

Amended ICSID Arbitration Rules Enter into Force

July 15, 2022

On July 1, 2022, the amendments to the Regulations and Rules of the International Centre for Settlement of Investment Disputes (“ICSID”) entered into force.¹ The amendment process, launched in October 2016, marks the fourth time the rules have been modified, with the most recent amendment going back to April 2006. The latest amendments are the most extensive to date and are intended to modernize the rules and incorporate lessons learned from ICSID’s administration of more than 600 cases since the rules were last amended.² The amended rules (the “2022 ICSID Arbitration Rules”) “*streamline procedures to enable greater access and speed, increase transparency, and enhance disclosures.*”³ The new rules include provisions meant to reduce the time and cost of ICSID proceedings, provisions clarifying (or codifying) practice on provisional measures and security for costs, provisions enhancing transparency (including with respect to third-party funding), and provisions aimed at increasing the legitimacy of ICSID arbitrations, particularly where there is significant public scrutiny of proceedings.

This alert memorandum summarizes and comments on the key changes. The 2022 ICSID Arbitration Rules will apply to ICSID arbitrations commenced on or after July 1, 2022.

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¹ ICSID, “ICSID Administrative Council Approves Amendment of ICSID Rules” (March 21, 2022) (available at <https://icsid.worldbank.org/news-and-events/communiqués/icsid-administrative-council-approves-amendment-icsid-rules>).

² ICSID, “The ICSID Caseload – Statistics, Issue 2022-1” (February 7, 2022) (available at https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf).

³ ICSID, “ICSID Administrative Council Approves Amendment of ICSID Rules” (March 21, 2022) (available at <https://icsid.worldbank.org/news-and-events/communiqués/icsid-administrative-council-approves-amendment-icsid-rules>).



Improving Time and Cost Efficiency

In line with the general objective of reducing time and costs of arbitration proceedings, the new Rule 3(1) imposes an obligation on tribunals and parties to “conduct the proceeding in good faith and in an expeditious and cost-effective manner.” Numerous provisions have been adopted to that end.

1. Bifurcation

Rule 42 provides a more detailed procedure concerning requests for the bifurcation of proceedings. The new rule provides clarity regarding the criteria to be applied by tribunals when considering bifurcation requests. Pursuant to Rule 42(4), the tribunal has to consider “all relevant circumstances” when determining whether to bifurcate, including: (i) whether bifurcation would materially reduce the time and cost of the proceeding; (ii) whether “the determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute,” and (iii) whether “the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.”

2. Time Limits at Various Stages of the Proceedings

The 2022 ICSID Arbitration Rules include numerous new rules setting out specific (and reduced) time limits for various procedural steps, in an attempt to improve the efficiency of proceedings. Certain of these time limits apply to parties, while others apply to arbitrators.

a) *Proposal for the Disqualification of an Arbitrator*

When requesting the disqualification of an arbitrator, parties are required to submit a proposal within 21 days after the later of either: (i) the date of the constitution of the tribunal, or (ii) the date on which the party first knew or first should have known of the facts on which the proposal is based.⁴ Time limits are also imposed on the other party to file a response and on the arbitrator concerned to file a statement, as well as for the filing by each party of a final written submission on the

proposal.⁵ The arbitrators not subject to the proposal or the Chair of the ICSID Administrative Council have to make their decision on the proposal for disqualification within 30 days after the later of the last written submission or the notification to the Secretary-General that the arbitrators are equally divided on the disqualification proposal.⁶

b) *Manifest Lack of Legal Merit*

A party objecting that a claim is manifestly without legal merit has to file such objection no later than 45 days after the constitution of the tribunal. The tribunal has to render its decision or award on the objection within 60 days of the later of the constitution of the tribunal or the last submission on the objection.⁷

c) *Time Limits for the Issuance of Orders, Decisions, and Awards*

Time limits imposed on the tribunal include a new requirement for the tribunal to issue the first procedural order within 15 days after the first session or the last written submission on procedural matters addressed at the first session.⁸

In addition, if one of the parties has submitted a request for bifurcation, the tribunal has to issue its decision on the request within 30 days after the last submission on the request.⁹

More significantly, Rule 58(1) sets deadlines for the rendering of awards. If the tribunal decides that all claims are manifestly without legal merit, it has to render an award to that effect 60 days after the later of the constitution of the tribunal or the last submission. If the tribunal decides to bifurcate preliminary objections, it has to render its award no later than 180 days after the last submission. In all other cases, the award must be rendered no later than 240 days after the last submission. These deadlines will likely significantly contribute to enhancing the efficiency of ICSID proceedings.

