

Key Arbitration Considerations After ICSID Rule Update

By **Danielle Morris and Sam Winter-Barker** (April 1, 2022)

On March 21, a comprehensively updated set of rules and regulations for International Centre for Settlement of Investment Disputes arbitration, conciliation and mediation proceedings was approved.[1] The new rules and regulations will go into effect on July 1.

The amendments are noteworthy in several respects.

The rules have been redrafted in plain, modern, gender-neutral language and have been structurally reorganized in a user-friendly way. The substantive changes to the rules are aimed at reducing the time and cost of proceedings, ensuring greater use of technology and increasing transparency.

There are also new stand-alone rules on mediation — for all or part of a dispute — and fact-finding.

In this article, we highlight the key amendments to ICSID's institution rules, arbitration rules and the additional facility rules and assess their likely effect on investor-state arbitrations.[2]

Measures to Enhance Efficiency of Proceedings

The amendments introduce new procedures within the ICSID framework that aim to streamline and enhance the efficiency of proceedings, many of which are contained in a new chapter titled "Special Procedures."

Most of these procedures were implied under the previous regime, but the new rules codify the process for parties to invoke these procedures. The rules also introduce timelines for several steps in the proceeding. The most important of these changes are outlined below.

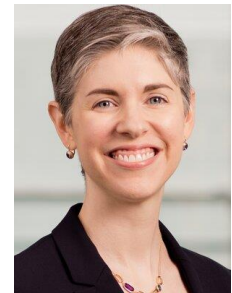
Expedited Arbitration

The new arbitration rules contain a new chapter on expedited arbitration, designed for claims of smaller value and lesser complexity. The provisions require the consent of the parties to the dispute.[3] Parties may also jointly opt out of the expedited procedure at any time.[4] Under the new expedited arbitration chapter, proceedings are subject to shorter timelines and limitations on the length of submissions.[5]

The requirement for consent may limit the efficacy of these rules in circumstances where a party considers it advantageous to prolong proceedings. Nevertheless, it is likely to be a valuable tool for parties to consider when structuring proceedings.

Other Timeline Changes

The amendments to the arbitration rules also introduce stricter timelines at various stages in the proceedings to reduce time and costs. Of particular interest to parties, the new arbitration rules set timelines for tribunals to render awards and decisions. Notably, however, the new arbitration rules only require tribunals to use best efforts to meet these



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time limits.

ICSID expressly rejected proposals to make tribunal compliance with time limits an "absolute obligation."^[6] This ensures flexibility for tribunals to address special circumstances, but it is unclear what the practical impact of the new time limits on the length of proceedings will be.

Bifurcation

The new arbitration rules confirm the ability of a tribunal to bifurcate proceedings and set out nonexhaustive criteria that tribunals should consider in deciding whether to bifurcate, including the extent to which bifurcation would: (1) materially reduce the time and cost of proceedings; (2) dispose of all or a substantial part of the dispute; and (3) address questions practically in separate phases.^[7]

The new rules also clarify the tribunal's authority to bifurcate proceedings on its own motion, empowering tribunals to take a more proactive approach to case management.^[8]

Consolidation and Coordination

Reflecting the practice of other leading arbitral rules, the new arbitration rules include a new stand-alone provision on consolidation and coordination, which provides that "[p]arties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations."^[9]

Notably, the provisions on consolidation and coordination are subject to party consent.^[10] Thus, a tribunal has limited recourse if a party opposes such measures for tactical reasons. It remains to be seen how frequently these provisions will be invoked.

Provisional Measures

Access to provisional measures is an essential feature of investor-state dispute settlement as in any other system of dispute resolution, to preserve the status quo or prevent an aggravation of the dispute.

Although the previous iteration of the arbitration rules broadly recognized the power of tribunals to grant provisional measures,^[11] the new amendments provide more clarity on the scope and standard for the grant of provisional measures.

