The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis of ICSID's Rule 41(5) on Its Tenth Anniversary

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Introduction

The adoption of summary disposition rules by four major commercial arbitral institutions – the latest at the end of 2018 – marks something of a turning point in the long-running debate over the appropriate role of summary disposition procedures in international arbitration. Though that role was extensively debated during the round of rule revisions between 2010 and 2014, none of the major commercial international arbitration institutions adopted summary disposition rules at that time. It was not until August 2016 that the first major commercial institution, the Singapore International Arbitration Centre (SIAC), adopted summary disposition rules. Three more institutions – the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC) and the Hong Kong International Arbitration Centre (HKIAC) – quickly followed suit, the latest (the HKIAC) in November 2018.

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The call for summary disposition procedures in international arbitration is a reflection of dissatisfaction with the duration and expense of the process. Arbitration users continue to press for reduced costs and increased efficiency, with many asserting that summary disposition would help accomplish this goal.[1] Other stakeholders continue to argue that summary disposition procedures are necessary to extend international arbitration into industries such as banking and finance, which historically rely on the dispositive motions available in New York and London courts to quickly enforce contracts.[2]

The arguments for and against the adoption of summary disposition in international commercial arbitration are by now familiar. Proponents argue that its use will increase procedural economy by disposing of legally insufficient claims and defences early in the arbitral process, thereby eliminating the time and costs associated with briefing, disclosure and a hearing on the merits for those claims and defences. They contend that even unsuccessful applications will streamline the arbitral process and encourage settlement because they will focus the parties and tribunal on dispositive issues early on.[3] Opponents argue that summary disposition will reduce procedural economy: that respondents will either use summary disposition as a tool to harass claimants and delay the process, or that they will submit applications as a matter of course, thus adding one more step

1 Respondents to the 2015 White & Case and Queen Mary, University of London, International Arbitration Survey, eg, ranked costs as the worst characteristic of arbitration and lack of speed as its fourth worst. Forty per cent of respondents believed summary disposition would be effective in reducing costs and time and, reflective of the divisiveness of the issue, 27 per cent believed it would not be effective. See White & Case and Queen Mary, University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration at 7, 24–25 www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf accessed 14 March 2019.

2 Respondents to the 2018 White & Case and Queen Mary, University of London International Arbitration Survey identified 'expedited procedures for claims' and 'summary determination procedures' as the two innovations necessary to increase the use of international arbitration in the banking and finance industry. See White & Case and Queen Mary, University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration at 30–31 www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf accessed 4 March 2019. See also ICC, ICC Commission Report: Financial Institutions and International Arbitration at 3–4, 10, https://cdn.iccwbo.org/content/uploads/sites/3/2016/11/ICC-Financial-Institutions-and-International-Arbitration-ICC-Arbitration-ADR-Commission-Report.pdf accessed 4 March 2019.

3 See, eg, Caline Mouawad and Elizabeth Silbert, 'A Case for Dispositive Motions in International Commercial Arbitration' (2015) 2(1) BCDR International Arbitration Review 78–79.

to the arbitral process.[4] Opponents further argue that summary disposition presents fundamental due process concerns by denying defending parties the full opportunity to be heard, thereby potentially placing awards at risk of challenge under the New York Convention.[5]

Proponents and opponents usually break down along the common law versus civil law divide, with their arguments, to date, remaining largely unexamined hypotheses. Now, however, it is possible to begin evaluating these arguments quantitatively, using information published by the International Centre for Settlement of Investment Disputes (ICSID) on its summary disposition rules: ICSID Rules of Procedure for Arbitration Proceedings 41(5) and (6) ('Rule 41(5)' and 'Rule 41(6)', respectively).[6] The ICSID summary disposition rules have now been in force for over a decade, and 12 May 2018 marked the tenth anniversary of the first decision issued under them. A total of 26 decisions have been issued since the rules were instituted, permitting, for the first time, at least an initial quantitative examination of summary disposition in international arbitration.

In this article, we first provide background information on ICSID's summary disposition rules, including a review of their application and interpretation by arbitral tribunals. We then assess the impact of those rules on ICSID arbitrations, including the frequency of their invocation, the time taken to dispose of objections under them, and the impact of their invocation on the arbitral process. As described below, ICSID's publicly available information demonstrates that opponents' fears of summary disposition procedures becoming a routine tool for harassment and delay are, to date, unsupported, though the low success rate of respondents' applications evidences that the summary disposition rules are overused. Further, although there is wide variation in the length of time taken to dispose of summary disposition applications, the procedure remains relatively expedited and, on average, has become faster over time.

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4 See, eg, *ibid* 89–90, 96; James P Duffy, 'Dispositive Motions and the Summary Disposition of Claims in International Arbitration' in Laurence Shore, Tai-Heng Cheng, Jenelle E La Chiusa, Lawrence Schaner and Mara VJ Senn (eds), *International Arbitration in the United States* (Wolters Kluwer 2017) 275–280.

5 Under the New York Convention, awards may be challenged on grounds that a party was 'unable to present his case' or that the 'arbitral procedure was not in accordance with the agreement of the parties'. See United Nations Commission on International Law Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art V(1)(b), (d), 10 June 1958, 330 UNTS 3.

6 ICSID Rules of Procedure for Arbitration Proceedings, ICSID Convention, Regulations and Rules p 119, https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf accessed 4 March 2019.

Perhaps most interesting, concluded ICSID arbitrations in which summary disposition applications have been determined are resolved substantially more quickly than the average ICSID arbitration – regardless of whether the applications are successful – lending support to proponents' arguments that summary disposition may serve to narrow or streamline the arbitral process. The data thus far is intriguing: to date, Rule 41(5) arbitrations have lasted, on average, over a year less than all ICSID arbitrations.

Finally, this article draws on the observations of ICSID's experience with summary disposition to provide recommendations for administering institutions to consider in adopting summary disposition rules in international commercial arbitration.

The application of ICSID's summary disposition rules

ICSID adopted its summary disposition rules in 2006 in response to 'recurring complaints from some respondent governments' that it was impossible to dispose of claims that were clearly legally defective before the final hearing, while there was a way to dispose of claims on jurisdictional grounds.[7] ICSID's response was to adopt Rule 41(5) and (6), which provide:

> '(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1)[8] or to object, in the course of the proceeding, that a claim lacks legal merit.

7 See Antonio R Parra, 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes' (Spring 2007) 41 The International Lawyer 47, 56.

8 ICSID Rule 41(1) provides for the filing of an objection that ICSID or the tribunal lacks jurisdiction or competence over a dispute or claim:

> '(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.'

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.'

The rules have been interpreted to apply *mutatis mutandis* to annulment proceedings.[9]

At the same time, ICSID adopted similar rules with 'effectively the same language'[10] in its Arbitration Additional Facility Rules.[11] The only tribunal that has applied the Additional Facility summary disposition rules in a public decision drew 'guidance, as to the applicable standard, from the jurisprudence developed' under Rules 41(5) and (6).[12] Accordingly, the Arbitration Additional Facility summary disposition rules are treated jointly with Rules 41(5) and (6) in this article.

Rules 41(5) and (6) impose a high legal standard on summary disposition objections: claims must be 'manifestly without legal merit' and objections must be filed by the earlier of 30 days from the tribunal's constitution or its first session. That first session must occur within 60 days of the tribunal's constitution unless extended by the parties.[13] The rules also hold the tribunal to a strict deadline: 'the Tribunal, after giving the parties the opportunity to present their observations on the objection, *shall*, at its first session or promptly thereafter, notify the parties of its decision'.[14]

Rule 41(5) was first invoked nearly two years after it went into effect, in February 2008, in *Trans-Global Petroleum Inc v Hashemite Kingdom of Jordan*. The tribunal partially granted the respondent's objection three months later, in May 2008.[15] Another 25 awards or decisions have been issued under the 'manifestly without legal merit' rule since then.[16] Nineteen results are public.

9 See *Elsamex SA v Republic of Honduras* (ARB/09/4) – Annulment, Decision on Elsamex SA's Preliminary Objections paras 100, 118–131.

10 *Lion Mexico Consol LP v United Mexican States*, ICSID Case No ARB(AF)/15/2, Decision on the Respondents' Preliminary Objection under Art 45(6) of the ICSID Arbitration (Additional Facility) Rules, para 56 (12 December 2016) (attorneys at Mayer Brown – although not this article's authors – represent the claimant in this proceeding). Arts 45(6) and (7) were also invoked in a non-public decision in Mobile TeleSystems *OJSC v Republic of Uzbekistan*, ICSID Case No ARB(AF)/12/7 (14 November 2013).

11 See ICSID Arbitration Additional Facility Rules, Arts 45(6) and (7).

12 *Lion Mexico Consol LP*, para 56.

13 ICSID Rule 13(1) ('The Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree').

14 ICSID Rule 41(5) [emphasis author's own].

15 *Trans-Global Petroleum Inc v Hashemite Kingdom of Jordan*, ICSID Case No ARB/07/25, The Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, para 124 (12 May 2008).

16 See ICSID, Decisions on Manifest Lack of Legal Merit, https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx accessed 4 March 2019. Pursuant to Rule 41(6), an award is issued if all claims are disposed of under Rule 41; a decision is issued if the Rule 41(5) objection is partially granted or denied.

