

International Arbitration Focus Team

October 2019

The revised proposals for amendment of the ICSID Rules**International Arbitration Focus Team***Focus Team Leader*

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1. Introduction

On 16 August 2019, ICSID issued for the third time its proposals for amendment of its rules. The document, titled “Working Paper #3: Proposals for Amendment of the ICSID Rules”, is the result of extensive consultations with Member States and the public, including legal practitioners, academics, and NGOs.

The proposals aim to respond to the main challenges and criticism of the ICSID system in the last decades, such as those relating to transparency in the conduct and outcome of proceedings, disclosure of third-party funding and related security for costs issues, independence and impartiality of arbitrators, and the duration of proceedings.

We set out below an overview of the background to the proposed changes, shedding light on the most significant amendments.

2. The process of reform of the ICSID Rules

In 2016, ICSID launched a process to update its procedural rules for the settlement of investor-State disputes. This reform consists of amending the rules governing arbitration and conciliation under the ICSID Convention and ICSID Additional Facility, as well as the drafting of stand-alone rules for fact-finding and mediation in investment disputes. ICSID invited, first, Member States, and then the public to suggest topics that merited consideration in their view. ICSID issued the first set of proposed amendments (Working Paper #1) on 2 August 2018, and the second one (Working Paper #2) in March 2019. According to the Centre, the fact that there are significantly fewer changes in Working Paper #3 than in the prior working papers reflects a **developing consensus** on the amendments through the consultation process.

3. The steps ahead

Member States will meet on 11-15 November 2019 to consult and discuss the updated text. Thereafter, the amended rules will have to be placed before the Administrative Council of ICSID for a vote. The approval of two-thirds of the representatives of Member States is required for amendments to be adopted.

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4. The main changes:

a. Time limits

Proposed Arbitration Rule 10 provides that the arbitral tribunal (or the Secretary-General of ICSID, if applicable) shall fix the time limits for the completion of each procedural step in the proceeding, other than time limits prescribed by the Convention or the Arbitration Rules.

Draft Arbitration Rule 11(1) states that the time limits established by the ICSID Convention to request rectification, revision, or annulment of the award (under Articles 49, 51 and 52) cannot be extended. Consequently, any application or request filed after the expiry of such time limits shall be disregarded by the tribunal.

The tribunal may grant an extension upon **reasoned application by either party** made prior to the expiry of the time limit. Accordingly, any procedural step taken or document received after the expiry of such time limit shall be disregarded, unless the tribunal concludes that there can be **special circumstances justifying the failure to meet the time limit**.

The proposed amendments also cover the time limits applicable to the arbitrators tasks. Draft Arbitration Rule 12 states that the tribunal shall use best efforts to meet all applicable time limits to render orders, decisions and the award, and, moreover, in case of impossibility to comply with an applicable time limit, it shall advise the parties of the **special circumstances that justify the delay and the date when it anticipates rendering the order, decision or award**.

The commentary to this specific provision clarifies that the Centre will **track compliance** with this rule on its website and payment of arbitrator invoices will be postponed if an order, decision or award is not rendered in accordance with the relevant time lines.

In comparison to the arbitration rules currently in force, namely under Rule 26, the regulation of time limits provided by the amendment proposals is **more detailed** and, notably, **sets more stringent constraints on the possibility of dilatory behaviour** in the arbitration by the parties and the tribunal itself.

b. Third-Party Funding and security for costs

The draft amendments contain provisions on third-party funding (absent in the ICSID Arbitration Rules currently in force). This is found under proposed Arbitration Rule 14, which states that **any party shall file a written notice disclosing the name of any third-party funder**, namely any non-party from which the concerned party, its affiliate or its representative has received funds or equivalent support for the pursuit or defense of the proceeding. Third-party funding may have the form of a

donation or grant, or funds given in return for remuneration dependent on the outcome of the dispute.

The notice of disclosure shall be filed with the Secretary-General upon **registration of the request for arbitration**, or, in case of subsequent third-party funding arrangement, **immediately upon the stipulation** thereof.

In addition, the concerned party shall immediately notify the Secretary-General of any changes to the information contained in the notice of disclosure.

Importantly, the third-party funding information shall be considered by arbitrators when rendering their declaration of independence and impartiality.

Provisions on the mandatory disclosure of third-party funding (including about the identity of the funder) have been already adopted by the CIETAC Investment Arbitration Rules under Article 27(2), the HKIAC Administered Arbitration Rules under Article 44, the SIAC Investment Rules under Rule 24(l), and the CAM Rules (Milan) under Article 43.

