

Kluwer Arbitration Blog

Some Highlights of the Amended ICSID Arbitration Rules

Antonio R. Parra (Consultant, World Bank) · Thursday, May 26th, 2022

On 21 March 2022, the Administrative Council of the [International Centre for Settlement of Investment Disputes](#), or ICSID, approved [extensive amendments](#) of ICSID's Regulations and Rules. The Regulations and Rules prominently include the rules of procedure for arbitration proceedings initiated under the constituent treaty of ICSID, the [1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States](#). These rules of procedure are commonly called the ICSID Arbitration Rules. They have governed most of the many so-called ISDS cases—investor-State arbitrations initiated pursuant to international investment agreements, or IIAs—that have been brought during the last three decades.

The recently approved amendments have thoroughly overhauled the ICSID Arbitration Rules. This post examines some highlights of the amended Arbitration Rules. It looks at amended Arbitration Rules 14, 23, 41, 53, and 62. These have introduced improvements in the system of investor-State arbitration under the ICSID Convention while remaining within the broad and mostly flexible confines of that system (since amendments of the ICSID Convention itself are exceedingly difficult to make, requiring ratification by all States parties to the Convention, which now number 156).

[Amended ICSID Arbitration Rule 14](#) is a new provision on third-party funding. It will obligate parties to disclose the name and address of any non-party funding their participation in the proceeding. The disclosure requirement will apply throughout the proceeding. Potential or serving arbitrators are to be informed, to enable them to avoid inadvertent conflicts of interest. While not extending the disclosure requirement to the funding agreement, the amended rule provides that the arbitral tribunal may order the funded party to divulge “further information” regarding the agreement. (For an extensive analysis of risks of requiring the disclosure of third-party funding agreements, see [here](#).)

Under the ICSID Convention, a challenge of an arbitrator for lack of independence, or ineligibility to serve on the arbitral tribunal, is to be decided by the other members of the tribunal unless they are evenly divided, in which case the challenge will be decided by the Chairman of the Administrative Council (the President of the World Bank). [Amended ICSID Arbitration Rule 23](#) should temper this much-criticized feature of the system of the ICSID Convention, of having the possible disqualification of a member of a tribunal normally determined by his or her colleagues on the tribunal. In accordance with amended Rule 23, the other members of the tribunal will, if they are unable to decide the challenge “for any reason,” be deemed to be “equally divided” for the purpose of the ICSID Convention, with the result that the challenge will instead be decided by the Chairman of the Administrative Council. (For a blog noting the problematic “optics of relying on

arbitrators for a neutral ruling on their colleague’s challenge,” see [here](#).)

The [2006 amendments of the ICSID Arbitration Rules](#) provided an innovative procedure for the early dismissal of claims manifestly lacking legal merit. In cases in which the procedure was invoked, it was seen as covering claims that were unsustainable from the jurisdictional as well as the substantive viewpoint, even though this was not clear from the 2006 provision. Newly [amended ICSID Arbitration Rule 41](#) eliminates the ambiguity, making it clear that the procedure allows for the early dismissal of claims that are manifestly ill-founded as to jurisdiction.

The ICSID Convention authorizes arbitral tribunals to issue provisional measures to preserve the respective rights of either party. Tribunals have commonly been requested to exercise this authority to order a party to provide security for costs. But the requests have seldom been granted. In several cases, this was because the tribunals considered that they could not issue provisional measures in respect of rights that were hypothetical or to be created only in the event of the requesting party prevailing in the arbitration. [Amended ICSID Arbitration Rule 53](#) confirms the power of an arbitral tribunal to order a party to post security for costs as a stand-alone authority, separate from the power to grant provisional measures. The amended rule also affirms that the tribunal may discontinue the proceeding in the event of non-compliance with such an order to furnish security.

In accordance with the ICSID Convention, the Centre may not publish an award without the consent of the parties. The earliest amendments of the ICSID Arbitration Rules, in 1984, included one permitting ICSID, even in the absence of consent of the parties, to publish excerpts of the legal holdings of an award. Such publication by ICSID of award excerpts was made mandatory when the provision was again amended in 2006. Newly [amended ICSID Arbitration Rule 62](#) takes the bold further step of deeming the parties to have given their consent to the publication of the entire award by ICSID if neither objects within 60 days after the dispatch of the document. The amended rule should help to foster greater consistency among arbitral awards by assuring the wider dissemination of their full contents.

