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Happ / Wilske

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ICSID Rules and Regulations 2022

– with Alternatives and Perspectives –

Article-by-Article Commentary

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Foreword to the second edition

WELCOME TO PROGRESS!

I always have wondered at the phrase *plus ça change plus c'est la même chose* (*the more things change, the more they stay the same*), authored by Jean Baptiste Alphonse Karr in January of 1849 in an issue of his monthly journal *Les Guepes* (*The Wasps*), which according to Wikipedia generally was written in a “keenly satirical tone.” On its face, it did not compare with the logic of Sir Isaac Newton’s rules of physics.

However, we loyal adherents to the traditional practice of international arbitration must confront the raging enemies of conventional investor/State arbitration, for example, led not only in Europe by the European Union’s Commission, but also by NGOs that take issue with globalism, States that realize that they are more on the receiving side of ISDS, and state-centered traditionalists who still believe that “the King (or State) can do no wrong.” The EU Commission’s stance already has destroyed ISDS among the Union’s Member States. Thanks to UNCITRAL’s radical departure from its usual mission of gathering non-governmental experts in groups to create instruments advancing global trade law, it has created a Working Group III consisting entirely of governmental agents as the diplomatic terrain on which the EU’s 27 Member States are pledged to market to the entire world the Commission’s dream of having all such disputes decided by an International Investment Court of fifteen alleged “Judges” appointed by States, thus leaving no role for the investors. In light of these events, we quickly recognize further fault in that declaration of Monsieur Karr: Changing the dispute settlement system from what resolved the famous *Alabama* dispute between the United States and the United Kingdom following the American Civil War clearly would be very far from *la même chose*! And it would be especially far from ICSID arbitration, a particularly uniquely designed and strong system for the fair resolution of investment disputes, with which I personally have been happily involved for decades!

We may now say *adieu* to Monsieur Karr, whose declaration definitely also is not consistent with the motivation that produces a Second Edition of an earlier First Edition of a technical – let us say informative – book on a professional subject. This is not the first time I have introduced a Second Edition and it is hardly the first time that ICSID’s steady improvement of itself over the now sixty years since its Convention entered into force on October 14, 1966 has richly deserved to be heralded.

I have, since the beginning of my career, first as counsel for arbitrating clients, then as international arbitrator, been a committed fan of ICSID, despite the fact that it got off to an exceedingly slow start, as it has over the sixty years since its establishment progressively ballooned both in its offerings and its importance.

I was fortunate to act as counsel for the Respondent in one of ICSID’s truly early cases, registered on February 7, 1981 as No. ARB/81/1, *Amco Asia Corporation and others v. Republic of Indonesia*, thus fifteen years after ICSID opened for business. It also happened to be one of the first awards to be annulled under Article 52 of the ICSID Convention, then followed by a second arbitration, then by a supplementary decision and rectification proceeding, and ending with both sides requesting annulment proceedings. A particularly unique aspect of ICSID is the internal corrective

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mechanisms of interpretation, revision and annulment of an ICSID award afforded by Articles 50, 51 and 52 of the Convention. Of course such requests, especially for annulment, were quite rare at first, but have long since become fairly frequent, if not *de rigueur*, as ICSID graduated over the years from exclusively contract-based and other non-treaty-based arbitrations into becoming an administrative behemoth of treaty disputes, as the number of treaties exploded into the thousands following the very first one concluded in 1958 between the Federal Republic of Germany and Pakistan. As a result, I suspect, of the growing volumes of registration of claims, the rulers of ICSID finally made the decision after a while which, after many years of working under its various rules, I welcomed and cheered most heartily, namely severing the position of Secretary-General of ICSID from its longtime Siamese twin, the General Counsel of the World Bank!

Apart, of course, from having sat as arbitrator in dozens of ICSID disputes, I have had the good fortune, thanks to the kindness of a satisfied client State, to have spent some years on ICSID's Panel of Arbitrators, from which I once was appointed to, and then presided over, an *ad hoc* Committee: definitely a unique experience. Again, I emphasize that the internal corrective mechanisms provided in the ICSID Convention, which are indeed unique, justify the strength of the strict commandments of Articles 53, 54 and 55 regarding the limited rights of a State Party to the ICSID Convention relating to the enforcement of an ICSID award.

