

WHAT DO THE NEW 2022 ICSID ARBITRATION RULES MEAN FOR THE PARTIES?

In this briefing we examine the new International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules and comment on what they mean for States, investors and those involved in investment treaty arbitration.

What is ICSID arbitration?

ICSID arbitration is the dispute resolution method applicable under the ICSID Convention¹, and the leading global forum for investment arbitrations between a host State and a foreign investor investing in that State.

It covers disputes where:

1. one of the parties is an ICSID contracting State and the other a national of another contracting State (there are certain exceptions);
2. the parties have agreed to ICSID arbitration. In practice, this is achieved by either inserting an ICSID clause into the relevant concession contract between the State and the investor, or, more usually, by contracting States entering into bilateral (**BIT**) /multilateral (**MIT**) treaties which themselves provide for ICSID arbitration. In doing so the contracting State is deemed to consent to ICSID arbitration. An investor indicates its consent when they commence the ICSID arbitration; and
3. the dispute involves a qualifying investment between the State and investor. The ICSID Convention does not define "investment", but there is fairly well established ICSID caselaw setting out what is required.

The 2022 Rules

On 1 July 2022, and after some five years in the making, the 2022 ICSID Arbitration Rules (**2022 Rules**)² entered into force and apply to ICSID arbitrations commenced on or after that date.

The 2022 Rules aim to "modernise, simplify, and streamline the rules" as well as increase the use of technology to reduce ICSID's carbon footprint - for example Rule 4 requires electronic filing (unless otherwise ordered), something that HFW, as a signatory of the Campaign for Greener Arbitrations³, welcomes.

The amendments can broadly be divided into three categories:

1. Increasing **transparency**;
2. Reducing the **time** and **costs** of the proceedings; and
3. Updating the rules to **regulate established practices** in international arbitration, such as security for costs and third-party funding.

1. Increasing Transparency

The ICSID arbitration framework has previously attracted some degree of criticism for its perceived lack of transparency. The criticism focused on the fact that privately appointed tribunals were making decisions regarding matters of public importance behind closed doors. The 2022 Rules aim to make ICSID proceedings more transparent.

1.1 Publication of awards, orders, and submissions

This is a significant change. The previous 2006 Rules required the parties' express consent for the publication of ICSID awards. Under the 2022 Rules, there is now an 'opt-out' mechanism whereby consent is automatically inferred unless a party objects within 60 days after dispatch of the document (Rule 62(3)). Even where the parties do not consent, ICSID will publish extracts of the award, but the parties are entitled to agree on redactions before publication (Rule 62(4)).

¹ [International Centre for Settlement of Investment Disputes \(worldbank.org\)](https://www.worldbank.org/icsid)

² [ICSID Rules and Regulations Amendment | ICSID \(worldbank.org\)](https://www.worldbank.org/icsid)

³ [Campaign for Greener Arbitrations](https://www.campaignforgreenerarbitrations.org/)

The change also extends to:

- procedural orders and decisions, with redactions agreed by the parties (or by the tribunal if the parties disagree) (Rule 63);
- publication of written submissions or other documents filed in the proceedings is also permitted, with the parties' consent (Rule 64); and
- recordings or transcripts of hearings at the request of a party unless the other party objects (Rule 65(3)).

1.2 Submissions by non/third parties

Interested non-parties continue to be able to apply for permission to file written submissions in proceedings, but the relevant criteria for permission to be granted has been expanded. In addition to considering the non-party's interest and how their submission will assist the proceedings, the tribunal will also consider their identity, activities, organisation, and ownership (Rule 67(2)(d)). The tribunal will also take into account any financial or other assistance provided to them in taking part in the proceedings (Rule 67(2)(e)).

1.3 The requirement to identify the ownership and control of an investment

Previously a request for arbitration only had to include information concerning the issues in dispute and confirm that the dispute arose directly out of an investment. The 2022 Rules are more specific, and now require that the request for arbitration includes "*a description of the investment and of its ownership and control*" (Rule 2(2)(a) of the ICSID Institution Rules, which apply before the registration of the case). Accordingly, claimants with complex investment structures will have to explain their corporate structure and how their various assets are attributable to the claimant-investor.

2. Saving time and costs

Another focus of change in the 2022 Rules is reducing the length of time the proceedings take, where data has shown that the average ICSID arbitration lasts between three to four years. The 2022 Rules aim to address that issue by streamlining procedures, reducing time limits, and leading to an overall time and costs saving, and include a provision requiring tribunals and parties to "*conduct the proceeding in good faith and in an expeditious and cost-effective manner.*" (Rule 3(1)).

2.1 Expedited Arbitration

Chapter XII of the 2022 Rules introduces the possibility of an entirely new Expedited Arbitration. Parties can opt-in to the procedure at any time (Rule 75(1)), and where they do so, the following shortened procedure applies:

time limits for the filing of pleadings (60 days for the memorial and counter-memorial and 40 days for the reply and rejoinder (Rule 81(1));

the length of pleadings (200 pages for the memorial and counter-memorial and 100 pages for the reply and rejoinder (Rule 81(1));

timing of the hearing (to be held within 60 days after the last written submission is filed) (Rule 81(1)(g)); and

election of either a sole arbitrator or a three-member tribunal (failing which, a sole arbitrator is the default) (Rule 76)).

