arbitrator to sign procedural orders on behalf of the tribunal after consultation with the co-arbitrators. That consultation process may be delayed, however, due to the tribunal members' availability. To facilitate the prompt resolution of procedural issues such as fixing of time limits and requests for extensions, it may be advisable to empower the presiding arbitrator to decide these issues without requiring prior consultation.

¹⁶³ UNCITRAL EAR, Article 9.

¹⁶⁴ ICC Rules, Article 22(2); UNCITRAL Rules, Article 17(1).

¹⁶⁵ ICC Rules, Article 22(1); UNCITRAL Rules, Article 17(1). ('The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute'.)

Depending on the circumstances, it may be advisable to obtain administrative assistance from an arbitral institution in ad hoc (ie, non-institutional) cases or to appoint a tribunal secretary to assist the tribunal. This may facilitate the administrative and organisational management of the proceeding, such as transmitting communications on behalf of the tribunal, and organising the tribunal's files as well as hearings and meetings. The scope of the tribunal secretary's role and responsibilities should conform to best practices.¹⁶⁶ Even though the use of an institution or a tribunal secretary may represent additional costs, it still may serve as a cost-saving measure by reducing the overall number of hours billed by the tribunal. This is because the secretary or institution can complete administrative tasks at a lower hourly rate than the tribunal otherwise would charge.

AGREE TO A BRIEF SUMMARY OF THE PARTIES' POSITIONS IN THE AWARD

Investment awards routinely span more than one hundred pages. A significant portion of these pages are used to set forth the parties' respective positions in detail. Empowering the tribunal to briefly summarise the parties' arguments may help streamline the award drafting process. This approach is already being adopted in revised arbitration rules. For example, the ICSID Rules require only that an award have a 'brief summary of the submissions of the parties, including the relief sought'.¹⁶⁷

SET A TIME LIMIT FOR THE TRIBUNAL'S ORDERS, DECISIONS, AND AWARD(S)

The average length of time between the last day of a final hearing and an award in ICSID arbitrations is 13.3 months.¹⁶⁸ Setting a time limit for various tribunal decisions in PO1 – such as the tribunal's order on document production (if any) and the issuance of the award – would encourage efficiency and the swift resolution of the dispute. The setting of time limits for the issuance of an award is becoming more common in international arbitration,¹⁶⁹ and it is also starting to be applied in the investment arbitration context. By way of example, the ICSID Rules currently envisage a final award for a regular proceeding no later than 240 days after the last written or oral submission.¹⁷⁰ A corollary may be to require periodic

166 *Young ICCA Guide on Arbitral Secretaries, The ICCA Reports No. 1* (ICCA, 2014), available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/aa_arbitral_sec_guide_composite_10_feb_2015.pdf, accessed 5 April 2022.

167 ICSID Rules, Rule 59(1)(h).

168 J. Commission & R. Moloo, *Procedural Issues in International Investment Arbitration* (OUP, 2018), para 10.31. See also 'Time and Costs in Investor-State Arbitration', *Arbitration Analytics Series: Vol. 1 – Time and Costs (A review of 2020 awards)*, Burford ('the average duration of ICSID and UNCITRAL arbitrations resulting in awards in 2020 was 4.28 years, with a significant portion of that period, 1.43 years, comprising the time between the close of the final hearing and the tribunal's issuance of an award') (emphases in original) (publication forthcoming).

169 ICC Rules, Article 31, setting a six-month time limit from the signature of the Terms of Reference to an award.

170 '(1) The Tribunal shall render the Award as soon as possible, and in any event no later than: (a) 60 days after the latest of the Tribunal constitution, the last written submission or the last oral submission, if the Award is rendered pursuant to Rule 41(3); (b) 180 days after the later of the last written or oral submission if the Award is rendered pursuant to Rule 44(3)(c); or (c) 240 days after the later of the last written or oral submission in all other cases. (2) A statement of costs and submission on costs filed pursuant to Rule 51 shall not be considered a written submission for the purposes of paragraph (1)', ICSID Rules, Rule 58; see also ICC Rules, Article 31(1).

updates from the tribunal during the deliberation and drafting process so as to keep the parties informed of the progress being made and the likely issuance date of the award.¹⁷¹

COMMIT THE TRIBUNAL TO RESERVE DELIBERATION DATES

A related suggestion is to encourage the tribunal to commit to reserve deliberation dates prior to and after the hearing, and to include such dates in PO1.¹⁷² Holding the tribunal accountable to deliberation dates (1) fosters the parties' confidence in the proceeding and in the tribunal's attention to the parties' dispute, (2) enhances transparency of the deliberative process and anticipated timing of an award (and thus minimises surprises), and (3) ensures that deliberations occur in a timely manner, when the evidence is still fresh on the tribunal's mind, so that an award can be rendered more promptly.

3. Cost budgeting

One of the central complaints of the investor–state arbitral process – for both claimants and respondents – is that of costs. According to one periodic study of investment treaty arbitration costs (last updated in 2021¹⁷³), an average claimant will incur more than US\$6m in costs in the course of proceedings and the average respondent more than US\$4.5m. It may not seem worthwhile to incur such costs when bringing or defending against claims with amounts that are in the range of these costs.

One method to help control legal costs – which was adopted in England and Wales following a review of civil litigation by Lord Justice Jackson¹⁷⁴ (the Jackson Report) – has been costs management, which is used to control costs in small value claims litigation (for claims under £10m). The core tenet of costs management is that the court plays an active role in managing the costs of the proceedings throughout the lifetime of the case – both in terms of the steps to be taken and the costs incurred by each party to the proceedings.

171 See Commission & Moloo, *supra* n.168, para 10.30: 'In October 2015, the Queen Mary International Arbitration Survey reported that the suggestion that was met with the most positive, and the least negative, response was the "requirement that tribunals commit to and notify parties of a schedule for deliberations and delivery of final award". It was noted that those interviewees were often kept in the dark about when awards would be rendered, and would welcome being better informed. Private practitioners shared this concern and commented that such a "proposal could alleviate some of their clients' frustrations with the length and uncertainty of the award process".'

172 L. Reed, *The Kaplan Lecture 2012 – Arbitral Decision-Making: Art, Science or Sport?*, available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media113581569903770reed_tribunal_decision-making.pdf (advocating for the Reed Retreat, in which the arbitrators meet prior to the merits hearing to discuss the parties' submissions and to consider issues on which they would like the parties to focus during the hearings), accessed 9 April 2021; D. Thomson, 'Rivkin's 'clarion call' for arbitration,' (*Global Arbitration Review*, 27 October 2015), available at <http://globalarbitrationreview.com/article/rivkins-clarion-call-for-arbitration> (advocating for tribunals to deliberate immediately after merits hearings), accessed 9 April 2021.

173 M. Hodgson, Y. Kryvoi and D. Hrcka, *2021 Empirical Study: Costs, Damages and Duration in Investor State Arbitration* (British Institute of International Comparative Law and Allen & Overy, 2021), available at www.biicl.org/publications/empirical-study-costs-damages-and-duration-in-investor-state-arbitration?cookieset=1&ts=1664163542, 11. See also S. D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (OUP, 2019), 184–186.

174 *Review of Civil Litigation Costs: Final Report* (December 2009), available at www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf, accessed 21 March 2021. Similar proposals were made around the same time in Australia's federal jurisdiction *A Strategic Framework for Access to Justice in the Federal Civil Justice System: A Guide for Future Action* (September 2009), available at www.ag.gov.au/sites/default/files/2020-03/A%20guide%20for%20future%20action.pdf.

