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## Amended ICSID Rules and Regulations

On 1 July 2022, the amendments to the ICSID Rules and Regulations of the International Centre for Settlement of Investment Disputes (**ICSID**) came into effect, after a long and carefully managed deliberation process.

Since October 2016, ICSID has been engaging in consultations to amend its Rules and Regulations with the goal to “modernize, simplify, and streamline the rules, while also leveraging information technology to reduce the environmental footprint of ICSID proceedings”.<sup>1</sup> This has been welcomed as a step in the right direction towards making ICSID disputes more efficient and cost effective.

The revisions constitute the fourth time that the ICSID Rules and Regulations have been amended and all new amendments are published on the ICSID website [here](#). Working papers containing the proposed revisions and tracing their drafting history are posted on the same website.<sup>2</sup> The amendments are the most wide-ranging in ICSID’s 55-year history and include the following:

1. Rules and Regulations for ICSID Convention Proceedings;
2. ICSID Additional Facility Rules;
3. ICSID Mediation Rules; and
4. ICSID Fact-Finding Rules.

The amendments were finalized and submitted to the Administrative Council, ICSID’s governing body, for approval on 20 January 2022 and the ICSID Member States approved them with the necessary majorities on 21 March 2022. The amended ICSID Rules and Regulations will apply to proceedings to which the parties consented on or after 1 July 2022.<sup>3</sup> ICSID has advised that in the future it will publish extensive guidance notes on the Rules and Regulations on its website.<sup>4</sup>

This newsletter will focus on the most commonly used ICSID Arbitration Rules and provide a thematic analysis of the most significant changes.

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<sup>1</sup> [ICSID Rules and Regulations Amendment | ICSID \(worldbank.org\)](#).

<sup>2</sup> Many of the following explanations rely on the various background papers and news releases by ICSID.

<sup>3</sup> ICSID Convention, Articles 33 (conciliation) and 44 (arbitration).

<sup>4</sup> [ICSID Releases 2022 Versions of its Rules and Regulations | ICSID \(worldbank.org\)](#).

## 1. Amendments to Arbitration Rules

### (1) Transparency

The revised Arbitration Rules further enhance the transparency of ICSID orders, decisions, and awards, while also assisting parties in identifying confidential information and specifying that protected personal information cannot be publicly disclosed.

<p>Publication (<i>Arbitration Rules 62 to 64, and 66</i>)</p>	<p>The Arbitration Rules aim to actively promote the publication of documents filed in ICSID proceedings including arbitral awards, decisions on annulment, orders, decisions and submissions.</p> <p>Article 48(5) of the ICSID Convention requires the consent of both parties to publish an award and due to the unanimity requirement in the ICSID Convention is unlikely to be changed in the near future. However, Arbitration Rule 62(3) deems that a party has given consent to publish awards and annulment decisions unless it objects in writing within 60 days, making future publications more likely. By contrast, submissions will only be published with the consent of the parties, while such consent will not be necessary (or deemed) for the publication of orders and decisions. In the case of awards and annulment decisions, even if a party objects to publication ICSID may publish excerpts.</p> <p>The Arbitration Rules indicate that the publication of these documents is to be done in consultation with the parties, in particular when it comes to the need for redactions. Confidential information is protected from publication pursuant to Arbitration Rule 66 and such information has been categorized into ten categories. This should give parties the comfort to proceed with ICSID proceedings despite the publication of documents filed therein.</p>
<p>Public hearings (<i>Arbitration Rule 65</i>)</p>	<p>To further promote transparency in ICSID arbitrations, Arbitration Rule 65 permits the tribunal to allow non-parties to attend and observe hearings (unless either party objects) and sets out mechanisms pursuant to which ICSID will publish recordings or transcripts of hearings upon the request of a party, unless the other party objects.</p>
<p>Participation of non-disputing state and treaty parties (<i>Arbitration Rules 67 and 68</i>)</p>	<p>Another amendment furthering transparency in ICSID arbitrations is the opportunity for non-disputing treaty parties (those who are non-parties in the proceeding but parties to an underlying treaty in dispute) and non-disputing parties (including States and non-governmental organizations) to participate in the arbitrations. The Arbitration Rules set out circumstances that tribunals should consider when allowing participation by either type of non-disputing parties. This is new for non-disputing treaty parties and has been expanded and clarified for non-disputing parties. Once granted the permission to participate non-parties can make submissions in the arbitration.</p>

## **(2) Efficiency**

The innovations introduced in the Arbitration Rules are designed to make cases more efficient. Arbitration Rule 3 states that the “*Tribunal and the parties shall conduct the proceeding in good faith and in an expeditious and cost-effective manner.*”

