

International Arbitration Alert

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ICSID Rules Reform: Public Comments are Due Before the End of December

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Key Points

- The current reform of the ICSID Rules, launched in October 2016, is the most far-reaching amendment process in over 50 years.
- The reform aims at modernizing and simplifying the Rules, enhancing the balance between investors and States, increasing efficiency in terms of time and cost, and making proceedings less paper-intensive.
- Released on August 3, 2018, the Proposed Rules are based on topics that emerged in the context of ICSID consultations with its 153 Member States and a subsequent solicitation of public views. The Proposed Rules notably include new provisions on transparency, arbitrator disclosure, security for costs and third-party funding.
- The ICSID Secretariat has invited the public and the Member States to submit their written comments on the Proposed Rules by December 28, 2018.
- Once finalized, 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.

Background of the Proposed Rules

The International Centre for Settlement of Investment Disputes' (ICSID) current caseload of administering investor-state arbitrations reflects the worldwide growth in investment arbitration. As of June 1, 2018, more than 676 cases were registered in 2018 alone. The significant growth in the number of cases has prompted ICSID to address a number of issues that are important to the parties to these proceedings. The reform of the ICSID rules (the "Rules"), which was launched in October 2016, is the most far-reaching amendment process in more than 50 years. Proposed amendments include changes to ICSID's administrative and financial regulations, institutional rules, arbitration and conciliation rules (particularly under the ICSID Additional Facility), and rules for fact-finding (the "Proposed Rules"). The ICSID Convention, however, remains intact.

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Previous revisions of the ICSID Rules have focused on:

- the requirements for disclosure of potential arbitrator conflicts of interest
- the publication of awards
- public hearings
- the possibility for respondents to obtain an “early dismissal” of frivolous cases
- the ability of nondisputing parties to file submissions in proceedings.

Building on that foundation, the current amendments are aimed at:

- simplifying the Rules in plain, modern and gender-neutral language
- increasing time and cost efficiency by specifying and reducing the time lines for numerous proceedings
- improving further the method and procedure for the appointment of arbitrators (including with respect to conflicts of interest)
- increasing the overall transparency of the proceedings
- promoting consistency among awards
- revising inaccurate translations to ensure consistency between the English, French and Spanish versions of the Rules.

The Proposed Rules will apply to all cases commenced after their approval by the ICSID Administrative Council. Given that most of the treaties providing for the ICSID arbitration were negotiated before 2010, the Proposed Rules will be able to modernize the arbitral procedure under these treaties through the amendments decreasing the reliance on new treaty negotiations between state parties.

Main Issues Addressed in the Proposed Rules

Appointment and Disqualification of Arbitrators

Due to a number of criticisms relating to the time, cost and complexity of composing the tribunal, the Proposed Rules seek to streamline this process. In particular, the Proposed Rules adopt a specific 90-day time frame by which the parties must appoint the tribunal, failing which either party can activate the default process of selection of arbitrators by the chairperson of the ICSID Administrative Council. There are also changes to 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. A decision on a disqualification motion must be made within 30 days of its filing. The Proposed Rules also suggest a new arbitrator’s code of conduct, which would require more fulsome declarations by nominated arbitrators relating to their relationship(s) with the parties, counsel, co-arbitrators and funders, and the arbitrator’s availability to hear the case.

Security for Costs

The Proposed Rules now explicitly provide for the ability to obtain security for costs, including the criteria on which security can be obtained. Previously, ICSID tribunals have not consistently found that they have the authority to order security for costs, and have applied varying criteria/standards.

Third-Party Funding

Parties to disputes under the Proposed Rules would now affirmatively be required to disclose third-party funding arrangements (by both investors and states). This provision has already attracted criticism due to its potentially ambiguous wording that provides for disclosure of not only third-party funders, but also legal “insurers,” which is not defined in the provision.

Publication of Awards

Under the Proposed Rules, awards, supplementary decisions on awards, rectifications, interpretations, revisions of awards and decisions on annulment will automatically be published, 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.

Bifurcation

The Proposed Rules contain express provisions on bifurcation allowing a party to 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. In any event, the tribunal is required to issue its decision on bifurcation within 30 days after the last submission on the request.

Revised Rules for Expedited Arbitration

The Proposed Rules suggest revising the provisions relating to expedited arbitral proceedings, which include additional and shortened timelines, provided that the parties jointly consent to such proceedings within 20 days after the date of registration of the Request for Arbitration. In an expedited arbitration, a panel will typically consist of a sole arbitrator, though a three-member tribunal remains possible.

Electronic Filing

The Proposed Rules are based on a presumption that filings will be electronic, except in cases of “exceptional circumstances,” where there is a possibility for the parties to submit their documents in a traditional paper format.

The reform package consists of the following documents in three volumes:

- Proposals for Amendments of the ICSID Rules – Synopsis, Volume 1, available at: https://icsid.worldbank.org/en/amendments/Documents/Homepage/Synopsis_English.pdf
- Proposals for Amendment of the ICSID Rules – Consolidated Draft Rules, Volume 2, available at: https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf
- Proposals for Amendment of the ICSID Rules – Working Paper, Volume 3, available at: https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Complete_WP+Schedules.pdf.

Akin Gump Strauss Hauer & Feld LLP will track the progress of the ICSID amendment process and provide further updates as appropriate. Please contact us if you would like to discuss its implications in further detail.