The four core elements of costs management were defined in the Jackson Report as follows:¹⁷⁵ (1) the parties prepare and exchange litigation budgets or (as the case proceeds) amended budgets; (2) the court states the extent to which these budgets are approved; (3) so far as possible, the court manages the case so that it proceeds within the approved budgets; and (4) at the end of the case, the recoverable costs of the winning party are assessed in accordance with the approved budget (under English procedural law, the winning party recovers its costs from the opposite side). For more details on the costs management process, see Annex 3 to this Report.

A similar mechanism can be adapted to the investment arbitration process should the tribunal and the parties agree. The purpose of a party's costs budget is not to limit the amount that a party spends on the arbitration. Rather, its purpose is to give the parties a clear idea throughout the proceedings of its costs in an arbitration and the portion of costs it may have to pay if the tribunal were to make an adverse costs decision.

4. Preliminary issues

At this stage, several mechanisms exist for tribunals to decide issues preliminarily, most notably bifurcation and review of preliminary objections. In investor–state arbitration, bifurcation generally means addressing jurisdictional objections first, followed by liability and quantum.¹⁷⁶ Occasionally, the latter two phases also are treated sequentially.¹⁷⁷ Preliminary objections, which take on various forms, may be envisaged in the arbitral rules or the applicable investment treaty.¹⁷⁸ The premise behind these mechanisms for the early disposition of issues is that they should yield more efficient proceedings either by ‘reducing the risk of having to hold a final hearing on the merits’¹⁷⁹ should the jurisdictional objections succeed or by narrowing the issues in dispute. However, should the jurisdictional objections be dismissed, having bifurcated proceedings could significantly increase the duration and costs of the proceedings.¹⁸⁰

A procedural calendar that anticipates the possibility of bifurcation or review of preliminary objections (as applicable) can serve to avoid further delaying the proceedings. In practice, this will mean that – in the case of possible bifurcation – the timetable will envisage (1) a request for bifurcation, followed by a

175 Jackson Report, s 40.1.4.

176 L. Greenwood, ‘Revisiting Bifurcation and Efficiency in International Arbitration Proceedings,’ (2019) 36 J. of Int’l Arb. 4, 421, 422.

177 *Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17.

178 ‘(2) The following procedure shall apply: (a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal; (b) the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments; (c) the Tribunal shall fix time limits for submissions on the objection; (d) if a party files the objection before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the objection, so that the Tribunal may consider the objection promptly upon its constitution; and (e) the Tribunal shall render its decision or Award on the objection within 60 days after the later of the constitution of the Tribunal or the last submission on the objection. [...] (4) A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 43 or to argue subsequently in the proceeding that a claim is without legal merit’. ICSID Rules, Article 41(2) and (4); ‘Without prejudice to a tribunal’s authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal’s competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.10’, United States–Peru Free Trade Agreement, Article 10.20(4).

179 L. Greenwood, *supra* n.176, 422.

180 L. Greenwood, *supra* n.176, 425.

response and the tribunal's decision; and (2) if the request is granted, an alternate schedule for briefing and a hearing on the bifurcated issues. In the case of a dispositive motion, the timetable also should provide for the timing of such a motion as well as the briefing and hearing schedule.

5. *Written submissions*

The number and length of written submissions in investment arbitration do not necessarily correlate to the particularities of a given dispute. Instead, it is commonplace for any investment arbitration, regardless of its size or complexity, to include at least two rounds of written submissions. These typically consist of a statement of claim by the claimant, a statement of defence by the respondent, a reply by the claimant, and a rejoinder by the respondent.¹⁸¹ If jurisdictional objections are raised, the respondent's rejoinder is normally followed by a rejoinder on jurisdiction by the claimant. Each round of written submissions protracts the procedural calendar of investment arbitrations. Unlike a private respondent in a commercial arbitration, on whom a tribunal may be willing to impose short deadlines, states at times may require longer periods to prepare submissions than private parties, as the state will need to coordinate among a number of public authorities to prepare its defence and avail itself of the relevant evidence.¹⁸² This results in extended intervals of time between each written submission, with six months being relatively standard.

Under the UNCITRAL Rules, the only written submissions that are specifically contemplated in the arbitral proceeding (in addition to introductory filings like the request for arbitration) are the statement of claim and the statement of defence. 'The arbitral tribunal shall decide which further written statements, in addition of the statement of claim and the statement of defence, shall be required from the parties or may be presented by them'.¹⁸³

Some options that are at the parties' disposal and that could be used alone or in combination follow.

AGREE ON ONLY ONE ROUND OF SUBMISSIONS

In small value claims, the parties and the tribunal may consider whether to dispense with the second round of submissions, where appropriate. Unlike other milestones in an arbitral proceeding that are largely out of the parties' control (eg, the time to constitute the tribunal or, to a lesser extent, the time for the final award to be issued), the time spent on the exchange of written submissions can be set by the parties. Indeed, this solution is particularly helpful to parties that are conscious of the time and money spent on the proceedings, given the small amounts at stake. Parties may seek to agree to only one round of briefs before the hearing: ie, the claimant's statement of claim, followed by the respondent's statement of defence. This will encourage both parties to set out their full case in their respective briefs, which would mitigate against any loss of 'adversarial exchange'. Furthermore, the parties could elaborate on their arguments and respond to any new arguments at the hearing.

181 ICSID Rules, Rule 30(1), which states that a memorial and a counter-memorial shall be filed, followed by a reply and a rejoinder (unless the parties agree otherwise).

182 UNCITRAL Working Group III (ISDS Reform), *supra* n.1, para 27.

183 UNCITRAL Rules, Article 24.

AGREE ON PAGE LIMITS

Limiting the length and scope of briefs in small value claims that do not present particularly complex issues of law or fact will allow the parties and the tribunal to narrow down the issues under discussion, which should result in a more efficient proceeding overall. Page limits incentivise parties to: (1) focus only on issues that are outcome determinative; (2) reduce the resources spent on arguing discrete claims that, although determinative of a portion of the outcome, may – by virtue of current case law or other technical or factual reasons – be extremely likely to be decided in favour of one of the parties from the outset, making the resources spent on its discussion arguably less efficient; and (3) may serve to curtail lengthy discussions on legal points that are well-established.

Indeed, ICSID's rules on expedited proceedings set out a page limit for written submissions. The statement of claim and statement of defence are limited to 200 pages,¹⁸⁴ and the reply and rejoinder to 100 pages.¹⁸⁵ Page limits can encourage parties to comprehensively introduce their arguments with the statement of claim and statement of defence, and to use the second round of written submissions to respond only to the other side's brief.¹⁸⁶

AGREE ON ELECTRONIC FILINGS

Additional cost savings may be possible if the parties can agree with the tribunal to dispense with the shipment of paper copies of written submissions (or at least to limit paper copies to certain key documents, such as the main submissions). To enable electronic filings, all major institutions also provide platforms for filing and exchanging case-related materials and for keeping an electronic record of the proceedings, accessible to all participants. If parties regard an electronic (paperless) arbitration to be desirable, they should consider selecting arbitrators comfortable with such a process.

6. *Witnesses and experts*

Witness and expert testimony is considered an integral part of presenting a party's case. Under the arbitration rules under consideration in this report, the parties and the tribunal have flexibility to tailor the use of witness and expert testimony to the needs of the proceeding.¹⁸⁷ Various techniques that could help foster the efficient use of witness and expert testimony are set out below.

EARLY DETERMINATION OF THE ISSUES ON WHICH WITNESS AND EXPERT EVIDENCE WILL BE ADDUCED AND THEIR NUMBER

In most cases, witness testimony is first introduced in the claimant's submission of its statement of claim. The respondent then usually presents witnesses to address the topics covered by the claimant's witnesses as well as any other issues.

