

Amended ICSID Rules and Regulations entered into force on 1 July 2022

Recent Development

After a five-year process involving six working papers and inputs from many states and other stakeholders, the International Centre for Settlement of Investment Disputes ("ICSID") amended its arbitration ("**Arbitration Rules**") and conciliation rules ("**Conciliation Rules**"), while establishing new stand-alone rules on mediation ("**Mediation Rules**") and fact-finding ("**Fact Finding Rules**") (together, "**Rules**").¹ The amendments to the Rules were approved by majority of the ICSID member states on 21 March 2022 and recently entered into force on 1 July 2022. With these amendments, ICSID aims to increase the time and cost efficiency of proceedings by streamlining them and provide greater transparency. This is the fourth time that ICSID is amending its rules, and this is its most comprehensive amendment. The preceding three amendments were respectively on 1984, 2003 and 2006.

Amendments to the Rules

The most comprehensive set of amendments in ICSID's history most notably concern (i) the efficiency of proceedings, (ii) third-party funding, (iii) costs, (iv) constitution of the arbitral tribunal and disqualification of arbitrators, (v) transparency, (vi) provisional measures, (vii) enabling broader access to the ICSID Additional Facility Rules, (viii) conciliation, (ix) mediation and (x) fact-finding proceedings.

Amendments Aimed at Increasing the Efficiency of the Proceedings

Several amendments target the efficiency of proceedings under the ICSID Institution Rules and Arbitration Rules. In this regard, while some of the amendments improve on — or significantly alter — the existing provisions, others bring entirely new provisions aiming at this goal.

- In line with the rising 'green arbitration' trend, Rule 4 of the Arbitration Rules amends the default method of filing in arbitration proceedings. Accordingly, as opposed to the previous practice of physical submissions, the filings must be made electronically unless there are special circumstances requiring a different form of filing.

This amendment enables more cost and time efficient filings by effectively removing the delivery cost and time required for physical submissions.

- Another amendment clearly aimed at accelerating the initial phases of a proceeding is Rule 2 of ICSID Institution Rules, stipulating that the request for arbitration will provide a description of the investment and its ownership and control, which was not previously required by the ICSID Institution Rules or the Arbitration Rules. In addition to this, Rule 3 of ICSID Institution Rules provides a list of certain (non-mandatory) information that can be included in the request for arbitration to help expedite the first steps of the proceedings, such as parties' procedural proposals or agreements on (i) the number and method of appointment of arbitrators, (ii) the procedural language, (iii) the use of expedited arbitration, and (iv) if the requesting party is a juridical person, names of persons and entities owning or controlling such juridical person.
- Another practical and beneficial addition is Rule 31 of the Arbitration Rules, stipulating that one or multiple case management conferences be held by the arbitral tribunal in order to determine

¹ You may access the Rules [here](#).

uncontested facts and thereby narrow the disputed issues to increase the time and cost efficiency of proceedings.

- Expedited arbitration provisions are also important additions to the Arbitration Rules. These provisions are only applicable with the parties' consent. Pursuant to Rule 75 of the Arbitration Rules, the parties can consent to expedited arbitration by jointly notifying the Secretary-General in writing. With the shorter time frames (such as the award being issued within 120 days from the hearing) and simpler submissions (including page limits), the expedited arbitration rules are expected to cut the length of proceedings to as much as half. However, it should be noted that pursuant to Rule 86 of the Arbitration Rules, the parties can opt out of an expedited arbitration procedure at any time during the proceedings.
- Rule 41 of the Arbitration Rules clarifies that a party's objection regarding a claim being manifestly without merit can in fact concern ICSID's jurisdiction and the arbitral tribunal's competence in addition to substance of the claim.
- Moreover, with Rule 42 of the Arbitration Rules, an arbitral tribunal's ability to bifurcate the proceedings — which already existed in practice but was not codified — is confirmed. In fact, Rule 42 of the Arbitration Rules also provides a non-exhaustive list of factors that should be taken under consideration by the arbitral tribunal when deciding on bifurcation. With this new provision, it is further confirmed that an arbitral tribunal can *ex officio* — i.e., even when not requested by a party — decide to bifurcate the proceedings.
- Another entirely new addition is Rule 46 of the Arbitration Rules, enabling the consolidation or coordination of arbitrations. Most notably, both consolidation and coordination require the parties' consent. Consolidation is a procedure whereby all aspects of the relevant arbitrations are consolidated and as a result, a single award will be rendered for the consolidated arbitrations. In contrast, coordination only aligns certain aspects of multiple arbitrations, and these arbitrations remain as separate proceedings that result in separate awards.
- Compared to its previous iteration, the Arbitration Rules foresee stricter timelines throughout, clearly aiming to reduce the time and costs of proceedings. Additionally, the amendments foresee new timelines specific for the arbitral tribunal, such as Rule 58 of the Arbitration Rules, stipulating that the arbitral tribunal shall render the award within (i) 60 days if it decides that all claims are manifestly without merit, (ii) 180 days for decisions on the preliminary objection and (iii) 240 days after the last submission is made in the other cases. In addition, Rule 72 of the Arbitration Rules regarding the procedure for interpretation, revision and annulment of awards provides that the arbitral tribunal will render its decision within 120 days after the last submission on the application.
- Rule 39 of the Arbitration Rules explicitly empowers the arbitral tribunal to appoint experts, unless the parties agree otherwise as opposed to the previous iteration of the Arbitration Rules, which only gave the arbitral tribunal the power to call upon the parties