⁴ 2022 ICSID Arbitration Rules, Rule 22(1).

⁵ 2022 ICSID Arbitration Rules, Rule 22(1).

⁶ 2022 ICSID Arbitration Rules, Rule 23.

⁷ 2022 ICSID Arbitration Rules, Rule 41(2).

⁸ 2022 ICSID Arbitration Rules, Rule 29(5).

⁹ 2022 ICSID Arbitration Rules, Rule 44(1)(e).

More generally, tribunals have an obligation to “*use best efforts to meet time limits to render orders, decisions and the Award,*” and if a tribunal cannot comply with a time limit, “*it shall advise the parties of the special circumstances justifying the delay and the date when it anticipates rendering the order, decision or Award.*”¹⁰

3. Case Management Conferences

The new Rule 31 introduces a requirement for tribunals to convene one or more case management conferences with the parties to identify uncontested facts, clarify and narrow the issues in disputes, or address any other procedural or substantive issue related to the resolution of the dispute.

4. Consolidation and Coordination of Cases

In accordance with Rule 46, parties to two or more pending arbitrations can agree to consolidate or coordinate the arbitrations. Consolidation consists in joining all aspects of the arbitrations, resulting in one award. Coordination consists in aligning specific procedural aspects of two or more arbitrations, while keeping the arbitrations separate, resulting in separate awards.

5. Expedited Arbitration

Chapter XII (Rules 75-86) of the new Rules sets forth a new set of expedited arbitration rules aiming at fast-tracking a case, reducing the length of the arbitration by approximately half.

Parties can consent to an expedited arbitration at any time and must do so by jointly notifying the Secretary-General in writing.¹¹

Rule 81 establishes a fixed procedural schedule for the expedited arbitration: the claimant and the respondent each have 60 days to file their respective memorial and counter-memorial (which are limited to 200 pages in length); they then have 40 days to file the reply and rejoinder (which are limited to 100 pages); the hearing

is held within 60 days of the last submission; and the tribunal shall render its award no later than 120 days after the hearing.

The parties may opt out of an expedited arbitration at any time by joint notification to the tribunal and the Secretary-General. In addition, upon request of a party, the tribunal can decide that an arbitration should no longer be expedited, taking into account the complexity of the issues, the stage of the proceeding and all other relevant circumstances.¹²

As a matter of administrative practice, the ICSID Secretariat noted that it will draw the parties’ attention to expedited arbitration for “*low value claims,*”¹³ but without providing an indication of a threshold.

6. Decisions on Costs

Rule 52(1) reduces the discretion of ICSID tribunals when awarding costs by listing some of the relevant circumstances that a tribunal has to consider when allocating the costs of the proceeding, including the outcome of the proceeding (or any part of it), the conduct of the parties during the proceeding, the complexity of the issues raised, and the reasonableness of the costs claimed. Tribunals can also make an interim decision on costs at any time.¹⁴ These new provisions on cost allocation may well encourage parties to act more efficiently, and dissuade them from resorting to dilatory tactics, by expressly empowering tribunals to take such conduct into account.

7. Electronic Filings

In accordance with Rule 4, unless otherwise ordered by the tribunal in special circumstances, the default method for filing submissions is through an electronic filing. This change, already envisaged in the early amendment proposals, was fast-tracked following the COVID-19 pandemic, which rendered electronic filing commonplace. This amendment also helps to reduce

¹⁰ 2022 ICSID Arbitration Rules, Rule 12.

¹¹ See 2022 ICSID Arbitration Rules, Rule 75(1).

¹² See 2022 ICSID Arbitration Rules, Rule 86.

¹³ ICSID, Proposals for Amendment of the ICSID Rules, Working Paper No. 6, November 2021, ¶ 33.

¹⁴ See 2022 ICSID Arbitration Rules, Rule 52(3).

the significant environmental footprints of ICSID arbitrations.

Clarifying the Rules for Provisional Measures and Security for Costs

1. Provisional Measures

Rule 47 clarifies (or codifies) the circumstances and cases in which provisional measures may be recommended by ICSID tribunals. It is first specified that these measures may be requested to preserve a party's rights, including to (i) prevent action that is likely to cause current or imminent harm to the party requesting the measure or prejudice to the arbitral process; (ii) maintain or restore the *status quo* pending determination of the dispute; or (iii) preserve evidence that may be relevant to the resolution of the dispute. When deciding whether to recommend provisional measures, tribunals should consider all relevant circumstances, including the urgency and necessity of the measures as well as the effect such measures might have on the parties.