184 ICSID EAR, Arbitration Rule 81(1)(c).

185 ICSID EAR, Arbitration Rule 81(1)(f).

186 Academic Forum on ISDS Working Group 1, *Excessive Costs & Insufficient recoverability of Cost Awards* (CIDS, 14 March 2019), available at www.cids.ch/images/Documents/Academic-Forum/1_Costs_-_WG1.pdf, accessed 29 March 2021, 5.

187 By way of example, under the ICSID Rules, the tribunal shall apply any agreement between the parties on procedural matters, and the tribunal may, at any stage of the proceedings, call upon the parties to produce witnesses and experts (see ICSID Rules, Rules 1(2) and 36(3)). See also UNCITRAL Rules, Article 1(1); and Article 27(3)-(4).

However, although rarely seen in practice, it is also possible for the parties and the tribunal to agree in advance on the number of witnesses and the issues that they will cover. The IBA Rules on the Taking of Evidence already contemplate that the tribunal may require the parties, in advance of the written submissions, to identify the witnesses and experts on whom they intend to rely and the subject matter of that testimony.¹⁸⁸ For these purposes, the tribunal may assist the parties in identifying those issues on which witness or expert evidence is required or expected. The parties, in turn, may try to reach an agreement as to which are the non-controversial facts that do not need to be addressed by witness or expert evidence.¹⁸⁹ This will allow the parties to present only the witnesses that are necessary for the resolution of the dispute. Ultimately, any guidance or limit that the parties establish on these issues at the outset will allow them and the tribunal to have greater control on the cost and duration of the proceedings. Should a party then wish to adduce additional witness or expert evidence, it could do so by seeking leave from the tribunal.

SELECTING AND MANAGING EXPERT WITNESSES

Experts in investment arbitration are typically retained to opine on matters of law, discrete technical issues, or the quantum of the claim. For small value claims, parties may wish to consider whether there are less costly alternatives to present the evidence to the tribunal.

With respect to expert evidence on legal matters, parties may wish to consider whether the law can be pleaded by counsel (in the case of international law) or by co-counsel admitted in the particular jurisdiction who would form part of the legal team of that party. Experts on law, whether international or domestic, may only be needed if there is a novel or untested issue of law, on which the tribunal may need guidance to rule.¹⁹⁰

Technical and quantum experts often are used to present their independent opinion to the tribunal on matters requiring specialised expertise. Although resorting to experienced and tested experts is the most common approach in investment arbitration, for small value claims, parties should weigh whether such technical or quantum expertise may be obtained from fact witnesses employed by the investor or by regulatory agencies at the host state. It is not unusual for the investor and state agencies to have this knowledge in-house. However, the drawback is that such evidence could be considered less independent than the same coming from independent experts.

In any event, parties using experts may wish to ensure that the expert has the benefit of clear instructions as to the points on which the expert is called to opine. The experts also should identify the facts that they use to base their opinions. Instructions often are provided by means of an instruction letter, which is later attached as an exhibit to the expert's report, and also includes a list of facts that the expert will assume as true in preparing the report. A precise understanding of the instructions and facts relied upon by each expert could help explain the divergences between the experts' opinions.

188 IBA Rules on the Taking of Evidence in International Arbitration, Article 4, para 1; Article 5, para 1.

189 This is suggested, for instance, in *Report on Techniques for Controlling Time and Costs in Arbitration*, 2nd ed (ICC Commission, December 2013), available at: <https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-english-version.pdf>, accessed 11 April 2021, 13.

190 N. Blackaby and A. Wilbraham, 'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration,' (2016) Vol 31 Issue 3 ICSID Review – Foreign Investment Law Journal, 660–661.

Tribunal-appointed experts may provide a useful alternative to reduce costs and time in investment arbitration. However, parties may be somewhat reluctant to use them given that their involvement reduces the parties' control over certain parts of the proceedings (the expert has the tribunal's ear). One way to address these concerns is to exert control over the appointment and work process of the tribunal-appointed expert. First, the parties may wish to be involved in the appointment process (by commenting on a list of experts) or agree together on the candidate who would act as tribunal-appointed expert. Likewise, both parties and the tribunal may discuss and agree on the instructions and inputs that the expert will receive. A tribunal-appointed expert also may issue their opinion under different factual scenarios provided by the parties and the tribunal, so that the work may be useful under the different scenarios argued by the parties, and/or under scenarios that the tribunal may be interested in exploring. It is also possible to allow the parties to comment on the expert report.

7. *Third parties*

A procedural feature of investment treaty arbitration – as distinct from international commercial arbitration – is the prospect of regular third-party involvement in what is otherwise a private form of dispute settlement.¹⁹¹ These NDPs may be sovereign parties to the relevant investment treaties that are not respondent states or any entity (such as an NGO) that wishes to bring its views to the attention of the tribunal because it is a matter of public interest (often called *amici curiae*).

NDPs have intervened regularly in investment treaty disputes since the early 2000s. Their participation, moreover, has steadily increased as transparency initiatives have found their way into various model investment treaties, regional trade agreements, and revisions to arbitration rules.

Third-party participation in investment treaty disputes entails additional procedural complexity, which in turn entails additional costs. This may be of particular concern in the context of small value claims. The following sections discuss different tools that a tribunal may employ to manage third-party interventions, which vary depending on the nature of the intervener.

PARTICIPATION OF STATE PARTIES TO THE UNDERLYING TREATY

A tribunal's capacity to manage intervention by an NDP usually will be limited by the terms of the relevant investment treaty. For example, NAFTA Article 1128 provides that state parties to the treaty that are not directly involved in the proceedings may intervene as of right. Such interventions are not rare: over 90 submissions have been made under NAFTA, in over 30 proceedings.¹⁹² However, under NAFTA, these interventions are limited to questions of treaty interpretation.¹⁹³

Other treaties such as DR-CAFTA, which has seven state parties, grant a right to state parties to make written and oral submissions.

While such submissions from state parties form part of the legal framework of investment arbitrations proceeding under such treaties, there are tools to manage their impact on cost. For instance, the tribunal

191 See generally Commission & Moloo, *supra* n.168, c 6.

192 Commission & Moloo, *supra* n.168, para 6.40.

193 'On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement', NAFTA, Article 1128.

could provide strict deadlines and page limits on these submissions. Moreover, subject to the terms of the treaty, the tribunal could provide that submissions be made in writing only (and not allow oral argument). state parties have generally avoided filing long submissions.¹⁹⁴

MANAGING THE PARTICIPATION OF *AMICI CURIAE*

Amici curiae rarely have a right to intervene in proceedings; rather, they must apply to the tribunal for permission to intervene. Accordingly, the tribunal will have a far greater range of tools at its disposal to ensure that any intervention does not impose an undue burden on the parties, which are especially pertinent in the small value claims context given costs concerns.

ADMISSION OF THE *AMICI CURIAE* TO THE PROCEEDINGS

The tribunal must decide whether to admit the *amicus* application. In practice, tribunals have applied five criteria to determine this issue: (1) whether the intervention would be of assistance to the tribunal; (2) whether the intervention would address matters within the scope of the dispute; (3) whether there is a real public interest in the subject matter of the dispute; (4) whether the *amicus* itself has a real interest in the proceedings; and (5) the avoidance of unnecessary disruption to the parties.¹⁹⁵ These criteria, however, are not exhaustive. In the small value claims context, the criterion of avoiding unnecessary disruption to the parties may be of particular relevance, given potential costs concerns. The dispute also may have less of a public interest impact.

