



International Arbitration Focus Team

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ICSID has amended its Rules

On 21 March 2022, the ICSID Member States approved a comprehensive set of amended rules and regulations for ICSID arbitration, conciliation, and mediation proceedings. These amendments to the ICSID Institution Rules, Arbitration Rules and the Additional Facility Rules will enter into force on 1 July 2022.

The new rules include substantive changes that aim to shorten the proceedings, constrain costs and enhance transparency.

In this client alert, we highlight some of the most important and innovative amendments and assess their possible effect on investor-State arbitration.

Measures to Enhance Procedural Efficiency and Flexibility

The most significant changes include:

- 1. Expedited Arbitration:** The new amended Arbitration Rules include a new chapter on “Expedited Arbitration”, which is meant for cases that are less complex and have lower value. For application of the provisions, consent of the parties is required.¹ Under this new Expedited Arbitration form, the proceedings have shorter timelines, and the length of submissions is limited.²
- 2. Case Management Conferences:** Tribunals should hold case management conferences to narrow the issues to the core of the dispute and address any procedural or substantive matters related to the dispute.³
- 3. Early Dismissal of Claims:** This amendment deals with applications for dismissal on the ground of manifest lack of legal merit. It aims to address potentially unmeritorious claims earlier in the process by stipulating that such an application needs to be raised within 45 days of the constitution of the tribunal. The tribunal

¹ 2022 ICSID Arbitration Rules, Rule 75 and 79.

² 2022 ICSID Arbitration Rules, Rule 81 and 85.

³ 2022 ICSID Arbitration Rules, Rule 31.

should then render its decision on these objections within 60 days.⁴

4. **Bifurcation:** A party may request to bifurcate a proceedings at any time or as a preliminary objection within a 45-day time frame. The new rule also indicates the factors that the tribunal shall consider in deciding whether to bifurcate.⁵
5. **Consolidation and Coordination:** The new Rules include a new stand-alone provision on consolidation. Subject to consent of the parties, two or more pending arbitrations can be consolidated or coordinated.⁶ This reflects the practice of many commercial arbitration institutional rules.⁷
6. **Timelines for Tribunals:** The new Rules set mandatory timeframes for the tribunals to issue an award.⁸ This is a “best efforts” obligation.
7. **Electronic Filing:** All filings shall be submitted electronically unless there are specific reasons for filing hard copies.⁹

Provisional Measures

The previous ICSID Arbitration Rules already recognized the power of tribunals to grant provisional measures.¹⁰ In addition to this existing broad power, the new Rules provide more guidance for tribunals as to the scope and standard for granting provisional measures. Tribunals expressly have authority to grant provisional measures to secure a “party’s rights”, including measures to:¹¹

- a) “prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process”
- b) “maintain or restore the status quo pending determination of the dispute”; or
- c) “preserve evidence that may be relevant to the resolution of the dispute.”

The Tribunal should consider “all relevant circumstances”, including “whether the measures are urgent and necessary” and “the effect that the measures may have on each party”.¹²

⁴ 2022 ICSID Arbitration Rules, Rule 41.

⁵ 2022 ICSID Arbitration Rules, Rule 42.

⁶ 2022 ICSID Arbitration Rules, Rule 56.

⁷ Article 10 of the 2021 ICC Rules; Article 22A of the 2020 LCIA Rules.

⁸ See for instance: 2022 ICSID Arbitration Rules, Rule 58.

⁹ 2022 ICSID Arbitration Rules, Rule 4.

¹⁰ 2006 ICSID Arbitration Rules, Rule 39(1).

¹¹ 2022 ICSID Arbitration Rules, Rule 47(1).

¹² 2022 ICSID Arbitration Rules, Rule 47(3).

Transparency

As a response to recurring criticism about a perceived lack of transparency, the new Rules maintain the requirement of party consent to the publication of awards, but now provide that awards and orders will be published by default unless a party clearly objects in writing within 60 days of the award being rendered.¹³ In the absence of consent, the new Rules still allow the Centre to publish excerpts of awards. Other documents, like orders, decisions and submissions filed in the proceeding can also be published with any redactions agreed by the parties.¹⁴ The new Rules also contain a presumption in favor of open hearings, including a requirement for the tribunal to establish procedures to prevent disclosure of confidential information during an open hearing.¹⁵

Disclosure of Thirty-Party Funding

Reflecting the growing participation of third-party funders in investor state disputes, the new Rules require parties to promptly disclose in writing the name and the address of any non-party from which they are receiving funds, directly or indirectly, to pursue or defend a claim.¹⁶ Furthermore, in case of funding from a juridical person, the parties are obliged to disclose the names of the persons and entities that own and control that juridical person.¹⁷ The tribunal also has the power to order disclosure of further information regarding the funding arrangements.¹⁸ This ongoing obligation throughout the proceeding is seen as a way of addressing potential conflicts of interest of arbitrators that might arise out of such funding agreements. This change is aligned with the approach taken by other arbitration institutions.¹⁹

Disqualification of arbitrators

The new rules aim to streamline the process of challenging arbitrators by setting stricter timelines. While a decision on an arbitrator's disqualification is pending, the proceedings shall be suspended unless the parties agree otherwise.²⁰ The arbitrators not being challenged, or the tribunal chair, will decide on the disqualification proposal within 30 days of the last written submission or notification to the Secretary General.²¹

¹³ 2022 ICSID Arbitration Rules, Rules 62 and 63.

