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THE PROCEDURE IN THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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In the article the authors examine the procedure of arbitration and conciliation and applicable law at the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre"). Specifically, the authors compare arbitration and conciliation procedures and analyse the benefits and drawbacks of each as well as outline different positions taken by Tribunals in applying norms of international law to disputes at the Centre.

Key words: investment dispute; arbitration; conciliation; International Centre for Settlement of Investment Disputes; applicable law.

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ПРОЦЕДУРА В МЕЖДУНАРОДНОМ ЦЕНТРЕ ПО УРЕГУЛИРОВАНИЮ ИНВЕСТИЦИОННЫХ СПОРОВ

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Исследуются арбитражная и примирительная процедуры и применимое право в Международном центре по урегулированию инвестиционных споров. Сравниваются арбитражная и примирительная процедуры. Анализируются преимущества и недостатки каждой из них, приводятся различные подходы составов арбитража к применению норм международного права при разрешении споров в центре.

Ключевые слова: инвестиционный спор; арбитраж; медиация; Международный центр по урегулированию инвестиционных споров; применимое право.

ICSID procedure

The procedure of an investment dispute settlement is governed by chapters 3 and 4 of the ICSID Convention, the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("Institution Rules"), the Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), and the Rules of Procedure for Conciliation Proceedings ("Conciliation Rules") approved by written vote of the Administrative Council.

Normally, if the parties intend to continue their cooperation upon settlement of their dispute, conciliation is considered a more appropriate means of investment dispute resolution. On the other hand, the parties would normally resort to arbitration if they do not anticipate pursuing their business relationship.

Conciliation proceedings are initiated by a written request for conciliation of one of the parties addressed to the Secretary-General. The request should contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings. If necessary requirements (*i. e., ratione voluntaris, ratione materiae, and ratione personae*) are met and after the request for conciliation is registered, the parties constitute a conciliation commission (the "Commission") by appointing a sole conciliator or any uneven number of conciliators as agreed by the parties. Where the parties do not agree on the number of conciliators and the method of their appointment, the Commission consists of three conciliators – one conciliator is appointed by each party and the third, the president of the Commission, is appointed by agreement of the parties. If the Commission is not constituted within 90 days or any other period as agreed by the parties, the Chairman of the Administrative Council appoints the conciliator or conciliators not yet appointed.

It is worth mentioning that when the ICSID Convention was drafted, one of the suggestions was to include the requirement for the parties to submit a joint request for conciliation. The rationale of this suggestion premised on the nature of conciliation that gener-

ally requires a higher level of cooperation between the parties to initiate this type of dispute resolution procedure. However, the final language of the provision that regulates the procedure of submitting a request for conciliation did not include the suggested joint request requirement and is identical to the respective arbitration provision.

The detailed requirements to contents of the request for conciliation are found in the Institution rules [1]. Specifically, under Rule 2 of the Institution rules, the request should designate each party to the dispute and state the address of each party, and, if one of the parties is a constituent subdivision or agency of a Contracting State, the request should indicate that it has been designated to the Centre by that State. Moreover, it is required that the request indicate the date of consent to submit a dispute to ICSID and the instruments in which it is recorded. If the parties gave consent on different dates, the request should indicate the latest date of one of the parties' consent. It is also required to include information on nationality of the investor party to the dispute as of the date the request is filed as well as information concerning issues in dispute to confirm that the Centre has jurisdiction over it (specifically, that there is a legal dispute between the parties that arises directly out of an investment). In addition, in accordance with Rule 3 of the Institution rules, the request may also include any other information with regard to the dispute, for example, the number of conciliators or arbitrators and the method of their appointment. It is also recommended that the claimant presents the case on the merit by including complete statement of facts underlying the dispute [2, p. 21].

Even though the Institution Rules contain detailed requirements to the contents of the request, the claimant may consult with the Centre on this matter prior to filing the request [3, p. 450–457]. Advance consultations prior to submitting the request allow the claimant to clarify points that need to be addressed in the request and reduce the risk of refusal to register the request by the Secretary-General [2, p. 23].