This new Expedited Arbitration procedure is particularly relevant for lower value claims or cases in which the dispute is not factually complex. However, as it is an opt-in mechanism requiring the consent of both parties, only time will tell how popular it proves.

2.2 Case Management Conferences

Tribunals will conduct one or more case management conferences (in addition to the First Session) to narrow the issues in dispute, identify uncontested facts on which the parties agree, and address any other procedural or substantive issues related to the resolution of the dispute (Rule 31).

2.3 Summary Dismissal of Meritless Claims

Within 45 days from the tribunal's constitution (or even before the constitution), parties can object to a particular claim on the basis that it is manifestly without legal merit (Rule 41) and apply to have the proceedings summarily dismissed. The tribunal will then fix time limits for submissions on the objection and are obliged to render their decision/award within 60 days from the later of the constitution of the tribunal of the last submission on the objection.

2.4 Bifurcation

The 2022 Rules contain a more detailed bifurcation procedure and set out the circumstances to be considered by the tribunal when determining these applications, including whether there will be time and costs savings (Rule 42(4)).

2.5 Time Limits

Tribunals must use their best efforts to render their awards within specific time frames (Rule 12). For awards other than those related to preliminary objections, the time limit is 240 days after the last submission (Rule 58). Rule 22 imposes **strict time limits of 21 days on applications to disqualify an arbitrator** (the old Rule 9 only required application to be made *promptly*). The 240 day time limit is a significant improvement as under the previous rules, it was not unheard of for awards to take over a year to be rendered.

3. Regulating established practices

3.1 Mandatory Disclosure of Third-Party Funding

The 2022 Rules require the parties to file a written notice disclosing the name and address of any non-party who funds the proceedings through a donation, grant, or in return for remuneration dependent on the outcome of the proceedings (Rule 14(1)). Notices will need to be filed on registration of the request for arbitration or immediately after concluding a third-party funding agreement (Rule 14(2)).

Additionally, the tribunal has an express power to order the disclosure of further information regarding the funding agreement and the funder (Rule 14(4)). It is not anticipated that this will be frequently ordered, and it is intended to assist in terms of conflicts rather than identifying the terms of the funding, which is not required under the 2022 Rules. Previously, the existence and identity of the funder were not required to be disclosed by claimants, giving rise to the potential for there to be unknown conflicts of interests. These enhanced disclosures will assist with the early identification of potential conflicts of interest, increase transparency, and potentially reduce conflict-related challenges.

The automatic and ongoing obligation to disclose the details of the funder is probably the most significant change introduced by the 2022 Rules. In requiring this, ICSID is following the lead set by other arbitral institutions (see for example the ICC Arbitration Rules that came into force on 1 January 2021).

3.2 Rules for security for costs

The 2022 Rules introduce an entirely new provision on security for costs (Rule 53). Security for costs applications were previously made under Rule 39, which governed provisional measures, but there was no dedicated provision. The 2022 Rules create a procedural timetable for security for costs applications and set out the key circumstances to be considered by the tribunal (which expressly includes the existence of third-party funding⁴).

3.3 The New Additional Facility Rules, Mediation, and Fact-finding Rules

Finally, amendments to the **ICSID Additional Facility Rules** significantly expand ICSID's ability to administer arbitration proceedings, including where none of the parties to the dispute are ICSID Member States or nationals of an ICSID Member State. When used, the Additional Facility Rules will provide access to ICSID's administrative support and expertise. However, they will lack some key benefits available under the ICSID Convention, such as streamlined enforcement of awards in Member State courts. Regional Economic Integration Organizations, including the European Union (**EU**), may also become a party to proceedings under the new Additional Facility Rules.

To complement the 2022 Rules on arbitration, ICSID's New Mediation Rules⁵ offer a process to support negotiated dispute resolution between parties, and the New Fact-finding Rules⁶ allow for an impartial and targeted assessment of facts related to an investment. The Fact-finding Rules allow parties to constitute a committee to inquire into and report on relevant circumstances in the pre-dispute phase. The idea behind the Fact-Finding Rules is to avoid disputes by providing an impartial assessment of facts arising in a contractual or other business dispute.

It is worth noting that Mediation and Fact-finding Rules can be used separately to, or in conjunction with, the arbitration proceedings.

CONCLUSION

The modernising of ICSID's arbitration procedures is likely to be welcomed by States and investors alike and was well overdue. The amended rules do appear to be a significant improvement and address some of the principal criticisms of the ICSID process. The introduction of an option for expedited arbitration, fact-finding committees, a summary dismissal procedure, and time limits for awards to be rendered should all help to reduce the time it takes for a claim to be determined. In doing so, the costs should also be reduced, and time and cost were, of course, two of the major criticisms of the previous regime.

The new rules relating to transparency should hopefully lead to more awards being made public and the development of the (non-binding) body of jurisprudence which, in turn, should lead to more informed and consistent decisions. The requirement for the upfront disclosure of the identity of any third-party funder is positive and in keeping with the

⁴ See Rule 53(4)

⁵ [New ICSID Mediation Rules 2022](#)

⁶ [New ICSID Fact-finding Rules 2022](#)

direction of travel with respect to other arbitral institutions. The theory is that the greater the transparency the greater the trust and the more confidence the users will have in the system. This should in turn lead to more foreign investment which is a benefit to both States and investors.

Ultimately time will tell, but the new 2022 Rules appear to be a significant step forward.

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