
ICSID reviews and approves new regulations and rules that modernize investment arbitration

ICSID is expecting to provide agility and transparency to the proceedings it administers and to keep its role as the leading institution in investor-State disputes

Legal flash

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Key aspects

- ICSID codifies widespread arbitral practice, especially on the use of technology and allowing holding virtual hearings
- The transparency of proceedings and rulings issued by arbitral tribunals is enhanced
- The parties must disclose the existence of third-party funders of the arbitration or conciliation
- The ICSID Additional Facility is amended to allow international organizations such as the EU to become parties to arbitration and conciliation proceedings
- The parties may resort to an "express" arbitration proceeding
- ICSID mediation is born, and the fact-finding proceeding is reviewed, which may be used independently or in support of arbitration



Context of the Regulations and Rules review and ICSID goals

On March 21, 2022, the International Centre for Settlement of Investment Disputes (“**ICSID**” or “the **Centre**”) approved its new Institution Rules (“**2022 Institution Rules**”), the new rules on conciliation (“**2022 Conciliation Rules**”) and arbitration (“**2022 Arbitration Rules**”); in addition to its new set of rules for its Additional Facility (“**2022 Additional Facility Proceedings**”), together “**2022 Procedural Rules**”. Although new Administrative and Financial Regulations have been approved (“**2022 Administrative and Financial Regulations**”), their amendment is of less interest for these purposes since it concerns the Centre’s internal organization (administrative and financial).

In the Centre’s words, the amendment aims “*to modernize, simplify, and streamline the rules*”.

- On the one hand, ICSID *modernizes* and *simplifies* its rules by building on widespread arbitration practices such as reducing the use of paper in favor of electronic means and facilitating communication between the parties through e-mail.
- On the other hand, the new rules aim to *streamline* arbitration and conciliation proceedings by shortening time limits and implementing procedures to speed up the dismissal of claims lacking legal merit.

In addition, ICSID has approved the regulations and rules for fact-finding proceedings (“**Fact-finding Rules**”) and for a new mediation proceeding (“**Mediation Rules**”).¹

When to expect their application?

The approved amendments will go into effect on **July 1, 2022**. From that date onwards, (i) mediation and fact-finding proceedings may be initiated; and (ii) proceedings initiated as of that date will be in accordance with the 2022 Procedural Rules, subject to the following singularities.

Specifically, the institution of new proceedings will be subject to the 2022 Institution Rules from July 1, 2022. However, for proceedings currently being conducted under the Conciliation Rules and Arbitration Rules in force since 2006, Articles 33 and 44 of the ICSID Convention apply; according to both provisions, the applicable Conciliation and Arbitration Rules are those in force “*on the date on which the parties gave their consent*”. This date is determined differently, depending on the type of claim involved. Thus:

¹ The new regulations and rules may be found on <https://icsid.worldbank.org/resources/rules-amendments>.



- in contract-based claims, the relevant date will be the one in the conciliation or arbitration agreement that is part of the contract; therefore, the new rules will only apply to disputes arisen from contracts entered into after July 1, 2022.
- in claims under an investment protection treaty, consent is given when an investor accepts the State's offer to arbitrate by submitting a request for arbitration; consequently, the new rules will apply to disputes in which the request for arbitration be submitted after July 1, 2022.
- the proceedings for annulment (article 52 of the ICSID Convention), revision (article 51 of the ICSID Convention), interpretation (article 50 of the ICSID Convention) and supplementary decisions and rectification (article 49(2) of the ICSID Convention) (all of which are procedural issues subsequent to the issuance of the award) will be administered according to the rules in force when the proceeding was instituted.

Finally, from the administrative and financial point of view, the 2022 Administrative and Financial Regulations will automatically apply to ICSID proceedings already instituted.

In light of the foregoing, the new procedural rules' entry into force does not entail that the current procedural rules will be automatically replaced, but rather both set of rules are intended to coexist for several years. Besides, we must consider that the parties may, as per articles 33 and 44 of the ICSID Convention, decide on the application of the 2022 Procedural Rules in any event.