<p>Tribunal’s case management powers (<i>Arbitration Rule 29</i>)</p>	<p>Arbitration Rule 29 gives the tribunal additional case management powers. It expands the matters to be discussed at the first procedural conference to include the applicable arbitration rules, document production requests, the transparency regime governing ICSID proceedings, and the place and format of hearings.</p>
<p>Filing procedures (<i>Arbitration Rule 4 and 5</i>)</p>	<p>Arbitration Rule 4 makes electronic filing of documents the default position, thereby increasing efficiency and fulfilling ICSID’s goal of reducing the environmental footprint of ICSID proceedings. Arbitration Rule 5 encourages “front loading” by requiring (extracts of) supporting documents to be filed together with submissions or communications to which they relate.</p>
<p>Bifurcation (<i>Arbitration Rules 42 to 45</i>)</p>	<p>Arbitration Rule 42 expressly sets out that a tribunal can address distinct questions in a separate phase of the proceeding by way of a “bifurcation”. The tribunal shall consider the following circumstances when determining whether to bifurcate:</p> <ul style="list-style-type: none"> <li>(i) would bifurcation materially reduce the time and cost of the proceeding;</li> <li>(ii) would a determination of the questions to be bifurcated dispose of all or a substantial portion of the dispute; and</li> <li>(iii) whether the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.</li> </ul>
<p>Mandatory time limits (<i>Arbitration Rules 9 to 12, and 58</i>)</p>	<p>With the aim of promoting efficiency, the tribunal shall use its best efforts to meet time limits throughout the proceeding. For example, the first session must be held within 60 days of constituting the tribunal, and the first procedural order must be issued within 15 days after the session. Awards must be rendered within 60 days after the last submission on an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection, and 240 days after the last submission on all other matters. This is anticipated to promote effective management and reduce the length of arbitrations.</p>
<p>Expedited arbitration (<i>Arbitration Rules 75 to 86</i>)</p>	<p>In addition to time limits, Chapter XII of the Arbitration Rules introduces expedited arbitration procedures, subject to the parties’ consent. These have become an increasingly common feature in modern arbitral rules<sup>5</sup> and in the ICSID context are aimed at making disputes more accessible for small and medium sized investors. Arbitration Rules 76 to 78 allow for expedited arbitrations to be heard by a sole arbitrator or a three member tribunal and Arbitration Rules 80 and 81 sets out detailed information regarding the timetabling and procedural schedule of an expedited arbitration. Finally, Arbitration Rule 81 requires that an award must be rendered as soon as possible, and in any event no later than 120 days after the hearing of an expedited arbitration.</p>

<sup>5</sup> The arbitration rules of the prominent arbitral institutions HKIAC, ICC, LCIA and SIAC all include such procedures.

### (3) Costs

Chapter VII of the Arbitration Rules focuses on costs, thereby reflecting a topic which is front of mind for many States and investors engaging in ICSID arbitrations.

**Decisions on costs**  
*(Arbitration Rule 52)* Arbitration Rule 52 focuses the tribunals' considerations when allocating the costs incurred in ICSID arbitrations by explicitly requiring that tribunals consider the following four factors and requiring express reasons for why and how costs should be allocated:

- (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.

This Arbitration Rule also enables a tribunal to make interim decisions on costs at any time, at its own initiative or upon a request from the parties.

**Security for costs**  
*(Arbitration Rule 53)* Introduced at the behest of the State parties to ICSID arbitrations, Arbitration Rule 53 sets out a clear procedure for the filing and granting of security for costs in ICSID proceedings as well as strict time limits to consider the following relevant circumstances:

- (i) the party's ability to comply with an adverse decision on costs;
- (ii) the party's willingness to comply with an adverse decision on costs;
- (iii) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and
- (iv) the conduct of the parties.

Significantly, pursuant to Arbitration Rules 53, the tribunal may suspend or discontinue the proceeding where a party fails to comply with an order for security for costs.

**Third party funding**  
*(Arbitration Rule 14)* In an effort to avoid conflicts of interest that may arise out of such financing arrangements, Arbitration Rule 14 requires parties to disclose the names and addresses of any non-party from which funds have been received in the proceeding, upon the registration of a request for arbitration (or immediately once the funding agreement is established after the request for arbitration is registered). The parties are not expressly required to disclose their funding agreements but a tribunal may order disclosure of further information regarding the funding agreement if it considers this necessary. This requirement may prove particularly prudent where a tribunal is making decisions on costs or security for costs, which both expressly require the tribunal to consider the existence of third party funding when making such orders.<sup>6</sup>

The above amendments modernize the Arbitration Rules, incorporate innovations designed to make ICSID cases more efficient for parties, broaden access to ICSID's facilities and services, and ensure greater public transparency in the conduct and outcome of proceedings.

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<sup>6</sup> See Arbitration Rule 53(4).

## 2. Further Amendments and New Sets of Rules

Further relevant amendments were made to the Additional Facility Rules and the Mediation and Fact-Finding Rules were introduced as new sets of rules aimed at expanding the choice of dispute resolution procedures available to States and investors.

### (1) Amended Additional Facility Rules

The ICSID Additional Facility Rules offer arbitration, conciliation and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention. Through the amendments, the scope of the Additional Facility Rules has been expanded to allow disputes between *any* consenting parties. Previously these Additional Facility Rules could only be used by Contracting States or nationals of Contracting States. Now, Article 2 of the Additional Facility Rule has been amended to allow disputes involving “Regional Economic Integration Organizations” (**REIO**) (such as the European Union). This accommodates international investment agreements that are signed by an REIO on behalf of regional entities and allows significantly expanded access to justice for investors and States.

### (2) New Mediation and Fact-Finding Rules

The Mediation and Fact-Finding Rules can be used in combination with or independent of the ICSID Rules and Regulations to allow participants access to multiple forms of dispute resolution mechanisms. The ICSID Mediation rules have a broad scope of application, allowing ICSID to administer any mediation proceeding that relates to an investment and involves a State or a REIO where the parties have given their consent. These rules respond to the requests by States and investors to provide greater mediation capacity.

The ICSID Fact-Finding Rules allow parties to jointly request a fact-finding Committee of one or more persons to determine a procedural protocol and to make specific fact-findings in the dispute. The fact-finding rules have a broad scope of application, permitting ICSID to administer fact-finding proceedings that relate to an investment and involve a State or REIO with the consent of the parties.

In light of the extensive changes, those contemplating proceedings under the new ICSID Rules and Regulations may benefit from seeking advice based on their individual circumstances. Nishimura & Asahi is able to provide tailored advice for all clients.

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