

## IBA focuses in on small value claims in investment arbitration

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According to UNCTAD, there have been at least 116 investment arbitrations where the claimant has sought compensation in excess of USD 1 billion. These are usually well-known and publicly reported cases. But not all investment arbitrations involve mega-claims, and it is reported that nearly a third of recent investment arbitrations involve claims of less than USD 50 million. It is this phenomenon of the small value investment arbitration claim that the International Bar Association (“**IBA**”) focuses in on in its recent report. On 25 October 2022, the IBA’s Investment Arbitration Subcommittee (the “**Subcommittee**”) published its [report](#) on the procedural tools available to facilitate the cost-effective resolution of small value investment claims (the “**Report**”). This Client Alert provides our overview and analysis of the IBA Report.

### ***Small value claims in investment arbitration***

Although it is always the high value investment arbitration mega-claims which make the headlines, there are a substantial number of investment arbitrations in which investors have sought more modest amounts. According to UNCTAD figures, there have been at least 321 investment arbitration cases (around 40% of the total number of known ISDS cases in respect of which there is data) in which the claimant has sought compensation of less than USD 100 million.<sup>1</sup> Indeed, there have been at least 59 cases in which the claimant has sought less than USD 10 million. It is therefore clear that there are substantial numbers of individuals and small businesses who are utilising investment arbitration as a remedy to obtain relatively modest amounts of compensation in respect of damage done to foreign investments.

It is this phenomenon which the IBA Subcommittee seeks to focus in on and analyse. Defining a “*small value claim*” as a claim of a value no greater than USD 50m or EUR 50m, the Subcommittee draws on recent case data from various arbitral institutions to assess the prevalence of small value claims and to consider what can be done to facilitate the effective resolution of such claims.

### ***Overview of the IBA Report***

In terms of content, the Report proceeds to: (i) analyse case information from the International Centre for Settlement of Investment Disputes (“**ICSID**”), the Permanent Court of Arbitration (“**PCA**”) and the Arbitration Institute of the Stockholm Chamber of Commerce (“**SCC**”);<sup>2</sup> (ii) assess various international investment agreements (“**IAs**”) and arbitration rules to identify special procedures that exist, or are available to parties,

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<sup>1</sup> See UNCTAD Investment Dispute Navigator database at <https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed 24 November 2022).

<sup>2</sup> The case docket examined pertained to the period from 1 January 2010 until 31 December 2021.

which take into account small value claims; and (iii) identify mechanisms that parties can agree to use throughout an arbitration to facilitate the resolution of such small value claims.

Finally, the Report contains various annexes, which include observations on methodological considerations, cost management in investment arbitration, and a comparison of existing expedited arbitration rules (“**EAR**”).

Overall, the Report does not take a view on whether small value claims are desirable or should be encouraged, but rather investigates the procedural tools available to parties in ISDS proceedings to facilitate the cost-effective resolution of small value claims.

## **Prevalence of small value claims in investment arbitration**

Of the 632 cases registered or reported between 1 January 2010 and 31 December 2021 at ICSID, the PCA and the SCC, almost 30% were small value claims. Over 40% of SCC cases were small value claims, and almost 25% were claims below USD 10m.

The Subcommittee observes that no particular industry sector or region was likely to face more small value claims. However, the Report does mention that a large proportion of prior proceedings with a value of up to USD 50m had concerned Eastern European and Central Asian parties. The figures relating to ICSID and PCA cases, in particular, reveal that individuals or small or medium-sized enterprises (“**SMEs**”) initiated at least half of the small value claims in the relevant time period.<sup>3</sup>

## **Special procedures for arbitrating small value claims under IIAs and arbitral rules**

The Subcommittee emphasises that various IIAs and arbitral rules already contain special tools which could be used for arbitrating small value claims. A number of recent IIAs provide the option to employ certain procedural mechanisms when the investor is an SME or when the claimed damages are relatively low. Such IIAs include the EU-Canada Comprehensive Economic and Trade Agreement, the Dutch Model Bilateral Investment Treaty and the Canadian Model Foreign Investment Protection Agreement (“**FIPA**”).

Special procedures include the possibility of using videoconference consultations, sole arbitrator nominations, the consolidation of multiple claims in one set of proceedings and considering the claimant’s financial resources. The Canadian Model FIPA also includes special mechanisms such as the possibility to consent to mediation, a limited document production phase, and the sole arbitrator’s discretion to limit written submissions and expert witness evidence.

However, the Report highlights that 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*”.

In terms of arbitration rules, the Report observes that IIAs most frequently refer to ICSID and United Nations Commission on International Trade Law (“**UNCITRAL**”) arbitration rules. However, some treaties also refer to

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<sup>3</sup> SMEs were defined by these institutions as companies with fewer than 250 employees, less than USD 50-70m turnover, or USD 50-62m in assets.

the arbitration rules of the PCA or the International Chamber of Commerce. Additionally, consent clauses in investment contracts may refer to arbitration rules that are more prevalent in the context of commercial arbitration, or to various arbitral institutions' special rules for investor-State arbitration.

The Report notes that, in the context of commercial arbitration, many arbitral institutions have adopted fast-track procedures or expedited rules when the dispute concerns a particular subject-matter, is “*simple*”, or involves a small value claim. Depending on the institution, these procedures would apply when parties consent to this, or in urgent cases.

The Report also provides an overview of the application of expedited rules in investment disputes and the typical features of an expedited arbitration. The Report notes that parties to ISDS proceedings usually have to opt in to use expedited rules (such as the ICSID EAR and the UNCITRAL EAR).

The Report also identifies certain typical features of expedited arbitration: a monetary threshold for small value claims, opt-in clauses with qualifiers, sole arbitrators by default, time limits for, and a limited number of, filings, the possibility to limit document production, time limits for tribunals to render awards, the power of tribunals to render unreasoned awards or awards with summary reasons, and the possibility to revert to non-expedited proceedings.

### **Additional procedural mechanisms available for arbitrating small value claims**

The Subcommittee lists additional procedural mechanisms that may be employed throughout the arbitration of a small value claim. The Report explains that whether parties may adopt these procedural mechanisms will depend on the instrument setting out the arbitration agreement, as well as the relevant arbitration rules.

While a tailored choice of arbitration rules, arbitrators and counsel remains imperative in the pre-arbitration phase, the Report found that the process of arbitrating small value claims could benefit from limiting submission rounds, document production, expert evidence, and imposing time limits on rendering orders, decisions and awards.

Similarly, in the post-arbitration phase, the procedural schedule could be compressed, and written submissions in the context of award annulment proceedings could be limited.

### **Overall appraisal of the Report**

Responding to the reality of an increasing prevalence in small value investment claims, the IBA has chosen to focus in on that phenomenon and offer procedural insights as to how such claims might be handled. The Report notes insightfully that “[s]mall 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”. It is in this context that the Report makes a meaningful contribution by usefully identifying a number of procedural tools to assist the parties to ISDS proceedings to reach a cost-effective resolution of such smaller value claims.

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