

The 2022 ICSID Arbitration Rules – A Brief Overview

22 April 2022

Background

On 21 March 2022, the Member States of the International Centre for Settlement of Investment Disputes (“ICSID”) approved amendments to the ICSID Regulations and Rules, which will enter into force on 1 July 2022. These amendments include changes to the ICSID Arbitration Rules (the “Rules”), which govern the procedure to be followed in arbitrations under the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”).

ICSID has amended its regulations and rules only four times (including the 2022 amendments) since its establishment in 1966, with the previous amendment having been introduced in 2006. The 2022 amendments follow a detailed review of the ICSID Regulations and Rules, which began in October 2016.

[According to ICSID](#), the goals of the 2022 amendments are to:

- (i) Modernise the ICSID Regulations and Rules based on ICSID’s experience of administering over 700 cases;
- (ii) Make the processes set out in the ICSID Regulations and Rules “*increasingly time and cost effective while maintaining due process and a balance between investors and States*”; and
- (iii) “[M]ake procedure less paper-intensive, with greater use of technology for transmission of documents and case procedures”.

ICSID has therefore conducted a large-scale revision of its Rules, including, most notably, with respect to matters such as (i) transparency, (ii) third party funding, (iii) costs, (iv) provisional measures, (v) expedited arbitration, and (vi) time and cost efficiency more broadly. This client alert briefly sets out these changes to the Rules below.

I. Transparency

The amended Rules demonstrate a clear focus on the enhancement of transparency in ICSID arbitration proceedings.

Some of the amended Rules which promote greater transparency include the following:

- (i) Publication of awards and decisions: Whilst the ICSID Convention provides that the consent of both parties to an arbitration is required for the publication of awards and decisions, the amended Rule 62 now states that consent shall be deemed to have been given if no party objects in writing to such publication within 60 days after the dispatch of the relevant document. In addition, even absent the consent of parties for such documents to be published, ICSID may still publish excerpts thereof;
- (ii) Non-disputing parties: Whilst the existing rules already set out certain factors which a tribunal should consider in determining whether to allow a submission from a non-disputing party, the amended Rules 67(d) and 67(e) include two new factors to be taken into account, namely relating to the identity and affiliation of the non-disputing party and in relation to whether any financial assistance will be provided to that party in relation to the submission.
- (iii) Observation of hearings: The amended Rule 65 states that the tribunal “*shall*” (as opposed to “*may*” in the previous version of the Rules) allow third parties to observe hearings, unless either party objects. As such, Rule 65 established a presumption in favour of public hearings; and

- (iv) Third party funding: The provisions relating to third party funding and the requirement of relevant disclosures, as set out in more detail below, have also been drafted in such a way to enhance transparency in investor-State arbitration.

II. Third party funding

The Rules set out requirements concerning third-party funding for the first time under the new Rule 14. Parties are required to disclose in a written notice the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defence of the proceedings upon registering the request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The parties also have an obligation to notify the ICSID Secretary-General of any changes in respect of the information set out in their third-party funding notice.

Notably, whilst the disclosure of the third-party funding agreement is not required by default, tribunals have the power to order its disclosure nonetheless. Tribunals may also request further information regarding the third party providing the funding.

III. Costs

Under Article 61(2) of the ICSID Convention, tribunals have discretion to “*assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses [...] shall be paid*”. Whilst the 2006 Rules did not provide guidance as to how tribunals could exercise this discretion, the position is clarified in the amended Rules. The amended Rule 52 states that, “*in allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances*”, and sets out a non-exhaustive list of factors to be considered, such as the conduct of the parties and the reasonableness of the costs claimed.

In addition, the new Rule 52(4) reflects the ICSID Member States’ desire for enhanced fairness and transparency in investor-State arbitration, as the provision states that tribunals shall ensure that all decisions on costs are reasoned, and form part of the award.

In addition, the amended Rules also contain a new Rule 53 setting out the tribunals’ power to order security for costs. This is a welcome development, particularly as, in the absence of an express power to order security for costs under the previous Rules, tribunals have generally been reluctant to award security for costs in the past.

IV. Provisional measures

The amended Rule 47(1) expands upon and clarifies the circumstances in which a party may request provisional measures and the factors to be taken into account by a tribunal. The amended Rule 47 now requires that a tribunal, in considering whether to recommend provisional measures, consider “*whether the measures are urgent and necessary*” and “*the effect that the measures may have on each party*”.

V. New expedited arbitration rules

The amended Rules contain a new Chapter XII (Rules 75-86) which sets out entirely new Rules for expedited arbitration. These Rules may be applied at any time with the parties’ consent.

Chapter XII provides for significantly shorter arbitration proceedings, for instance, as follows:

- (i) The timeframe for appointing arbitrators is reduced by more than half according to the new Rule 76; and
- (ii) The new Rule 81 imposes strict time limits to be observed in the procedural schedule of the arbitration, as well as page limits for the parties’ various written submissions.

As explained in [Working Paper 6](#), these new Rules may be particularly useful in resolving “*low value claims*”, and reducing their cost. These new provisions may appeal to a broader pool of potential claimants, including to those who have more limited financial resources and who may be concerned about the time and cost of a long-running arbitration.

VI. General focus on time and cost efficiency

In line with the goals of the amended Rules to modernise and simplify the process of ICSID arbitration proceedings, the amended Rules have a strong focus on the achievement of time and cost efficiency. In addition to the abovementioned new Rules providing for expedited arbitration, by way of further example, the amended Rules promote time and cost efficiency as follows:

- (i) The new Rule 3(1) spells out the tribunals and parties’ duty to “*conduct the proceeding in good faith and in an expeditious and cost-effective manner*”;
- (ii) Under the amended Rule 4(2), all documents and submissions must be filed electronically by default. The filing of documents in a different format (including in paper format) may be ordered by tribunals only in “*special circumstances*”;
- (iii) The new Rule 31 states that, “[w]ith a view to conducting an expeditious and cost-effective proceeding”, tribunals must hold case management conferences to identify uncontested facts, and clarify and narrow the issues in dispute;
- (iv) The amended Rules confirm the tribunals’ power to bifurcate the proceedings in the new self-standing Rules 42 and 44. In particular, the new Rule 42(4) sets out a non-exhaustive list of factors to consider when deciding whether to bifurcate. In addition, the new Rule 42(6) empowers the tribunal to decide “*on its own initiative*” whether a question should be bifurcated;
- (v) Under the new Rule 46(1), parties to two or more pending arbitrations administered by ICSID may agree to consolidate or coordinate the arbitrations; and
- (vi) Under the new Rule 58(1), the longest a tribunal may take to render its award is 240 days after the last submission in the case. This is an especially welcome amendment considering the long duration of some investment arbitration proceedings in the past.

Comment and next steps

This 2022 amendment of the ICSID Regulations and Rules is likely the largest, most wide-ranging and labour-intensive review of the regulations and rules to date. This exercise has benefitted from active input from most ICSID Member States, including from those States that have traditionally been more involved in investment arbitration proceedings than others, as well as other stakeholders in the ICSID arbitration process. The quality of the amendments and the forward-looking, cost-sensitive and environmentally mindful approach taken in the amendments to the Rules are promising, and will likely increase the parties’ confidence in the effectiveness and legitimacy of investment arbitration proceedings under the auspices of ICSID.

It will be important now to monitor and consider how arbitral tribunals apply these new rules in practice. Furthermore, ICSID has already [stated](#) that it intends to publish guidance notes on the application of the amended Rules. This together with arbitral practice as it develops will provide fuller guidance to parties on the scope and proper application of the amended Rules.

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