New features of the 2022 Procedural Rules

As advanced, the 2022 Procedural Rules' entry into force does not make them automatically applicable to all ICSID conciliation or arbitration proceedings. The only amendment that will necessarily be applied after their entry into force affects **2022 Institution Rules**, in particular the conversion of the case filing process to an electronic format (the still in force Rule 4 required the delivery of five signed copies) and to the content of the request, which will have to be more detailed (e.g., it will have to include a summary of the relevant facts and claims and the request for relief, including an estimate of the amount of any damages sought).

2022 Arbitration Rules

The 2022 Arbitration Rules incorporate several changes that form the bulk of the new features approved by ICSID. We will divide their presentation into five aspects:

(a) Codification of the arbitral doctrine and practice



The 2022 Arbitration Rules codify issues that, although observed by Arbitral Tribunals in ICSID proceedings, had not been addressed in the Centre's rules. In particular, they now regulate:

- the circumstances that the Tribunal shall consider in **allocating the costs** of the proceedings between the parties (Rule 52, "*Decisions on Costs*");
- the circumstances that the Tribunal shall consider in determining whether to decide on a question on a separate phase of the proceeding, such as its jurisdiction over the merits of the case, or liability *versus* damages (Rule 42, "*Bifurcation*"); and
- additional relevant circumstances that the Tribunal shall consider in its decision on a request for leave to intervene as an *amicus curiae* or as a Party to an investment protection treaty that is not a disputing party in the arbitration, as well as the procedure to be followed depending on the subject matter of its brief; thus, current Rule 37(2) is split into two (Rule 67, "*Submission of Non-Disputing Parties*" and Rule 68, "*Participation of Non-Disputing Treaty Party*").

(b) Streamline the proceedings

The amendments aimed to "*streamline the rules*" consist of either shortening time limits or speeding up the termination of certain proceedings that are likely to conclude on a dismissal. In particular:

- The time limit for the parties to agree on the number of arbitrators to form the Tribunal and the method of appointment is shortened from 60 to 45 days (Rule 15, "*Method of Constituting the Tribunal*").
- The time limit for instituting the discontinuance proceeding is shortened from six months to 150 consecutive days (Rule 57, "*Discontinuance for Failure of Parties to Act*").
- There still is, although treated separately, a proceeding for **manifest lack of legal merit** of a claim, which the Respondent may file no later than 45 days after the constitution of the Tribunal and which may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal (Rule 41, "*Manifest Lack of Legal Merit*", Rule 41(5) in the version in force). This proceeding will coexist with the classic jurisdictional objections, which are limited to objections on jurisdiction and competence (now Rule 43, "*Preliminary Objections*").

A new rule compels the Tribunal, in the event it fails to comply with its time limits, to notify the parties of the special circumstances justifying the delay and the date on which it expects to render the order, decision or award (Rule 12, "*Time Limits Applicable to the Tribunal*"). For the first time, the Center also sets express time limits to render the award, counted from the last submission of the parties (Rule 58, "*Timing of the Award*").

(c) New powers

Other amendments grant new powers to the parties and to Arbitral Tribunals:



- Arbitral Tribunals may order any party asserting a claim or counterclaim to provide security for costs, under penalty of suspending the proceeding and eventually of ordering its discontinuance (Rule 53, “*Security for Costs*”), treating this security expressly and separately from any provisional measure for which applications have already been filed.
- Arbitral Tribunals will be allowed to appoint independent experts, unless otherwise agreed by the parties and upon consultation to them (Rule 39, «*Tribunal-Appointed Experts*»).
- Parties will be allowed to **consolidate or coordinate arbitrations** administered by the Centre, por el Centro, in accordance with the conditions they establish (Rule 46, «*Consolidation or Coordination of Arbitrations*»).

(d) Transparency

Other amendments are aimed to increase transparency, both outwards and inwards the proceedings.

