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Key amendments to the ICSID Arbitration Rules

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I. Introduction

International commercial arbitration has become a standard and familiar dispute resolution alternative both within Japan and by Japan-based parties doing business abroad. However, investor-state arbitration, which is a system for resolving disputes between private parties and sovereign states, usually pursuant to the terms of a bilateral or multi-lateral trade treaty – is still relatively uncommon in Japan. Having said that, there has been a slow rise in the number of such cases being reported in recent years and based on regional and global trends, it is expected that cases initiated both by Japanese companies regarding their overseas investments and foreign investors against the government of Japan are likely to increase.

With this in mind, Japanese companies doing business abroad and foreign companies doing business in Japan should be aware that the International Centre for Settlement of Investment Disputes ("**ICSID**") — a leading arbitral institution for investment treaty arbitration – has enacted extensive amendments to its Rules governing disputes (the "**Amended Rules**"). Last amended in 2006 (the "**2006 Rules**"), the latest amendments were approved by the member states on March 21, 2022, and came into force on July 1, 2022.

With regard to the Amended Rules, Mr. David Malpass, the Chair of ICSID Administrative Council, explained that "*The amended rules streamline procedures to enable greater access and speed, increase transparency, and enhance disclosures, with the ultimate goal of facilitating foreign investment for economic growth.*[1]"

In this newsletter, we have highlighted some of the important changes brought about through the Amended Rules.

II. Key Amendments

[1] https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules

1. Transparency

In order to promote transparency to the process, the Amended Rules provide for a detailed set of rules on public disclosure of tribunal decisions. More specifically, ICSID must publish -- with the consent of the parties -- every arbitral award, supplementary decision on an award, rectification, interpretation and revision of an award, as well as decisions on annulment (Rule 62(1)). In relation to this publication, unless a party objects within 60 days after the dispatch of the award, the party is deemed to have consented to its publication (Rule 62(3)).

Delving further, written submissions and supporting documents filed by the parties in a proceeding may also be published by ICSID but only upon the consent of the parties' (Rule 64). Unlike the decisions issued by the tribunal referred to in the preceding paragraph, such consent must be explicit.

As explained above, the amended Rules intend to increase the transparency of ICSID proceedings by encouraging the publication of decisions issued by the arbitral tribunal; however, such principles are applied more conservatively in relation to the publication of the parties' submitted materials.

2. Required disclosure of third-party funding

The Amended Rules also provide for new disclosure rules regarding third-party funding.

More specifically, a party must file a written notice disclosing the name and address of any third-party funder from which the party, directly or indirectly, has received funds for the proceeding. Also, if such a third-party funder is a juridical person, such notice must include the names of the persons and entities that own and control that juridical person (Rule 14(1)). The tribunal can order disclosure of further information regarding the funding agreement and the third party providing funding (Rule 14(4)).

These new requirements on disclosure of third-party funding follow years of discussions and the role of funders in international arbitration and correspond to the enactment of regulations in the institutional arbitration rules for commercial arbitration (e.g., Article 44 of the 2018 HKIAC Administered Arbitration Rules).

3. Clear timelines for initiating action

The Amended Rules set out several new timelines for arbitration proceedings, as follows:

- An arbitral award needs to be rendered within 240 days from the last submission (Rule 58(1)).

- An application to disqualify an arbitrator must be filed within 21 days after the later of: (a) the constitution of the tribunal; or (b) the date on which the party proposing the disqualification first knew or first should have known of the facts on which the application is based (Rule 22 (1)).

- An objection to a claim which is "manifestly without legal merit" must be made within 45 days of the constitution of the arbitral tribunal (Rule 41) and a request for bifurcation, in general, must be filed within 45 days after filing the memorial on the merits (Rule 44).

All of these timelines appear to be oriented toward clarifying and expediting arbitral proceedings.

4. Expedited Arbitration

The Amended Rules introduce expedited arbitration procedures (Chapter 12).

