

Exploring the updated ICSID proposals for amendment of the rules

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Arbitration analysis: Hamish Lal, Brendan Casey and Tania Iakovenko-Grasser at Akin Gump Strauss Hauer & Feld, discuss the latest International Centre for Settlement of Investment Disputes (ICSID) proposed amendments of its procedural rules for resolving international investment disputes, focusing on the key changes since the last proposals were published in August 2018.

Original news

ICSID updates proposals for amendment of rules, [LNB News 18/03/2019 41](#)

ICSID has published a second working paper on its proposals for amendment of the ICSID rules, including its arbitration rules.

What are the key changes since the last proposals were published?

Background

On 15 March 2019, the Secretariat of ICSID released its second working paper of its proposed amendments to the ICSID Rules, including new provisions on third-party funding, arbitrator disqualifications and expedited proceedings (the Second Working Paper). The paper builds on the proposals that were originally published in August 2018 in the first paper on proposed amendments to the ICSID Rules (the First Working Paper).

Since publishing the First Working Paper in August 2018, ICSID says it has organised over 50 public consultations and has received over 100 written submissions from states and the public.

Key changes

There are a number of changes, but the key changes relate to:

Expedited arbitration

To encourage the use of this expedited procedure, the Second Working Paper removes the time limit for the parties to consent to the expedited process. It also adds a proposal for parties to be able to 'opt in' to an expedited arbitration process at any time, which ICSID says 'would reduce the length of proceedings by half'. Parties will also have the ability to 'opt out' of the expedited process at any time.

Third party funding

ICSID has explicitly required parties to disclose third-party funding arrangements (by both investors and states). Following criticism on the (potentially ambiguous) wording of the definition of third-party funding in the First Working Paper, the Second Working Paper now simplifies the definition to accommodate the various forms that funding can take. Parties will now be required to file a written notice 'disclosing the name of any non-party from which the party, its affiliate or its representative has received funds or equivalent support for the pursuit or defense of the proceeding'.

Appointment and disqualification of arbitrators

Users of ICSID arbitration will be familiar with the time-consuming process of constituting a tribunal under the ICSID Rules. The First Working Paper proposed a specific 90-day period by which the parties would appoint the tribunal, failing which either party could activate the default process of selection of arbitrators by the chairperson of the ICSID Administrative Council. It also proposed to change the procedure for seeking disqualification of an arbitrator, replacing the previous requirement that a motion for disqualification be filed 'promptly' with a 20-day period for filing such a motion.

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The Second Working Paper has made minor amendments including additional time to respond to a proposal to disqualify an arbitrator from one week in the First Working Paper to three weeks in the Second Working Paper. Further, ICSID has discontinued the proposal in the First Working Paper that proceedings should continue while a challenge to an arbitrator which is pending has been abandoned. Now, in the Second Working proceedings are automatically suspended when a challenge is filed, unless the parties agree no suspension is necessary.

Provisional measures

The First Working Paper had included a requirement that parties seeking provisional measures must establish the urgency and necessity of the measures in view of all relevant circumstances—reflecting the consistent practice of tribunals. The Second Working Paper now includes a balancing test or proportionality requirement, whereby tribunals will have to consider the effect of the measures on each party.

Bifurcation

In the First Working Paper, a party could file a request for bifurcation—if it relates to a preliminary objection—within 30 days after the filing of the memorial on the merits and—if it relates to an ancillary claim—within 30 days after the filing of the written submission containing the ancillary claim. The tribunal was required to issue its decision on bifurcation within 30 days after the last submission on the request.

The Second Working Paper adds a stand-alone rule clarifying the procedure regarding requests for bifurcation of preliminary objections and subsequent steps. It provides that tribunals must consider whether bifurcation ‘could materially reduce the time and cost of the proceeding’.