Specifically, tribunals are now expressly empowered to grant provisional measures to secure a party's rights, including to "prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process," "maintain or restore the status quo pending determination of the dispute," and "preserve evidence that may be relevant to the resolution of the dispute."^[12]

The new rules also provide that the tribunal should consider all relevant circumstances when assessing an application for provisional measures, including whether the measures are urgent and necessary and what effect the measures may have on the parties.

Third-Party Funding

The practice of third-party funding in investor-state dispute settlement has come under considerable scrutiny in recent years. Despite calls by some member states for a complete ban on third-party funding in ICSID disputes, the rules in final form adopt a measured approach.

Striking a balance between the interest of states and the concerns over access to justice for impecunious investors, the new rules continue to permit third-party funding but call for greater disclosure of such arrangements.[13]

The new rules require a party to file a written notice disclosing the name and address of any third-party funders upon the registration of the request for arbitration or "immediately upon concluding a third-party funding arrangement after registration." [14]

Where the funder is a juridical person, the notice must include the names of the funder and entities that control it, thus further aiding tribunals in identifying any conflicts of interest.[15] The rules define 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.[16]

The broadly worded definition goes beyond traditional commercial funding arrangements and includes nonprofit arrangements, such as the funding provided to Uruguay by the Bloomberg Philanthropies and the Bill & Melinda Gates Foundation in its high-profile tobacco labeling dispute with Philip Morris.[17]

The notice will be delivered to each arbitrator prior to the arbitrator completing his or her declaration of independence and impartiality.[18] Tribunals are also empowered to order the disclosure of further information on the third-party funder and funding agreement, if they deem necessary, at any time during the proceeding.[19]

In this way, the new rules protect against conflicts of interest arising due to third-party funding, without curtailing access to justice for investors that otherwise would not have sufficient funds to bring legitimate claims.

Costs

The updated rules contain a new chapter on costs. There are three notable features in this chapter.

Guidance on Cost Allocation

The new rules include a nonexhaustive list of factors a tribunal should consider when allocating costs, highlighting that tribunals should take into account all relevant circumstances including the proceeding's outcome; the parties' conduct during the proceeding — including the extent to which they acted in a cost-effective manner and complied with the rules, orders and decisions of the tribunal; the "complexity of issues"; and "the reasonableness of the costs claimed." [20]

The rules also expressly empower tribunals to order interim costs where necessary, rather than waiting until the final award.[21]

In contrast to the approach of some national courts, costs do not necessarily follow the event, i.e., there is no "loser pays" principle, except where a claim is dismissed for manifest lack of legal merit.[22]

Security for Costs

The new rules codify in a new stand-alone provision a tribunal's authority to order security for costs.[23]

To guide tribunals, the rules set out a nonexhaustive list of factors for tribunals to consider when granting security for costs, including: a party's ability and willingness to comply with an adverse decision on costs; the effect that posting security for costs may have on the ability of a party to pursue its claims; and the conduct of the parties during the proceeding.[24]

The existence of third-party funding is a relevant but not determinative factor.[25]

Failure to comply with an order to provide security for costs could lead to a suspension of proceedings, and even a discontinuation where the proceedings remain suspended for more than 90 days.[26]

Reasoned Decision on Costs

The new rules require that "all decisions on costs are reasoned and form part of the Award," having considered the factors set out in the guidance on cost allocation above.[27]

Disqualification of Arbitrators

Challenges to arbitrators are not uncommon in investor-state dispute settlement.

A survey of ICSID cases suggests that nearly 15% of disputes between 2014 and 2018 saw a party challenge the appointment of an arbitrator, though only one-third of those challenges succeeded.[28]

The new rules seek to streamline the challenge process by imposing stricter timelines.[29] These new timelines will help minimize disruption to the proceedings, but are unlikely to reduce the risk of tactical challenges given that a challenge will still result in an automatic suspension of the proceedings absent party agreement otherwise.[30]

The new rules also provide clarity on the decision maker in challenge applications. Under the ICSID Convention, challenges are to be decided by the nonchallenged arbitrators in a three-member tribunal; or the chairman of the ICSID Administrative Council in the case of a sole arbitrator, a challenge to the majority of the tribunal or where the remaining arbitrators are equally divided on the challenge.[31]

The new rules provide that arbitrators can recuse themselves from ruling on a challenge application for any reason.[32] In this way, the remaining arbitrators may avoid deciding on a challenge if they prefer the chairman of the ICSID Administrative Council to do so, even if the arbitrators are not equally divided on the merits of the challenge.

