



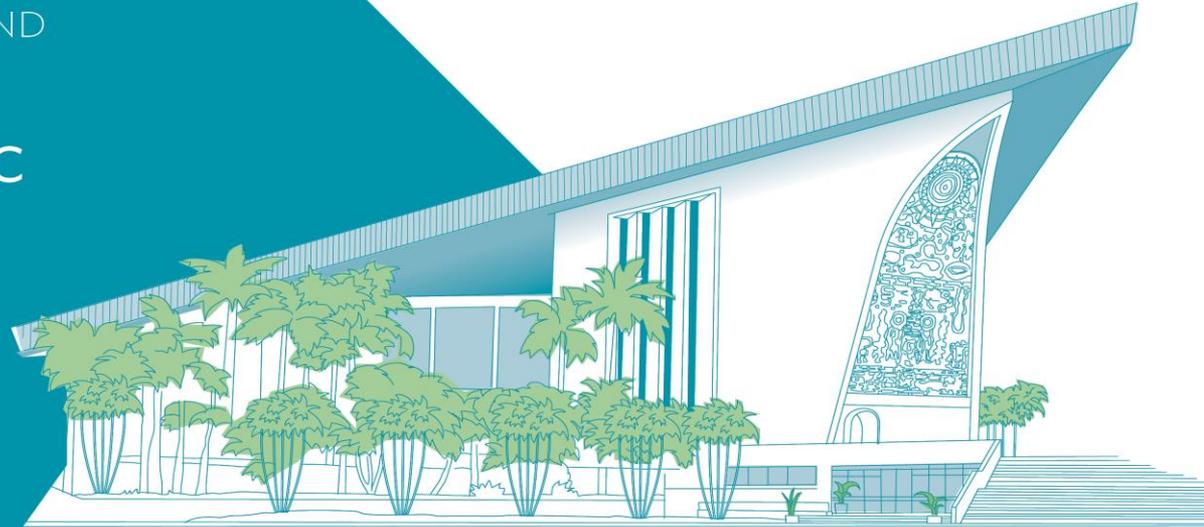
WILMER CUTLER PICKERING HALE AND DORR LLP



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Developments in Institutions and Rules

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Cost and Efficiency



- **Early determination of claims/defenses/issues**
 - SIAC Rule 29.1: “A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that (a) a claim or defence is manifestly without legal merit; or (b) a claim or defence is manifestly outside the jurisdiction of the Tribunal.”
 - HKIAC Art. 43: “The arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that:(a) such points of law or fact are manifestly without merit; or (b) such points of law or fact are manifestly outside the arbitral tribunal’s jurisdiction; or (c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party.”
- **Mandatory case management conferences** (e.g., DIS Art. 27.2, LCIA Art. 14)
- **Expedited procedure rules** (e.g., ICC Art. 30 and many others)



Cost and Efficiency



- **Incentives to increase efficiency** – both for arbitrators (e.g., ICC) and parties (e.g., DIS Art. 33.3 and others)
- **Promotion of settlement** – remains uncommon, *but see* CIETAC Art. 47; DIS Art. 26: “Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.”
- [Note that the 2018 DIS Rules continue to provide for some other “civil law” practices, e.g.:
 - whether to exclude or limit document production by the party that does not carry the burden of proof (Annex 3(E))
 - whether the tribunal shall provide preliminary factual or legal assessment (Annex 3(F))



Transparency



- **Communicating reasons for institution decisions – e.g., arbitrator challenges**
 - The LCIA now publishes anonymized excerpts from arbitrator challenge decisions on its website
 - 2017 ICC Art. 11(4) – deleting language saying reasons for decisions would not be communicated to parties (see Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration)
- **Disclosure of third party funding**
 - HKIAC Art. 44 (“If a funding agreement is made, the funded party shall communicate a written notice to all other parties, the arbitral tribunal, any emergency arbitrator and HKIAC of: (a) the fact that a funding agreement has been made; and (b) the identity of the third party funder.”) and HKIAC Art. 34.4 (“The arbitral tribunal may take into account any third party funding arrangement in determining all or part of the costs of the arbitration ...”)
 - Also proposed ICSID Rule 13(2) (“A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the Secretariat immediately upon registration of the Request for conciliation, or upon concluding a third-party funding arrangement after registration.”)



Transparency



- **Investor-state disputes** – 2014 UNCITRAL Transparency Rules and the Mauritius Convention
 - Disclosure of case-related documents (UNCITRAL Rules on Transparency Art. 2, 3 and 6)
 - Public access to hearings (UNCITRAL Rules on Transparency Art. 6)
 - Participation of non-disputing parties (UNCITRAL Rules on Transparency Art. 4 and 5)
 - Disclosure through a repository (UNCITRAL Rules on Transparency Art. 8)

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Emergency arbitrators

- **Now well-established**
- Despite its expedited formation approach, the LCIA adopted an emergency arbitrator provision (Art. 9B)
- BUT DIS did not include in its 2018 revisions ...
- And ICSID did not include in its proposed amendments
- [UNCITRAL?]

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Proposed Amendments to ICSID Rules

- What isn't there:
 - Emergency arbitrator provision
 - Early determination procedure
 - Standards to address many repeat substantive issues
- And not clear what will happen given the nature of the process



Competition Between and With Institutions and Courts

- **Geographic competition among arbitral institutions**
- **Competition with international (English language) courts**
 - English language courts in Frankfurt, Paris, Amsterdam, etc.
 - Singapore International Commercial Court
 - [China's International Commercial Court?]



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