Security for costs

The First Working Paper provided for the ability to obtain security for costs, including the procedure for such an application. The First Working Paper only required that the tribunal consider the party’s ability to comply with an adverse decision on costs. The Second Working Paper adds that tribunals are now directed to consider:

- the party’s willingness to comply with an adverse decision on costs
- the effect providing security for costs may have on the party’s ability to pursue its claim or counterclaim
- the conduct of the parties
- all other relevant circumstances

Publication of awards

The Second Working Paper retains the proposal to automatically publish awards, decisions and orders unless a written objection is lodged by either of the parties to the proceedings within 60 days after the date of dispatch of the document. The Second Working Paper has clarified that parties can refer disputes regarding the publication or redaction of a document to the tribunal for determination.

Which do you consider to be the most significant and why?

Overall, the most significant changes to the ICSID Rules are responding to developments in the arbitral sphere in both investment and commercial disputes. In our view, the most significant changes from the current ICSID Rules relate to:

- third party funding—there is no question that third party funding is on the rise and will remain a significant factor in international arbitration going forward. Its existence, including the identity of the funder, is important to both parties and the members of the tribunal for a variety of reasons (strategically, conflicts of interest, security for costs, etc). The ICSID Rules should remove some of the ambiguity surrounding the timing and extent of disclosure
- security for costs—like third party funding, security for costs applications are now a routinely used procedural device in international arbitrations. All procedural tools can respond to legitimate needs or

- serve to disrupt the proceedings and harass other parties. The additional criteria in the Second Working Paper more accurately reflects the 'state of play' in international arbitration with respect to the factors the tribunal ought to consider in deciding these applications and may deter some bad behaviours publication—transparency is no longer affecting only international investment arbitration. Institutions which typically resolve commercial disputes are also becoming more transparent in different ways (for example, the *London Court of International Arbitration's* publication of arbitrator challenges, the International Chamber of Commerce's (ICC) publication of all ICC awards made from 1 January 2019). While the Second Working Paper takes a broad view of publication, its success or failure will ultimately depend on the users of ICSID arbitration as each party still retains a 'veto' power with respect to the publication of any document after it is issued

What is next for the rules amendment project?

The exact timing and next steps are unclear. What is certain is that ICSID will consult Member States on the latest proposals at a meeting in Washington DC from 7–9 April 2019. Written comments from Member States and the public on the Second Working Paper can be submitted before 10 June 2019.

ICSID has stated that it 'hopes that broad consensus can be reached on the text of the rules during the April 2019 meeting so that a final proposed text can be sent to Member States in the summer of 2019. This would allow Member States to vote on the amendments in October 2019.' However, there is a possibility that further in-person meetings may be required—this will largely depend on outstanding issues from the April 2019 consultations.

Once finalised, a reform package will be presented to the ICSID Administrative Council for a vote at its annual meeting in 2019 or 2020. In order for changes to be adopted, two-thirds of the ICSID Member States need to approve any proposed amendments.

What are your views on the project in light of the EU Commission's continued push for reform of ICSID in favour of a multi-lateral investment court?

It is an interesting question. On the one hand, the two proposals are aimed at 'reforming' the investment disputes space. On the other, the two projects are on completely separate, but parallel tracks.

Within certain segments of the EU there have been strong criticisms of the investor state dispute settlement regimes of which ICSID is the biggest player. However, in light of those criticisms ICSID is very much maintaining the current process through modernising and simplifying the ICSID Rules. Put another way, the ICSID Rules reform is 'evolution' rather than 'revolution' along the lines of other recent revised institutional arbitral rules.

The EU's objective of creating a multilateral investment court—essentially a permanent body to settle investment disputes under future and existing investment treaties—is wholly isolated from the ICSID Rules reform. There are still fundamental questions of procedure of that court which are unanswered, and one never knows how much of the current ICSID arbitral procedures will actually find their way into the court. In that context, it may be that those responsible for implementing the EU Investment Court are looking closely at the current reforms. Nothing currently suggests that ICSID is responding to the EU Investment Court.

Interviewed by Susan Ghaiwal.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

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