to produce experts if deemed necessary. Rule 39 of the Arbitration Rules also provides that the arbitral tribunal will consult with the parties regarding appointment of experts. In addition, the parties need to provide the tribunal-appointed experts with any information, documents and evidence required by the expert.

Third-Party Funding

Over the last decade, there has been a remarkable increase in the use of third-party funding in the arbitration community. Third-party funding is a funding process where a party who is not involved in the arbitration provides funds to a party to the arbitration in order to cover typically the fees and expenses of the arbitration in exchange for an agreed amount. Since the use of the third-party funding is increased, the rules of the institutions are also amended accordingly. It was one of the more controversial issues during the amendment process of the Rules, due to certain member states calling for a complete ban of the practice. However, the Arbitration Rules still enable third-party funding while imposing stricter disclosure requirements.

- Accordingly, Rule 14 of the Arbitration Rules requires the party using third-party funding to disclose, in written form, the name and address of third-party funders upon registration of the request for arbitration or — if the third-party funding arrangement is made afterward — immediately upon making such arrangement. In addition, if the funder is a juridical person, names of entities controlling the juridical person must also be disclosed. The scope of third-party funding is expansive and covers nonprofit arrangements.
- Importantly, the amendments grant the arbitral tribunal the power to order disclosure of further information regarding the funding agreement and the funder. This empowers the arbitral tribunal to further ensure protection from possible conflicts of interests.

Costs

- With the amendments, a new chapter entirely dedicated to costs is established. In this regard, a crucial addition is Rule 52 of the Arbitration Rules, stipulating that all decisions on costs must be reasoned.
- Another notable aspect of Rule 52 of the Arbitration Rules is that, for the first time, it sets a non-exhaustive list of factors that the arbitral tribunal will consider when allocating costs. Accordingly, all relevant circumstances must be considered, including but not limited to the complexity of the case, whether the costs claimed are reasonable, and the parties' conduct in the course and outcome of the proceedings. Notably, as opposed to before, the arbitral tribunal can now rule on interim costs if such is deemed necessary and 'the costs follow the event' rule does not necessarily apply, except when a claim is dismissed due to manifest lack of merit.
- Furthermore, Rule 53 of the Arbitration Rules is another entirely new provision on security for costs. Accordingly, upon a party's request, an arbitral tribunal can order a party asserting a claim or counterclaim to provide security for costs. A non-exhaustive list

of factors that the arbitral tribunal can consider while evaluating whether to make such an order is also provided. It should be noted that failure to comply with the order on security for costs may initially result in the suspension of proceedings and, if the suspension proceeds for 90 days, the arbitral tribunal may order discontinuance of the proceedings after consulting the parties.

Constitution of the Arbitral Tribunal and Disqualification of Arbitrators

- Rule 15 of the Arbitration Rules provides a method for constituting the arbitral tribunal and streamlines the process. Accordingly, if the parties cannot agree on an uneven number of arbitrators and the method of their appointment within 45 days of registration, the arbitral tribunal will consist of three arbitrators: one appointed by each party and the third, who will act as president, appointed by the parties' agreement as per Article 37(2)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
- Another crucial amendment targets the challenge of arbitrators, whereby Rules 22 and 23 of the Arbitration Rules foresee shorter timelines for the challenge of arbitrators. Accordingly, challenges must be made within 21 days of either the constitution of the arbitral tribunal or the date on which the party challenging the arbitrator discovered — or should have known — the facts constituting the basis of the challenge, whichever is later. In addition, it is clarified that arbitrators who are not subject to the proposal for disqualification or the Chair of the ICSID Administrative Council will decide on disqualification.

Transparency

- In addition to the provisions on third-party funding which aims for transparency in the proceedings, the other amendments under Chapter X also aim to provide greater transparency through publication of documents. In this regard, Rule 62 of the Arbitration Rules provides that all awards and decisions on annulment will be published, in full or redacted, with the consent of the parties. A most notable difference compared to the previous iteration of the Arbitration Rules is that consent for publication will be deemed given if the parties do not object to publication in writing and within 60 days of its dispatch. Furthermore, the process for parties to agree on any necessary redactions is also more clearly established. Same as the previously existing practice, if the parties do not consent to the publication of the relevant document in its entirety, excerpts of that documents can still be published. Additionally, Rules 63 and 64 of the Arbitration Rules provide the requirements and process of publishing orders, decisions and documents filed during the proceedings.
- With the amendments, Rule 65 of the Arbitration Rules establishes a presumption in favor of open hearings unless parties object to it. This is a most crucial improvement on transparency of proceedings.