Transparency

The amendments introduce a new chapter titled "Publication, Access to Proceedings and Non-Disputing Party Submissions" that aims to increase transparency in ICSID proceedings. The ICSID provisions apply as a default where parties have not agreed to more specific transparency regimes, like the United Nations Commission on International Trade Law transparency rules.

The new transparency chapter can be broken down into three sections: the publication of documents; observation of hearings; and non-disputing parties.

First, the rules maintain the requirement in the ICSID Convention for party consent in the publication of awards. However, the rules now provide that parties are deemed to have consented to the publication of awards unless they object within 60 days of the award being rendered.[33]

In the absence of consent, ICSID may still publish excerpts of the awards in line with its practice. Other documents, like orders, decisions and documents filed in the proceeding — e.g., written submissions, but excluding supporting documents — can also be published with any redactions agreed to by the parties.[34]

Second, the rules now create a presumption in favor of open hearings. Tribunals thus shall allow nonparties to observe hearings unless either party objects.[35] The rules also require that the tribunal establish procedures to prevent the disclosure of confidential or protected information when hearings are open to nonparties.[36]

Third, the rules expand the list of nonexhaustive criteria that the tribunal should consider in permitting non-disputing party participation. Tribunals must now take into account the identity, activities, organization and ownership of the non-disputing party, and whether the non-disputing party is provided with financial or other assistance from a third party in filing its submissions.[37]

Consistent with existing practice, the new rules also separately recognize the right of non-disputing treaty parties to make submissions on the interpretation of the treaty in dispute.[38]

For both non-disputing parties and non-disputing treaty parties, tribunals can impose conditions on participation to ensure proceedings are not disrupted and the parties are not unduly burdened. Such measures include limits on the format, length, scope and timing of non-disputing party submissions.[39]

Broadening Access to ICSID Additional Facility Rules

Recourse to the ICSID Convention is limited to member states and their nationals. The additional facility rules were thus introduced in 1978 to expand access to ICSID's facilities and expertise in administering investor-state disputes to cases involving, among others, a state and a national of another state, at least one of which are member states of the ICSID Convention.

Under the new amendments, the scope of application of the additional facility rules has been expanded in two ways.

First, the additional facility rules now also apply to disputes between states and nationals of

another state, regardless of whether either state is a member of the ICSID Convention.[40]

Second, reflecting their growing prominence in negotiating and entering into trade agreements that often include investment chapters, the new ICSID additional facility rules also permit regional economic integration organizations, like the European Union or the Association of Southeast Asian Nations, to access the additional facility rules.[41] The latter change is particularly timely as regional economic integration organizations are starting to play a larger role in investment disputes.[42]

Other Notable Amendments

Apart from the changes above that have been addressed thematically, there are three other noteworthy amendments in the rules.

Electronic Filings

The new rules require all filings to be made electronically, unless there are special reasons to maintain paper filings.[43] This change is not only environmentally friendly, but also improves the time and cost effectiveness of proceedings by avoiding the need for hard copy bundles.

Preparing such bundles is particularly laborious in the investor-state dispute settlement context, where submissions are known to run into hundreds of pages — sometimes thousands, including exhibits.

Contents of Request for Arbitration

The institution rules now recommend that requests for arbitration include details of any procedural proposals or agreements reached by the parties, for instance, in relation to the number of arbitrators, the procedural language, or the method of constitution of the tribunal.[44]

In addition, where a claimant is a juridical entity and not a natural person, the rules recommend that the request for arbitration should include information on the ownership and control of the entity.[45] The information is designed to assist the secretariat in screening new requests and to expedite the initial stages of the proceedings.