In 2018, at the outset of its current efforts on the reform of ISDS in general, [Working Group III](#) of the United Nations Commission on International Trade Law identified various concerns as meriting the development of reforms. Several of the identified concerns have been addressed in these amended ICSID Arbitration Rules: concerns pertaining to third-party funding, concerns over the adequacy of mechanisms to deal with challenges of arbitrators and unmeritorious claims, concerns about security for costs, and concerns regarding inconsistency of investment awards.

A challenge for Working Group III has been to bring reforms in these and other areas to bear on proceedings under the very large number pre-existing IIAs. This problem, however, has had limited relevance in the ICSID ISDS context. The Arbitration Rules applicable to the conduct of an ICSID Convention arbitration proceeding are, unless the parties agree otherwise, those in effect on the date of the parties’ consent to arbitration. When the parties consent on different days, the date of consent is the date on which the second party acts. Thus, to determine the applicable version of the ICSID Arbitration Rules—in an ICSID Convention ISDS case—the date of the consent of the parties will normally be the date of the investor’s consent, which will ordinarily be given on or soon before submitting the case to ICSID. In other words, ICSID Convention ISDS proceedings initiated after the adoption of amendments of the ICSID Arbitration Rules are, in general, subject to the rules as amended, irrespective of the date of the underlying IIA containing the consent to arbitration of the State.

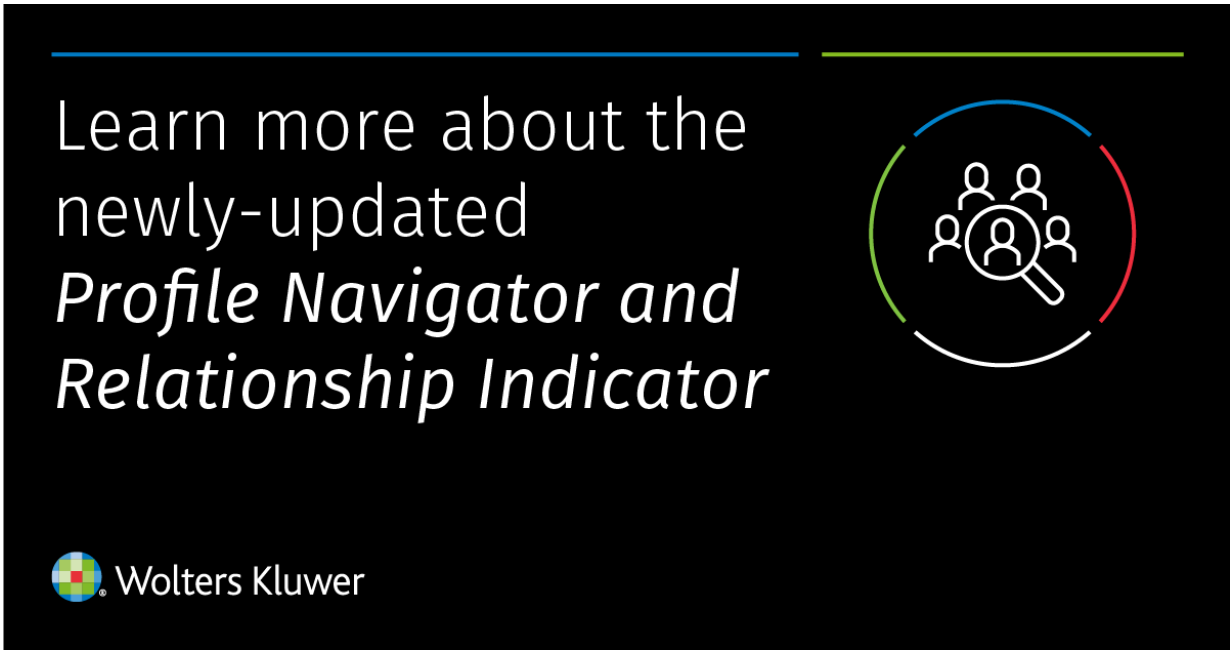
Along with the other amended Regulations and Rules, the newly amended ICSID Arbitration Rules will come into force at the start of the next fiscal year of ICSID, on 1 July 2022. They generally will apply to all ICSID Convention ISDS proceedings initiated on or after that date. Responding to widely shared concerns about ISDS in several areas, the now concluded process of amending the ICSID Arbitration Rules is therefore poised for immediate implementation.

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