The draft amendments also refer to third-party funding in the regulation of security for costs, which is addressed under the proposed Arbitration Rule 53. According to the revised proposals, the arbitral tribunal, when determining whether to order a party to provide security for costs, shall consider **all relevant circumstances**. In this respect, the tribunal **may** consider third-party funding as a relevant circumstance, **but the mere existence of third-party funding is not sufficient, in and of itself, to justify an order for security for costs**.

c. Independence, impartiality, and disqualification of arbitrators

Responding to comments from a number of States, Working Paper #3 retains the **declaration of impartiality and independence** that arbitrators would have to make, which was already proposed in earlier versions of the suggested amendments. The declaration provides a list of expanded disclosures and pledges, and emphasizes the concept of impartiality, in addition to the current rules' focus on independence. In the future, the declaration may work in conjunction with an arbitrators' Code of Conduct, which ICSID and UNCITRAL are currently working on.

Working Paper #3 retains the suggested procedures for seeking to disqualify arbitrators, which were proposed in earlier drafts.

The proposed amendments add a clearer timeline to the disqualification procedure.

While Working Paper #1 had suggested that the **automatic suspension of arbitral proceedings** pending a challenge to an arbitrator should be lifted, Working Paper #2 and #3 abandoned this proposal, after many States voiced concerns about the continued participation of a challenged arbitrator in the proceedings.

However, the latest amendments reject suggestions made by some States that witnesses and experts presented by the parties sign a similar declaration of independence and impartiality.

ICSID noted that, in reality, witnesses are often not independent (e.g. state officials testifying in support of the government’s position), and that experts are paid by parties. The real check on the credibility and accuracy of witnesses and experts is the cross-examination process.

d. Transparency

Article 48(5) of the ICSID Convention prevents the Centre from publishing an arbitral award, “without the consent of the parties”. In practice, this means that the **majority of ICSID awards remain unpublished**. Over the years, ICSID faced criticism for lack of transparency, which meant that the task of finding a balance between confidentiality, one of the tenets of arbitration as a dispute settlement mechanism, and transparency, was one of the goals of the amendment project. The difficulty of this task can be seen in the development of the proposed amendments.

Working Paper #3 proposes that a party will be **deemed to have given its consent** to publish if it does not object in writing within 60 days.

A similar proposal was included in Working Paper #1 but was then struck out from Working Paper #2. It should be noted that even where consent is not granted, ICSID currently has the authority to publish excerpts from the award. While such excerpts only refer to “the legal reasoning of the Tribunal”, Working Paper #3 allows the Center to publish **excerpts of “the documents”**, leaving a wider room for interpretation of what such excerpts may include. ICSID’s comments suggest that this reflects current practice. Working Paper #3 also suggests a change to the process for deciding on which excerpts to publish. The new rules grant the Secretary General 60 days to prepare the excerpts, following which the parties have 60 days to provide their comments, which shall not be obligatory.

The proposed rules give the Secretary General the discretion to consider these comments and decide what to publish within 30 days of receiving the parties’ comments, which puts the timeline of publication around 7 months from the issuance of the award.

Notably, ICSID has clarified that the parties’ power to object to publication does not extend to other decisions or orders, and that it is only limited to the award. The proposed rules give ICSID the **right to publish all other orders and decisions**, merely giving the parties a limited authority to jointly agree on redactions.

The **proposed rules also reduce the parties’ power to object to open hearings**, i.e. attendance of hearings by the public. While current Arbitration Rule 32(2) allows the parties to veto external attendance, the proposed rules leave the ultimate decision to the arbitral tribunal, requiring it simply to consult with the parties. This proposal, however, is

narrower than earlier proposals, which tilted even more towards open hearings.

In all cases, the tribunal must protect confidential information, which Working Paper #3 has now defined in detail, providing tribunals with guidance in their decisions on excerpts and open hearings.

5. Conclusions

As of 30 June 2019, ICSID had registered in its history 728 investment cases under the ICSID Convention and Additional Facility Rules. Based on this unique experience and through the modernization of its rules, **ICSID** seeks to enhance **its international reputation, legitimacy, and credibility**.

The current amendment proposals have been welcomed by ICSID Secretary-General Meg Kinnear as constituting “*tremendous progress since publishing the first working paper almost exactly a year ago*”.

It remains to be seen whether the amendments, once finally adopted, will significantly diminish the criticism that investor-State arbitration has attracted in recent years.



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The Focus Team is a constellation of skills in different practice areas with a focus on International Arbitration.

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