Normally, a Second Edition, at a minimum, is issued for the purpose of updating the substance of what was published in the First Edition, and would cite changes, whether substantive improvements on matters set forth in the First Edition or fundamental alterations constituting a change of basic design. This Second Edition, however, is unique in that it takes the reader not in one direction, and not in two directions, but in three, each quite different from the other two:

(1) The Co-Editors perform the basic updating of all Chapters of the First Edition to reflect developments since 2022, including new case law and procedural practice, hence the following four sets of ICSID's previously established Rules:

- ICSID Arbitration Rules;
- ICSID Institution Rules;
- ICSID Conciliation Rules;
- ICSID Administrative and Financial Regulations;

(2) For the very first time, this Second Edition also comments on four additional sets of rules:

- ICSID Mediation Rules;
- ICSID Fact-Finding Rules;
- ICSID Additional Facility Rules;
- Memorandum on the Fees and Expenses and the Schedule of Fees;

(3) as no other Second Edition, or even First Edition, I have ever heard of, the Co-Editors simply turn all the further pages of the Second Edition over to a thematic section of essays titled “*Alternatives to and Perspectives on ICSID Arbitration*”, in which a handful of leading institutions and systems operating in the field of investment arbitration are presented and analyzed, with a view to highlighting what distinguishes *their* dispute settlement mechanisms from that of ICSID and makes *their* system, with its own unique features, advantages, and practical relevance, a compelling alternative to ICSID. These contributions address:

- the China International Economic and Trade Arbitration Commission
- the International Chamber of Commerce

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- the Permanent Court of Arbitration (in The Hague, the Netherlands, founded in 1899, dealing, apart from State-to-State disputes, largely with UNCITRAL Arbitration Rules cases)
- the Stockholm Chamber of Commerce Arbitration Institute
- the Singapore International Arbitration Centre
- the *Organisation pour l'harmonisation en Afrique du droit des affaires* (Organization for the Harmonization of Business Law in Africa) and various regional Arbitration Centers in Africa (e.g., the Cairo Regional Centre for International Commercial Arbitration)

This is a book that I have never known, whether as a First, or Second or any other Edition. Ordinarily a book such as this is designed by the Co-Editors to inform those that they wish to educate about the professional matters they intend to convey. In this case, the organization on which the book focuses has been so active and progressive itself that this Second Edition expands to serving as, in fact, a First Edition as to what ICSID so actively produced since that 2022 First Edition.

Moreover, how unusual is it for the Co-Editors to invite significant rivals of the organization on which they have focused in two successive Editions to argue their own cases as to why arbitrating parties instead should choose them? Has one ever seen a bus of one company painted with advertisements for a competitor?

I conclude that the extraordinary Second Edition into which, you, the reader, are about to dive, will be the most unique, fully informative, and persuasive one of this genre that ever will have come your way. I close with the exclamation with which the Co-Editors ended their Preface to the First Edition: “*Let the revels begin, let the fire be started...*”

Hon. Charles N. Brower

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Preface

As we had mentioned already in the preface of the first edition, this book is not only the brainchild of the editors' spirited discussion at the Hamburg *Elbphilharmonie* in 2019, but also a child of the COVID-19 pandemic. The COVID-19 pandemic is, serendipitously, over, but while writing this preface, quite some people are worried that the next pandemic – the hantavirus – is in the offing and might not just be limited to the cruise-faring part of society. However, the time it took to compile this second edition of this book has mostly been defined by other events.

We lived through disruptive times: in terms of geopolitics, artificial intelligence, and an increasing criticism towards ISDS (but nevertheless an increasing caseload), *inter alia*.

Temporary rules, measures, and exceptions that were invented and implemented for the COVID-19 era have, meanwhile, become an established part of the toolbox of international arbitration.

Since 2022, the new ICSID Rules and Regulations have been tried and tested in practice. Admittedly, this did not change the size and shape of the book tremendously. But in light of the editors' quest for the "Holy Grail" of legal-commentary-perfection, we have not only updated and polished the previous commentaries of the ICSID Administrative and Financial Regulations, the ICSID Institutional Rules, the ICSID Arbitration Rules, and the ICSID Conciliation Rules, but also added new commentaries on the ICSID Additional Facility Rules, the ICSID Mediation Rules, the ICSID Fact-Finding Rules, and the Memorandum on the Fees and Expenses (2022) and the Schedule of Fees (2023). This, by itself, should already convince hesitant buyers of the first edition to also purchase the second edition.

We have also added a new Part 10, dealing with *Alternatives to ICSID Arbitration*, in order to allow the reader to compare ICSID's investment dispute services with those offered by other arbitral institutions. Finally, we added a new Part 11, with essays on *Perspectives on ICSID Arbitration* by a line-up of very experienced investment arbitration practitioners with, at times, rather diverse positions. We consider this to be our take on The University of Chicago's "*freedom to debate*" and, here, offer a venue to discuss the merits of competing ideas.

The *Perspectives on ICSID Arbitration* section concludes with a chapter prepared independently by the ICSID Secretariat. It provides a four-year retrospective on its own experience administering 182 proceedings under the 2022 Rules. The chapter highlights ICSID's efforts to advance three core objectives: (i) broadened access to modern dispute resolution facilities; (ii) efficiency in ICSID arbitration; and (iii) modernizing procedures around transparency, third-party funding, and security for costs.

