

New ICSID Rules Offer Broader Access, Greater Transparency and More Streamlined Proceedings

30 May 2022

On 21 March 2022, the Member States of the International Centre for Settlement of Investment Disputes (“ICSID”) approved a comprehensive set of amendments to ICSID’s rules for resolving disputes between foreign investors and host States (the “Rules”). The amended Rules come into effect on 1 July 2022 and apply to ICSID proceedings filed on or after that date.¹

The current amendments reflect a more than five-year process of consultation, negotiation and commentary, which aimed “to modernize, simplify, and streamline the rules, while also leveraging information technology to reduce the environmental footprint of ICSID proceedings.” Some of the amendments mirror Debevoise’s [Efficiency Protocol](#) to promote efficiency in international arbitral proceedings.

A summary of the salient amendments to the Rules is below.

Broadening Access to ICSID

The amendments to the Additional Facility Rules broaden access to ICSID’s rules and services by including within their scope (i) *any* investment dispute, as long as the parties consent to their use, and (ii) disputes involving regional economic integration organizations (“REIOs”), such as the European Union. Previously, parties could only have recourse to ICSID’s arbitration if: (i) the dispute was between a Contracting State and a national of another Contracting State (under the ICSID Convention, and Arbitration and Conciliation Rules); or (ii) at least one party to the dispute was a Contracting State or a national of another Contracting State (under the ICSID Additional Facility Arbitration and Conciliation Rules). The amendments represent a significant expansion of access to ICSID’s rules and services. For example, access is now available in disputes between a national of a non-contracting State, such as Brazil and India, against another non-contracting State, with party consent.

¹ ICSID Convention, Article 44.

Measures to Enhance Transparency

The Rules introduce a new Chapter X to enhance public access to ICSID arbitration orders and awards.

- ICSID will publish every award and annulment decision following consultation with the parties. If the parties object, the Secretary-General will publish excerpts after considering input from the parties, including on redactions.²
- ICSID will publish all orders, decisions and written submissions of a party filed in the proceedings, and the parties will have an opportunity to propose redactions.³
- Absent party objection, non-parties unrelated to the proceedings will be able to attend hearings.⁴
- Non-disputing State parties to the underlying investment instrument will have a right to make submissions while all other non-disputing parties—for example, a non-governmental or regional organization—may request tribunal permission to do so.⁵ In either case, the tribunal may grant them access to relevant submissions and documents from the proceedings.
- The Rules make clear that the publication of awards, orders, decisions and written submissions, as well as the participation of non-parties in hearings, will be subject to the withholding of confidential and protected information from disclosure. Such information is defined in ten categories, including: by the applicable law; by the law of the State party if it concerns information of a State party; in accordance with a tribunal's orders and decisions; by party agreement; as constituting confidential business information or protected personal information; because considered by a State party to be contrary its essential security interests; or because it would aggravate the dispute or undermine the integrity of the arbitral process.⁶

These measures aim to improve legitimacy of the investor-state dispute resolution system. It remains to be seen if non-disputing parties will increasingly participate in proceedings, particularly in highly topical areas such as ESG and energy transition.

² Revised Arbitration Rule 62.

³ Revised Arbitration Rules 63 and 64.

⁴ Revised Arbitration Rule 65(1).

⁵ Revised Arbitration Rules 67, 68.

⁶ Revised Arbitration Rule 66.

Disclosure of Third-Party Funding

The Rules, for the first time, expressly address third-party funding in arbitration.⁷ This amendment reflects the significant increase in third-party funding in arbitration over the past decade, and the corresponding increase in the express regulation of third-party funding disclosures by arbitral institutions⁸ and national arbitration laws (see our previous report [here](#)).⁹ To promote access to justice the amendments permit third party funding but provide for disclosure to avoid conflicts of interest.

Under the new Rule 14, parties must disclose in writing the name and address of a third-party funder upon registration of a request for arbitration (or immediately upon concluding the funding arrangement if funding is secured later). The Rule, however, does not require disclosure of the often confidential and/or privileged funding arrangement but the tribunal may order additional disclosure. Only “non-party” funders must be disclosed, thereby excluding intra-group funding arrangements and conditional fee and damages-based agreements with legal counsel. Without expressly setting out in what way, the amended Rules also stipulate that the tribunal must “consider” the existence of third-party funding when awarding security for costs.¹⁰

New Cost-Related Procedures

The Rules have a new stand-alone Chapter VII on costs, which is an area of increasing concern for users of arbitration. While the award of costs remains within the tribunal’s discretion,¹¹ the new Rule 52 now expressly requires the tribunal to consider four factors when making a costs award: (i) the outcome of the proceeding; (ii) the parties’ conduct during the proceeding; (iii) the complexity of the issues; and (iv) the reasonableness of the claimed costs.¹² The Rules also authorize the tribunal to make an interim decision

⁷ Revised Arbitration Rule 14 defines a third-party funder as “any non-party from which the party, directly or indirectly, has received funds 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.”

