

THE PLACE OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID) ADDITIONAL FACILITY IN INTERNATIONAL COMMERCIAL ARBITRATION*

Abstract

The additional facility was made available to the world in 1978 by the International Centre for the Settlement of Investment Disputes (ICSID)¹. It is a detailed and extensive body of rules fashioned or tailored for proceedings that are not otherwise under the jurisdiction of ICSID. Traditionally, ICSID is “a forum for investor-state arbitration and conciliation”², which focuses on settlement of legal disputes arising directly out of investment between “contracting” states or state entities and nationals of other “Contracting” states which the parties consent in writing to submit to the centre.³ Additional facility was therefore developed and offered to the world by the centre to fill some of the lacunae left by the limited traditional ICSID jurisdictional scope. This article examines the place of the additional facility if any in international commercial arbitration.

Structure and Content of the ICSID Additional Facility

Structurally, the Additional Facility instrument is of four parts (A, B, C & D). Part A is the rules governing the Additional Facility for the administration of proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (i.e. Additional Facility Rules.)

The other three parts comprised the three Schedules⁴ to the Rules namely; Part B is the Fact Finding (Additional Facility) Rules; Part C is the Conciliation (Additional Facility) Rules and Part D contains the Arbitration (Additional Facility) Rules. A fifth part to the Additional Facility is the Administrative and Financial Regulations of ICSID (specifically the financial provisions) which is adopted by Article 5 of the Additional Facility Rules to guide the Secretariat in operating the Additional Facility. Furthermore, it would be worthwhile to point out that items in the Additional Facility bear generally the same meaning ascribed to them in the Convention⁵. For example, in Article 4 (2) & (4) of the Additional Facility Rules direct reference were made to the jurisdictional requirements *ratione personae*⁶ of Article 25 of the Convention.

Proceedings of ICSID Additional Facility

Substantively and by virtue of Article 2 of the Additional Facility Rules the Secretariat is authorized to administer three types of proceedings under the facility. These proceedings are:

1. Fact finding proceeding⁷
2. Conciliation proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the centre because either the state

* **Ken Kingsley Ezeibe**, Esq LL.M, LL. B, Barrister at Law, e-mail: kcezeibe@yahoo.com; Phone 08033950631 and
***Dr. Meshach Nnama Umenweke**, Ph.D, LL.M, B.L, LL.B, Senior Lecturer & Head, Department of Int'l Law & Jurisprudence, Nnamdi Azikiwe University, Awka.

¹ Hereinafter referred to as ICSID or the Centre

² R. Danino, Secretary-General of ICSID, Highlights – A Speech at the 8th Biennial IFCAI Conference at Washington D.C. June 3 2005; at page 1 of 3.

³ Article 25(1) ICSID Convention (alternatively referred to as Washington Convention).

⁴ Under Article 6 ICSID Additional Facility Rules.

⁵ Article 1 ICSID Additional Facility Rules; the Convention means Convention on the Settlement of Investment Disputes between States and Nationals of other States; i.e. the Washington Convention.

⁶ Ratione Personae means parties must be a contracting state (or one of its subdivisions or agencies) and a national of another contracting state.

⁷ Article 2(c) ICSID Additional Facility Rules and Schedule B to the Additional Facility Rules provides for the detailed (19 Article) Fact – Finding (Additional Facility) Rules

party to the dispute or the state whose national is a party to the dispute is not a contracting state; and conciliation proceedings for the settlement of legal disputes which are not within the jurisdiction of the centre because they do not arise directly out of an investment, provided that either the state party to the dispute or the state whose national is a party to the dispute is a Contracting State⁸.

3. Arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the centre because either the state party to the dispute or the State whose nationals is a party to the dispute is not a contracting state; and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the center because they do not arise directly out of an investment, provided that either the State party to the dispute or the state whose national is a party to the dispute is a Contracting State.⁹

In this article however, it must be noted that we are concerned only with international commercial arbitration proceedings. From the provisions of the Additional Facility Rules, international commercial arbitration can only be envisaged in the first arm¹⁰ of the provisions under its jurisdictional scope. The second arm as provided for by Article 2(b) is clearly outside commercial arbitration because (1) it excludes legal disputes that arise directly out of an investment; and (2) Article 4(3) provides that one condition for approval by the Secretary-General in a request based on Article 2(b) is that the underlying transaction has features which distinguish it from ordinary commercial transaction, although the term ordinary commercial transaction is not defined therein. The two provisions in Article 2(b) accordingly have, therefore excluded disputes relating to investment and to commerce, thereby leading to the inevitable conclusion that the legal disputes envisaged are clearly outside the commercial spectrum and will therefore not qualify as international commercial arbitration with which we are concerned.

