

## ICSID RULES 2022 PROMOTE EFFICIENCY IN INVESTOR-STATE ARBITRATION AND MEDIATION

The latest Rules of the International Centre for Settlement of Investment Disputes (ICSID) take effect on 1 July 2022, following an extensive consultation process. Significant new provisions in the ICSID Arbitration Rules (**2022 Arbitration Rules**) and Arbitration (Additional Facility) Rules are aimed at making proceedings more efficient. Major developments in the updated Rules are the introduction of an expedited arbitration procedure and a requirement for disclosure of third-party funding. Other new measures seek to make proceedings and their outcome more transparent, which seeks to address one of the main criticisms of Investor-State Dispute Settlement (ISDS). In an entirely new development, Rules for ICSID Mediation Proceedings (**2022 Mediation Rules**) are added to promote the efficient, amicable resolution of Investor-State disputes and are available to parties regardless of whether they are engaged in ICSID arbitration.

### A FOCUS ON EFFICIENCY

#### Expedited arbitration procedure

The 2022 Arbitration Rules introduce an expedited procedure that the parties may agree to adopt. They may also withdraw from the expedited procedure at any time (Rules 75-86). The expedited procedure provides a condensed timeline requiring, for example, the filing of the claimant's memorial within 60 days after the first session of the tribunal (Rule 81). While the expedited procedure is most likely to be of assistance in cases of limited complexity, its inclusion in the 2022 Arbitration Rules is to be welcomed.

Where the expedited procedure does not apply, the 2022 Arbitration Rules provide that in most cases an award shall be rendered as soon as possible, and in any event no later than 240 days after the last submission in the proceedings (Rule 58).

#### Notable features of the 2022 ICSID Rules

- The 2022 Arbitration Rules promote the efficiency of proceedings.
- Parties may opt-in to an expedited procedure, most likely suitable for low value disputes.
- Special procedures are provided for applications for bifurcation, provisional measures, and early determinations.
- Parties receiving third-party funding are required to disclose the identity of funders, with the tribunal able to order disclosure of further information if relevant.
- New provisions set out factors a tribunal is to consider in assessing applications for costs or security or costs.
- The 2022 Arbitration Rules provide for automatic publication of awards and orders. However, parties retain a right to agree redactions.
- Third parties may apply for permission to make submissions in proceedings.
- The scope of the Arbitration (Additional Facility) Rules is expanded, with the removal of the requirement that at least one party to proceedings be an ICSID Member State or a national of one.
- Mediation Rules are provided for the first time, promoting the amicable settlement of investor-State disputes.

## **Efficient Special Procedures**

The 2022 Arbitration Rules add procedures and time limits for applications for:

- bifurcation (Rule 42);
- preliminary objections that a dispute is not within the jurisdiction of ICSID or within the competence of the tribunal (Rule 43);
- provisional measures (Rule 47); and
- objections that a claim is manifestly without legal merit (Rule 41).

Since 2006, when ICSID first introduced an explicit early determination procedure in its rules, major commercial arbitral institutions including the Singapore International Arbitration Centre (**SIAC**), the Hong Kong International Arbitration Centre (**HKIAC**) and London Court of International Arbitration (**LCIA**) have followed with similar updates to their procedural rules.

Under the 2022 Arbitration Rules, an objection that a claim is manifestly without legal merit must be made no later than 45 days after the constitution of the tribunal and may relate to the substance of the claim, the jurisdiction of ICSID, or the competence of the tribunal. With a view to efficiency, the tribunal shall render its decision or award on the objection within 60 days of the later of the constitution of the tribunal or the last submission on the objection (Rule 41).

## **COSTS AND THIRD-PARTY FUNDING**

### **Security for Costs**

The 2022 Arbitration Rules include a new provision that, upon request of a party, a tribunal may order a party asserting a claim or counterclaim to provide security for costs. The factors to be considered by the tribunal include the relevant party's ability and willingness to comply with an adverse decision on costs and the conduct of the parties (Rules 53).

In addition, the 2022 Arbitration Rules make clear that in assessing the costs of the proceedings, the tribunal shall consider circumstances including the outcome of the proceedings, the conduct of the parties, complexity of the issues and reasonableness of the costs claimed (Rule 52).

### **Disclosure of Third-Party Funding**

Parties to arbitration under the 2022 Arbitration Rules shall be required to file a notice disclosing the identity and address of any third party which has provided funding for a claim or defence through a 'donation or grant, or in return for remuneration depending on the outcome of the proceeding', with the tribunal able to order disclosure of further information regarding the funding agreement and the third-party funder (Rule 14).