CONDITIONS ON APPLICATION FOR INTERVENTION

A further method of reducing the burden of an *amicus* submission on the parties is to impose conditions on the mechanism by which the *amicus* makes its application, all of which may be set out in PO1. For instance, PO1 may limit the length of the *amicus*'s application to intervene in the proceedings and to only the criteria for intervention, rather than the *amicus*'s full observations. PO1 further could provide that the *amicus* has the burden of proving its interest in the proceedings and its *bona fides*. Any observations by the parties on the *amicus*'s initial application also could be limited in length and again may address only the criteria for intervention. The tribunal may seek to impose yet further conditions, such as a condition that at least one party approve in principle that the *amicus* should be permitted to intervene if that intervention is to be permitted.

CONDITIONS ON *AMICUS CURIAE* SUBMISSIONS

Tribunals habitually require that *amicus* submissions be concise and precise, and address only the matters on which the *amicus* has been permitted to intervene. In practice, this means page limits and also could cover limits on the amount and type of evidence that can be submitted – or indeed the exclusion of such materials unless the tribunal specifically requests them. Access by *amicus curiae* to the parties' pleadings,

194 See the 26-page US submission in *Bay View v. Rwanda*, which addressed nine substantive issues spanning jurisdiction and the merits. *Bay View Group LLP & The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Submission of the United States of America, 19 February 2021.

195 ICSID Rules, Rule 37(2).

the evidentiary record of the dispute, and the oral hearings also may be restricted and, in the small value claims context, may be limited to exceptional circumstances.

COSTS

Although this has not been done in practice, the tribunal also could, where appropriate, apportion all or some of the costs engendered by the *amicus*'s submission to that entity.¹⁹⁶

8. Document production

Investment arbitration proceedings often include a document production phase, by which the parties request certain documents or categories of documents from the other side.¹⁹⁷ This phase of the proceeding is often costly and time-consuming, as document requests may be numerous and the parties' objections to the requests also may be lengthy. In addition, complying with document requests may require a party to review large numbers of documents to locate responsive documents for production.

In the abstract, the parties may agree or grant the tribunal discretion to decide whether it can dispense with the document production phase altogether.¹⁹⁸ This would significantly limit costs of the parties. If that is not possible, approaches can be adopted by the parties in an effort to impose limits on document production and streamline the mechanics of the disclosure process, as outlined in the paragraphs below.

REFER TO APPLICABLE RULES OR GUIDING PRINCIPLES

The document production phase may benefit from choosing a framework from existing rules or guidelines (eg, the 2020 IBA Rules on the Taking of Evidence in International Arbitration or the 2018 Prague Rules). This serves to ensure that the parties take a consistent approach to the document production phase.

LIMIT THE SCOPE OF THE DOCUMENT PRODUCTION PHASE

The scope of document production phase may be limited at the outset, or by request of a disputing party. This may include such limitations as requiring that the scope of requests only cover specifically identifiable documents rather than categories of documents.¹⁹⁹

196 G. B. Born and S. Forrest, 'Amicus Curiae Participation in Investment Arbitration', (2019) Vol 43, Issue 3, ICSID Review – Foreign Investment Law Journal, 626-665, available at <https://doi.org/10.1093/icsidreview/siz020>, accessed on 4 April 2022. ('Another procedural tool to protect the parties from the unwanted consequences of amicus participation is an order against an amicus for any additional costs associated with its participation in the arbitration or resulting from its procedural misconduct. This was the approach taken in *Philip Morris v Uruguay*, where the Tribunal reserved the right to make an order for costs to be paid by the amicus if either party claimed costs resulting from the amicus submission'.)

197 IBA Guidelines on the Taking of Evidence 2020, Article 3.

198 'The arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate. In particular, the arbitral tribunal may, after consultation with the parties, decide not to allow requests for document production [...]', Appendix IV of the ICC Rules, Article 3(4).

199 At the request of a disputing party, the sole arbitrator may grant limited requests for specifically identifiable documents that the requesting disputing party knows, or has good cause to believe, exist and are in the possession, custody or control of the other disputing party', Canadian Model FIPA, Article 52(4).

INCLUDE A COST ALLOCATION PROVISION

This proposal combines a contemporaneous cost consequence (ie, bearing the costs of disclosure for a specific request) with an *ex post facto* consequence (ie, allocating the disclosure costs after the disclosure phase is completed). The idea is to incentivise the participants to remain judicious and proportionate in their requests, given the amounts at stake.

UPDATE THE REDFERN SCHEDULE

The five columns in a Redfern Schedule are typically used to make and respond to document production requests, as they can become unwieldy. A few strategies may help alleviate some of these difficulties, such as: (1) to require grouping the requests by topic such that the parties can navigate these requests more easily and the tribunal can resolve multiple requests at once more easily; (2) to provide a justification for requests per topic, which streamlines the justifications and objections (where applicable); (3) to set out the main justifications (and responses) and objections in a cover note (with a word limit) along with a defined term for these, and then to use the defined term in the Redfern Schedule (eg, the privilege objection or the materiality objection), which avoids long paragraphs (often repeated) for each request in extremely narrow columns; and (4) to supplement the cover note with a high level overview of the issues for the tribunal's decision (with a page limit).

9. *Hearing preparation and hearing*

Once the written phase of the arbitration is concluded, the hearing phase – which includes the pre-hearing work leading up to the hearing – begins. It is typically the most expensive stage of an investment arbitration, reflecting the intensity of preparing for and participating in a hearing: oral arguments, testimony of witnesses and experts, cross-examination outlines can take one to three weeks of hearing days – and everything in between. This is an all-hands-on-deck phase of the case, garnering the focused attention of all participants.

Such an approach to the hearing phase may not be the most appropriate for small value claims.

As noted above, it is not a requirement that there be a hearing at all.²⁰⁰ Indeed, after consulting with the parties, the tribunal could decide the dispute based on the documents alone. This is a permissible approach under a number of expedited rules, including the UNCITRAL and ICSID EAR.²⁰¹ This is also a possible approach under new investment treaties, such as the Canadian Model FIPA.²⁰² If a hearing is to be held, the below techniques may help minimise costs and make the hearing more efficient.

²⁰⁰ See *supra* pp 16–17.

²⁰¹ ‘The arbitral tribunal may, after inviting the parties to express their views and in the absence of a request to hold hearings, decide that hearings shall not be held’ UNCITRAL EAR, Article 11; see also ‘The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts’, ICC Rules, Appendix VI, Article 3(4).

²⁰² ‘The sole arbitrator may, following a joint request by the disputing parties, decide the dispute solely on the basis of the documents submitted by the disputing parties, with no hearing and no or a limited examination of witnesses or experts’, Canadian Model FIPA, Article 52(6).

ORGANISE A (FIRST) PRE-HEARING CALL EARLY

Oftentimes, a pre-hearing organisational call is held with the tribunal four weeks prior to the hearing to finalise logistics and address any other procedural matters. By then, the parties often have ironed out many of their differences, agreed on a hearing schedule and order of witnesses and experts, and organised the logistics (eg, hearing location, interpreters, court reporters). This pre-hearing call allows the parties to inform the tribunal of their areas of agreement and to seek a decision on outstanding issues. In addition to this type of logistics-focused pre-hearing call, however, the parties would benefit from an earlier pre-hearing call soliciting the tribunal's input on (1) the parameters of the hearing (eg, number of hearing days, hours, time allocation, length of opening and closing statements, witness or expert conferencing, etc.), and (2) the issues or questions that the tribunal considers most critical and pertinent for the hearing. Having this information upfront can help the parties focus their preparation and hearing time on the key issues, within the parameters set by the tribunal, thereby reducing overall time and costs expended.