Within these themes, the authors "look back" and analyze how parties, tribunals, and the ICSID Secretariat have applied the range of procedural innovations and reforms introduced by the 2022 Rules in practice. They also "look forward" to offer insight on the continued evolution of ICSID practice under the 2022 Rules.

Nevertheless, please do not throw away your first edition! Because we did not simply want to reprint all the previous essays, they are still of value to you: even just to find out what Pippi Longstocking (Bungenberg/Böhme, p. 801), Miles Davis (Bhatty, p. 803), alternative facts (Franck, p. 815) and 2048 Canadian Cabernet (Gastrell, p. 840) have to do with ICSID arbitration. Hopefully, by now, you will also have found out what the

Preface

subtitle of the first edition's Part 5, "Enforcement of ICSID Awards – A Walk in the Park?", refers to. If not, this 1980 song by the *Nick Straker Band* obviously does not ring any bells with you.

What else has happened since the first edition was launched? We did not only lose Jürgen Habermas in March 2026, one of the most influential thinkers on the European side of the Atlantic, but also two contributors from the first edition, Professor Karl-Heinz Böckstiegel and Alvin Yeo. We will, hopefully, never find out if the hectic finalization of the manuscripts impacted the health of other contributors.

The relevance of public international law has been challenged as though it could easily be replaced by individual notions of "morality". The latest geopolitical developments rather underline that consensus on certain basic tenets of a peaceful and stable world order is indispensable.

Sanctions have recently been a big topic in international arbitration – directly impacted, of course, by some of the major geopolitical developments, which, at this point, have a major influence on international commercial arbitration. However, even the geopolitical developments themselves will trigger an increased need for ISDS.

Not everything has turned for the worse. After the launch of the first edition, the Rolling Stones issued "*Hackney Diamonds*" in October 2023 – their first studio album with original material after a long period of time – and promoted it during a trip through the U.S. in 2024. At this time, we have already enjoyed listening to (and studying the chords of) the follow-up album "*Foreign Tongues*" in July 2026. We hope that the readers of this second edition will not associate it with Amy Winehouse's "*You Know I'm No Good*" – which is covered by the Rolling Stones on "*Foreign Tongues*" – but rather with titles such as "*In the Stars*," "*Divine Intervention*," "*Never Wanna Lose You*," or "*Back in Your Life*." Please let us know.

Finally, there are many people without whom this project would never have succeeded. There are, firstly, our authors, who are all busy practitioners not only willing to write long chapters, but also to cope in a patient and resilient – but always constructive – manner with our irksome editorial comments. Then, there are our two assistant editors, Ralf Lewandowski and Matthew T. Adams. They helped us cope with the administrative part of editorial work, which everyone expects and, at the same time, massively underestimates. Without their efficient assistance, we might not have managed it.

And of course, everything depended on the patience and magnanimousness of "*Our Ladies*" in our respective families.

Last, but not least, we have to thank the staff of the ICSID Secretariat for their unremitting preparatory work in the Rules Amendment Project. Additionally, we must express our sincere appreciation for our Publisher, C.H.Beck, and in particular Jonathon Watson for his enduring patience with us, his indulgence of our requests, and, of course, his knack for finding practical solutions in the face of what seem like esoteric problems.

And now, back to the quote from the final song of this neo-noir rock opera *Streets of Fire*, probably the most important cyberpunk movie of its time: "*Let the revels begin, let the fire be started...*"

Hamburg/Stuttgart

Dr. Richard Happ
Prof. Dr. Stephan Wilske
(aka "*The Glimmer Twins*" of ICSID Commentaries)

Foreword to the first edition

Amending laws and arbitration rules is a precarious exercise. It requires a careful balancing of potentially conflicting demands and considerations. On the one hand, users are assisted by a stable and consistent framework. Too frequent changes suggest that existing rules are inadequate or inflexible. At the same time, a periodic review of whether a set of rules is fit for purpose provides confidence to users, and updates from time to time are important to ensure that the regulatory framework is “best in class”.

This is the fourth update since the adoption of the ICSID Arbitration Rules in 1967 and the process has been lengthy, thorough and inclusive.

In carrying out any rules update, a balance must be struck between codifying best practice, and modernisation and the introduction of new features. Furthermore, once a revision project is ongoing, discipline is required to avoid that the process resembles a domestic renovation project: only too often does a kitchen upgrade result in the gutting of the entire house.

For ICSID, additional challenges had been addressed, notably the multi-layered structure of the rules and regulations spread out over the ICSID Convention, the Arbitration Rules, the ancillary Rules and the Additional Facility Rules. The different nature and scope of the various instruments and in particular the fact that the ICSID Convention can only be amended by means of a formal treaty revision, which was not a realistic proposition, imposed a *de facto* cap on what could be achieved by means of a rules revision. Nevertheless, even a “mere” rules revision required the participation of and buy-in from the Member States, impacting the agility of the project.