2. Security for Costs

While the previous version of the rules did not contain provisions on security for costs applications, tribunals previously ordered security for costs as part of their general power to recommend provisional measures, pursuant to the prior Rule 39. Provisions on security for costs are now expressly provided for in Rule 53, which details the procedure as well as the circumstances tribunals should consider when determining whether to order a party to provide security for costs (including the existence of any third-party funding agreement). Provisions of this sort can be now commonplace in the main institutional arbitration rules.¹⁵

Enhancing Transparency

The 2022 ICSID Arbitration Rules aim to ensure greater transparency in ICSID arbitrations, including through provisions regarding publication of certain case materials, but also through provisions regarding third-party funding and statements on costs.

1. Greater Detail in Requests for Arbitration

The 2022 ICSID Institution Rules apply from the filing of a request for arbitration under the ICSID Convention to the date of registration (or refusal to register), and provide for a checklist of what must be included in a request for arbitration. Institution Rule 2 specifies the contents of the request, which must include, in particular, a description of the investment and of its ownership and control. The Secretariat specified that this reflects existing practice to address issues of ownership or control to the extent it is relevant to jurisdiction.¹⁶ This follows concerns expressed by ICSID Member States about the complex corporate structures of certain corporate claimants.¹⁷

2. Publication of Awards, Decisions, Orders, and Transcripts

While Rule 62 provides that the publication of awards and decisions on annulment requires the consent of the parties, such consent is deemed to have been given absent objection by any party within 60 days after the dispatch of the document. The 2022 ICSID Arbitration Rules thus implement an "opt-out" system, instead of the "opt-in" mechanism provided for in the previous version of the rules.

The 2022 ICSID Arbitration Rules also provide for the publication of orders and decisions, with redactions agreed upon by the parties (Rule 63) and of documents filed in the proceeding, with consent of the parties (Rule 64).

¹⁵ See, e.g., ICC Rules, Article 28; LCIA Arbitration Rules, Article 25.2; and SIAC Arbitration Rules, Rule 27(j).

¹⁶ See ICSID, Proposals for Amendment of the ICSID Rules, Working Paper No. 5, June 2021, ¶ 20.

¹⁷ See ICSID, Compendium of Comments for Working Paper No. 4 (March 23, 2021) (available

at <https://icsid.worldbank.org/sites/default/files/amendments/Compendium%20of%20State%20Comments%20on%20Proposed%20Amendments%20to%20the%20ICSID%20Rules%20-WP%20%23%204%20-%20As%20of%202021.03.23.pdf>).

Rule 65(3) allows the Centre, upon request of a party, to publish recordings or transcripts of hearings, unless the other party objects.

3. Third-Party Funding

Following a general consensus on the need to avoid conflicts of interests that may arise out of third-party funding agreements,¹⁸ the 2022 ICSID Arbitration Rules join a number of other sets of rules in addressing third-party funding expressly.¹⁹ Rule 14 defines third-party funding as a party receiving funds from a non-party, directly or indirectly, for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.

Rule 14 establishes a disclosure obligation requiring the funded party to file a written notice disclosing the name and address of the third-party funder. Unlike other sets of rules, Rule 14 requires that, where the funder is a juridical person, the funded party must disclose the names of the persons and entities that own and control it.²⁰ This disclosure obligation is ongoing throughout the arbitration: the disclosure notice should be filed with the Secretary-General upon registration of the request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. Any changes to the information in the notice also have to immediately be notified to the Secretary-General. The notice is then transmitted to the parties and to any arbitrator appointed or proposed for appointment.

Rule 14 does not require disclosure of the third-party funding agreement itself or its contents. This was suggested by some ICSID Member States, but was ultimately dropped on the basis that any funding agreement and/or the information contained are likely to be confidential.²¹ However, the final version of

Rule 14(4) enables tribunals to order disclosure of further information regarding the funding agreement and the third-party funder, to the extent necessary. By way of example, when there appears to be a risk that a funded party is impecunious, a tribunal may request disclosure regarding whether the third-party funder would be compelled to pay an adverse award on costs. In a similar vein, as noted, third-party funding is expressly an element to be considered by tribunals when awarding security for costs.

4. Statement on Costs in Awards

Reflecting international arbitration practice, awards are now required to include a statement of the costs of the proceeding, including the fees and expenses of each member of the tribunal, and a reasoned decision on costs.²² Including a statement on costs in an award, which as a general matter may be publicly disclosed, may deter parties from incurring excessive costs.