A fairly consistent application of the rules has emerged from these decisions. First, as succinctly summarised by one tribunal, an objection 'may go either to jurisdiction or the merits'.[17] In *Brandes Investment Partners LP v Bolivarian Republic of Venezuela*, the second decision issued under Rule 41(5), the tribunal decided whether the rule extended to jurisdictional objections as well as merit-based objections as an issue of first impression. It reasoned that there were no 'objective reasons why the intent not to burden the parties with a possibly long and costly proceeding… should be limited to' the legal merits and not the tribunal's jurisdiction.[18] The tribunal then explained that a party has three opportunities to make jurisdictional objections: 'by the Secretariat, and if the case passes that level, it would then be under Rule 41(5), and if it passes that level, it might still be under Rule 41(1)'.[19]

Second, an objection 'must raise a legal impediment to a claim, not a factual one'.[20] Thus, tribunals will not determine disputed facts during the Rule 41(5) procedure.[21] Instead – and those practiced in US-style dispositive motions will be familiar with this practice – the tribunal assumes all facts to be true as alleged, unless they are '(manifestly) incredible, frivolous or vexatious or inaccurate or in bad faith' or they are legal assertions masquerading as fact.[22] Any doubts are construed in favour of the non-movant.[23]

Third, to meet the rules' stringent 'manifestly without legal merit' standard, the legal objection 'must be established clearly and obviously, with relative ease and dispatch'.[24] In fact, as established in *Trans-Global*

17 *RSM Prod Corp and Others v Grenada*, ICSID Case No ARB/10/6, Award para 6.1.1 (10 December 2010).

18 *Brandes Investment Partners LP v Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/3, Decision on the Respondents' Objection under Rule 41(5) of the ICSID Arbitration Rules, paras 52, 55 (2 February 2009) ('The Arbitral Tribunal therefore interprets Rule 41(5) in the sense that the term "*legal merit*" covers all objections to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal').

19 *Brandes Investment Partners*, para 53.

20 *RSM Prod Corp*, para 6.1.1.

21 *Trans-Global Petroleum*, para 97.

22 *Trans-Global Petroleum*, para 105; see *also Brandes Investment Partners*, para 73 ('With respect to the merits of the claim, an award denying such claims can only be made if the facts, as alleged by the Claimant and which *prima facie* seem plausible, are not manifestly of such a nature that the claim would have to be dismissed'); *Emmis Int'l Holding BV, Emmis Radio Operating BV and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v Hungary*, ICSID Case No ARB/12/2, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), para 26 (28 October 2014) (The tribunal 'must ordinarily presume the facts which found the claim on the merits as alleged by the claimant to be true (unless they are plainly without any foundation)').

23 *Brandes Investment Partners*, para 61.

24 *RSM Prod Corp*, para 6.1.1.

Petroleum Inc v Hashemite Kingdom of Jordan, the first decision issued under Rule 41(5), this standard is considerably more stringent than the standard used on United States-style summary disposition motions, which requires a party only to establish there is 'no genuine dispute as to any material fact'.[25] In *Trans-Global Petroleum Inc*, the claimant argued that it had invested in a petroleum exploration venture in Jordan and, after it informed Jordan that it had discovered oil deposits, Jordan breached the parties' contract by preventing it from developing those deposits. The claimant asserted claims under the Jordan-US bilateral investment treaty (BIT) (1997), including a claim that Jordan had failed to consult with the claimant about the investment. Claimant's counsel admitted during oral argument that Jordan did not have any obligation to consult with the claimant under the BIT and withdrew the claim.[26] In its decision, the tribunal confirmed the withdrawal on grounds that the claim was 'manifestly without legal merit within the meaning of Rule 41(5)'.[27]

The *Trans-Global Petroleum* decision has come to define the requirements of the Rule 41(5) 'manifestly without legal merit' standard. In it, the tribunal assessed the meaning of the standard by first reviewing commentary on the ICSID convention's use of the word 'manifest', which it described as, inter alia, imposing 'an extremely high bar', able to be 'discerned with little effort and without deeper analysis' – in a word, 'obvious'.[28] The tribunal then turned to the time limits imposed by Rule 41(5), ruling that because Rule 41(5)'s procedure contains 'prescribed time-limits [which] are severely truncated', it 'indicat[ed] a summary procedure not susceptible to elaborate, lengthy memorials requiring detailed preparation, presentation and deliberations', and that, accordingly, the standard must apply only to 'clear and obvious cases'.[29] Finally, the tribunal reasoned that a 'clear and obvious' standard is required by due process itself: '[i]t would… be a grave injustice if a claimant was wrongly driven from the judgment seat… with no opportunity to develop and present its case under the written and oral procedures prescribed' by the ICSID arbitration rules.[30]

25 Fed R Civ Pro 56 ('A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law').

26 The tribunal explained, 'whilst the Respondent bears an obligation thereunder to consult with the USA as its "Contracting Party", it is obvious the Respondent owes no similar obligation to the Claimant. The Claimant clearly has no legal rights' under the relevant article of the BIT. *Trans-Global Petroleum*, para 118.

27 *Trans-Global Petroleum*, para 119.

28 *Ibid* at paras 83–87.

29 *Ibid* at para 90.

30 *Ibid* at para 92.

The tribunal, however, went on to contemplate that that the 'clear and obvious' standard did not preclude the determination of 'complicated' objections:

> '[g]iven the nature of investment disputes generally, the Tribunal nonetheless recognises that this exercise may not always be simple, requiring (as in this case) successive rounds of written and oral submissions by the parties, together with questions addressed by the tribunal to those parties. The exercise may thus be complicated; but it should never be difficult'.[31]

In applying the 'clear and obvious' standard, subsequent tribunals have contested Rule 41(5)'s application to complicated objections. The tribunal in *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, for example, contended that allowing the summary disposition of complicated objections blurred a necessary distinction 'between a claim by an investor that can properly be rejected out of hand, and one which requires more elaborate argument for its eventual disposition'.[32] Rather, *MOL Hungarian Oil* held that Rule 41(5) should not be used to dismiss claims that 'are "susceptible to argument one way or the other" or where it is "necessary to engage in elaborate analysis"'.[33]

Even before *MOL Hungarian Oil and Gas Company*'s explicit rejection of *Trans-Global Petroleum*'s allowance for 'complicated' objections, other tribunals had effectively rejected this allowance by denying objections on the basis that they were too elaborate or raised novel issues – even when the objections were based exclusively on questions of law. For example, in *Emmis International Holding BV v Hungary*, the tribunal refused to evaluate what it deemed a complex jurisdictional question. It wrote, '[d]espite the opportunities afforded to both Parties to develop their written submissions on the Rule 41(5) Objection, the Tribunal does not consider that this question has as yet been sufficiently briefed to enable it to reach a conclusive determination on the point'.[34] Similarly, in *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*, the tribunal refused to decide jurisdictional and other legal questions that were issues of first impression for an ICSID tribunal on a Rule 41(5) objection. It wrote that Rule 41(5) 'is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts' because Rule 41(5)'s compressed procedure

31 *Ibid* at para 88.

32 *MOL Hungarian Oil and Gas Co Plc v Republic of Croatia*, ICSID Case No ARB/13/32, Decision on Respondent's Application Under ICSID Arbitration Rule 41(5), para 45 (2 December 2014).

33 *Ibid*.

34 *Emmis Int'l Holding*, para 83.

'inevitably limit[s] the Parties' opportunity to be heard and the Tribunal's opportunity to reflect'.[35] Despite the fact that these Rule 41(5) objections were unsuccessful, both of these arbitrations were later dismissed for lack of jurisdiction.[36]

Given this strict interpretation of Rule 41(5)'s already facially high legal standard, it is perhaps not surprising that few objections filed under it have been successful. Since the first invocation of Rule 41(5) in 2008, there have been 26 Rule 41(5) decisions, as tracked by ICSID in its Table of Decisions on Manifest Lack of Legal Merit. Nineteen results are public[37] and seven are not.[38] Of the 19 public decisions, three Rule 41(5) objections were granted in

35 *PNG Sustainable Dev Programme Ltd v Indep State of Papua New Guinea*, ICSID Case No ARB/13/33, Tribunal's Decision on the Respondent's Objections Under Rule 41(5) of the ICSID Arbitration Rules, paras 89, 94 (28 October 2014). See also *Brandes Investment Partners*, para 71 (declining to analyse the legal effect of a waiver (as well as intertwined factual issues) on grounds that 'the answers to these questions necessitate the examination of complex legal… issues which cannot be resolved in these summary proceedings'); *MOL Hungarian Oil and Gas Co*, para 46 (declining to determine the respondent's objections under Rule 41(5) because 'the Respondent has advanced plausible arguments… which in each case have been rebutted by plausible arguments from the Claimant…').

36 See *Emmis Int'l Holding*, Award, para 265 (16 April 2014); *PNG Sustainable Dev Program*, Award, para 417 (5 May 2015).