Notably, to ensure that confidential and protected information will not be disclosed, the arbitral tribunal will take the necessary procedural measures if the hearing is to be open.

- Furthermore, Rule 67 of the Arbitration Rules provides for an extended list of non-exhaustive factors that the arbitral tribunal will consider while permitting a non-disputing party to participate in the proceedings. The non-disputing party assists the arbitral tribunal to decide on the dispute by providing a different perspective than that of the parties and can, therefore, play an important role. With the amendments, it is provided that the arbitral tribunals also take into consideration the identity, activities, organization and ownership of the non-disputing party, as well as whether it will be provided with any assistance, while deciding on whether to let that party file a written submission. This further improves upon transparency in terms of non-disputing party participation.

Provisional Measures

- Rule 47 of the Arbitration Rules on provisional measures expressly provides that arbitral tribunals can recommend provisional measures to prevent current or imminent harm to one party or prejudice to the proceedings, and to maintain or restore the *status quo* or preserve important evidence, upon a party's request or *ex officio* after taking into consideration all the relevant circumstances. Importantly, with the amendments, the procedure for provisional measures is also more clearly established.

Amendments to the ICSID Additional Facility Rules

ICSID Additional Facility Rules always aimed to broaden access to ICSID's expertise, which is otherwise limited to disputes between member states and nationals of other member states. Previously, scope of the ICSID Additional Facility Rules, was limited to disputes between a state and an investor where one of them was either a member state or national of a member state. These amendments further broaden the scope of the ICSID Additional Facility Rules by (i) enabling their application to disputes where neither host state nor the investor are among member states; and (ii) enabling regional economic integration organizations, which were previously not covered and the most well-known example of which is the European Union, to access them. Therefore, at the time being, ICSID Additional Facility Rules are applicable in three cases; namely when (i) one of the parties is either a member state or national of a member state or (ii) neither party is a member state or national of a member state and (iii) a regional economic integration organization is party to the dispute. Naturally, if the parties are a member state and a national of a member state, ICSID Additional Facility Rules are not applicable since these disputes fall into the scope of rest of the Rules. It should be noted that the dispute subject to proceedings must arise from an investment between a state or regional economic integration organization on the one hand and investor on the other.

Conciliation Rules

In addition to the Arbitration Rules, the existing rules on conciliation under ICSID also underwent considerable changes. In essence, these changes aim to reinforce confidentiality and streamline the procedure as a whole. With the new amendments, Rule 10 of the Conciliation Rules takes a step to bolster confidentiality of the conciliation proceedings by preventing the parties from relying on the views expressed, statements, admissions, offers of settlement made or positions taken by either party or any reports, orders, decisions and recommendations made by the commission in other proceedings. The above-mentioned disclosure requirements for third-party funding exist for conciliation proceedings as well.

Mediation Rules

With the amendments, entirely new stand-alone Mediation Rules are established. Accordingly, Mediation Rules offer a confidential procedure to parties who can initiate mediation under ICSID either through prior written agreement or by offering the counterparty to resort to mediation. The mediator will assist the parties to find an amicable way to resolve their dispute, but mediation proceedings are not binding and mediators are not empowered to decide on a binding solution.

Fact-Finding Rules

Previously, fact-finding procedure already existed under the ICSID Additional Facility Rules. However, with the amendments, Fact-Finding Rules are made a separate set of rules to be used either on their own or in support of Arbitration Rules. Fact-Finding Rules aim to provide an impartial assessment of facts relating to the dispute, such as the assessment of the investment subject to the dispute.

Accordingly, if the parties wish to initiate a fact-finding procedure under ICSID, they can file a joint request with the Secretary-General. Rule 3 of the Fact-Finding Rules expressly permits the parties to significantly modify the Fact-Finding Rules to their needs. Unless the parties agree otherwise, fact-finding proceedings are also confidential in the sense that, like the conciliation procedure, parties cannot rely on them afterward.

Conclusion

The comprehensive amendments to the Rules are the product of an ambitious project involving the contributions of many states and stakeholders. The amendments put great emphasis on, most notably, reducing the time and cost of proceedings and achieving greater transparency. ICSID announced that it will publish guidance notes on the Rules and their application in the upcoming months. These guidance notes are expected to provide better insight into the application of some of these new provisions. In any case, time and practice will best demonstrate whether these amendments achieve their purpose.

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