DISPENSE WITH HARD-COPY HEARING BINDERS

Part of the pre-hearing costs involves preparing and dispatching multiple copies of the record to the parties and to the tribunal. In addition to hearing bundles, the parties prepare and send to the hearing multiple copies of direct examination and cross examination binders for witness and expert examinations, which often go untouched. Disposing of providing hard copies may be cost effective. The alternative is

to prepare electronic binders for the hearing and for witness and expert examinations. The parties can decide whether to upload the documents on a dedicated iPad or on a specific e-document management platform (should it not be too costly), whether to organise them in chronological order or by witness/expert/party, and whether to use a hyperlinked index or other similar tool to navigate through the documents.

CONSIDER A REMOTE HEARING

Prior to the Covid-19 pandemic, the parties and the tribunal rarely considered holding hearings remotely (eg, by videoconference). The default was an in-person hearing. Although a remote hearing may not be appropriate or ideal for every investment arbitration, conducting a hearing by videoconference is now a viable option depending on the circumstances, and particularly so in the context of small value claims. For example, hearings that are predominantly comprised of oral argument and tribunal questions may be well suited for a remote setting.

Resorting to remote hearings has given rise to some innovative suggestions, especially in light of the time zone spread and possibly shorter hearing days (eg, the submitting parties recording opening statements prior to the remote examination of witnesses and experts). Whether a remote hearing is appropriate will depend on the particular circumstances of each case and will require balancing with other concerns (including equal technological access); even so, the parties and the tribunal would be well served to consider seriously whether part or all of the hearing may be conducted remotely, thereby allowing the hearing to be scheduled sooner and for the hearing to be conducted at lower cost.

10. *Post-hearing*

The closing of the evidentiary hearing does not mean that the parties' work is over. Typically, the tribunal orders final post-hearing briefs to address specific questions on the matters in dispute. Here, too, the parties and the tribunal have leeway to ensure that these tasks are completed in a manner that is cost-effective and suitable to their particular case.

REVIEW OF THE HEARING TRANSCRIPTS

The standard practice in large investment arbitrations is to have a team of stenographers at a hearing, transcribing everything that is said. The parties and the tribunal usually have screens on their desk, where a live transcript appears only seconds after the words are uttered. Stenographers who are capable of providing this service with a high degree of accuracy are not inexpensive. Moreover, after the hearing is concluded, the parties will agree on a transcript review process, whereby associates will go over the complete audio recording of the hearing while reading the transcript, and will make small and (for the most part, trivial) corrections to the transcript. Parties then will exchange their corrections, and will go over the other side's, to decide whether they agree or disagree with such corrections. If there is disagreement on a particular correction, which is quite rare, the parties will present their disagreement to the tribunal, for the tribunal to decide which is more accurate. This process is not inconsequential in terms of costs and, when dealing with experienced stenographers (as it is most often the case), the revised transcript hardly diverges from the initial one provided by the stenographers.

To streamline the process, an alternative is to use transcription software instead that could allow for cost savings. Technological advancements may make the use of this type of software more common.

If post-hearing review of the transcripts is inevitable, the parties could agree on a focused review of the transcript, for instance, by reviewing the testimony of only certain witnesses. Parties also may choose not to review the transcripts at all and instead work directly from the draft provided by the stenographers, pointing out in their post-hearing briefs when they have made a correction to the transcript. After the post-hearing briefs are exchanged, if necessary, a party would be allowed to file a short letter identifying the corrections by the other party with which it disagrees.

EVALUATE WHETHER POST-HEARING BRIEFS ARE NEEDED AND, IF THEY ARE, AGREE ON THEIR LENGTH AND CONTENT

Post-hearing briefs are frequently used in investment arbitration. These submissions will be prepared following the agreement of the parties or at the tribunal's request, in order to answer tribunal questions or to provide a final summary of each party's position on the evidentiary record – in particular, on evidence produced at the hearing.

Post-hearing briefs can be beneficial when a tribunal has spent a week or more listening to several witnesses and experts from both sides, and would be well served if the parties organise and narrow down the important excerpts of that testimony. However, tribunals also can write the award without a final round of submissions, especially when the dispute is straightforward and final questions have been sufficiently addressed at the hearing.

The main alternative to post-hearing briefs is to have closing arguments on the last day of the hearing or shortly after the end of the evidentiary hearing, where the parties summarise the testimony that was heard

during the hearing and address final tribunal questions. Although in certain complex cases it is possible to envisage both closing arguments and post-hearing briefs, parties should try to avoid having both instances in small value claims to reduce costs.

Parties and tribunals also may agree on page limits for the post-hearing briefs. This compels parties to avoid repetition of the prior written submissions and instead to focus on the crucial points discussed at the hearing. In addition to page limits, and even if the tribunal does not have specific questions to pose to the parties, the tribunal should try to indicate to the parties on which issues it would like to see briefing, such that if they are filed simultaneously, as they often are, the parties focus on the same issues.

ASK THE PARTIES TO INCLUDE THEIR COSTS IN THE POST-HEARING BRIEF AND HAVE THEM COMMENT WHILE THE TRIBUNAL IS DELIBERATING, SO THAT THE COSTS ARE INCLUDED IN THE FINAL AWARD

The decision on costs is normally the last issue addressed by the tribunal; there is no uniform approach as to when and how parties should plead the allocation of costs. Some tribunals issue a final award ‘save as to costs’ and request cost submissions after the final award is rendered. In small value cases, the tribunal could ask the parties to include a cost table shortly after their post-hearing brief, listing the fees and costs incurred in different categories, and allow the parties to comment on each other’s costs within a certain period of time thereafter.

With a view to reducing costs, the parties also should not be required to file fully fledged submissions on costs (which set out the legal standard for the allocation of costs). Rather, only a table setting out the costs incurred in the arbitration is to be submitted. Providing such cost statements shortly after the post-hearing brief allows the parties’ exchanges on costs – which typically do not require much input from the tribunal except for their final determination – to run in parallel to the tribunal’s deliberations for rendering the final award. In this way, by the time the tribunal is ready to issue the award, costs already would have been pleaded by the parties and the tribunal would be able to allocate them in the final award.

C. Post-arbitration phase

The issuance of the final award usually signals the end of proceedings, with the losing party generally voluntarily complying with any award. In general, there is no prospect of appeal and parties have limited means of recourse to annul the award. This section will focus solely on the annulment procedure.

The procedural mechanisms for annulling an arbitral award will depend on the legal framework underlying the arbitration. The annulment of ICSID awards is governed by the ICSID Convention and the ICSID Arbitration Rules. The ICSID Convention provides for a full and self-contained system with its own grounds for review and annulment of awards and its own procedural rules. Such system is entirely independent of any law and any court of any state. On the other hand, if the investment arbitration was conducted under other arbitration rules, an application to set aside the award usually will be submitted to a national court at the seat of the arbitration.

Cost-effective strategies that could be used when challenging or seeking the annulment of awards issued in small value disputes thus may differ depending on whether the (1) ICSID Convention or (2) other arbitration rules apply.

