The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis

B. Ted Howes and Allison Stowell

By now, the arguments for and against the adoption of summary disposition rules in international commercial arbitration are familiar. Proponents of summary disposition, largely from the U.S. and other common-law jurisdictions, argue that it will reduce the length and cost of international arbitration by providing parties with the means to dispose of meritless claims and defenses early in the dispute resolution process. Proponents argue that even when a summary disposition application is unsuccessful, it nonetheless encourages settlement by focusing the parties and the tribunal on potentially dispositive issues, or at least on factually or legally specious claims.

Opponents of summary disposition, largely from civil-law jurisdictions, counter that parties will turn the procedural tool into a vehicle of harassment and delay, producing groundless summary disposition applications and adding another rote procedural step to the arbitral process. Opponents also contend that summary disposition presents 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.

Due to the lack of available statistics, the arguments for and against summary disposition procedures in international arbitration have largely remained unexamined hypotheses. However, May 12, 2018 marked the 10th anniversary of the first decision issued under the International Centre for Settlement of Investment Disputes (ICSID) summary disposition rules. With over 10 years of accumulated public data from ICSID, it is now possible to conduct at least an initial quantitative analysis of the impact of summary disposition applications on international arbitration.

ICSID Rules of Procedure for Arbitration Proceedings 41(5) and (6) ("Rule 41(5)" and "Rule 41(6)") permit a party to "file an objection that a claim is manifestly without legal merit" within 30 days after the arbitral tribunal is constituted and before the tribunal's "first session." After the parties have "opportunity to present their observations on the objection," the arbitral tribunal must issue its decision at that first session or "promptly thereafter[.]"[1]

Between its implementation in 2006 and the end of 2018, twenty-six decisions on Rule 41(5) applications have been issued. The data to date is intriguing. Fears that summary disposition would become a routinely abused procedural tool is, thus far at least, unsupported. Moreover, the summary disposition process remains relatively expedited, lasting, on average, less than three and one-half months from start to finish. Most interestingly, ICSID arbitrations in which summary disposition applications have been made are resolved, on average, *over a year earlier* than the average ICSID arbitration—regardless of whether the applications are successful.

A longer and more detailed version of this article originally appeared in the May 2019 issue of *Dispute Resolution International*. Readers interested in a more fulsome presentation of, and evidentiary support for, the statistics presented below are encouraged to review the *Dispute Resolution International* article.

A. Summary Disposition Has Not Become a Rote Tool of Harassment

Parties were slow to begin invoking summary disposition following Rule 41(5)'s implementation in 2006. For ICSID arbitrations registered between 2007 through 2011, no more than two Rule 41(5) objections were filed. Its use caught on in 2012, when it was invoked five times, and remained relatively steady at four to five arbitrations each year until 2015, after which its use appears to have declined again. Overall, Rule 41(5) has only been invoked in 6.1 percent of arbitrations through 2018; at its peak, in 2013, it was only invoked in 12.5 percent of ICSID arbitrations registered that year.

Rule 41(5)'s low usage rate, extending now for over a decade, should allay fears of summary disposition becoming a rote and widespread tool for harassing or dilatory tactics in international arbitration. It should be noted,

---

B. Ted Howes (bhowes@mayerbrown.com) is a partner and Head of the U.S International Arbitration Group at the law firm of Mayer Brown LLP. Allison Stowell (astowell@mayerbrown.com) is a senior associate in Mayer Brown's U.S. International Arbitration Group.

A version of this article originally appeared in the May 2019 issue of *Dispute Resolution International* (Vol. 13, No. 1) and is reproduced by kind permission of the International Bar Association, London, UK © International Bar Association.

however, that two characteristics of ICSID arbitration safeguard against this potential for abuse: (1) Rule 41(5) imposes the high legal standard that a claim must be "manifestly without legal merit"; and 2) ICSID tribunals, like most international arbitration tribunals, are authorized to award costs to the prevailing party. The imposition of a high legal standard within Rule 41(5) itself limits the spectrum of claims to which the rule apply, and the prospect of bearing the opposing party's costs seems to provide an effective deterrent to aggressive or groundless Rule 41(5) objections.

"Most interestingly, though the sample size remains small, concluded ICSID arbitrations in which summary disposition applications have been determined are resolved over a year earlier than the average ICSID arbitration—regardless whether theapplications are successful."

B. Summary Disposition Remains an Expedited Process

The data to date also evidences a relatively expedited summary disposition process. Two early Rule 41(5) procedures were notoriously lengthy, with one lasting eleven months from the objection's filing to a decision,[2] and a second lasted nearly eight months.[3] In reference to one of these cases, a later tribunal lamented that "[t]he scheduling problems created by the expectations inherent in Rule 41(5) as drafted are by now well-known and documented."[4]

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 expedite the resolution of Rule 41(5) objections, including reducing the number of rounds of briefing, reducing the time between briefs, and foregoing oral argument.