Thus, by arbitration here we mean arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the state party to the dispute or the state whose national is a party to the dispute is not a contracting state. This means that one of the parties is not ordinarily entitled to the traditional ICSID facilities.¹¹ This also implies that one of the parties should be either a Contracting State or the national of a Contracting State. By this provision and the inference therefrom it means that the *locus* developed for the private individual investor by the Washington Convention is also available under the Additional Facility. Consent of the parties, the pivotal fulcrum of arbitration is not negotiable though. Thus, by consent of the parties a non-contracting State (or its constituent subdivision or agency) and a national of a non-contracting State can enjoy ICSID facility under Additional Facility Rules provided that the other party to the dispute is either a contracting state or a national of a contracting State. However, it must be noted that since the proceedings envisaged by Article 2 of the Additional Facility Rules are outside the traditional jurisdiction of the Centre that none of the provisions of the special Convention for the settlement of investment disputes between States and nationals of other States shall be applicable to them, nor to recommendations, awards, or report which may be rendered from

⁸ Article 2(a) & (b) ICSID Additional Facility Rules, and Schedule to the Additional Facility Rules provides for the detailed (41 Articles) Conciliation (Additional Facility) Rules.

⁹ Article 2(a) & (b) ICSID Additional Facility Rules and Schedule to the Additional Facility Rules provides for the detailed (59 Articles) Arbitration (Additional Facility) Rules

¹⁰ Article 2(a) of ICSID Additional Facility Rules

¹¹ As provided in Sections 25-27 of the Washington Convention.

them¹². Accordingly, choice of forum under the Additional Facility is limited only to states that are parties to the 1958 United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Award¹³. This is because as the award is not governed by the Washington Convention, it will not be enforceable under the novel and effective provisions of that Convention.¹⁴ Thus, an award that qualifies for recognition and enforcement under the New York convention is regarded as the best alternative, hence the provision¹⁵.

Access to the Additional Facility is subject to the approval of the Secretary-General's, who will under the powers granted under Article 4 of the Additional Facility Rules examine the request to verify or ascertain whether the jurisdictional requirements provided therein and in Article 2 are met by the parties before granting his approval and notifying the parties of his decision¹⁶.

Differentiating Elements of the Additional Facility

It would be worthwhile to point out that like the Washington Convention; the Additional Facility has detailed rules and procedures for conducting arbitration from beginning to end. In as much as we are not going to delve into the nitty gritty of the Arbitration (Additional Facility) Rules, it may be worthwhile to point out as aforesaid that it is a 59 Article document containing everything necessary to midwife arbitration from request to award. A perusal of these rules reveals that it is substantially similar to ICSID Convention Rules. However, some other discrepancies observed should be pointed out and they include:

1. By the Additional Facility Rules, parties may apply to any competent judicial authority for interim measures, or conservatory measures. By doing so, they shall not be held to infringe the agreement to arbitrate or to affect the powers of the Tribunal.¹⁷ Under the Washington Convention however, this is not possible without a prior agreement of the parties.¹⁸
2. The award of an Additional Facility Tribunal is subject to the law of the forum. Thus, if the arbitration law of the country where the award is made requires that it be filed or registered by the Tribunal, the Tribunal (or the Secretary-General on their behalf) shall comply¹⁹. This is not so with the Convention as the award under the Convention is complete, binding and final, and will only be subjected to municipal law if the award debtor fails to comply with the terms willingly and the award creditors moves to enforce same, that is only when the municipal law and court will come in but only to verify and enforce same.
3. Where the parties fail to designate the applicable law, the Additional Facility Tribunal shall apply (a) the law determined by the conflict of law rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable²⁰. This is

¹² Article 3 ICSID Additional Facility Rules

¹⁴ For example, in Nigeria it is enforced simpliciter and without anything more once filed therein as a final judgement of the Supreme Court; See Section 1(1) of the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act CAP 120 LFN, 2004 See also Article 54 of the ICSID Convention.

¹⁵ A. Redfern and M. Hunter, **Law and Practice of International Commercial Arbitration**, 3rd ed. London Sweet & Maxwell 1999, (hereinafter cited as Redfern and Hunter), 58

¹⁶ Article 4 Additional Facility Rules; Arbitration (Additional Facility) Rules Articles 2,3,4,5 for detailed Rules and procedures for the request and processing of same by the Secretariat of the Centre.