37 Results have been compiled from publicly available Rule 41(5) decisions, as well as descriptions of the Rule 41(5) decision found in decisions and awards issued later in that proceeding. The 19 public results are: (1) *Trans-Global Petroleum*; (2) *Brandes Investment Partners*; (3) *Global Trading Resource Corp and Globex International Inc v Ukraine*, ICSID Case No ARB/09/11; (4) *RSM Prod Corp*; (5) *Rafat Ali Rizvi v Republic of Indonesia*, ICSID Case No ARB/11/13; (6) *Accession Mezzanine Capital LP and Danubius Kereskedöház Vagyonkezelö Zrt v Hungary*, ICSID Case No ARB/12/3; (7) *Emmis Int'l Holding*; (8) *Lundin Tunisia BV v Republic of Tunisia*, ICSID Case No ARB/12/30; (9) *Elsamex*; (10) *Transglobal Green Energy, LLC and Transglobal Green Panama SA v Republic of Panama*, ICSID Case No ARB/13/28; (11) *MOL Hungarian Oil and Gas Co*, ICSID Case No ARB/13/32; (12) *PNG Sustainable Dev Program*, ICSID Case No ARB/13/33; (13) *CEAC Holdings Limited v Montenegro*, ICSID Case No ARB/14/8; (14) *Ioan Micula, Viorel Micula and others v Romania – Annulment*, ICSID Case No ARB/05/20; (15) *Ansung Housing Co Ltd v People's Republic of China*, ICSID Case No ARB/14/25; (16) *Álvarez y Marín Corporación SA and others v Republic of Panama*, ICSID Case No ARB/15/14; (17) *Venoklim Holding BV v Bolivarian Republic of Venezuela – Annulment*, ICSID Case No ARB/12/22; (18) *Eskosol SpA in liquidazione v Italian Republic*, ICSID Case No ARB/15/50; and (19) *Lion Mexico Consol.*

38 The seven non-public results are: (1) *Pan American Energy LLC v Plurinational State of Bolivia*, ICSID Case No ARB/10/8; (2) *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12; (3) *Mobile TeleSystems*; (4) *Edenred SA v Hungary*, ICSID Case No ARB/13/21; (5) *Elektrogospodarstvo Slovenije - razvoj in inzeniring doo v Bosnia and Herzegovina*, ICSID Case No ARB/14/13; (6) *Mathias Kruck and others v Kingdom of Spain*, ICSID Case No ARB/15/23; and (7) *Portigon AG v Kingdom of Spain*, ICSID Case No ARB/17/15.

their entirety[39] and only another three were partially granted.[40] Of the seven non-public decisions, we know that none of the Rule 41(5) objections were granted in their entirety because, even though those decisions are not public, the procedural details of the arbitrations are public and none of them was summarily disposed. It is, however, possible that some of the objections in the non-public decisions were partially granted. Thus, only three of the 26 Rule 41(5) objections to date have been granted in their entirety.[41]

The effects of summary disposition rules on ICSID arbitrations

Although the sample size of Rule 41(5) decisions over the first ten-and-a-half years of use remains small at 26, the publicly available information about the cases provides a mine of data that can be used to analyse the impact of summary disposition's first decade of use in international arbitration and to assess, quantitatively, some of the arguments for and against its wider adoption.

Despite the low observed success rate of Rule 41(5) objections, analysis of the data available thus far indicates the benefits of summary disposition. As discussed below, the process remains an expedited process – currently, it averages less than three and a half months from the objection's filing to a decision.[42] Potentially more consequential, this three-and-a-half month addition to the arbitral process is, so far, correlated with a speedier arbitration: concluded arbitrations in which Rule 41(5) objections are determined have been resolved over a year faster than all ICSID arbitrations, despite the fact that the large majority of objections are denied.[43] Even though the sample size remains too small to statistically evaluate whether the Rule 41(5) process is the cause of or merely correlated with shorter arbitrations, and even though proceedings that are still ongoing may increase the average duration of Rule 41(5) arbitrations, the available evidence indicates that summary disposition increases procedural economy. Further analysis is warranted when more data is available.

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39 The three Rule 41(5) objections granted in their entirety are: (1) *Global Trading Resource Corp*; (2) *RSM Prod Corp*; and (3) *Ansung Housing Co Ltd*.

40 The three partially granted Rule 41(5) objections are: (1) *Trans-Global Petroleum Inc*; (2) *Accession Mezzanine Capital LP*; and (3) *Emmis Int'l Holding*.

41 The data and calculations utilised in this article are based on information compiled from the ICSID's database of case details, decisions and awards issued in arbitrations, ICSID Annual Reports and ICSID caseload statistics.

42 See 'The Rule 41(5) process remains reasonably expeditious' below.

43 See 'Rule 41(5) objections are associated with speedier arbitrations' below. As explained below, Rule 41(5) arbitrations that remain pending will impact this difference, but by how much is unclear.

While arguably overutilised, the invocation of Rule 41(5) has not become routine

In Table 1, we present the number of times and the percentage of ICSID arbitrations in which a Rule 41(5) objection was determined to date. In Table 1, as well as in Tables 2–8, to enable comparison with ICSID's caseload statistics, objections are counted by the calendar year in which the arbitration was registered (which may be different from the year in which the objection was filed).[44] Thus, the first invocation of Rule 41(5) (which was in 2008) is counted in 2007, the year its arbitration was registered. Likewise, the last invocation of Rule 41(5) for which a decision has been issued (which occurred in February 2018, with the decision issued in May 2018) is counted in 2017, the year that arbitration was registered.

Year	Total Registered Arbitrations	Rule 41(5) Objections[1]	Percentage of Rule 41(5) Objections
2007	36	1	2.8%
2008	21	1	4.8%
2009	25	1	4.0%
2010	26	2	7.7%
2011	37	1	2.7%
2012	48	5	10.4%
2013	40	5	12.5%
2014	38	4	10.5%
2015	52	5	9.6%
2016	47	0	0.0%
2017	53	1	1.9%
2007 - 2011	**145**	**6**	**4.1%**
2012 - 2017	**278**	**20**	**7.2%**
2007 - 2017	**423**	**26**	**6.1%**

[1] By year measured.

Table 1: percentage of Rule 41(5) objections

For arbitrations registered in the first five years following the enactment of Rule 41(5), the rule was invoked only once annually, with the exception of arbitrations registered in 2010, when there were two invocations. Its use,

44 See The ICSID Caseload – Statistics (Issue 18-1) p 8, https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf accessed 4 March 2019.

however, jumped in 2012, when it was invoked five times, and remained steady at four to five invocations per annum until 2015. It appears that the number of annual invocations has fallen significantly since then. As of 1 December 2018, ICSID has reported only one Rule 41(5) decision in over a year and a half – a decision issued in May 2018 in an arbitration registered in May 2017. If invocation rates had continued to remain steady, we expect that ICSID would have already reported decisions issued in arbitrations registered in 2016 and 2017. Even during the peak years of Rule 41(5)'s use from 2012 to 2015, the percentage of arbitrations in which Rule 41(5) was invoked remained relatively low, when it hovered around ten per cent of the total arbitrations registered. At its peak in 2013, Rule 41(5) objections were asserted in 12.5 per cent of arbitrations registered that year.

The fact that the percentage of Rule 41(5) objections has remained relatively low, never exceeding 12.5 per cent of arbitrations annually, undercuts opponents' arguments that adopting summary disposition rules will necessarily add another procedural layer to arbitration, or that requesting summary disposition will necessarily become a rote delay tactic.

There are two characteristics of ICSID arbitrations that guard against these dangers: (1) Rule 41(5)'s high legal standard is made express within the rule; and (2) tribunals are authorised to award costs.[45] The express imposition of a high legal standard limits the spectrum of claims to which Rule 41(5) could apply to a small percentage of claims, and the threat of bearing the claimant's costs associated with an unmeritorious objection provides a disincentive to asserting objections far outside this spectrum. Tribunals readily make this threat (though they fail to carry it out so readily, based on published costs decisions). The *MOL Hungarian Oil and Gas Company* tribunal, for example, reasoned, '[g]iven that one of the main reasons behind the introduction of Rule 41(5) was to spare respondent States the wasted trouble and expense of having to defend wholly unmeritorious claims, it must follow *per contra* that a Respondent invoking the procedure under the Rules takes on itself the risk of adverse cost consequences should its application fail'.[46]

Notwithstanding the low percentage of Rule 41(5) objections being asserted, respondents still appear to be asserting them too frequently, as the observed success rate of Rule 41(5) objections is low. In Table 2, we tabulate Rule 41(5) objections by result.[47]

45 See ICSID Arbitration Rule 28, 47.

46 *MOL Hungarian Oil and Gas Co*, para 54. Tribunals have generally applied the principle that costs follow the event. See, eg, *RSM Prod Corp*, para 8.3.4.

47 Again, objections are counted by the year in which the arbitration was registered, which may be different from the year in which Rule 41(5) was invoked.

Year	Rule 41(5) Objections[1]	Not Public		Successful or Partially Successful		Unsuccessful	
		Number	% of Total	Number	% of Total	Number	% of Total
2007	1	0	0.0%	1	100.0%	0	0.0%
2008	1	0	0.0%	0	0.0%	1	100.0%
2009	1	0	0.0%	1	100.0%	0	0.0%
2010	2	1	50.0%	1	50.0%	0	0.0%
2011	1	0	0.0%	0	0.0%	1	100.0%
2012	5	2	40.0%	2	40.0%	1	20.0%
2013	5	1	20.0%	0	0.0%	4	80.0%
2014	4	1	25.0%	1	25.0%	2	50.0%
2015	5	1	20.0%	0	0.0%	4	80.0%
2016	0	0	0.0%	0	0.0%	0	0.0%
2017	1	1	100.0%	0	0.0%	0	0.0%
2007 - 2011	**6**	**1**	**16.7%**	**3**	**50.0%**	**2**	**33.3%**
2012 - 2017	**20**	**6**	**30.0%**	**3**	**15.0%**	**11**	**55.0%**
2007 - 2017	**26**	**7**	**26.9%**	**6**	**23.1%**	**13**	**50.0%**

[1] By year measured.

Table 2: Rule 41(5) objections by result

For the first five years, between 2007 and 2011, the rate of success or partial success of the objections could be interpreted as high. However, an abundance caution is warranted with respect to this success rate as it is based on a very small number of objections (one or two objections per annum). Three of the objections lodged in arbitrations registered between 2007 and 2011 were at least partially successful, which accounts for half of all objections and three-fifths of public objections.

The observed success rate dropped considerably starting in 2012, the year that marked a significant increase in the number of Rule 41(5) objections per annum. Twenty objections were asserted in total in arbitrations registered from 2012 to 2017. Of those 20, however, only *one* is known to have been successful (five per cent of 20 objections), only *two* are known to have been partially successful (ten per cent of total objections), and *11* are known to be denied in full (55.0 per cent). Thus, out of the 14 objections for which the results are known for arbitrations registered in 2012–2017, only three (or 21.4 per cent) were successful or partially successful.[48] Notably, arbitrations registered in 2013 and 2015 each saw four objections with a published result and all were denied in full.