⁸ See, e.g., 2021 ICC Arbitration Rules, Article 11(7); 2018 HKIAC Administered Arbitration Rules, Article 44; 2017 SIAC Investment Rules, Article 24(i); 2021 VIAC Rules of Investment Arbitration and Mediation, Article 13a.

⁹ For Hong Kong, see Hong Kong Arbitration ordinance (Cap 609) 2011, Sections 98E-98W. For Singapore, see Civil Law Act 1909, Section 5B.

¹⁰ Revised Arbitration Rule 53(4).

¹¹ ICSID Convention, Article 61.

¹² Revised Arbitration Rule 52(1).

on costs at any time, on its own initiative or upon party request.¹³ The potential for such decisions could help limit guerilla tactics during interlocutory stages.

Importantly, a new Rule authorizes the tribunal to order security for costs and prescribes the procedure for requesting costs orders. In making its determination, the tribunal must “consider all relevant circumstances” including: (i) the non-moving party’s ability and willingness to comply with an adverse decision on costs; (ii) the effect that a security for costs order may have on the non-moving party’s ability to pursue its claim or counterclaim; and (iii) the conduct of the parties.¹⁴

Expedited Arbitration Rules and Mandatory Time Limits

The new Chapter XII of the Rules allows parties to opt for expedited arbitration, which aims to halve the length of proceedings through shorter time limits and page limits.¹⁵ This is a welcome alternative for smaller claims and to facilitate access for small and medium-size enterprises.

For non-expedited arbitrations, the Rules also introduce mandatory time frames. The tribunal must render an award “as soon as possible” and no later than 240 days after the last submission, with shorter time frames for applications to dismiss claims for manifest lack of legal merit, and requests for bifurcation relating to a preliminary objection.¹⁶ Mandatory timeframes will also apply to rulings on requests for bifurcation, provisional measures and security for costs.¹⁷ Throughout the arbitration the tribunal is required to use its best efforts to meet time limits,¹⁸ justify any delay to the parties in light of “special circumstances” and inform the parties of “the date when it anticipates rendering the order, decision or Award.”¹⁹ The expedited and mandatory timeframes also aim to address the main concerns by investment arbitration users: duration and cost.²⁰

¹³ Revised Arbitration Rule 52(3).

¹⁴ Revised Arbitration Rule 53(3).

¹⁵ See generally Revised Arbitration Rules, Chapter XII.

¹⁶ Revised Arbitration Rule 58.

¹⁷ Revised Arbitration Rules 42, 47 and 53, respectively.

¹⁸ Revised Arbitration Rule 12(1).

¹⁹ Revised Arbitration Rule 12(2).

²⁰ Queen Mary and White & Case, “2021 International Arbitration Survey: Adapting arbitration to a changing world” (2021), accessible at https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

Expanded Case Management Powers

Tribunals and parties will have to conduct the proceeding “in good faith and in an expeditious and cost-effective manner.”²¹ The tribunal will have broad authority to convene one or more case management conferences with the parties at any time after the first session, including to identify the facts and narrow the issues in dispute.²² The Rules also expand the list of procedural matters for discussion at the first procedural session to include the applicable arbitration rules, document production requests, the transparency regime governing the proceedings, and the place and format of hearings.²³ While it remains to be seen whether tribunals will in fact exercise their full authority, the codification of this authority in the Rules, alongside the specific duty to ensure expeditious proceedings, is likely to also help address concerns about time and cost.

Streamlined Filing Procedures

The Rules have clarified and streamlined filing procedures to facilitate the tribunal’s duty to ensure expeditious proceedings. Electronic filing will be the default means of transmission unless otherwise justified by special circumstances, and the Rules now provide better guidance concerning (i) the information that must be included in a request to initiate proceedings; (ii) the scope of any reply and rejoinder submissions; (iii) the submission of translations; and (iv) the calculation and management of time limits.²⁴ These prescriptive changes will likely help reduce the administrative and transactional costs for all parties, assist the Secretary-General when screening new requests and reduce the tribunal’s need to resolve procedural disagreements between the parties relating to the scope of the Rules.

Mediation and Fact-Finding Rules

The amendments include updated and stand-alone rules on fact-finding and a new set of rules on mediation to modernize the range of dispute settlement options available to the parties to resolve their disputes.²⁵ The parties may jointly request a fact-finding committee, which then establishes a procedural protocol and, ultimately, makes specific findings of fact in the dispute. The mediation rules provide a more flexible, party-driven

²¹ Revised Arbitration Rule 3(1).

²² Revised Arbitration Rule 31.

²³ Revised Arbitration Rules 29(1), 29(4).

²⁴ Revised Institution Rules 2, 3, 4(1), 4(4); Revised Arbitration Rules 4(2), 7, 9-12, 30(2).

²⁵ Proposals for Amendment of the ICSID Rules Working Paper 1, Volume 3, August 2018, para. 5.

dispute resolution tool than the conciliation rules, and are broad in scope, allowing ICSID to administer mediation proceedings that relate to an investment and involve a State or a REIO with the parties' consent. Either process may be used instead of, or alongside, arbitration or conciliation.

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Please do not hesitate to contact us with any questions.

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