- *Outwards the proceedings*, the amendments enhance the publicity of decisions: the general rule becomes the publication of all decision with the consent of the parties, with redactions if necessary to protect confidential information. The parties may oppose publication in the time limit of 60 days, in which case only excerpts will be published as per the Secretary-General’s proposal (Rule 62 “*Publication of Awards and Decisions on Annulment*” and Rule 63 “*Publication of Orders and Decisions*”).
- *Inwards the proceedings*, parties are compelled to file written notice to the Secretary-General if they receive **third-party funding** (Rule 14, “*Notice of Third-Party Funding*”). This will be shared with the other parties and with the arbitrators. In particular, an Arbitral Tribunal will have to consider this circumstance in an eventual request to provide security for costs, but will not necessarily have to grant that request.

(e) Expedited Arbitration is born

The 2022 Arbitration Rules also create Expedited Arbitration, a procedural modality with shortened time limits and less procedural steps and to which the parties may consent at any moment:

- The **procedural schedule** is determined by the 2022 Arbitration Rules: Expedited Arbitration would be concluded no later than **290 days** after the constitution of the Arbitral Tribunal and the Award would be issued no later than 120 days after the conclusion of the hearing (Rule 81, “*Procedural Schedule in Expedited Arbitration*”).
- There are limits to the extension of the written submissions: 200 pages for the memorial and counter-memorial, and 100 pages for the reply and the rejoinder (Rule 81).
- In the event that this modality applied to an **interpretation, revision or annulment** proceeding, the procedural calendar would be even shorter: the Expedited Arbitration would conclude no later than 135 days after the constitution of the Arbitral Tribunal and the Award would be rendered no later than 60 days after the



conclusion of the hearing. Besides, the written submissions will be limited to 100 pages, and no reply or rejoinder will be allowed (Rule 84, “*Procedural Schedule for Interpretation, Revision or Annulment in Expedited Arbitration*”).

Expedited Arbitration is subject to the consent of both parties (Rule 75) and, in a way, of the members of the Tribunal, who shall confirm their availability. The parties may withdraw their consent and opt out of this modality; if there is no agreement, the Tribunal will decide (Rule 86).

2022 Conciliation Rules

The 2022 Conciliation Rules have also been subject to a series of significant changes that may be summarized as follows:

- **Confidentiality.** Although the current conciliation proceedings are already confidential (as per the initial declaration of the conciliators and the privacy and secrecy of their meetings), the amendments reinforce it by preventing the parties from using views expressed, statements, offers of settlement, or reports in other proceedings (Rule 10, “*Use of Information in Other Proceedings*”).
- **Legal certainty.** The amendments set a time limit for any of the parties to challenge the jurisdiction of the Conciliation Commission. In this regard, unlike the current rules (under which a party is only obliged to raise jurisdictional objections “*as early as possible*”), the 2022 Conciliation Rules establish a time limit of 30 days after the constitution of the Commission (Rule 33, “*Preliminary Objections*” in relation with Rule 30, “*Written Statements*”).
- **Simplicity.** The 2022 Conciliation Rules reduce some formalities (such as by unifying the preliminary procedural consultation and the objections to jurisdiction) and erase any reference to the possible participation of witnesses and expert witnesses on the proceedings.

The 2022 Conciliation Rules contain an identical provision to the 2022 Arbitration Rules in regard with the duty to file a notice disclosing third-party funding (Rule 12, “*Notice of Third-Party Funding*”).

Changes to the Additional Facility

The ICSID Additional Facility was created in 1978 to extend ICSID's jurisdiction to cases where one of the conditions set out in Article 25 of the ICSID Convention is not met. Typically, when the State party to the dispute or the State of which the investor is a national was not a Contracting State to the Convention.



From July 1, 2022 onwards, the Additional Facility expands its competence and will also be applicable to those cases in which neither the State party to the dispute nor the State of which the investor is a national are Contracting States to the Convention, as well as those cases in which a Regional Economic Integration Organization ("REIO"), such as the European Union, is a party to the dispute.