When the ICSID Convention was drafted, it was proposed that its provisions allow the claimant to make amendments in the filed request that does not conform to the requirements or to supplement an incomplete request [3, p. 774]. This suggested provision was included in the final language of the ICSID Convention and, accordingly, if the contents of the claimant's request does not meet certain formal requirements or misses any required information, the Secretary-General gives the claimant an opportunity to correct or supplement the request. For example, in *Fedax N. V. v. Bolivarian Republic of Venezuela*, the Secretary-General sent an acknowledgement of receipt of the request to the claimant and at the same time, required that the request be supplemented with address of the other party in accordance with Rule 2(1)(a) of the Institution rules. On the same day, the requesting party provided the Centre with the missing information and the Secretary-General transmitted a copy of the request and the accompanying documentation to the other party in accordance with Rule 5(2) of the Institution rules the following day [4].

The request and supporting documents should be accompanied by five additional signed copies, unless the Secretary-General requires that more copies be provided (Rule 4 of the Institution rules). All the documents should be in a language approved for the proceeding in question or accompanied by a certified translation into this language (Rule 30 of the Administrative and Financial Regulations).

Once the request is registered and the Conciliation Commission is properly appointed, the Commission works with the parties to clarify the facts and circumstances of the dispute in question and to suggest terms of mutually acceptable solution. To achieve this goal, on different stages of the conciliation proceeding, the Commission proposes various options of the parties' dispute resolution. This procedure is relatively flexible and allows the parties to reach an agreement in a variety of ways. In particular, unlike in arbitration, the Conciliation Commission is not strictly bound by the norms of substantive law, including provisions of the investment treaties. For example, the Commission may propose that, instead of resorting to remedies provided in multilateral and bilateral investment treaties, parties consider and negotiate benefits of their potential cooperation on a new investment project. Parties to conciliation proceedings, in turn, are expected to cooperate in good faith with the Commission and consider its recommendations.

In addition to comparative flexibility of the procedural norms, parties also benefit from predictability with respect to the expenses that they bear as a result of resolving their dispute through conciliation with the Centre. Specifically, in accordance with Article 61(1) of the ICSID Convention, in conciliation proceedings, the fees and expenses of members of the Commission and the charges for the use of the facilities of the Centre

are borne equally by the parties. In contrast, in arbitration proceedings, the Tribunal first assesses the expenses incurred by the parties in connection with the proceedings and decides how such expenses should be allocated (Article 61(2) of the ICSID Convention).

When the parties reach an agreement, the Conciliation Commission prepares a report that includes the issues in dispute and terms and conditions of the parties' agreement. However, if at any stage of the proceedings, the Commission finds that there is no likelihood of reaching agreement by the parties, it closes the proceeding and prepares a report recording the failure of the parties to reach an agreement. In other words, the result of the Conciliation Commission's work is typically either reaching an agreement by the parties or concluding that such agreement cannot be reached. In addition, if one of the parties fails to appear or participate in the proceeding, the Commission gives a notice to the parties and closes the proceeding by drawing up its report to record the failure of the party to appear or participate.

Notwithstanding the benefits of conciliation, only two percent of the disputes registered with the Centre were resolved through conciliation. More specifically, according to the information published on the official ICSID website, conciliation practice of the Centre is limited to ten disputes. In eight cases, the Conciliation Commissions drew reports and two of the cases are currently under consideration. This infrequent recourse to conciliation proceedings as compared to arbitration can be explained by a non-binding character of a report drawn by the Conciliation Commission and absence of a mechanism of legal enforcement and recognition of an agreement that the parties reach in the course of conciliation proceedings.

