

CHOOSING BETWEEN UNCITRAL AND ICSID ARBITRATION RULES IN ISDS CASES

ISDS arbitration is a dispute settlement mechanism that allows foreign investors to resolve disputes with host governments. Two major rules are often applicable in ISDS cases: the UNCITRAL Arbitration Rules and the ICSID Arbitration Rules.

The UNCITRAL Arbitration Rules are characterized by flexibility, in that parties can tailor them to the specifics of their dispute, but this flexibility can also lead to confusion due to the lack of procedural rules and standards. In contrast, the ICSID Arbitration Rules are characterized by consistent application of procedural rules and standards, with the limitation that, in order for the ICSID Arbitration Rules to apply, the dispute must be a dispute arising directly from an investment under the ICSID Convention. Both the ICSID and UNCITRAL Arbitration Rules have certain advantages and disadvantages, and the arbitration procedure that is more favorable to the parties should be chosen based on the specifics of the dispute.

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1. Introduction

As of 31 December 2023, ten investor-state dispute settlements (“ISDS”) cases have been initiated against the Republic of Korea (“Korea”), and Korean nationals have filed eight cases against respondent states.¹ ISDS arbitration provides a mechanism for foreign investors to resolve disputes with host governments, and ISDS cases involving various nationals may likely increase. Against this backdrop, it is worth considering the respective frameworks of the two major rules applicable in adjudicating on ISDS cases: (i) the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules and (ii) the International Centre for Settlement of Investment Disputes (“ICSID”) Arbitration Rules.

¹ [ISDS Navigator operated by the United Nations Conference on Trade and Development](#).

2. UNCITRAL Rules

The UNCITRAL Arbitration Rules are a set of procedural rules for arbitral proceedings² and apply broadly to international commercial disputes. Arbitrations under the UNCITRAL Arbitration Rules can be ad hoc or administered by an institution like ICSID or the Permanent Court of Arbitration.³ The UNCITRAL Arbitration Rules allow parties to tailor the arbitral procedures to the specific needs of their dispute, which can be particularly useful in complex or unique cases. However, this flexibility may lead to procedural complexity due to lack of set procedural rules and standards.

The seat of the arbitration plays an important role in arbitrations under the UNCITRAL Arbitration Rules. In UNCITRAL and other non-ICSID arbitrations, national courts of the seat of the arbitration may set aside the award if certain conditions apply, and recognition and enforcement of awards are often governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), which states that enforcement of an award can be refused if the award was “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”⁴

3. ICSID Rules

The ICSID Arbitration Rules require the dispute to arise from an economic activity that constitutes an investment under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”). While the ICSID Convention does not define investment, ICSID case law suggests that to constitute an investment, (1) “the project should have a certain duration,” (2) “there should be a certain regularity of profit and return,” (3) there should typically be “an element of risk for both sides,” (4) the commitment involved should be substantial, and (5) “the operation should be significant for the host state’s development.”⁵ Furthermore, both the host government and the investor’s home state must be parties to the ICSID Convention.

As ICSID has significant experience in administering ISDS cases, this specialized expertise may lead to a more efficient arbitration process and to more consistency in the application of procedural rules and standards. In addition, it is possible to apply for urgent provisional measures under ICSID even before the tribunal has been constituted.⁶ ICSID awards do not require a formal process for recognition and its pecuniary obligations are enforceable in over 150 countries under the ICSID Convention.⁷ ICSID awards cannot be set aside by state courts and can be annulled only on a limited number of grounds by an ad hoc ICSID committee.

² [UNCITRAL Arbitration Rules](#)

³ [Choosing an Arbitral Forum for Investor-State Arbitration](#)

⁴ [Article V\(1\)\(e\) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#)

⁵ [International Investment Law: Understanding Concepts and Tracking Innovations. Chapter 1: Definition of Investor and Investment in International Investment Agreements](#)

⁶ [Provisional Measures - ICSID Convention Arbitration.](#)

⁷ [Comparing ICSID Convention and ICSID-Administered UNCITRAL Arbitration](#)

While arbitral proceedings under the ICSID Arbitration Rules can be considered more costly than proceedings under the UNCITRAL Arbitration Rules due to administrative fees, an empirical study of costs, damages, and duration in ISDS cases released in June 2021 found that ICSID and UNCITRAL arbitrations cost about the same, with mean costs of approximately USD 1 million.⁸ Thus, costs should not be a determinative factor in the choice between the two arbitration frameworks.

4. Conclusion

The choice between the ICSID and UNCITRAL Arbitration Rules depends on factors such as the nature of the dispute, the parties' preferences, enforceability concerns, and procedural flexibility. Both the ICSID and UNCITRAL Arbitration Rules have strengths and weaknesses, and the specific circumstances of a dispute will determine which is better for the parties.

Yoon&Yang's International Arbitration & Litigation Team has successfully handled a wide array of disputes in multiple jurisdictions. It also handles effective enforcement strategies in conjunction with the dispute resolution process.

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⁸ [Empirical Study: Costs, Damages and Duration in Investor-State Arbitration.](#)