Participation in and Access to ICSID Proceedings

1. Participation of Non-Disputing Parties

The 2022 ICSID Arbitration Rules clarify the scope of non-disputing parties submissions, generally known as *amici curiae* submissions. While the previous version of the rules permitted such submissions, Rule 67 further specifies the circumstances the tribunal should consider when determining whether to permit a non-disputing party submission. In particular, tribunals should consider “*the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party.*”²³

¹⁸ See M. J. Alarcon, E. Shirlow, “Interview with Meg Kinnear, Secretary-General of ICSID”, *Kluwer Arbitration Blog*, March 22, 2022, p. 2.

¹⁹ See, e.g., the 2021 ICC Arbitration Rules (Article 21(7)); the 2021 VIAC Investment Arbitration Rules (Article 13a) and the 2020 CAM Arbitration Rules (Article 43).

²⁰ See A. Favro, “New ICSID Arbitration Rules: A Further Step in the Regulation of Third-Party

Funding,” *Kluwer Arbitration Blog* (June 3, 2022) (available at <http://arbitrationblog.kluwerarbitration.com/2022/06/03/new-icsid-arbitration-rules-a-further-step-in-the-regulation-of-third-party-funding/>).

²¹ See ICSID, Proposals for Amendment of the ICSID Rules, Working Paper No. 6, November 2021, ¶ 11.

²² See 2022 ICSID Arbitration Rules, Rule 59(1)(j).

²³ 2022 ICSID Arbitration Rules, Rule 67(2)(d).

Tribunals can also permit non-disputing treaty parties who are signatories to the treaty at issue in the dispute to make submissions regarding the interpretation of the underlying treaty.²⁴

2. Additional Facility Rules

The modified ICSID Additional Facility Rules broaden the jurisdictional requirements, authorizing the Secretariat to administer arbitration and conciliation proceedings in cases where the investor and the respondent are not ICSID Member States or nationals of ICSID Member States, and in cases where one party is a regional economic integration organization (REIO).²⁵ In theory, this amendment would allow arbitration claims to be brought directly against REIOs including the European Union (EU), as noted by the EU itself in a Council Decision regarding the rule amendments.²⁶

Conclusion

The amendments to the ICSID Rules, which impose new obligations on the parties as well as on arbitral tribunals, enhance the efficiency and transparency of ICSID administered arbitrations, thus addressing criticism of the ICSID process. These changes modernize the rules and bring them in line with various other arbitration rules, the recent reforms of which pursued similar objectives.²⁷

The 2022 ICSID Arbitration Rules aim in part at “rebalancing” the rights of investors and States in investment arbitration proceedings, given concerns expressed by ICSID Member States in this regard,

including through clarifying the scope of intervention by non-disputing parties and through the scrutiny levied on third-party funding, often the preserve of claimants. Similar imperatives on the part of ICSID to increase transparency and enhance disclosures in investor-State arbitration are also reflected in other reforms it is undertaking, in particular the establishment of a Code of Conduct for Adjudicators in International Investment Disputes, in collaboration with the UNCITRAL Secretariat.²⁸

As a general matter, the innovations in the 2022 ICSID Arbitration Rules are likely to benefit all participants in ICSID arbitrations, by encouraging efficiency in costs and time and helping to bring the ICSID Rules in line with evolving arbitral practice. The resulting clarity will likely be a boon to ICSID arbitration in the years to come.

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²⁴ See 2022 ICSID Arbitration Rules, Rule 68(1).

²⁵ See Regulations and Rules for ICSID Additional Facility Proceedings, Article 2.

²⁶ See Council Decision on the position to be adopted on behalf of the European Union within the Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID), March 4, 2022, ¶ 4.

²⁷ See, e.g., Cleary Gottlieb Alert Memorandum, “2021 ICC Rules of Arbitration Unveiled,” November 12, 2020 (available at [https://www.clearygottlieb.com/news-and-insights/publication-listing/2021-icc-rules-of-](https://www.clearygottlieb.com/news-and-insights/publication-listing/2021-icc-rules-of-arbitration-unveiled)

[arbitration-unveiled](https://www.clearygottlieb.com/news-and-insights/publication-listing/the-london-court-of-international-arbitration-releases-updated-arbitration-rules)); and Cleary Gottlieb Alert Memorandum, “The London Court of International Arbitration Releases Updated Arbitration Rules, Emphasizing Efficiency,” October 26, 2020 (available at <https://www.clearygottlieb.com/news-and-insights/publication-listing/the-london-court-of-international-arbitration-releases-updated-arbitration-rules>).

²⁸ See ICSID and UNCITRAL, Draft Code of Conduct for Adjudicators in International Investment Disputes, September 2021 (available at https://icsid.worldbank.org/sites/default/files/documents/Code_of_Conduct_V3.pdf).