Reflecting these efforts, the average length of the Rule 41(5) process—from the filing of the objection to the issuance of a decision—has been declining over time. Through 2011, Rule 41(5) procedures lasted, on average, a total of 163.2 days. Between 2012 and 2017, Rule 41(5) procedures lasted, on average, 103.7 days,[5] a reduction in excess of two months. All other statistical measurements—median, standard deviation, and minimum and maximum—likewise confirm this time reduction.

C. Summary Disposition Is Associated with Speedier ICSID Arbitrations

Of the 26 arbitrations in which a Rule 41(5) objection has been determined to date, 16 are original (*i.e.*, non-annulment) proceedings that have concluded.[6] The difference in the average duration of these sixteen concluded Rule 41(5) proceedings and the average duration of all ICSID concluded arbitrations is significant: *Rule 41(5) arbitrations have ended, on average, more than a year earlier than all ICSID arbitrations*.

To date, the average duration of all ICSID arbitrations, from constitution of the tribunal to conclusion, has been 37.8 months. In contrast, the average duration of Rule 41(5) arbitrations, has been only 23.0 months—14.8 months less. This is true even though, through 2018, only three Rule 41(5) objections had been granted in their entirety.[7]

There may be multiple reasons why Rule 41(5) arbitrations are currently observed to conclude more swiftly. On the one hand, the filing of a Rule 41(5) objection could simply correspond with weaker claims, which could, in turn, correspond with a faster dispute resolution process regardless of Rule 41(5). On the other hand, the possibility remains that Rule 41(5) assists in streamlining the arbitration by focusing participants on the substance of the dispute early in the proceeding, narrowing issues, or concentrating attention on potentially dispositive issues at the outset—even when the Rule 41(5) objection is denied.

The experience of parties and tribunals in Rule 41(5) arbitrations would appear to support the latter hypothesis. One ICSID tribunal directly attributed the Rule 41(5) process to streamlining the arbitral 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."[8] The impact of Rule 41(5) objections on other ICSID arbitrations is readily apparent from their procedural history. In *Accession Mezzanine Capital L.P. v. Hungary*, for example, the claimant withdrew claims as a result of the Rule 41(5) process.[9] Similarly, the claimant withdrew one of three claims during oral argument on the Rule 41(5) objection in *Trans-Global Petroleum v. Hasemite Kingdom of Jordan*; in so doing, counsel observed that that the claim was "on further reflection and consideration, manifestly without legal basis."[10] In a fourth example, the tribunal in *CEAC Holdings Limited v. Montenegro* requested that the parties brief a specific issue one month after issuing its Rule 41(5) decision, and then rendered a final award resolving all claims based on that issue.[11]

Conclusion

While further analysis is warranted as more ICSID data becomes available, the data available to date—over 10 years of data—supports arguments for the wider adoption of summary disposition in international arbitration. Rule 41(5)'s infrequent invocation—invoked in only 6.1 percent of all ICSID arbitrations to date—evidences that summary disposition has not become a tool for harassment or delay, nor has it become a rote procedure. The Rule 41(5) summary disposition procedure has also become increasingly expedited over time, lasting, on average, just a little more than three months. Most significant, the data to date strongly correlates summary disposition applications with the faster completion of the arbitral process—almost 15 months faster on average.

Proponents and opponents of summary disposition in international arbitration may, and should, continue to rely on anecdotal evidence. We suggest that statistics also has a role to play in this debate. The ICSID data, as currently observed, is a compelling argument for the further experimentation with summary disposition in international arbitration.

Reprinted with permission from: *New York Dispute Resolution Lawyer*, Spring 2020, Vol. 13, No. 1, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.

Endnotes

1. Rules 41(5) and (6) state in full:

   > (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) or to object, in the course of the proceeding, that a claim lacks legal merit.
   >
   > (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.

   These rules have been interpreted to apply mutatis mutandis to annulment proceedings. *See Elsamex, S.A. v. Republic of Honduras* (ARB/09/4)—Annulment, Decision on Elsamex S.A.'s Preliminary Objections ¶¶ 100, 118-131. ICSID's Arbitration Additional Facility Rules contain similar rules with "effectively the same language." *See Lion Mexico Consol. L.P. 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, ¶ 56 (Dec. 12, 2016).

2. *See* ICSID Case Details, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/09/11.

3. *See* ICSID Case Details, *Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8, https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/8.

4. *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) ¶ 9 (Dec. 2, 2014) (citing *Global Trading Resource Corp.*).

5. This average excludes days in which an arbitration was suspended during the Rule 41(5) process, which occurred in two arbitrations.

6. 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.

7. Some circumspection of this conclusion is warranted given that six Rule 41(5) arbitrations are still pending. This analysis should be updated once these six outstanding arbitrations have concluded and their final duration is known.

8. *PNG Sustainable Dev. Program Ltd. v. Indep. State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award ¶ 410 (May 5, 2015).

9. *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondents' Objection under Arbitration Rule 41(5) ¶ 64 (Jan. 16, 2013).

10. *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 ¶ 119 (May 12, 2008).

11. *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, ¶¶ 10, 226 (July 26, 2016).