¹⁴ 2022 ICSID Arbitration Rules, Rules 63 and 64.

¹⁵ 2022 ICSID Arbitration Rules, Rule 65.

¹⁶ 2022 ICSID Arbitration Rules, Rule 14(1).

¹⁷ 2022 ICSID Arbitration Rules, Rule 14(1).

¹⁸ 2022 ICSID Arbitration Rules, Rule 14(4).

¹⁹ See Article 11(7) of the 2021 ICC Rules and article 44 of the 2018 HKIAC Rules.

²⁰ 2022 ICSID Arbitration Rules, Rule 22.

²¹ 2022 ICSID Arbitration Rules, Rule 23.

Costs

There is a new chapter on “Costs” that has several important features:

- a) **Security for Costs:** The new Rules codify a party’s right to request security for costs and specifies the factors that the tribunal shall consider in determining whether to order a party to provide security for costs.²²
- b) **Allocation of Costs:** The new Rules include a non-exhaustive list of factors that the tribunal should consider when allocating the costs of the proceedings.²³
- c) **Decision on Costs:** The tribunal should consider the abovementioned factors when it decides on the allocation of the costs of the proceedings.²⁴

Non-contracting party participation

Under the new Rules, non-disputing parties may participate in the arbitration proceedings by making written or oral submissions with the consent of the tribunal. The tribunal may also allow a non-disputing party to access documents filed in the proceedings, if the other parties do not object.²⁵

These amendments may be relevant in disputes that have broader potential consequences (*e.g.*, environmental or social) than the dispute itself. Non-disputing parties might want to raise (*e.g.*, environmental or social) concerns in the arbitration proceedings, despite not being entitled to bring their own claims under investment treaties.

To ensure that participation by non-disputing parties does not disrupt the arbitration proceedings, the tribunal has discretion to impose conditions on the non-disputing party (*e.g.*, the format, length, and scope of the written submissions as well as the time limit to file such submissions).²⁶

Broader access to the Additional Facility Rules

With the aim of enlarging access to ICSID’s rules and services, the ICSID Additional Facility Rules have been also amended so that disputes under those rules can be brought when both parties are not contracting States or members of Contracting States under the ICSID Convention.²⁷ This amendment is a remarkable change from the former version of the ICSID

²² 2022 ICSID Arbitration Rules, Rule 53.

²³ 2022 ICSID Arbitration Rules, Rule 52.

²⁴ 2022 ICSID Arbitration Rules, Rule 52(4).

²⁵ 2022 ICSID Arbitration Rules, Rules 67 and 68.

²⁶ 2022 ICSID Arbitration Rules, Rule 68 (2).

²⁷ 2022 ICSID Additional Facility Rules, Rule 2(1)(a).

Additional Facility Rules, which only allowed for arbitration arising in connection with an investment between a state and a foreign national, where one of the contracting Parties to the Treaty was an ICSID Member. The amendments also make specific reference to Regional Economic Integration Organizations, such as the European Union, that can have access to ICSID administered arbitration.²⁸

New rules for mediation and fact-finding

A new set of mediation rules and fact-finding rules has been introduced to increase the number of dispute-settlement procedures offered by ICSID. This gives the parties a greater choice in deciding what works best for resolving their disputes.

Conclusion

The amended ICSID rules are a significant step towards a more modern, efficient, transparent, and simplified process, which reflects the current needs of users and the changing use of technology in international arbitration proceedings. The 2022 ICSID Institution Rules, Arbitration Rules and Additional Facility Rules also address some criticisms of the ISDS system (*e.g.*, lack of transparency, lack of guidance regarding cost allocation and excessive delays in the arbitration process), with “*the ultimate goal of facilitating foreign investment for economic growth*”.²⁹

²⁸ 2022 ICSID Additional Facility Rules, Rule 2(1)(c).

²⁹ David Malpass, President of the World Bank Group and Chair of the ICSID Administrative Council. See [ICSID Administrative Council Approves Amendment of ICSID Rules | ICSID \(worldbank.org\)](#)



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The Focus Team is a constellation of skills in different practice areas with a focus on International Arbitration.

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