48 While it is possible that some of the Rule 41(5) objections in the six non-public cases were partially successful, we know that none of the objections was granted in its entirety because, even though the decisions are not public, the procedural details of the arbitrations are public and none of them was summarily disposed.

Interestingly, all of the ICSID tribunals that are known to have granted a Rule 41(5) objection, at least in part have, had at least two of the three arbitrators appointed come from common law jurisdictions where summary disposition procedures are available in the local court system.[49] This raises the possibility that, in order to achieve success on a Rule 41(5) objection, the majority of the tribunal must be familiar with and comfortable with the concept of summary disposition.

The observed low success rate of Rule 41(5) objections would call into question the need for the rule. Because few claims have been dismissed under it, one could argue that Rule 41(5) is unnecessary and merely increases the inefficiency of the arbitral process. However, while this argument has facial appeal, it misses a critical point: the impact of Rule 41(5) is not limited to successful objections. As detailed below, invocation of the rule correlates with the speedier resolution of arbitrations *regardless of the objection's success.*

The Rule 41(5) process remains reasonably expeditious

Just as arguments that summary disposition will become a rote procedure are, to date, unfounded, arguments that summary disposition will cause delays to the final resolution of an arbitration are also unsupported.

Before 2012, two Rule 41(5) procedures were notoriously lengthy. Specifically, the Rule 41(5) procedure in *Global Trading Resource Corp v Ukraine* lasted 11 months from the objection's filing to a decision,[50] and the Rule 41(5) procedure in *Pan American Energy LLC v Plurinational State of Bolivia* lasted nearly eight months.[51] As the *MOL Hungarian Oil and Gas Company* tribunal later observed in reference to one of these cases, '[t]he scheduling problems created by the expectations inherent in Rule 41(5) as drafted are by now well-known and documented'.[52]

Since 2012, however, parties and tribunals have made observable efforts to maintain an expedited Rule 41(5) procedure. As testament to arbitration's much-lauded flexibility, arbitrators have used a wide array of procedures to

49 See, eg, Fed R Civ Pro 56 (US); Civil Procedure Rules, Part 24 (United Kingdom); Federal Court Rule 26.01 (Australia); and Federal Court Rule 213 (Canada).

50 See ICSID Case Details, *Global Trading Resource*, https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/09/11 accessed 4 March 2019. Respondent filed its Rule 41(5) objection on 5 January 2010 and the tribunal issued its decision on the objection in an Award dated 1 December 2010.

51 See ICSID Case Details, *Pan American Energy LLC*, https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/8 accessed 4 March 2019. Respondent filed its Rule 41(5) objection on 7 September 2012 and the tribunal issued a decision on the objection on 26 April 2013.

52 *MOL Hungarian Oil and Gas Co*, para 9 (citing Global Trading Resource Corp).

expedite the resolution of Rule 41(5) objections. Less than half of the 26 objections filed – ten arbitrations, or 38.5 per cent – were resolved with the traditional (and more cumbersome) two rounds of briefing and only eight of those procedures then had oral argument. Roughly another third – eight arbitrations, or 30.8 per cent – had only a single round of briefing, with only five of those then holding oral argument. The remainder of the tribunals employed varied procedures, including the submission of responses to the tribunal's questions following hearing and additional briefing by the respondent only.[53]

Although the number of arbitrations at 26 is a small sample, which limits the scope of the empirical investigation available, statistical analyses can be insightful regarding the effects of ICSID's adoption of Rule 41(5), including on the 'typical' duration of the Rule 41(5) procedure. What is 'typical' for a sample is known in statistics as 'central tendency'. The most well-known estimate of central tendency is the average (or mean), which is employed extensively in this study. However, using the average alone to infer what is 'typical' has limitations, particularly in smaller samples, where outliers can distort the interpretation of what may be 'typical'. Thus, we also rely upon another measure of central tendency, the midpoint (or median), which is not sensitive to outliers. Additionally, we look at the 'range of values': minimum, maximum and the standard deviation. The range of values captures the spread of any particular variable, such as the number of months; a reduction in the spread of the variable indicates less uncertainty in assessing what is typical.

An analysis of these measures – average, median, standard deviation, and minimum and maximum – on the typical duration of the Rule 41(5) procedure evidences that the parties' efforts to maintain an expedited Rule 41(5) procedure have, in fact, been quite successful, resulting in a more streamlined and expedited process. In Table 3, we provide the summary statistics for cases from an objection's filing to the tribunal's decision and compare the 2007–2011 period against the 2012–2017 period to examine whether differences exist over time.[54]

53 Presently, it is difficult to discern whether there is a relationship between the number of briefs filed and the observable success rate of the objection, which is due to the limitations imposed from a sample of 26 arbitrations. This would be an area for further study as the number of objections increase over time.

54 The data and calculations utilised in this table are based on information compiled from the ICSID's database of case details, and decisions and awards issued in the arbitrations.

Time Period	Rule 41(5) Objections[1]	Average	Standard Deviation	Median	Minimum	Maximum
2007 - 2011	6	163.2	105.0	148	45	330
2012 - 2017	20	103.7	55.4	101	14	204
Difference		**59.5**	**49.6**	**47**	**31**	**126**

[1] By year measured.

Table 3: total days for Rule 41(5) objections

By all measures, the number of days to resolve a Rule 41(5) objection – from the filing of the objection to the issuance of a decision – appears to be declining over time. From 2007 to 2011, the procedure lasted, on average, a total of 163.2 days. From 2012 to 2017, Rule 41(5) procedures became a full two months faster on average, or a total of 103.7 days,[55] representing a 36.5 per cent decrease from the 2007–2011 period. The median number of days also fell, from 148 days in the 2007–2011 period to 101 days in the 2012–2017 period, representing a 31.8 per cent decrease. Similarly, the arbitrations with the shortest process fell from 45 days to 14 days between the two periods, representing a 68.9 per cent decrease. Even the longest Rule 41(5) process declined between the two periods: from 330 days to 204 days between the two periods, representing a 38.2 per cent decrease.

Another revealing statistic is the standard deviation of the total number of days, which provides a measure of how spread out the number of days is across the arbitrations. A lower standard deviation in this instance means that there is less variability (a narrower spread) in the number of days among the different arbitrations. The standard deviation fell markedly (nearly half) from 105 days during the 2007–2011 period to 55.4 days during the 2012–2017 period. This is notable as it shows that the number of days to resolve a Rule 41(5) objection appears to have become more predictable. This augurs well for users' satisfaction with the process.

The observed decline in total days was not due to a reduction in a particular stage of the procedure. Rather, the more expedited Rule 41(5) process in the 2012–2017 time period corresponds with greater speed at every phase of the procedure, including briefing, oral argument preparation and deliberations, as summarised in Tables 4–8.[56]

55 This average excludes days in which an arbitration was suspended during the Rule 41(5) process, which occurred in two arbitrations: (1) *Emmis Int'l Holding*; and (2) *Vattenfall AB*.

56 The data and calculations utilised in these tables are based on information compiled from the ICSID's database of case details, and decisions and awards issued in the arbitrations.

Time Period	Rule 41(5) Objections[1]	Total Days	Briefing Days	Argument Days[2]	Deliberation Days
2007 - 2011	6	163.2	67.0	38.5	57.7
2012 - 2017	20	103.7	49.6	21.2	41.4
Difference		**59.5**	**17.4**	**17.3**	**16.3**

[1] By year measured.

[2] No oral argument period for
Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary
Edenred SA v. Hungary
Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama
Ioan Micula, Viorel Micula and others v. Romania - Annulment
Álvarez y Marín Corporación S.A. and others v. Republic of Panama
Mathias Kruck and others v. Kingdom of Spain
Lion Mexico Consolidated L.P. v. United Mexican States
Portigon AG v. Kingdom of Spain

Table 4: average days by phase

Table 4 summarises the duration of the various phases of the Rule 41(5) procedures, demonstrating the across-the-board declines in the duration of each phase of the process. The number of briefing days fell from an average of 67 days in the 2007–2011 period to an average of 49.6 days in the 2012–2017 period, representing a 26.0 per cent decrease. The number of oral argument days (ie, the number of days devoted to oral argument preparation, as measured by the number of days between the last-filed written submission and oral argument) fell from an average of 38.5 days in the 2007–2011 period to an average of 21.2 days in the 2012–2017 period, representing a 44.9 per cent decrease. Finally, the number of tribunal deliberation days fell from an average of 57.7 days in the 2007–2011 period to an average of 41.4 days in the 2012–2017 period, representing a 28.2 per cent decrease. Collectively, this has shaved a full two months off the average procedure.[57]

The briefing period was and remains the longest phase, though it saw a decline of over two weeks, accounting for 29.2 per cent of the 59.5-day difference. Oral argument preparation, though the shortest of the three

57 The average 'Total' days calculation is equal to the sum of the average 'Briefing Days', 'Oral Argument Days' and 'Deliberation Days' for the 2007–2011 period. However, that is not the case for the 2012–2017 period, which is due to the number of Rule 41(5) procedures that had no oral argument in that time period. These procedures must necessarily be excluded when calculating the average 'Oral Argument Days'. This results in a more reliable estimate of this statistic, but does not allow for summing across to arrive at a total.

phases, also saw a significant decline, amounting to 29.1 per cent of the decline. Finally, the tribunal's deliberation period saw another material decline: a decrease of 16.3 days, on average, representing 27.4 per cent of the total decline. Deliberations remain, on average, eight days shorter than the briefing period. That both briefings and deliberations decreased by over two weeks on average is supportive evidence of an effort by everyone involved, parties and arbitrators alike, to expedite the procedure.

In Table 5, we present a closer examination of the briefing stage.

Time Period	Rule 41(5) Objections[1]	Average	Standard Deviation	Median	Minimum	Maximum
2007 - 2011	6	67.0	37.4	73.5	25	104
2012 - 2017	20	49.6	33.7	34.0	12	129
Difference		**17.4**	**3.7**	**39.5**	**13**	**-25**

[1] By year measured.