¹⁷ Article 46 (4) Arbitration (Additional Facility) Rules

¹⁸ See Rule 39 (5) Arbitration Rules, of the Washington Convention

¹⁹ Article 52 (3) & 53(1), Arbitration (Additional Facility) Rules

²⁰ Article 5(1), Arbitration (Additional Facility) Rules

different when it is a proceeding under the Washington Convention, under the Washington Convention first recourse is the law of the contracting state party to the disputes.²¹

4. By virtue of Article 55, 56 and 57 of the Arbitration (Additional Facility) Rules, the only remedies or relieves available against the award of Additional Facility Tribunal under the rules are interpretation of the award, correction of clerical, arithmetical or similar errors in the award; and application for supplementary decisions to decide any question which the Tribunal had omitted to decide in the award respectively. All these process should be done within 45 days of the delivery of the award with notice to the other party. These are about the only internal remedies visible in the Additional Facility Rules. Remedies like revision and annulment which are internally available under the Washington Convention are not available here. This means that for such remedies resort would be had to the courts either at the place of arbitration or at the place of enforcement.

The last brings back to the fore the fact already stated that the place of arbitration might have very significant legal consequences on the award of a Tribunal set up under the Additional Facility. These consequences will be those equally observable in any international commercial arbitration proceedings, and which are outlined in instruments such as the New York Convention. In proceedings under the ICSID Additional Facility, there is therefore the possibility of intervention by the courts of the place of arbitration and the possibility of refusal of recognition and enforcement of resultant awards.²² The Rules acknowledge these consequences by providing as aforementioned that the place of arbitration shall be within the territory of a State party to the 1958 New York Convention and that the award shall be made at the place of arbitration²³. It is my humble suggestion and a better and clear option that such court proceedings should be guided by the New York Convention.

Conclusion

A closer look at ICSID Additional Facility and all the instruments thereto shows that the facility is not just a trifle that should be played down or dismissed by referring to it as the so-called Additional Facility²⁴ or seen as a foot note in international commercial arbitration. This foregoing conclusion is even more apposite given the fact that other vital proceedings like fact finding, conciliation proceeding and arbitration of disputes other than Convention disputes are also offered by the Additional facilities.

Indeed, the Additional Facility especially with regard to international arbitration generally is rather an extensive and comprehensive Facility developed and provided by ICSID to expand its scope as to be able to handle very weighty matters between states and private individuals that are otherwise not under its ordinary jurisdiction. It will avail parties that may not ordinarily enjoy ICSID excellent services and expertise. Furthermore, matters that are not ordinarily under ICSID original jurisdiction including those that are not commercial can be handled under the canopy of the Additional Facility.²⁵ Infact, the scope and utility of the Convention and that of the Additional Facility put together is so wide that if properly and fully exploited by States

²¹ Article 42, Washington Convention

²² A.A. Escobar, "Three Aspects of ICSID's Administration of Arbitration Proceedings" – based on a paper delivered at the XVI Inter-American Conference on Commercial Arbitration, Rio De Janeiro, 11-13, 1997, 7 & 8

²³ Redfern & Hunter, 57; G.C. Nwakoby, "The Law and Practice of Commercial Arbitration in Nigeria," Enugu : Iyke Ventures Production, 2004, 169

²⁴ Redfern & Hunter, 57; Nwakoby, *Op Cit.* 169

²⁵ These include Fact-finding, Conciliation and Arbitration of disputes other than investment and commercial disputes; see Article 2 of the Additional Facility Rules.

and private individuals (natural and corporate), contracting and non-contracting states, resort by these parties to *ad hoc* arbitration with all its difficulties will be highly reduced. Thus today, it should be noted that reference to the Additional Facility is now made in several bilateral investment treaties concluded by many countries like the United States and the United Kingdom with other countries. The one between the United States and Senegal is particularly interesting, because it shows clearly how both ICSID and the Additional facility can be used jointly²⁶. In the said treaty, the two contracting states provided *inter alia*, that "...they may, upon the initiative of either of them and as a part of their consultation and negotiation, agree to rely upon non-binding, third party procedures, such as fact-finding facility available under the Rules of the Additional Facility... 3(a) Each party consents to the submission of any dispute between such party and a national or company of the other party to the Centre for settlement by conciliation or binding arbitration if, at any time after six months from the date upon which the dispute arose..."

Although, the above quotation reflected *inter alia*, the incorporation of fact-finding facility (and not Arbitration Facility) of the Additional Facility in the contract, it is nevertheless a reflection of the utility or use of the additional facility by parties in their agreements.

Finally, ICSID Additional facility with regard to its facility or provisions for international commercial arbitration is an alternative venue or forum to other international commercial arbitration institutions like LCIA, ICC, AAA, AALCC, etc. It however, has an added advantage of being offered by a neutral or universally accepted and constituted agency of the World Bank as contrasted to the parochial origin of other international commercial Arbitration institutions.

²⁶ G. Delaume, "ICSID Arbitration: Practical Considerations" **Journal of International Arbitration** Vol 1, P. 124