Independent of the results of the Conciliation Commission's work, at any point of the conciliation proceedings, the parties may resort to arbitration. The procedure of initiation of the arbitration proceedings is analogous to conciliation. Specifically, a party submits a written request for arbitration containing an issue at dispute, information on both parties, and their consent to arbitration in accordance with the Institution rules to the Secretary-General. As in conciliation proceedings, an arbitration Tribunal consists of a sole arbitrator or any uneven number of arbitrators appointed by the parties. If the parties have not agreed upon the number of arbitrators and the method of their appointment, the Tribunal consists of three arbitrators – one is appointed by each party and the third, the president of the Tribunal, is appointed by agreement of the parties. If the Tribunal is not constituted within 90 days after notice of registration of the request has been dispatched or any other period as agreed by the parties, the Chairman of the Administrative Council appoints the arbitrator or arbitrators not yet appointed shall at the request of either party and after consulting both parties in accordance with Article 38 of the ICSID Con-

vention. Arbitrators appointed by the Chairman in the manner described above should not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

The provisions of the ICSID Convention require that the majority of the arbitrators are not nationals of the Contracting State party to the dispute or the Contracting State whose national is a party to this dispute. This requirement, however, does not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Arbitrators of the Tribunal have broad powers as compared to conciliators. For example, the Tribunal may request that the parties produce documents or other evidence as well as independently visit the scene connected with the dispute and conduct such inquiries there as it deems appropriate. On the other hand, the Tribunal's authority related to enforcement of its awards is limited. Specifically, the Tribunal is not authorized to take any coercive measures directed at enforcement of its award but may only advise the parties on any additional measures to ensure enforcement by each of the parties.

An arbitration award that is rendered by a majority of the votes of all the members of the Tribunal should address every question submitted to the Tribunal and should state the reasons upon which it is based. An award is required to be signed by all members of the Tribunal. However, any of the members of the Tribunal, whether or not he or she dissents from a majority vote, may attach an individual opinion or a statement of a dissent to the award. The award is published only upon the consent of the parties (Article 48(5) of the ICSID Convention).

The Secretary-General promptly dispatches certified copies of the award to the parties. In accordance with Article 49(1) of the ICSID Convention, the award is deemed to have been rendered on the date on which the certified copies were dispatched.

Upon the request of any of the parties made within 45 days after the award was rendered, the Tribunal may decide any question which it had omitted to decide in the award, and should rectify any clerical, arithmetical or similar errors in the award, which becomes part of the award and is notified to the parties in the same manner as the award.

As opposed to a report issued by the Conciliation Commission, the Tribunal's award is binding on the parties and is not subject to an appeal.

The Tribunal may revise the award upon written application of a party if this party discovered a new fact that would decisively affect the award, provided that the Tribunal and the applicant did not know of that fact when the award was rendered and that the applicant's ignorance of it was not due to negligence. This application should be submitted within 90 days after the party discovered of such fact and in any event no later than within three years after the date on which

the award was rendered. In addition, if possible, the request to revise the award should be submitted to the Tribunal which rendered that award. If not possible, however, a new Tribunal is constituted in the manner described above.

Either party may request annulment of the award in writing based on one or more of the following grounds listed in Article 52(1) of the ICSID Convention:

- 1) that the Tribunal was not properly constituted;
- 2) that the Tribunal has manifestly exceeded its powers;
- 3) that there was corruption on the part of a member of the Tribunal;
- 4) that there has been a serious departure from a fundamental rule of procedure;
- 5) that the award has failed to state the reasons on which it is based.

The procedure of filing of an application to request annulment is governed by Article 52 of the ICSID Convention. Specifically, an application requesting annulment of the award should be made within 120 days after the date on which such award was rendered. However, if annulment is requested on the ground of corruption it should be made within 120 days after discovery of the corruption but in any event within three years after the award was rendered.

Upon receipt of the request of annulment of the award, the Chairman of the Administrative Council appoints an *ad hoc* Committee of three persons from the Panel of Arbitrators. None of the members of the *ad hoc* Committee should (i) be a member of the Tribunal which rendered the award, (ii) be of the same nationality as any such member, (iii) be a national of the State party to the dispute or of the State whose national is a party to the dispute, (iv) have been designated to the Panel of Arbitrators by either of those States, or (v) or have acted as a conciliator in the same dispute. The *ad hoc* Committee has the authority to annul the award or any of its part on any of the grounds discussed above. The Committee may also stay enforcement of the award pending its decision if it considers that the circumstances so require. If the award is annulled the dispute should be submitted to a new Tribunal at the request of either party.