Table 5: briefing days for Rule 41(5) objections

We measured briefing days as the time between the filing of the Rule 41(5) objection to the last written submission before oral argument (or, if none, the decision) plus, in three cases of post-hearing briefing,[58] the time between the hearing and the last post-hearing written submission. As noted above, the average time allocated to briefing a Rule 41(5) objection declined by two and a half weeks between the two periods, a 26.0 per cent decline. The median also fell, from 73.5 days in 2007–2011 to 34.0 days in 2012–2017, representing a 53.7 per cent decline. However, even though these averages decreased, the standard deviation did not materially decrease. In addition, the 2012–2017 period did see one case with a higher number of days spent briefing than the prior period – ironically, this outlier case was *MOL Hungarian Oil and Gas Company*, whose tribunal had complained about the length of the Rule 41(5) process.[59] Interestingly, three of the 20 arbitrations in the 2012–2017 period shared the same minimum briefing

58 There were up to three instances of post-hearing submissions: (1) *Emmis Int'l Holding*; (2) *Elsamex*; and (3) *MOL Hungarian Oil and Gas Co.* The subjects addressed in submissions filed after oral argument in *Elsamex* are not publicly identified; we have included the time spent briefing these submissions (14 days), which may slightly skew our calculations of the Briefing Days and the Total Days for the Rule 41(5) procedure greater than they actually are.

59 See *MOL Hungarian Oil and Gas Co*, para 9 (citing *Global Trading Resource Corp and Globex International Inc v Ukraine*).

period: a speedy 12 days.[60] Generally, it can be concluded that briefing days are getting materially shorter.

The average time devoted to oral argument preparation – as measured by the number of days between the last-filed written submission and oral argument – also declined, as reported in Table 6.

Time Period	Rule 41(5) Objections[1]	Average	Standard Deviation	Median	Minimum	Maximum
2007 - 2011	6	38.5	31.3	33	4	89
2012 - 2017[2]	12	21.2	18.5	17	0	55
Difference		**17.3**	**12.8**	**16**	**4**	**34**

[1] By year measured.

[2] No oral argument period for
Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary
Edenred SA v. Hungary
Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama
Ioan Micula, Viorel Micula and others v. Romania - Annulment
Álvarez y Marín Corporación S.A. and others v. Republic of Panama
Mathias Kruck and others v. Kingdom of Spain
Lion Mexico Consolidated L.P. v. United Mexican States
Portigon AG v. Kingdom of Spain

Table 6: oral argument days for Rule 41(5) objections

As reflected in Table 6, preparation for oral argument fell by two and a half weeks, representing a 44.9 per cent decline. The decrease also was reflected in the median, which exhibited a similar decline of 16 days between the two periods, reflecting a 48.5 per cent decline. In one case, the hearing occurred the same day the claimant filed its rejoinder submission.[61] The maximum number of days also decreased materially from 89 days in the 2007–2011 period to 55 days in the 2012–2017 period, representing a 38.2 per cent decrease. While all of the Rule 41(5) procedures in the 2007–2011 period had oral argument, eight of the 20 procedures – 40 per cent – in the 2012–2017 period did not. This willingness to forego oral argument, along with the shorter argument preparation periods when one was held, must reflect that those involved are now evaluating the necessity of oral argument at all and, if one is required, providing greater flexibility in scheduling hearings sooner.

As reflected in Table 7 below, the average time tribunals took to deliberate a Rule 41(5) objection – as measured by the time between the latter of oral argument or the last-filed written submission[62] and the issuance of a decision – also declined significantly in the 2012–2017 period.

60 Three arbitrations had briefing periods of only 12 days: (1) *Lundin Tunisia*; (2) *Ioan Micula*; and (3) *Mathias Kruck*.

61 *Emmis Int'l Holding*.

62 There were up to three instances of post-hearing briefings: (1) *Emmis Int'l Holding*; (2) *Elsamex*; and (3) *MOL Hungarian Oil and Gas Co.* See note 58 above.

Time Period	Rule 41(5) Objections[1]	Average	Standard Deviation	Median	Minimum	Maximum
2007 - 2011	6	57.7	51.7	45	4	147
2012 - 2017	20	41.4	33.7	39	2	116
Difference		**16.3**	**18.0**	**6**	**2**	**31**

[1] By year measured

Table 7: deliberation days for Rule 41(5) objections

The average time tribunals spent deliberating fell from an average of 57.7 days in the 2007–2011 period to an average of 41.4 days in the 2012–2017 period, a difference of 16.3 days, representing a 28.3 per cent decline. Measured using the median statistic, the decline was six days, representing a 13.3 per cent decline. For both time periods, the maximum deliberation periods are relative outliers: indeed, only one other tribunal took longer than three months to issue its decision.

In Table 8, we provide an additional breakdown of the average number of days between the two relevant periods by result.

Time Period	Result	Rule 41(5) Objections[1]	Total Days	Briefing Days	Oral Argument Days	Deliberation Days
2007 - 2011	Full/Partial Grant	3	178.0	57.3	49.7	71.0
	Full Denial	2	107.0	64.5	18.5	24.0
	Not Public	1	231.0	101.0	45.0	85.0
2012 - 2017	Full/Partial Grant[2]	3	141.7	70.3	6.0	67.3
	Full Denial[3]	11	108.4	49.6	23.0	44.1
	Not Public[4]	6	76.0	39.2	27.0	23.3

[1] By year measured

[2] There are 2 cases with oral arguments

[3] There are 7 cases with oral arguments

[4] There are 3 cases with oral arguments

Table 8: average days by stage and result

Given the limited number of cases in each category, it is difficult to draw additional conclusions beyond these breakdowns. However, trends can be observed. First, and most notable, in the 2012–2017 time period, non-public decisions were issued, on average, faster than public decisions. Non-public decisions were issued, on average, three weeks faster than public decisions denying objections and more than six weeks faster than public decisions granting objections in full or in part. This may reflect the willingness of arbitrators to dispose with lengthy or well-reasoned decisions when they know their decisions will not be subject to public scrutiny.

Not surprisingly, the average duration of the process in which objections are granted (in whole or in part) is longer than the average duration of the process in which objections are denied. As can be seen from the 2012–2017 period, this difference is reflected in the difference in the number of briefing days and deliberation days. From difference in deliberation days, one may also surmise that tribunals deliberate longer before granting objections than they do before denying objections, which is a logical presumption in the first place (as frivolous objections can be quickly disposed of by tribunals).

Rule 41(5) objections are associated with speedier arbitrations

Most significantly for the summary disposition debate, the time spent resolving a Rule 41(5) objection appears, on average, to be time well spent. Of the 26 arbitrations in which a Rule 41(5) objection has been determined to date, 16 are original (ie, non-annulment) proceedings that have concluded. Seven Rule 41(5) arbitrations remain pending and three more are annulment proceedings, which are excluded from this analysis to enable comparison with ICSID's calculation of the average duration arbitration proceedings from 2010 to 2017.[63]

The difference in the average length of these 16 concluded Rule 41(5) original proceedings and the average length of all ICSID concluded arbitrations[64] is significant: the Rule 41(5) arbitrations lasted, on average, more than a year less than all ICSID arbitrations.

In Table 9, we examine the difference between the duration of concluded Rule 41(5) arbitrations and all ICSID arbitrations, as measured in months. To enable comparison with ICSID's statement of concluded cases in its Annual Reports, the duration of Rule 41(5) arbitrations is calculated from the date of the constitution of the tribunal to their conclusion and are counted by the

63 The three annulment proceedings that are excluded from this calculation are: (1) *Elsamex*; (2) *Ioan Micula*; and (3) *Venoklim Holding*.

64 As calculated and reported by ICSID; its calculation includes Rule 41(5) original proceedings but excludes annulment proceedings. See note 63.

fiscal year (July 1 to June 30) in which they concluded. The statistics in the table below, however, are preliminary and circumspection is warranted due to the seven Rule 41(5) arbitrations that have not closed. Further, limited information is available regarding the average duration of all ICSID arbitrations: particularly, it is unavailable for ICSID fiscal years 2009 and 2016 to 2018.

ISCID Fiscal Year	Rule 41(5) Objections[1]	All ICSID Arbitrations	Difference
2009	14.7	*N/A*	*N/A*
2010	*N/A*	37.0	*N/A*
2011	8.1	25.0	16.9
2012	32.2	42.0	9.8
2013	*N/A*	42.0	*N/A*
2014	21.2	42.0	20.8
2015	21.6	39.0	17.4
2016	27.3	*N/A*	*N/A*
2017	21.6	*N/A*	*N/A*
2018	*N/A*	*N/A*	*N/A*
2019	37.0	*N/A*	*N/A*
Average	**23.0**	**37.8**	**14.9**

Table 9: average duration of arbitrations (months)

The difference in the average length of these 16 concluded Rule 41(5) arbitrations and the average length of concluded non-Rule 41(5) arbitrations is significant: the Rule 41(5) arbitrations concluded, on average, over a year earlier than the non-Rule 41(5) arbitrations. According to available data, all ICSID arbitrations lasted, on average, 37.8 months or over three years, from constitution of the tribunal to conclusion.[65] Rule 41(5) arbitrations, meanwhile, lasted, on average, only 23.0 months, or 1.9 years, for the same period, representing a 39.3 per cent decrease.

