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A New Chapter for ICSID: 4 Key Amendments to the ICSID Rules

ICSID Member States approve long-awaited update to ICSID rules and regulations.

On 21 March 2022, the International Centre for Settlement of Investment Disputes (ICSID) Member States approved a long-awaited update to the ICSID rules and regulations, concluding perhaps the most extensive amendment process in ICSID's 56-year history. The amendments will come into effect on 1 July 2022 and will apply to arbitrations commenced from that date onwards.

The ICSID rules and regulations are the most commonly used rules of procedure in investor-State arbitration, and the comprehensive amendments have been hailed as a significant step forward in investor-State arbitration.

This *Client Alert* focuses on four key amendments that will likely have significant effects in practice. These include: (1) relaxed jurisdictional requirements; (2) a new requirement to set out the ownership and control of an investment in the request for arbitration; (3) new disclosure requirements for third-party funding; and (4) new rules for security for costs.

1. Relaxed jurisdictional requirements

Amendments to the ICSID Additional Facility Rules significantly expand ICSID's ability to administer arbitration and conciliation proceedings, including when none of the parties to the dispute is an ICSID Member State or a national of an ICSID Member State, or when a Regional Economic Integration Organization (REIO) is a party to the dispute.

This is a fundamental change as it extends access to ICSID arbitration and conciliation to non-ICSID Member States (including India, Brazil, and South Africa) and their nationals as well as to REIOs (notably, including the European Union). These parties, which would have typically been limited to using rules of commercial arbitration, may now select ICSID arbitration as the primary dispute resolution mechanism in their investment laws, contracts, and treaties.

2. New requirement to set out the ownership and control of an investment

While a request for arbitration previously only had to contain information concerning the issues in dispute, indicating that there is a dispute arising directly out of an investment, the new rules are more specific. In particular, the request for arbitration now has to include "a description of the investment and of its ownership and control".

Claimants with complex investment structures will thus no longer be able to merely list various assets in the request, and only in the course of the further proceeding provide an explanation of how those assets are attributable to the claimant investor. This will permit both ICSID and respondent States to assess whether the invoked assets qualify as the claimant's investment and will likely enable an earlier resolution of issues of jurisdiction *ratione materiae*, possibly already in the registration phase.

3. New disclosure requirements for third-party funding

ICSID has included an amendment to address third-party funding. The funded party has to disclose the name and address of any non-party from which it receives funding as soon as possible.

The scope of this new obligation appears to be broad in nature as it covers parties who have received "a donation or grant, or in return for remuneration dependent on the outcome of the proceeding" from a non-party, whether it was received "directly or indirectly". It also requires disclosure of the names of the persons and entities that own and control a funder. Time will tell whether this will be interpreted to include after the event insurance or more novel funding arrangements.

As a general rule, this new obligation does not require disclosure of the funding agreement and its terms and conditions. However, ICSID tribunals have the authority to order the disclosure of this information if it is relevant in the circumstances, including details of the funding agreement or the funder's history of cases against the same States.

The addition of a disclosure requirement for third-party funding was important to a number of ICSID Member States during the amendment process. Several ICSID Member States had expressed concerns that third-party funders were hiding their identities behind complex corporate structures, making it difficult to identify potential conflicts of interest for arbitrators. With this in mind, the amendment presents a sensible solution in that the name of an involved funder must now be provided to potential arbitrators as early as possible to avoid inadvertent conflicts of interest.

4. New rules for security for costs

One of the most important amendments to the ICSID rules is the introduction of a provision on security for costs. Tribunals previously recommended security for costs as provisional measures under Article 47 of the ICSID Convention and ICSID Arbitration Rule 29. They typically did so in exceptional circumstances, and the absence of a more specific basis to order security for costs appeared to result in a general reluctance of tribunals to use their powers.

ICSID has now included a detailed rule allowing a tribunal to order any party asserting a claim or counterclaim to provide security for costs. The rule provides a procedural timetable to decide a request for security for costs, with an illustrative list of circumstances to consider in the tribunal's decision-making process. Importantly, it also regulates the consequences of a failure to comply with an order for security for costs (suspension and ultimately discontinuance of the arbitral proceedings).

The new provision on security for costs does not contemplate a tribunal ordering a respondent State to provide security for costs (unless that State has filed a counterclaim). However, tribunals could consider making an order for security for costs against the claimant investor contingent on the respondent State also providing security for the claimant's costs.

Parties (and any third-party funders) can likely mitigate the risk of orders for security for costs by taking out after the event insurance that includes any costs the party has to reimburse the other side.

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