According to the 2016 Annual Report issued by the Centre, only 15 arbitration awards rendered by the ICSID Tribunals were annulled in 2016, five of which in totality and ten – in part, which evidences their high quality [5, p. 38].

Each Contracting State should recognize an award rendered by the ICSID Tribunal as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. Moreover, in accordance with Article 54(3) of the ICSID Convention, execution of the award is governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought. Article 54(4) further clarifies

that the recognition and enforcement provisions contained therein should not be interpreted as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution. Accordingly, the ICSID Convention does not provide an effective mechanism of enforcement of the awards rendered by the arbitration Tribunals. In practice, a Contracting State that is a party to an

investment dispute settled through the ICSID arbitration mechanism could refuse to enforce the Tribunal's award in its territory. For example, in *Liberian Eastern Timber Corporation v. Republic of Liberia*, Liberia who was a party to the dispute refused to recognize the ICSID Tribunal's award in favour of the foreign investor. As a result, the foreign investor had to resort to the domestic U.S. court for enforcement of this award.

Applicable law

Pursuant to Article 42(1) of the ICSID Convention, the Tribunal decides a dispute in accordance with such rules of law as agreed by the parties. In the absence of such agreement, the Tribunal applies the law of hosting Contracting State party to the dispute as well as "such rules of international law as may be applicable".

Accordingly, because of participation of parties of different legal nature in ICSID investment disputes – a Contracting State on one side and a foreign investor on the other, – the ICSID Tribunals apply both international and domestic civil norms and principles [6, p. 74].

Article 42(1) of the ICSID specifies a priority of applicable sources of law – domestic law of the host Contracting State, then – international law norms. In accordance with doctrine [6, p. 75] and the ICSID precedent (e. g., *SPP v. Arab Republic of Egypt*), the norms of international law apply in case of a gap in the applicable domestic law or a conflict between the domestic and international law. Accordingly, the norms of international law play the complementary (or supplemental) and corrective functions [3, p. 623]. Interestingly, in its Award in *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), the Tribunal observed that different approaches on the role of international law as a source of law in the ICSID proceedings had been taken, i. e., either restricting its role or applying it broadly and, in turn, restricting the role of the host State's law. The Tribunal further noted that the use of the word "may" in the second sentence of Article 42(1) cited above in-

dicates that the Convention does not draw a sharp line for the distinction of the respective scope of international and of domestic law and, correspondingly, that this has the effect to confer upon the Tribunal a certain margin and power for interpretation. The Tribunal in *Autopista Concesionada de Venezuela, C. A. v. Bolivarian Republic of Venezuela* [7] dissented the position taken by the Tribunal in *Wena Hotels* and refused to surpass the corrective and supplemental functions of international law, concluding that the arbitration proceeding was based on the contract between the parties and not on a treaty.

Generally, the ICSID Tribunals are reluctant to apply domestic norms that in any way restrict any of the party's rights for a dispute resolution, such as, for example, statute of limitation provisions. In *Wena Hotels*, for example, the Tribunal refused to apply a domestic three-year statute of limitation noting that that "municipal statutes of limitation do not bind claims before an international tribunal".

Further, in accordance with Article 42(2), the Tribunal may not bring in a finding of *non liquet* based on silence or obscurity of the law.

Finally, the Tribunal is authorized to decide a dispute *ex aequo et bono* only if the parties so agree. In practice, in a number of cases the Tribunals decided disputes *ex aequo et bono*, including but not limited to awards in *Atlantic Triton Company v. People's Revolutionary Republic of Guinea* (ICSID Case No. ARB/84/1), *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo* (ICSID Case No. ARB/77/2).

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