1. Annulment of ICSID awards

As discussed above, ICSID arbitrations are not subject to review by national courts because they are conducted under an international treaty – ie the ICSID Convention. The limited exception to the finality of ICSID awards is the annulment process contained in Article 52(1) of the ICSID Convention, which sets out an exhaustive list of limited grounds for annulment.²⁰³ While the ICSID Convention does not provide any tailored procedures for small value claims,²⁰⁴ the ICSID EAR set out certain procedures for deciding annulment applications within the context of expedited arbitrations, including:

- A compressed procedural schedule: each party is granted one month to file its submissions and only one round of submissions is envisaged.²⁰⁵
- The submissions have a page limit of 100 pages.²⁰⁶
- A hearing shall be held within 45 days after the filing of the last submission.²⁰⁷

These procedural rules are aimed at expediting the proceedings, which also could prove useful to save costs in annulment applications of awards issued in the context of small value claims. The parties could agree to these procedures outside of the context of an ICSID EAR, or could agree on similar time and cost controlling measures in a regular post-award remedy proceeding (eg, limited number of written submissions with short deadlines, page limits, no hearing or remote hearing, and time limits for issuing decisions).

If the parties do not agree on the use of expedited arbitration or similar procedures, the ICSID Rules prescribe the following cost-effective provisions in the post-award remedy phase:

- One round of written submissions in an interpretation or revision proceeding and, if the parties agree or if ordered by the tribunal or the ad hoc committee, only one round of written submissions in an annulment proceeding.²⁰⁸
- A hearing held only upon the request of either party or if ordered by the tribunal or ad hoc committee.²⁰⁹

203 'Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based', ICSID Convention, Article 52(1).

204 According to Rule 72(1) of the ICSID Rules, the rules governing the arbitration shall also apply, with necessary modifications, to any procedure relating to the interpretation, revision, or annulment of an award and to the decision of the tribunal or committee. Further, the existing procedural agreements and orders from the first session of the original tribunal will continue to apply to such procedure, unless the parties agree or the tribunal or the *ad hoc* committee orders otherwise. See ICSID Rules, Rule 72(2).

205 ICSID Rules, Rule 84(1)(a) and (b).

206 ICSID Rules, Rule 84(1)(c).

207 ICSID Rules, Rule 84(1)(d).

208 ICSID Rules, Rule 72(3).

209 ICSID Rules, Rule 72(4).

If a hearing is to be held, the parties further could agree to conduct it remotely (eg, by videoconference).²¹⁰ The use of remote hearings has been frequent in international arbitrations, especially in the past few years due to the Covid-19 pandemic.²¹¹ Remote hearings for small value claims will minimise time and costs for parties, which is especially important in small value claims where efficiency is crucial to reduce the costs of the parties.²¹²

Finally, the parties may consider invoking Rule 41(1) of the ICSID Rules and argue that the request for revision or annulment manifestly lacks legal merit. However, such a strategy will prove to be cost-effective only if the request for revision or annulment is indeed without legal merit, otherwise the procedure under Rule 41(2) risks creating additional work and costs.

2. *Annulment of non-ICSID awards*

The seat of the arbitration will be the place where the award is deemed to have been made. Any request for annulment of non-ICSID awards will be submitted to the courts of the seat of the arbitration. The law of the seat also will determine the grounds on which an award can be set aside before its local courts. As stated above, it is important to choose a seat in which the law provides for limited grounds for challenge and does not allow re-opening the analysis of the merits of the dispute.²¹³

Since the challenge procedures will be governed by local procedural rules of the court in which recourse is sought, the parties cannot tailor these rules to suit the specifics of their dispute. However, parties should bear in mind how efficient a jurisdiction is in deciding on challenges when selecting a seat.²¹⁴

As discussed above, to effectively manage costs, parties to small value claims may agree to contractually waive their right to pursue challenge proceedings. The choice of the seat would be decisive in enforcing such agreements. National arbitration legislations differ on the enforceability or validity of agreements that

210 ICSID Rules, Rule 29(2).

211 K. Menéndez de la Cuesta, 'Drafting the Ideal Arbitration Agreement to Guard against the Next Pandemic,' in C. Bueno (ed), *40 under 40 International Arbitration* (Editorial Dykinson 2021), 130. See also M. Scherer, 'The Legal Framework of Remote Hearings' in M. Scherer, N. Bassiri, et al (eds), *International Arbitration and the COVID-19 Revolution* (Wolters Kluwer, 2020) 65–104. Even before the Covid-19 pandemic, remote hearings have been widely used in international arbitration. For example, ICSID announced that the majority of its hearings in 2019 were held by videoconference. See ICSID News Release, 'A Brief Guide to Online Hearings at ICSID' (24 March 2022) available at <https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid>, accessed 6 April 2022.

212 Rule 32 of the ICSID Rules (concerning 'Hearings') does not directly address remote hearings but does not exclude them. In practice many remote hearings have been conducted under the ICSID Rules. See *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 7.

213 *Supra* Section V.A.2 (The choice of the seat for non-ICSID cases).

214 *Supra* Section V.A.2 (The choice of the seat for non-ICSID cases).

exclude or limit a party's rights to seek annulment of an award.²¹⁵ Nonetheless, national courts typically give effect to them in at least some circumstances.²¹⁶

215 G. Born, *International Commercial Arbitration*, 3rd ed (Kluwer Law International, 2021) c 25: Annulment of International Arbitral Awards, 3661–3671.

216 *Ibid*, 3661–3664: in Belgium, such agreements concluded between non-Belgian parties are presumptively valid and enforceable, regardless of the grounds on which annulment might be sought. In Switzerland, non-Swiss parties are also expressly permitted by Article 192(1) to waive either some or all of the grounds for annulment specified in Article 190. French arbitration legislation has also recently been amended to permit parties to waive (entirely) the right of annulment of international arbitration awards made in France. Unusually, such waivers must be of all grounds, not just one or some grounds, of annulment. English law takes a more limited view of such waivers than Belgian, Swiss, or French law, however, and does not permit waivers of the right to set aside an award for either jurisdictional objections or serious irregularity affecting the tribunal or the proceedings. In a few jurisdictions (notably, Italy and Egypt), national arbitration legislation provides that agreements waiving or restricting the parties' rights to seek annulment of an award are unenforceable.

Annex 1: Members of the International Bar Association's Investment Arbitration Subcommittee

2022 members of the Investment Arbitration Subcommittee

Member	Affiliation
Professor Maxi Scherer Co-Chair <i>Investment Arbitration Subcommittee</i>	Wilmer Hale LLP/Queen Mary University of London
Caline Mouawad Co-Chair <i>Investment Arbitration Subcommittee</i>	Chaffetz Lindsey LLP
John Choong	Freshfields Bruckhaus Deringer LLP
Jeffery Commission	Burford Capital
Gaela Gehring Flores*	Allen & Overy LLP
Lauren Friedman	King & Spalding LLP
Professor Chiara Giorgetti	University of Richmond
Kelly Herrera*	ConocoPhillips
Cheng-Yee Khong	Omni Bridgeway
Markiyani Kliuchkovskiy*	Asters
Mark Mangan	Dechert LLP
Marc Michael	AES
Cameron Miles*	3VB
Yasmin Mohammad	Fortress Investment Group
James Morrison*	Peter & Kim
Carmen Núñez-Lagos*	Núñez-Lagos Arbitration
Ana María Ordoñez	National Agency of State Legal Defence of Colombia
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Martina Polasek*	ICSID
Michele Potestà*	Levy Kaufmann-Kohler
Dirk Pulkowski*	PCA
Martín Rosati*	Ferrere
Margaret Ryan*	Shearman & Sterling LLP
Shirin Saif	Roschier
Patrick Taylor	Debevoise & Plimpton LLP
Gustavo Topalian*	Dechamps Law
Can Yeginsu	3VB

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Annex 2: Methodological considerations

Compiling information on the prevalence of small value claims is complicated by several methodological difficulties, such as:

- Not all claims in ISDS are monetary: some claims may be for restitution or, in contract-based cases, specific performance or other contractual remedies.
- The amount claimed may evolve over the course of the proceedings, which raises the question as to the appropriate point for qualifying a claim as a small value claim.
- In some cases, the size of the claim may never be known, as the claim is not quantified in the initial pleadings and the case is discontinued before any quantification takes place (because the tribunal denies jurisdiction in a preliminary phase, the case is settled by mutual agreement, or the claim is withdrawn).
- While claimants usually distinguish the principal amount of damages sought from interest, in certain cases a single, indivisible amount of damages is sought.²¹⁷
- Claims may be presented in different currencies, which raises the question as to the date to be used for currency conversion.
- The value of money changes over time, raising the question as to whether claims should be adjusted for inflation for purposes of the analysis.