65 In its Annual Reports, ICSID reported the average duration of arbitration proceedings, 'calculated from constitution of the tribunal to the conclusion' as: 37 months in fiscal year 2010; 25 months in fiscal year 2011; 'between 3 to 4 years' in fiscal year 2012; 'between 3 and 4 years' in fiscal year 2013; 'just over three and a half years' in fiscal year 2014; and 39 months in fiscal year 2015. Where a range was provided, we used the middle value in our analysis. Further, the average duration of arbitration proceedings was not published in the Annual Reports for fiscal years 2009, 2016, 2017 and 2018. See 2011 Annual Report p 35 https://icsid.worldbank.org/en/Documents/resources/2011%20-%20Annual%20Report%20%20-%20English.pdf; 2012 Annual Report p 34 https://icsid.worldbank.org/en/Documents/resources/2012%20Annual%20Report%20-%20English.pdf; 2013 Annual Report p 30 https://icsid.worldbank.org/en/Documents/resources/2013%20AR-%20ENG.pdf; 2014 Annual Report p 30 https://icsid.worldbank.org/en/Documents/resources/ICSID_AR14_ENG.pdf; and 2015 Annual Report at 31 https://icsid.worldbank.org/en/Documents/resources/ICSID_AR15_ENG_CRA-highres.pdf all accessed 4 March 2019).

As mentioned previously, seven Rule 41(5) arbitrations remain pending. As one of these pending Rule 41(5) arbitrations[66] is less than a year old (as of 1 December 2018), it is unknown whether it will ultimately serve to increase or decrease the average duration of Rule 41(5) arbitrations. The other six pending Rule 41(5) arbitrations, however, had tribunals constituted more than 23 months ago (ie, January 2017) and the longest of these, *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12, has lasted 72.6 months as of 1 December 2018. Accordingly, including these other six pending Rule 41(5) arbitrations in the calculation will necessarily increase the average duration of Rule 41(5) arbitrations, but by how much is unclear.

Using a hypothetical closing date can provide some guidance on the impact of these six other pending arbitrations that will increase the average duration of a Rule 41(5) arbitration. In Table 10, we provide the recent procedural developments for each pending arbitration as of 1 December 2018.

Vattenfall AB and others v Federal Republic of Germany, ARB/12/12	14 December 2012	10–21 October 2016 on jurisdiction, merits and quantum	On 12 November 2018, the respondent filed a proposal for the disqualification of all three arbitrators. The proceeding remains suspended pending a decision on the proposal.
MOL Hungarian Oil and Gas Company Plc v Republic of Croatia, ARB/13/32	14 April 2014	21 February – 3 March 2017, 24–28 July 2017, 7–16 March 2018 and 4–6 July 2018 on jurisdiction and merits	On 26 October 2018, the parties filed costs submissions and, on 28 October 2018, made additional filings related to those submissions. On 30 October 2018, the tribunal decided on the admissibility of new evidence.
Elektrogospodarstvo Slovenije – razvoj in inzeniring doo v Bosnia and Herzegovina, ARB/14/13	2 July 2015	11–15 December 2017 on jurisdiction and liability	On 7 April 2018, the parties filed submissions on costs and, on 20 April 2018, observations on the other party's statement of costs.
Mathias Kruck and others v Kingdom of Spain, ARB/15/23	19 January 2016	None	On 8 August 2018, the tribunal was reconstituted following the resignation of an arbitrator on 25 June 2018.
Lion Mexico Consolidated LP v United Mexican States, ARB(AF)/15/2	27 July 2016	None	On 26 October 2018, the respondent filed a counter-memorial on the merits.
Eskosol SpA in liquidazione v Italian Republic, ARB/15/50	19 October 2016	24–26 September, 2018 on jurisdiction and merits	On 20 November 2018, the claimant filed a request for the tribunal to determine the admissibility of new evidence and, that same day, the respondent filed observations on that request.

Table 10: status of the six[67] pending Rule 41(5) arbitrations as of 1 December 2018

66 *Portigon AG*.

67 *Portigon AG* is excluded from this analysis because it is less than a year old as of 1 December 2018. It is unknown whether it will ultimately serve to increase or decrease the average duration of Rule 41(5) arbitrations.

It currently appears reasonable to estimate that these six pending Rule 41(5) arbitrations will close, on average, by 31 December 2019. This estimate, which provides an average duration of 56.5 months, currently appears to be conservative when compared to the average of all ICSID arbitrations, which is 37.8 months.

As Table 10 shows, two of the three Rule 41(5) arbitrations with tribunals constituted prior to 2016 appear to be at a very advanced stage: the parties have submitted costs in both *MOL Hungarian Oil and Gas Company* and *Elektrogospodarstvo Slovenije - razvoj in inzeniring doo v Bosnia and Herzegovina*. Accordingly, it appears reasonable to estimate that these will conclude sometime within the next year. It is more difficult to predict a potential end date of the third arbitration with a tribunal constituted prior to 2016, *Vattenfall AB and others v Federal Republic of Germany*: the parties filed replies to post-hearing briefing well over a year ago, in September 2017. However, they have made multiple filings since then and the respondent recently filed a proposal to disqualify the tribunal. As of 1 December 2018, the arbitration is suspended pending a decision on that proposal, and may be considered an outlier.

The tribunals in the other three pending Rule 41(5) arbitrations were all constituted in 2016. Of these arbitrations, nearly three years has passed since the constitution of the tribunal in the oldest of these arbitrations: *Mathias Kruck and others v Kingdom of Spain*. It has not yet had a hearing on the merits and the tribunal was reconstituted in August 2018 following an arbitrator's resignation. However, the parties have briefed the issue of jurisdiction, which may or may not result in an award concluding the arbitration. Briefing is ongoing in the second arbitration, *Lion Mexico Consolidated LP v United Mexican States*. The third arbitration, *Eskosol SpA in liquidazione v Italian Republic*, is farther along: a hearing on jurisdiction and merits was held in September. Our hypothesis applies an *average* end date of 31 December 2019 for the six pending cases, meaning that it incorporates the fact that some of the proceedings may extend beyond that date while others conclude before it.

Factoring these assumptions into our analysis, the six pending Rule 41(5) arbitrations would last, on average, 56.5 months, as shown in Table 11.

Arbitration	Date of Constitution of Tribunal	Hypothetical Date of Closing of Arbitration	Hypothetical Duration of Arbitration
Vattenfall AB and others v. Federal Republic of Germany, ARB/12/12	14-Dec-12	31-Dec-19	85.8
MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia, ARB/13/32	14-Apr-14	31-Dec-19	69.6
Elektrogospodarstvo Slovenije - razvoj in inzeniring d.o.o. v. Bosnia and Herzegovina, ARB/14/13	2-Jul-15	31-Dec-19	54.8
Mathias Kruck and others v. Kingdom of Spain, ARB/15/23	19-Jan-16	31-Dec-19	48.1
Lion Mexico Consolidated L.P. v. United Mexican States, ARB(AF)/15/2	27-Jul-16	31-Dec-19	41.7
Eskosol S.p.A. in liquidazione v. Italian Republic, ARB/15/50	19-Oct-16	31-Dec-19	38.9
Average			**56.5**

Table 11: average duration of pending Rule 41(5) arbitrations assuming 31 December 2019 end date

Based on these assumptions for the six pending Rule 41(5) arbitrations, the average duration for Rule 41(5) arbitrations increases from 23.0 months to 26.7 months, and the difference between Rule 41(5) and all ICSID arbitrations is reduced to 11.1 months – still a material difference.[68] This is shown in Table 12.

ISCID Fiscal Year	Rule 41(5) Objections[1]	All ICSID Arbitrations	Difference
2009	14.7	*N/A*	*N/A*
2010	*N/A*	37.0	*N/A*
2011	8.1	25.0	16.9
2012	32.2	42.0	9.8
2013	*N/A*	42.0	*N/A*
2014	21.2	42.0	20.8
2015	21.6	39.0	17.4
2016	27.3	*N/A*	*N/A*
2017	21.6	*N/A*	*N/A*
2018	*N/A*	*N/A*	*N/A*
2019	37.0	*N/A*	*N/A*
2020	56.5	*N/A*	*N/A*
Average	**26.7**	**37.8**	**11.1**

[1] By year measured.

Table 12: average duration of arbitrations (months) including pending Rule 41(5) arbitrations

68 Even if the six pending Rule 41(5) arbitrations close on 31 December 2020, on average, the average duration for Rule 41(5) arbitrations increases to 28.0 months – and this is still a 9.8 month difference from all ICSID arbitrations.

There could be multiple reasons for the swifter resolution of Rule 41(5) arbitrations that is currently observed. For example, the filing of even an unsuccessful Rule 41(5) objection could correspond with a particularly weak claim. This in turn could correspond with a faster dispute resolution process irrespective of Rule 41(5). On the other hand, it could also be that, just as proponents of summary disposition have argued, Rule 41(5) serves to streamline the arbitration by requiring the tribunal to focus on the substance of the dispute early in the proceeding, narrowing issues, or concentrating attention on the key, potentially dispositive issues at the outset.