While expedited arbitral proceedings under other major arbitral institutions typically apply by default when the amount in dispute is below a designated threshold, that is not so under the Amended Rules. Rather, the expedited proceedings under the Amended Rules apply only if the parties consent, which they can do at any time of the proceedings (Rule 75).

Should the parties choose expedited arbitration, the rules provide that the tribunal may consist of either a sole arbitrator or a three-member tribunal. However, if the parties do not reach an agreement as to the number of arbitrators, the dispute will be decided by a sole arbitrator (Rule 76). The Amended Rules provide relatively detailed timelines for the expedited arbitration to resolve the dispute. For example, the arbitral award needs to be rendered within 120 days after the hearing, etc. (Rule 81).

5. Additional measures

(i) Cost allocation

The ICSID Rules provide authority to the arbitral tribunal to award costs. However, the 2006 Rules did not explicitly set forth what factors the arbitral tribunal must consider in determining allocation of costs. The Amended Rules provide that the arbitral tribunal must consider all relevant circumstances, including the following factors:

(a) the outcome of the proceeding or any part of it;
(b) the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost effective manner and complied with the rules and the orders and decisions of the tribunal;
(c) the complexity of the issues; and
(d) the reasonableness of the costs claimed (Rule 52).

An arbitral award needs to contain a reasoned decision on costs (Rule 59).

(ii) Bifurcation

Taking advantage of the procedural flexibility of arbitration, the proceedings are sometimes divided or “bifurcated” for efficiency purposes into discrete phases, e.g., jurisdiction and merits phases, or merits and quantum phases. While there were no explicit rules governing birfurcation issues in the 2006 Rules, the Amended Rules establish explicit rules for such bifurcation. Specifically:

> if a party requests bifurcation on a specific matter, the arbitral tribunal must, in deciding whether or not to grant the request, consider all relevant circumstances including whether:
>
> (a) bifurcation would materially reduce the time and cost of the proceeding;
> (b) determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and
> (c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical (Rule 42).

By these amendments, parties now have clearer guidance regarding the availability of bifurcation as well as the factors the tribunal should consider in deciding such issues.

(iii) Security for costs

The Amended Rules contain new provisions concerning securities for costs. That is, upon the request of a party, the tribunal can order any party asserting a claim or counterclaim to provide security for costs, if warranted by the circumstances.

Specifically, in determining whether to order a party to provide security for costs, the arbitral tribunal must consider all relevant circumstances, including the following factors：

(a) that party’s ability to comply with an adverse decision on costs;
(b) that party’s willingness to comply with an adverse decision on costs;
(c) the effect that providing security for costs may have on that party’s ability to pursue its claim or counterclaim; and
(d) the conduct of the parties (Rule 53(3))

For this process, the tribunal must consider all evidence adduced in relation to the above factors including the existence of third-party funding (Rule 53(4)).

After an order to provide security for costs has been issued, if a party fails to comply with such order, the tribunal can suspend the proceedings. If the proceedings are suspended for more than 90 days, the tribunal may, after consulting with the parties, order the discontinuance of the proceedings (Rule 53(6)).

The new provisions on securities for costs provide the arbitral tribunal with an explicit framework for making its decision while also giving parties clear guidance on the issue.

III. Conclusion

While opinions may vary as to whether these revisions and newly introduced elements through the Amended Rules go far enough, or too far, they are generally considered to be reflections of current concerns and preferences of the arbitration community at large.

In relation to the Amended Rules, the ICSID has stated that "[o]*ver the coming months, ICSID will publish guidance notes to assist users in applying the updated rules, as well as offer briefings and courses by request*."[2] Parties considering or facing a dispute under the Amended Rules should refer to such ongoing guidance notes from the institution.

[2] https://icsid.worldbank.org/news-and-events/communiques/icsid-administrative-council-approves-amendment-icsid-rules

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