The arbitral institutions that the Subcommittee contacted used the following approach in generating the data presented below.

The date range used for compiling information was a 12-year period between 1 January 2010 and 31 December 2021.

As regards the identification of the amount claimed:

- ICSID used the claim as it was set out in the request for arbitration, or, when an award was rendered, the amount of damages sought by the claimant as indicated in the award.²¹⁸
- The PCA used the first formal statement of the amount claimed, often found in the notice of arbitration or in the statement of claim, and disregarded any subsequent changes to the claim in later pleadings.
- The SCC used the amount in dispute²¹⁹ as it may have evolved over the proceeding up until the award was rendered, based on the parties' pleadings.

²¹⁷ In addition, some claims also aggregate the costs of the arbitration (including legal fees) into the amount claimed.

²¹⁸ For cases where there was no reference to the amount claimed in the award, the last formal statement of the amount claimed was taken, when available, from the parties' pleadings.

²¹⁹ The amount in dispute is not necessarily identical with the amount of the claim. The SCC Rules define the amount in dispute as the 'aggregate value of all claims, counterclaims and set-offs,' Arbitration Rules, Appendix IV, Article 2(3) and Expedited Rules, Appendix III, Article 2(2).

All institutions based their data on the principal amount of monetary compensation claimed by the investor, excluding interest and costs (ie, the costs of the arbitration and legal costs).

With respect to currency conversions, each arbitral institution used a distinct approach:²²⁰

- ICSID converted all claims to US dollars, based on the historical rates recorded in the OANDA Historical Currency Converter²²¹ as of the date of the document from which the information was obtained (eg, the date on which the request for arbitration containing the amount claimed was submitted or the date of the award).
- The PCA also converted all claims to US dollars, based on the market exchange rate from Morningstar as at the beginning of the year in which the case was registered at the PCA.
- The SCC converted the amount in dispute to Euros, using the exchange rate applicable on the date of the submission containing the claim.

²²⁰ For purposes of reporting to the Working Group, the institutions were asked not to adjust these figures for inflation.

²²¹ Available at www1.oanda.com/lang/es/currency/converter/, accessed 5 April 2022.

Annex 3: Costs management in investment arbitration

Costs management requires the active management of the tribunal from the outset of the case, for which the tribunal may have powers under its general discretion with respect to the efficient and cost-effective management of proceedings and the allocation of costs.²²² The various steps that costs management could entail are set out below.

1. The tribunal determines if the claim is suitable for costs management

The views of the parties as to whether the case is appropriate for costs management is decided at the case management conference, based on the views of the parties and the tribunal. The smaller and less complex a claim is, the more likely it is to be a candidate for costs management. In the event that the parties disagree on whether costs budgeting is appropriate, it is unlikely that the tribunal would impose such a mechanism.

Principles to help assess whether a case is suitable for costs management include:

1. the quantum of the claim;
2. the potential for ancillary proceedings (such as preliminary objections to jurisdiction or admissibility or an application for provisional measures);
3. the potential for interventions or attempted interventions by non-disputing parties or *amici curiae*;
4. the potential scale of document production;
5. the potential number of fact and/or expert witnesses;
6. the potential number and length of any hearings;
7. the potential need for translation or interpretation of documents, submissions or testimony; and
8. any other circumstances that may indicate the wider legal and factual complexity of the case.

2. The parties prepare costs budgets

If costs management is appropriate, each party then prepares a budget. The parties may wish to consult one another in the process of preparing their individual budgets. The budget should cover: (1) allowances for intended activities (eg, preparation of witness statements, obtaining expert reports, drafting written submissions or any other steps which are deemed necessary for the resolution of the case, including preparation of the costs budget itself); (2) allowances for specified contingencies (eg, if the respondent applies for and/or secures bifurcation of the proceedings on the basis of preliminary objections, the claimant applies for provisional measures, or a non-disputing party invokes its right to make a submission); and (3) allowances for any disbursements (eg, institution fees, tribunal fees or expert fees).

²²² 2021 ICC Rules, Articles 22 and 38; 2013 UNCITRAL Rules, Articles 17 and 40; ICSID Convention, Article 61(2); ICSID Rules, Rule 52.

3. The tribunal convenes a costs management hearing

Once the parties have prepared their budgets, they are exchanged with the other party and submitted to the tribunal. The tribunal will then hold a CMH with a view to concluding a CMO.

At the CMH, the tribunal will, either by party agreement or after hearing argument, record approval or disapproval for each party's budget. The tribunal also may make a number of additional orders, including: (1) attendance by the parties at regular, short hearings so that the tribunal can monitor expenditure and consider proposed revisions to either party's budget in light of procedural developments; or (2) making provision for each party to apply to the tribunal for assistance in the event it considers that the other party is behaving in an obstructive manner and causing that party to incur additional expense unnecessarily.

After the CMH, the tribunal will record each party's budget and such additional orders as it deems appropriate in a CMO, which has the same status as a regular procedural order of the tribunal.

4. The claim proceeds with the tribunal engaging in costs management as required

With each party's costs budget in place, the tribunal steps back and will only re-engage if required by the CMO, any procedural developments, or a party's request. The onus of costs management is largely borne by the parties.

In the event that a party (1) exceeds the costs previously estimated for any element of its budget, or (2) apprehends a procedural development that is likely to result in a considerable expense for which that party has not budgeted, then the party so affected must immediately notify the other party and the tribunal. If the tribunal deems it necessary, a CMH at that point may be reconvened in order to determine why the excess or development has occurred and whether it is justified.

This process may result in a revision to either or both parties' costs budget (whether by agreement or by tribunal decision) and the making of additional orders for costs management. Within a reasonable time after the reconvened CMH, the tribunal will issue a revised CMO along with a reasoned decision (if required).

5. Tribunal decision(s) on costs

The tribunal relies on the CMO to assess what the reasonable costs incurred in the case are, and relies on this budget should it decide to allocate costs to one party. The tribunal usually will award only those costs that fall within the approved total.

Annex 4: Checklist

This is a checklist of the issues to consider that were discussed above in Section V in connection with small value claims in investment treaty arbitration cases.