As one would expect to see from any of these causes, more Rule 41(5) arbitrations are resolved before being decided on the merits. Indeed, while nearly half (49.8 per cent) of ICSID arbitrations proceed to a final award on the merits,[69] only two of the 16 Rule 41(5) arbitrations (12.5 per cent) were resolved by a decision on the merits.[70] By contrast, half of Rule 41(5) arbitrations – eight of the 16 – were eventually dismissed for lack of jurisdiction.[71]

A comparison of those arbitrations resolved on jurisdictional grounds also yields evidence to support the position that Rule 41(5) objections are associated with faster arbitrations. Although the number of observations is insufficient to warrant a more thorough statistical examination between these two groups of cases, a simple comparison can provide additional insight into the length of resolutions while controlling for an important case characteristic. Between fiscal years 2012 and 2017, seven of the arbitrations in which the Rule 41(5) objection was denied or partially granted were

69 See 2009 Annual Report p 5 https://icsid.worldbank.org/en/Documents/resources/2009%20-%20Annual%20Report%20-%20English.pdf; 2010 Annual Report p 23 https://icsid.worldbank.org/en/Documents/resources/2010%20-%20Annual%20Report%20%20-%20English.pdf; 2011 Annual Report p 33–34 https://icsid.worldbank.org/en/Documents/resources/2011%20-%20Annual%20Report%20%20-%20English.pdf; 2012 Annual Report p 33–34, https://icsid.worldbank.org/en/Documents/resources/2012%20Annual%20Report%20-%20English.pdf; 2013 Annual Report p 28–29, https://icsid.worldbank.org/en/Documents/resources/2013%20AR-%20ENG.pdf; 2014 Annual Report p 29–30, https://icsid.worldbank.org/en/Documents/resources/ICSID_AR14_ENG.pdf; 2015 Annual Report at 29–30, https://icsid.worldbank.org/en/Documents/resources/ICSID_AR15_ENG_CRA-highres.pdf); and 2016 Annual Report p 37–38, https://icsid.worldbank.org/en/Documents/resources/ICSID_AR16_English_CRA_bl2_spreads.pdf; 2017 Annual Report at 37–38, https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20AR%20EN.pdf; and 2018 Annual Report at 34–35, https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf. all accessed 4 March 2019.

70 This calculation is based on information compiled from ICSID's database of case details and decisions and awards issued in the Rule 41(5) arbitrations.

71 *Ibid.*

later resolved by a finding that the tribunal lacked jurisdiction to hear the claims.[72] In that same time period, according to ICSID, another 27 non-Rule 41(5) arbitrations were similarly resolved by a finding that the tribunal lacked jurisdiction over the dispute. We were able to identify 24 of them.[73] These two groups – Rule 41(5) arbitrations later resolved on jurisdictional grounds and non-Rule 41(5) arbitrations resolved on jurisdictional grounds – enable something of an apples-to-apples comparison. If it were the case that Rule 41(5) had no effect on the duration of arbitrations, one would expect there to be no difference between the two groups in terms of the average number of days. We looked into the number of days from constitution to closure for both groups and present the results in Table 13.

Group	Number of Arbitrations	Average	Standard Deviation	Median	Minimum	Maximum
Rule 41(5) Arbitrations	7	722.6	219.1	743	322	967
Non-Rule 41(5) Arbitrations	24	958.2	428.1	906	225	2,162
Difference		**235.6**	**209.0**	**163**	**-97**	**1,195**

Table 13: number of days – constitution to closure for jurisdictional grounds

The comparison of the arbitrations resolved on jurisdictional grounds indicates materially shorter days for Rule 41(5) arbitrations. The average number of days for Rule 41(5) arbitrations later resolved on jurisdictional grounds is 235.6 days, or 7.9 months, shorter than non-Rule 41(5) arbitrations resolved on jurisdictional grounds – a 24.6 per cent difference. The median number of days for Rule 41(5) arbitrations later resolved on jurisdictional grounds is 163 days shorter than non-Rule 41(5) arbitrations resolved on jurisdictional grounds, an 18.0 per cent difference. While circumspection is warranted in light of the small sample size, these results support the proposition that Rule 41(5) objections may expedite cases.

The experience of parties and tribunals in Rule 41(5) arbitrations support this comparison. One tribunal stated outright that the Rule 41(5) process did, in fact, streamline the process: '[t]he Tribunal also agrees with the Respondent that its Rule 41(5) Application has significantly expedited and focused the discussion on the issues of jurisdiction'.[74] The effects of Rule 41(5)

72 An eighth Rule 41(5) arbitration, *Álvarez y Marín Corporación SA*, was dismissed on jurisdictional grounds on 12 October 2018 during ICSID's Fiscal Year 2019. Because this fiscal year is ongoing, comparable data for all non-Rule 41(5) arbitrations dismissed on jurisdictional grounds during the fiscal year is not yet available. Accordingly, *Álvarez y Marin Corporación SA* is excluded from this analysis.

73 These arbitrations were identified through the Case Details published on ICSID's website, published awards and statistics on concluded cases published in ICSID's Annual Reports.

74 *PNG Sustainable Dev Program*, Award, para 410.

objections on other arbitrations is apparent from their procedural posture. In *Accession Mezzanine Capital LP v Hungary*, for example, the claimant withdrew claims as a result of the Rule 41(5) process: though it originally asserted multiple claims under a treaty and customary international law, it revised its request for arbitration a week after the Rule 41(5) objection was filed and withdrew even more claims in briefing and 'oral discussion' before the tribunal.[75] After a partial denial of the Rule 41(5) objection, the remainder of the arbitration focused solely on the tribunal's jurisdiction. Likewise, briefing and oral argument on a Rule 41(5) objection caused claimant's counsel in *Trans-Global Petroleum* to withdraw one of three claims during oral argument on the objection, observing that the claim was 'on further reflection and consideration, manifestly without legal basis'.[76] The entire dispute was settled within a year of that oral argument.[77] And in *CEAC Holdings Limited v Montenegro*, the tribunal, one month after issuing its Rule 41(5) decision, requested that the parties brief a specific issue and then rendered a final award resolving all claims based on that issue.[78]

The adoption of summary disposition in international commercial arbitration

The swifter resolution of Rule 41(5) arbitrations lends support to summary disposition's continued expansion into the rules of international commercial arbitration. Fears that its adoption will decrease procedural economy are unsupported by its use so far: Rule 41(5)'s infrequent invocation – at a brief peak, only 12.5 per cent of ICSID arbitrations – evidences that summary disposition has not become a tool for harassment or delay nor a rote procedure during its decade of use. It also remains, on average, an expedited procedure. Meanwhile, its anticipated benefits of increased procedural economy are so far supported by the data: that Rule 41(5) arbitrations are resolved over a year faster than non-Rule 41(5) arbitrations suggests that it may very well streamline procedure or narrow focus to the dispositive issues early on in the proceedings. The speedier resolution of disputes when Rule 41(5) is involved, as currently observed, is a compelling argument for the further experimentation with summary disposition in international commercial arbitration.

75 *Accession Mezzanine Capital LP*, Decision on Respondents' Objection under Arbitration Rule 41(5), para 64 (16 January 2013).

76 *Trans-Global Petroleum, Inc*, para 119.

77 See Case Details, *Trans-Global Petroleum Inc*, https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/25 accessed 4 March 2019 (at tab 'Procedural Details', first session held 22 April 2008, award rendered 8 April 2009).

78 *CEAC Holdings*, Award, paras 10, 226 (26 July 2016).

The tide, in any event, does appear to be turning. Over the past two years, four administering institutions have followed ICSID's lead by adopting summary disposition procedures into their rules. The SIAC was the first, adopting a dedicated rule effective 1 August 2016; the Arbitration Institute of the SCC followed, with a rule effective 1 January 2017; the ICC issued a note published 30 October 2017 incorporating summary disposition into an existing rule; and the HKIAC most recently adopted a rule effective 1 November 2018. Each institution adopted the Rule 41(5) model to varying degrees.

SIAC's rule, the first by a major commercial administering institution, parallels ICSID's Rule 41(5) most closely. It provides, in the relevant part:

> '29.1 A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that:
>
> a. a claim or defence is manifestly without legal merit; or
>
> b. a claim or defence is manifestly outside the jurisdiction of the Tribunal.
>
> …
>
> 29.3 The Tribunal may, in its discretion, allow the application for the early dismissal of a claim or defence under Rule 29.1 to proceed. If the application is allowed to proceed, the Tribunal shall, after giving the parties the opportunity to be heard, decide whether to grant, in whole or in part, the application for early dismissal under Rule 29.1.
>
> 29.4 If the application is allowed to proceed, the Tribunal shall make an order or Award on the application, with reasons, which may be in summary form. The order or Award shall be made within 60 days of the date of filing of the application, unless, in exceptional circumstances, the Registrar extends the time.'[79]

Thus, SIAC adopts Rule 41(5)'s express 'manifestly without legal merit' standard, though with several noteworthy adaptations that should serve to expand the use of summary disposition. First, whereas Rule 41(5) applies only to claims, SIAC's rule permits the early disposition of both claims *and defences*. This may particularly appeal to users such as financial institutions who seek to quickly exercise contractual rights. Second, in contrast to Rule 41(5)'s 30-day deadline to file an objection following constitution of the tribunal, an objection may be filed in a SIAC arbitration at any time during the proceeding. Third, SIAC imposes a very short, mandatory deadline on the summary disposition procedure: a decision 'shall' be issued within

79 SIAC, Arbitration Rules of the Singapore Int'l Arbitration Centre (6th edn, 1 August 2016), www.siac.org.sg/images/stories/articles/rules/2016/SIAC%20Rules%202016%20English_28%20Feb%202017.pdf accessed 4 March 2019.

60 days of the application, subject only to extensions 'in exceptional circumstances'. ICSID tribunals would have met this 60-day deadline in only six of the 26 Rule 41(5) objections.[80] Finally, the SIAC Rule adopts a two-step process under which the tribunal must first grant a party leave to apply for summary disposition before the application may proceed. This initial procedural hurdle appears to be designed to protect against the encroachment of summary disposition into routine procedure. It may well do so, though it may also serve to extend the procedure, as it will require meritorious applicants to tread through an extra step of briefing before a final decision is issued.

The SCC followed SIAC effective 1 January 2017, becoming the second major administering institution to adopt a summary disposition rule. In doing so, the SCC carved its own path, departing, in some cases widely, from both ICSID Rule 41(5) and the SIAC rule. The SCC's rule, Rule 39, states in the relevant part:

> '(1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, ….
>
> (2) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that: (i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable; (ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or (iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.
>
> (3) The request shall specify the grounds relied on and the form of summary procedure proposed, and demonstrate that such procedure is efficient and appropriate in all the circumstances of the case.
>
> …
>
> (5) In determining whether to grant a request for summary procedure, the Arbitral Tribunal shall have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.
>
> (6) If the request for summary procedure is granted, the Arbitral Tribunal shall seek to make its order or award on the issues under consideration in an efficient and expeditious manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case …'[81]

80 Cf Table 3.

81 SCC, 2017 Arbitration Rules, Art 39 (1 January 2017), https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf accessed 4 March 2019.