Method of Constituting the Tribunal

In circumstances in which the parties do not agree on any uneven number of arbitrators and the method of their appointment, the new rules provide for a default method of tribunal constitution pursuant to Article 37(2)(b) of the ICSID Convention.[46] The new rule is welcome in that it streamlines the arbitrator constitution process, which before allowed for lengthy back and forth between the parties.[47]

Conclusion

The scale of the rules' revision process has been remarkable, and it is, by any measure, a resounding achievement for the ICSID secretariat. The amendments are a welcome change to the ICSID system and demonstrate ICSID's responsiveness to the needs of its users.

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[1] ICSID refers to the International Centre for Settlement of Investment Disputes. The amended rules were approved by a majority of ICSID's 156 Member States.

[2] ICSID has different rules and regulations that govern different aspects of disputes and methods of dispute settlement: (i) Administrative and Financial Regulations (that govern, among other things, the procedures of the ICSID Administrative Council and the functions of the Secretariat); (ii) Institution Rules (that govern the initiation of arbitration and conciliation proceedings from the filing of a request through the dispatch of the notice of registration); (iii) Arbitration and Conciliation Rules under the ICSID Convention and the ICSID Additional Facility Rules (that govern the conduct of arbitration and conciliation proceedings); (iv) Fact-Finding Rules; and (v) Mediation Rules.

[3] 2022 ICSID Arbitration Rules, Rule 75(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 79(1).

[4] 2022 ICSID Arbitration Rules, Rule 86(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 88(1).

[5] 2022 ICSID Arbitration Rules, Rule 81(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 85(1).

[6] ICSID, Proposals for Amendment of the ICSID Rules – Working Paper, dated 15 June 2021, at para. 36, at p. 277.

[7] 2022 ICSID Arbitration Rules, Rule 42(4); 2022 ICSID Additional Facility Arbitration Rules, Rule 52(4).

[8] 2022 ICSID Arbitration Rules, Rule 42(6); 2022 ICSID Additional Facility Arbitration Rules, Rule 52(6).

[9] 2022 ICSID Arbitration Rules, Rule 46(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 56(1).

[10] See ICSID, Proposals for Amendment of the ICSID Rules – Working Paper, dated 2 August 2018, at paras. 406-407; ICSID, Rule Amendment Project – Member State & Public Comments on Working Paper 1 of August 3, 2018, at pp. 274-279.

[11] See e.g., 2006 ICSID Arbitration Rules, Rule 39(1) ("At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.").

[12] 2022 ICSID Arbitration Rules, Rule 47(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 57(1).

[13] As ICSID explained, "[t]he receipt of TPF does not, in itself, mean a claim is frivolous, and some argue that TPF enables the pursuit of meritorious claims or defences, including those that otherwise might not be pursued due to impecuniosity." ICSID, Proposals for Amendment of the ICSID Rules – Working Paper, dated 2 August 2018, at para. 242.

[14] 2022 ICSID Arbitration Rules, Rule 1(2); 2022 ICSID Additional Facility Arbitration Rules, Rule 23(2).

[15] ICSID, Proposals for Amendment of the ICSID Rules – Working Paper, dated 12 November 2021, at para. 8.

[16] 2022 ICSID Arbitration Rules, Rule 14(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 23(1).

[17] Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, dated 8 July 2016, at para. 141.

[18] 2022 ICSID Arbitration Rules, Rule 14(3); 2022 ICSID Additional Facility Arbitration Rules, Rule 23(3).

[19] 2022 ICSID Arbitration Rules, Rule 14(4); 2022 ICSID Additional Facility Arbitration Rules, Rule 23(4).

[20] 2022 ICSID Arbitration Rules, Rule 52(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 62(1).

[21] 2022 ICSID Arbitration Rules, Rule 52(3); 2022 ICSID Additional Facility Arbitration Rules, Rule 62(3).

[22] 2022 ICSID Arbitration Rules, Rule 52(2); 2022 ICSID Additional Facility Arbitration Rules, Rule 62(2).