A. Pre-arbitration phase

1. *Choice of arbitral rules and institution*

- Consider default number of arbitrators and method for calculation of fees
- Check availability of expedited procedures
- Compare institutional or administrative fees, if applicable
- Identify any incentives for timely issuance of awards
- Consider venue and laws applicable to annulment and enforcement procedures

2. *Choice of the seat for non-ICSID cases*

- Assess suitability of arbitration laws at different seats
- Consider familiarity of domestic courts with set-aside proceedings concerning investor–state arbitrations
- Identify standard of review applied by the courts of the seat
- Check international treaties facilitating enforcement of awards between the state of the seat and states where enforcement may be sought

3. *Pre-arbitral settlement negotiations*

- Explore potential amicable settlement options
- Use discussions to clarify or narrow the issues in dispute

4. *Pre-arbitral mediation*

- Explore potential amicable settlement options
- Use discussions to clarify or narrow the issues in dispute
- Consider application of the Singapore Convention on Mediation

5. *Possibility of bringing mass claims*

- Consider reduction of costs and of duration of proceedings
- Examine strategic issues in the aggregation of claims for both parties

6. *Selection of counsel*

- Consider diversifying the pool of potential counsel where appropriate (eg experience, geography, firm size, etc.)
- Solicit competitive bids or requests for proposal from potential counsel
- Consider different types of fee arrangements (eg fixed fees, caps by stage, discounts with success fee, contingency fees, third-party funding)
- Confirm the availability of counsel to proceed swiftly

7. *Selection of arbitrators*

- Evaluate number of arbitrators
- Consider rules for calculation of fees
- Ensure arbitrator availability for hearings and deliberations

B. Arbitration phase

1. *Procedural order no. 1 and procedural calendar*

- Use model PO1
- Impose time limit to hold case management conference and issue PO1
- Hold remote case management conference (rather than in-person)

2. *Tribunal's inner workings*

- Empower presiding arbitrator to extend time limits without consulting co-arbitrators
- Use administrative assistance from arbitral institution or tribunal secretary
- Agree to a brief summary of the parties' positions in the award
- Set a time limit for the tribunal's orders, decisions, and awards
- Commit the tribunal to reserve deliberation dates

3. *Cost budgeting*

- Consider using UK-style cost budgeting to control costs

4. *Preliminary issues*

- Consider whether early disposition of issues or bifurcation would be desirable
- Anticipate the possibility of preliminary issues in procedural calendar and alternatives

5. *Written submissions*

- Consider only one round of submissions
- Agree on page limits
- Agree on electronic submissions

6. *Witnesses and experts*

- Contemplate early agreement on the issues on which witness and expert evidence will be adduced and their number
- Consider whether counsel, rather than legal experts, may present legal issues
- Examine the possibility of tribunal-appointed experts

7. *Third parties*

- Request that the tribunal provide strict deadlines and page limits on submissions by NDPs, and require them to be in writing only (with no oral argument)
- Ask the tribunal to weigh the admission of *amici curiae* submissions against disruption and additional costs to the parties

- Circumscribe *amicus curiae* submissions (eg page limits, criteria for intervention, approval by one party required)
8. *Document production*
- Refer to applicable rules or guiding principles
 - Limit the scope of the document production phase
 - Include a cost allocation provision
 - Update the format of the Redfern Schedule
9. *Hearing preparation and hearing*
- Organise a (first) pre-hearing call early
 - Dispense with hard copy hearing binders
 - Consider a remote or hybrid hearing
10. *Post-hearing*
- Limit the scope of review of the hearing transcripts
 - Evaluate whether post-hearing briefs are necessary and, if so, agree on length and content
 - Submit skeletal costs statement with the post-hearing brief

C. Post-arbitration phase

1. *Annulment of ICSID awards*
- Compress the schedule
 - Provide for only one round of submissions
 - Consider dispensing with a hearing or, alternatively, holding a hearing within 45 days after the filing of the last submission
2. *Annulment of non-ICSID awards*
- Choose an arbitral seat where the law provides for limited grounds for a challenge and does not allow re-opening the analysis of the merits of the dispute
 - When choosing a seat, evaluate how efficient a jurisdiction is in hearing set-aside applications

Annex 5: Comparison of expedited arbitration rules

	ICSID expedited arbitration	UNCITRAL expedited arbitration rules	CIETAC summary procedure	HKIAC expedited procedure	ICC expedited procedure provisions	ICDR international expedited procedures	SCC rules for expedited arbitrations	Swiss expedited procedure	SIAC expedited procedure
Application	Opt-in	Opt-in	If disputed amount does not exceed monetary threshold; opt-in; or as determined by CIETAC	If disputed amount does not exceed monetary threshold; opt-in; or exceptional urgency	If disputed amount does not exceed monetary threshold; or opt-in	If disputed amount does not exceed monetary threshold; or opt-in	Opt-in	If disputed amount does not exceed monetary threshold; or opt-in	If disputed amount does not exceed monetary threshold; opt-in; or exceptional urgency
Monetary threshold	N/A	N/A	RMB 5m	HK\$25m	US\$2m (for agreements on or after 1 March 2017) US\$3m (for agreements on or after 1 January 2021)	US\$500,000	N/A	CHF 1m	SG\$6m
Number of arbitrators	1 or 3, 1 by default	1, unless otherwise agreed	1, unless otherwise agreed	1, unless otherwise agreed	1, notwithstanding agreement to the contrary	1, unless otherwise agreed	1	1, unless otherwise agreed	1, unless otherwise determined by president of SIAC Court
Possibility to no longer apply the expedited procedure	By party agreement or if the tribunal so determines upon party request	By party agreement or if the tribunal so determines upon party request and in exceptional circumstances	By party agreement; if necessary as determined by the tribunal; if determined by CIETAC	If HKIAC so determines upon party request	Opt-out; or if ICC Court so determines upon party request or own motion	By party agreement; or as determined by ICDR	SCC may invite the parties to apply the Arbitration Rules	By party agreement	If the tribunal so determines in consultation with the Registrar after consulting the parties

	ICSID expedited arbitration	UNCITRAL expedited arbitration rules	CIETAC summary procedure	HKIAC expedited procedure	ICC expedited procedure provisions	ICDR international expedited procedures	SCC rules for expedited arbitrations	Swiss expedited procedure	SIAC expedited procedure
Hearing	Yes, unless otherwise agreed ¹	The tribunal may, after consulting the parties and in the absence any request to hold hearings, decide that hearings shall not be held	The tribunal may, after consulting the parties, decide whether to examine the case based solely on the documents or to hold a hearing	The tribunal shall decide the dispute solely on the documents, unless it decides a hearing is appropriate	The tribunal may, after consulting the parties, decide the dispute solely on the documents	If disputed amount does not exceed US\$100,000, the dispute shall be decided solely on the documents, unless otherwise determined by the arbitrator	Upon party request and if arbitrator finds compelling reasons	Yes, unless parties agree documents only	The tribunal may, after consulting the parties, decide the dispute solely on the documents
Time to render the award	120 days after the hearing	6 months from tribunal constitution (unless otherwise agreed); tribunal may extend period by at most 3 months in exceptional circumstances and after consulting the parties; tribunal may make final extension (with reasons) if agreed between the parties.	3 months from tribunal constitution	6 months from case referral to the tribunal	6 months from case management conference	30 days from closing of the hearing or final written submission	3 months from case referral to the tribunal	6 months from case referral to the tribunal	6 months from tribunal constitution

¹ 'The Tribunal shall hold one or more hearings, unless the parties agree otherwise'. ICSID Rules, Rule 32(1).

	ICSID expedited arbitration	UNCITRAL expedited arbitration rules	CIETAC summary procedure	HKIAC expedited procedure	ICC expedited procedure provisions	ICDR international expedited procedures	SCC rules for expedited arbitrations	Swiss expedited procedure	SIAC expedited procedure
Reasoned award	Yes	Yes, unless parties agree no reasons (standard provision in UNCITRAL Rules) ²	Yes, unless parties agree no reasons (standard provision in arbitration rules) ³	Summary reasons, unless parties agree no reasons	Yes	Yes, unless parties agree no reasons	Reasons upon request of either party	Summary reasons, unless parties agree no reasons	Summary reasons, unless parties agree no reasons

² UNCITRAL Rules, Article 34(3).

³ CIETAC Rules, Article 49(3).



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