## ADDRESSING CRITICISMS OF ISDS

### Transparency

Seeking to address the criticism that ICSID proceedings lack transparency, the 2022 Arbitration Rules provide that:

- ICSID shall publish all awards unless a party objects in writing within 60 days of the date of the document's dispatch (Rule 62). Parties may agree, however, on redactions to the documents. Where the parties do not consent to publication of an award, ICSID shall instead publish excerpts;
- Similarly, ICSID shall publish orders and decisions issued in proceedings, with redactions to be agreed by the parties or otherwise determined by the tribunal (Rule 63);
- Parties may consent to the publication of any written submission or supporting document filed by a party in the proceedings, again with redactions agreed by the parties or determined by the tribunal (Rule 64);
- Third parties shall be permitted to observe hearings, absent an objection by a party (Rule 65); and
- Where the ICSID Secretary General or a tribunal are to decide on redactions, however, neither shall order the publication of 'Confidential or Protected Information', which includes 'confidential business information' (Rule 66).

### ADDITIONAL FACILITY RULES

The ICSID Arbitration (Additional Facility) Rules are broadly similar to the 2022 Arbitration Rules but provide for resolution of disputes that fall outside the scope of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (**ICSID Convention**). Under the 2006 Additional Facility Rules, that included arbitration of investment disputes between a State and a foreign national, one of which was not an ICSID Member State or a national of an ICSID Member State. The application of the 2022 Additional Facility Rules is broader, with the removal of the requirement that at least one party to proceedings be an ICSID Member State or a national of one. The number of cases heard pursuant to the Additional Facility Rules has been relatively small and consistent during the past decade<sup>1</sup>, but eventually numbers could increase if more investment treaties and contracts provide for arbitration pursuant to the latest rules.

### MEDIATION RULES

The 2022 Mediation Rules are entirely new and allow parties to enter into mediation administered by the ICSID Secretariat. Parties may utilise the 2022 Mediation Rules regardless of whether their dispute has been submitted to, or any applicable investment treaty provides for, ICSID arbitration. If the parties have not previously agreed to mediation pursuant to the 2022 Mediation Rules, a party may submit a request for mediation to the ICSID Secretary-General seeking the agreement of the other party.

Mediation under the 2022 Mediation Rules may be conducted before one or two 'impartial and independent' mediators appointed by the parties, either with or without the assistance of the Secretary-General. After the parties each have

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<sup>1</sup> See, for further detail, [ICSID Caseload Statistics, Issue 2021-2](#), at page 8.

filed a brief initial written statement with the Secretary-General, they shall meet with the mediator to agree a protocol for conduct of the mediation. Parties are provided with a significant degree of autonomy to shape the procedure of the mediation, which shall terminate in circumstances including where the parties have signed a settlement agreement, have otherwise agreed to terminate the mediation, or where the mediator has determined that there is no likelihood of resolution through the mediation.

## **CONCLUDING COMMENTS**

The 2022 ICSID Rules seek to address some of the common criticisms of ISDS. While the amendments are substantial, the 2022 ICSID Rules still do not provide emergency arbitrator powers for ICSID arbitrations. The rules do, however, allow requests for provisional measures and the tribunal must issue a decision on any request within 30 days after the later of the constitution of the tribunal or the last submission on the request. Some will see this as a significant omission in ICSID arbitration, especially if facing imminent expropriation or other harm. It may be that a treaty that provides recourse to a commercial arbitration institution whose procedural rules include emergency arbitration powers – such as the LCIA or Stockholm Chamber of Commerce (**SCC**) – may provide a significant advantage.

It remains to be seen the extent to which the updated rules will result in the greater transparency in ICSID proceedings that stakeholders have called for. Overall, however, the revisions should help to make ICSID arbitration more streamlined for parties and arbitrators alike. In seeking to address the major issues currently facing the arbitral process generally, while retaining characteristics of ICSID arbitration and promoting Investor-State mediation, the 2022 rules should support ICSID's attempts to strike an appropriate balance between the interests of investors and of States.

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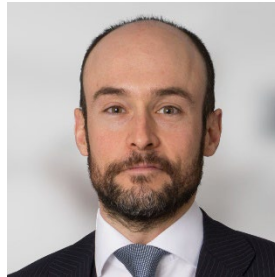
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