A rules revision process should also do justice to the plurality of ICSID’s users and stakeholders. Moreover, a redraft should somehow preserve the strengths of the current system while at the same time take note of evolving trends in (investment) arbitration and calls for recalibration of the entire system. The fact that ICSID conducted the review process in its three official languages of English, French and Spanish provided a further layer of complexity.

ICSID, its Secretary-General and its Secretariat are to be congratulated on the successful conclusion of this herculean project. The editors of this book are to be congratulated on launching this comprehensive and insightful Commentary, and doing so in such a timely fashion.

The editors have managed to gather a stellar cast of contributors. They hail from a wide range of jurisdictions and they include academics and practitioners. While they include both more senior and more junior contributors, they are united in having extensive experience in investment arbitration, including ICSID practices and procedures.

The Commentary is logically presented, following the system of the various rules and regulations, and includes a section with short contributions focusing on new perspectives of ICSID Arbitration. Such a structured Commentary is especially welcome given the somewhat overwhelming volume of working papers. Although these papers contain a wealth of information it is easy to get lost in them and for a proper understanding of each revision it is necessary to digest each step of the process, which requires a review of all of the working papers and constant cross-referencing. Against that background, a

Foreword to the first edition

focused Commentary on each section is particularly welcome and ensures that the user sees the forest for the trees.

The revised Rules contain a number of new sections dealing with new concepts and procedures. The full impact of the revision cannot, however, simply be assessed by reviewing a track-change version of the text. This is in part because many sections have been reworded even though they have not been amended substantively, reflecting the aim to adopt plain, modern and gender-neutral language.

Some of the changes are similar to changes adopted by other major institutions in recent updates of their rules. This includes, for example, as part of the focus on time and cost effectiveness, the requirement that all filings are to be made electronically, unless there are special reasons to maintain paper filings. Recent changes to the LCIA and ICC Rules similarly nudge users to discard environmentally unfriendly and cumbersome paper filings. This development is in part the silver lining of the Covid pandemic, which forced users and institutions alike to dispense with paper and communication by post or courier, paving the way for a formal adoption of this approach.

Other changes are more specific for the ICSID process or at least for investment arbitration, notably the provisions in relation to transparency. These amendments relate to the publication of awards, where the revised Rules provide that the parties are deemed to have consented to the publication of awards unless objected to within 60 days of the award being rendered. The Rules also create a presumption in favour of open hearings and require a Tribunal to establish procedures to prevent disclosure of confidential protected information in such case. Third, the Rules provide more guidance to Tribunals in permitting non-disputing party participation. These changes, while perhaps more limited than some may have aspired, will be particularly welcomed by those who sought more fundamental changes to the system of investment arbitration in order to strengthen the legitimacy of the process in an increasingly critical environment.

In some cases, the changes effectively amount to a codification of more recent practice, such as the provisions regarding costs. Even though the revised Rules do not go quite as far as imposing a hard and fast rule that costs follow the event, which is the system commonly adopted in commercial arbitration, the revised provisions do amount to a significant change compared with earlier practice in investment arbitration.

Some changes could be implemented by amending the existing text such as the tighter wording of (old) Rule 39, new Rule 47 on provisional measures, or by introducing (extensive) additional wording, such as the provisions on expedited arbitration or third-party funding. In other instances, however, the limitations imposed by the structure of the ICSID system, and in particular the dual nature of the rules (partly treaty-based and partly rules-based), required more creative solutions and drafting. Notably, while the new Rules were able to introduce some streamlining of the procedure of disqualification of arbitrators, the contents of Article 58 of the ICSID Convention prescribing that a challenge be decided by the non-challenged arbitrators could not be eradicated. Instead, the new Rules provide more room for the non-challenged arbitrators to recuse themselves if they prefer the Chairman of the ICSID Administrative Council to decide, as they are not limited to the situation in which they are “equally divided” on the merits of the challenge.

These are mere examples of some of the changes introduced by the amendments to the Rules, and illustrate the need for, and the importance of the Commentary, highlighting what has changed, what has remained the same, and why and how to deal with these changes.

Foreword to the first edition

Over time, further practice will develop, which may justify a revised edition of this book at some point. For now, users will benefit tremendously from this comprehensive Commentary, which, thanks to the Editors' hard work and perseverance, is launched as users are finding their feet with the revisions.

Jacomijn J. van Haersolte-van Hof

* Prof. Dr. Jacomijn J. van Haersolte-van Hof, Former Director General London Court of International Arbitration, Professor of arbitration law, Rijksuniversiteit Leiden, member of the ICSID Panel of Arbitrators.

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