The Regulations and Rules for ICSID Additional Facility Proceedings are influenced by their equivalents under the ICSID Convention, so we refer to previous paragraphs. However, the 2022 Additional Facility Proceedings show some singularities:

- *First*, proceedings under the 2022 Additional Facility Proceedings will be governed by the procedural rules in force at the time the request is submitted, unless otherwise agreed.
- *Second*, both the 2022 Additional Facility Arbitration Rules and the 2022 Additional Facility Conciliation Rules allow parties to **modify the application** of any of these Rules other than the ones governing the institution of the proceeding.
- *Third*, a new rule under the heading "*Confidential or Protected Information*" defines in which cases the information present in arbitration proceedings must not be published.

New ICSID proceedings: fact-finding and mediation

Besides amending its Regulations and Rules, ICSID has adopted two new proceedings of different nature that may be used either on their own or in support of an arbitration proceeding.

Fact-finding proceedings

The Fact-Finding Proceedings was regulated under the 2006 ICSID Additional Facility Rules and therefore limited to proceedings under those rules. However, as of July 1, 2022, investors and States will be able to request under ICSID rules that impartial third parties undertake investigations about facts relating to an investment involving a State or REIO that the parties have consented in writing to submit to ICSID. To this end, a Fact-Finding Committee will be constituted in a way similar to arbitral tribunals or conciliation commissions.

The proceeding main particularity is its **flexibility**. The Fact-Finding Rules expressly recognize that the parties may agree to modify the application of the Rules, other than the general provisions and the rules relating to the proceeding's institution. Likewise, the mandate of the Committee will depend entirely on the parties: to this effect, within 15 days of the



constitution of the Committee, the parties shall file their preliminary written statements addressing, among others, on the scope of the investigation.

The proceedings will be confidential in the same terms as the 2022 Conciliation Rules, so no party will be able to rely in other proceedings on any view expressed by neither the parties nor the members of the Committee.

The procedure will terminate, unless discontinuance or agreement, upon the issuance of a **Report by the Committee** the effects of which are subject to the parties' discretion. The Report may contain an indication of a party's failure to participate or cooperate.

Unless the parties agree otherwise, the fees and expenses of the Committee and the Centre will be borne equally, and each party will bear their own costs.

Mediation

Investors and States will be able to institute a mediation under ICSID Rules, either under a prior written agreement or by filing a request with an offer to the other party to mediate.

The mediation shall be submitted to one or two mediators, who shall be appointed by agreement or, in its absence, by the Secretary-General of the Centre after consultation with the parties. In line with the functions of the mediator, its role will be to assist the parties in finding a solution to the dispute, but without the authority to impose a resolution. The mediator may also make oral or written recommendations and may even, prior agreement between the parties, be assisted by an expert witness.

Besides participating in the meetings that the mediators deem convenient, to which all or some of the parties may assist, there are not many procedural actions to be taken by the parties. In this sense, the rules only account for some brief initial written presentations to describe the dispute and a first session to determine the protocol for the processing of the mediation, in which only procedural issues are dealt with.

The proceeding will be confidential and will terminate after issuing a notice of termination upon the parties signing a settlement agreement; reaching an agreement to terminate the mediation or a withdrawal from any of them, without the other opposing; or a determination by the mediator that there is no likelihood of resolution through the mediation. Said notice shall contain a brief summary of the procedural steps, any agreement of the parties, and the basis for termination.

Unless the parties agree otherwise, the fees and expenses of the mediator and the Centre will be borne equally, and each party will bear their own costs.



Conclusion

The amendments described above constitute major changes to the way ICSID conciliation and arbitration proceedings are now conducted. The new ICSID arbitration is expected to be more streamlined and transparent and less adversarial. Parties should seriously consider adopting expedited arbitration to save time and costs and could combine it with mediation or fact-finding.

In any case, the conduct of the procedure will depend on its circumstances, so any recommendation should be accompanied by a bespoke analysis of the present or future dispute.

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