[23] RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Security for Costs, dated 13 August 2014; Commerce Group v. El Salvador, ICSID Case No. ARB/09/17, (Annulment Proceeding) Decision on Security for Costs, dated 20 September 2012.

[24] 2022 ICSID Arbitration Rules, Rule 53(3); 2022 ICSID Additional Facility Arbitration Rules, Rule 63(3).

[25] 2022 ICSID Arbitration Rules, Rule 53(4); 2022 ICSID Additional Facility Arbitration Rules, Rule 63(4).

[26] 2022 ICSID Arbitration Rules, Rule 53(6); 2022 ICSID Additional Facility Arbitration Rules, Rule 63(6).

[27] 2022 ICSID Arbitration Rules, Rule 52(4); 2022 ICSID Additional Facility Arbitration Rules, Rule 62(4).

[28] Ekaterina Finkel & Louise Oakley, YAR, Arbitrator Challenges: A Practical Guide to an Unwieldy Issue (2020) at 62.

[29] The new rules impose deadlines on both the submissions on a challenge by the parties and the decision on a challenge by the arbitrators. 2022 ICSID Arbitration Rules, Rules 22(1), 23(3); 2022 ICSID Additional Facility Arbitration Rules, Rules 30(2), 31(2) (The ICSID Additional Facility Arbitration Rules require the Secretary-General to decide the challenge).

[30] 2022 ICSID Arbitration Rules, Rule 22(2); 2022 ICSID Additional Facility Arbitration Rules, Rule 30(4). Although proposals were mooted at ICSID to reverse this presumption, consensus could not be reached and the automatic suspension of proceedings was retained. ICSID, Proposals for Amendment of the ICSID Rules – Working Paper, dated February 2020, at para. 73.

[31] 2006 ICSID Arbitration Rules, Rule 9(4). See also ICSID Convention, Art. 58.

[32] 2022 ICSID Arbitration Rules, Rule 23(2).

[33] 2022 ICSID Arbitration Rules, Rule 62(3); 2022 ICSID Additional Facility Arbitration Rules, Rule 73(1) and (2) (The ICSID Additional Facility Arbitration Rules do not require party consent to publish the award. Consent is only required to determine the scope of redactions.).

[34] 2022 ICSID Arbitration Rules, Rules 63-64; 2022 ICSID Additional Facility Arbitration Rules, Rules 73-74. Any disputes over redactions will be referred to the tribunal. 2022 ICSID Arbitration Rules, Rules 63-64; 2022 ICSID Additional Facility Arbitration Rules, Rules 73-74.

[35] 2022 ICSID Arbitration Rules, Rule 65(1); 2022 ICSID Additional Facility Arbitration Rules, Rule 75(1).

[36] 2022 ICSID Arbitration Rules, Rule 65(2); 2022 ICSID Additional Facility Arbitration Rules, Rule 75(2).

[37] 2022 ICSID Arbitration Rules, Rule 67(2); 2022 ICSID Additional Facility Arbitration Rules, Rule 77(2).

[38] 2022 ICSID Arbitration Rules, Rule 68; 2022 ICSID Additional Facility Arbitration Rules, Rule 78.

[39] 2022 ICSID Arbitration Rules, Rules 67(4), 68(2); 2022 ICSID Additional Facility Arbitration Rules, Rules 77(4), 78(3).

[40] 2022 ICSID Additional Facility Rules, Rule 2(1)(a).

[41] 2022 ICSID Additional Facility Rules, Rule 2(1)(c).

[42] See, e.g., Nord Stream 2 AG v. European Union, PCA Case No. 2020-07, Notice of Arbitration, 26 September 2019.

[43] 2022 ICSID Arbitration Rules, Rule 4(2).

[44] 2022 ICSID Institutional Rules, Rule 3(a).

[45] 2022 ICSID Institutional Rules, Rule 3(b).

[46] 2022 ICSID Arbitration Rules, Rule 15(2); 2022 ICSID Additional Facility Arbitration Rules, Rule 24(2).

[47] 2006 ICSID Arbitration Rules, Rule 2.