The SCC rule broke new ground in the flexibility and scope of authority granted to the tribunal. First, and most notably, it extends summary disposition beyond questions of law to questions of fact, greatly expanding the issues that may be determined by summary disposition. Unlike Rule 41(5) and the SIAC rule, the SCC's rule is not limited to claims that are 'manifestly without *legal* merit'. Second, it mandates a procedural standard that must be satisfied before a tribunal may grant a summary disposition application: the requesting party must demonstrate 'that such procedure is efficient and appropriate in all the circumstances of the case' and that it 'contributes to a more efficient and expeditious resolution of the dispute'. Third, despite mandating this procedural threshold standard, the SCC rule does not mandate the standard to be applied in determining the actual summary disposition application. Instead, the SCC rule provides several 'examples' where summary disposition 'may' be warranted, effectively leaving it to the tribunal to adopt an appropriate one. For example, it proposes a 'manifestly unsustainable' standard for allegations of fact or law. Fourth, the rule leaves all deadlines – both as to the filing of the summary disposition request and the length of the procedure – to the tribunal, requiring only that the procedure be 'efficient and expeditious', while ensuring the parties have 'an equal and reasonable opportunity' to be heard.

The ICC, the third major institution to expressly adopt summary disposition procedures, did so in its 30 October 2017 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (the 'ICC Note'). The ICC Note, which makes clear that summary disposition falls within its existing Article 22,[82] states, in the relevant part:

82 See ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration p 10 (30 October 2017) https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf accessed 4 March 2019 ('This section includes guidance as to how an application for the expeditious determination of manifestly unmeritorious claims or defenses may be dealt with, within the broad scope of Article 22'). Art 22 states:

'1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

3) Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

5) The parties undertake to comply with any order made by the arbitral tribunal.'

ICC, Arbitration Rules, Art 22 (1 March 2017) https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf accessed 4 March 2019.

'60. Any party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction ('application'). The application must be made as promptly as possible after the filing of the relevant claims or defences.

61. The arbitral tribunal has full discretion to decide whether to allow the application to proceed. In so doing, it shall take into consideration any circumstances it considers to be relevant, including the stage of the proceedings and the need to ensure time and cost efficiency.

62. If the arbitral tribunal allows the application to proceed it shall promptly adopt the procedural measures it considers appropriate, after consulting the parties. The responding party or parties shall be given a fair opportunity to answer the application. Further presentation of evidence will be allowed only exceptionally. When the arbitral tribunal determines that a hearing is appropriate, such hearing may be conducted by videoconference, telephone or similar means of communication.

63. Consistent with the nature of the application, the arbitral tribunal shall decide the application as promptly as possible and state the reasons for its decision in as concise a fashion as possible. The decision may be in the form of an order or award. In either case, the arbitral tribunal may decide on the costs of the application pursuant to Article 38 or reserve this decision to a later stage.

64. The Court will scrutinise any award made on an application for expeditious determination, in principle within one week of receipt by the Secretariat.'[83]

The ICC Note strikes something of a middle ground between ICSID Rule 41(5) and the SIAC and SCC summary disposition rules. First, like the SIAC rule, the ICC Note expressly applies summary disposition of both claims and defences. Second, and again like the SIAC rule, it imposes an express legal standard: claims or defences must be 'manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction'. Noteworthily, the ICC Note does not simply apply to claims that are 'manifestly without *legal* merit', thus opening the door, like the SCC rule, to summary disposition on questions of fact as well as law. Third, more akin to the SCC's flexible

83 ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (30 October 2017) https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf accessed 4 March 2019.

timetable, the ICC leaves it to the parties and tribunal to sculpt an efficient process, requiring only that applications be filed 'as promptly as possible after the filing of the relevant claims or defences' and that the 'tribunal shall decide the application as promptly as possible'. Fourth, the ICC uniquely limits the procedure to one round of briefing and, only if deemed appropriate by the tribunal, a hearing. 'Further presentation of evidence' will be granted only 'exceptionally'. Finally, like the SIAC Rule, the ICC Note also requires the tribunal to first grant a party leave to apply for summary disposition before the application may proceed.

One year after the ICC's Note, the HKIAC became the fourth institution to adopt summary disposition procedures in a rule that became effective as of 1 November 2018. Its new Article 43 states in the relevant part:

> '43.1 The arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that: (a) such points of law or fact are manifestly without merit; or (b) such points of law or fact are manifestly outside the arbitral tribunal's jurisdiction; or (c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party.
>
> …
>
> 43.3 Any request for early determination procedure shall be made as promptly as possible after the relevant points of law or fact are submitted, unless the arbitral tribunal directs otherwise.
>
> 43.4 The request for early determination procedure shall include the following: (a) a request for early determination of one or more points of law or fact and a description of such points; (b) a statement of the facts and legal arguments supporting the request; (c) a proposal of the form of early determination procedure to be adopted by the arbitral tribunal; (d) comments on how the proposed form referred to in Article 43.4(c) would achieve the objectives stated in Articles 13.1 and 13.5; and (e) confirmation that copies of the request and any supporting materials included with it have been or are being communicated simultaneously to all other parties by one or more means of service to be identified in such confirmation.
>
> 43.5 After providing all other parties with an opportunity to submit comments on the request, the arbitral tribunal shall issue a decision either dismissing the request or allowing the request to proceed by fixing the early determination procedure in the form it considers appropriate. The arbitral tribunal shall make such

decision within 30 days from the date of filing the request. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

43.6 If the request is allowed to proceed, the arbitral tribunal shall make its order or award, which may be in summary form, on the relevant points of law or fact. The arbitral tribunal shall make such order or award within 60 days from the date of its decision to proceed. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

43.7 Pending the determination of the request, the arbitral tribunal may decide whether and to what extent the arbitration shall proceed.'[84]

The HKIAC's summary disposition rule most closely resembles SIAC's, though it also borrows from other institutions' models. First, it applies the 'manifestly without merit' standard applied by SIAC, though, unlike SIAC, it adopts the SCC's extension of summary disposition to both questions of law and fact. Second, like SIAC, the HKIAC does not limit an application for summary disposition to a specific phase in the arbitration. In a departure from SIAC, however, it requires that an application be filed 'as promptly as possible after the relevant points of law or fact are submitted' unless otherwise permitted by the tribunal. Third, the HKIAC adopts SIAC's two-step process under which the tribunal must first grant a party leave to proceed with its summary disposition application, adding a 30-day time limit in which the tribunal must make this initial determination. Fourth, the HKIAC imposes SIAC's 60-day deadline for the tribunal to issue its decision on the application, though this time period begins to run from the date of the tribunal's initial determination and not, as SIAC's rule does, from the date of the party's initial request.

Other major administering institutions have rules that, like ICC Article 22, grant tribunals broad authority to manage cases – particularly, to manage them efficiently and economically – and would apparently encapsulate summary procedures.[85] Even so, many arbitrators have been hesitant to grant summary disposition applications absent express grants of authority. It would not be surprising if the remaining major administering

84 HKIAC, 2018 Administered Arbitration Rules, Art 43 (1 November 2018) www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 accessed 4 March 2019.

85 See International Centre for Dispute Resolution Art 20.3 ('The tribunal may… direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case') and London Court of International Arbitration Art 14.4 ('…the Arbitral Tribunal's general duties… shall include:… (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute').

institutions, including the ICDR and the LCIA, adopted summary disposition rules in the months or years ahead. As the major commercial international arbitration institutions continue to experiment in crafting their own summary disposition rules, three observations from this article's analysis of Rule 41(5) may guide this effort.

First, the rule must protect against the encroachment of summary disposition applications into routine procedure and their use as a dilatory tactic. There are various ways of accomplishing this. Rule 41(5)'s stringent legal standard, coupled with the tribunals' authority to award costs, has proven successful thus far. The two-step process adopted by the SIAC, ICC and HKIAC, wherein the requesting party must meet a threshold bar to proceed with a summary disposition application, will likely provide another means of protection.

Second, the rule must protect against delay. The two infamously lengthy Rule 41(5) procedures in the early years after the rule's adoption[86] exemplify the natural tendency for drawn-out procedures and the need for external restrictions to protect against delay. The SCC's lack of a mandatory timetable may prove to be a flaw in its process, while the SIAC's and HKIAC's 60-day time limit may prove to be too restrictive. The data in this article may help institutions find the right balance in terms of time limits.

Third, and perhaps most challenging, the rule must grant tribunals sufficient flexibility to craft the summary disposition process to the questions at hand. A major contributing factor to the low observed success rate of ICSID Rule 41(5) applications, no doubt, is the reluctance of tribunals to determine complicated or novel questions of law during the Rule 41(5) process. It seems likely that introducing sufficient flexibility into the summary disposition process to accommodate the resolution of complex or novel questions of law will increase summary disposition's success rate, eliminate the need for duplicative briefing and argument on dispositive issues of law, and thereby expedite resolution of a larger number of arbitrations. The SCC's rule, which grants wide authority to the tribunal to craft a bespoke procedure, may address this need.

The adoption of summary disposition rules by four major institutions in just the past two years may mark a turning point for the use of summary disposition procedures in international commercial arbitration. If past is prologue, these new rules may also herald a shortening of the average arbitration process. The Rule 41(5) data indicates that it is less about winning a summary disposition application than it is about focusing the tribunal and the parties on the weaknesses and defects in the case before too much time has passed and too much money has been expended.

86 See *Global Trading Resource Corp and Pan American Energy LLC.*