ICSID arbitration: how long does it take?

Thanks to fresh research the answer is known. **Anthony Sinclair**, of Allen & Overy's international arbitration group, with the help of colleagues **Louise Fisher** and **Sarah Macrory**, analysed the timetables of the ICSID cases that, to date, have produced an award. Their findings are summarised below

When lawyers in private practice or in-house counsel prepare estimates or budgets for legal expenditure, they are all too aware that time means money. Yet when a potential claimant or respondent, facing an ICSID arbitration, asks "how long will it take?", do we really know? The reader will find some of the answers in the report below, which summarises the key findings of a survey we undertook of the 115 ICSID cases that have led to an award (including awards embodying settlement agreements), from the creation of the ICSID Centre through to 1 July 2009.

Most lawyers can think of horror stories of litigation gone off the rails or drawn-out wars of attrition. Presumably this happens in ICSID arbitrations too, and these unusually long cases therefore affect some of the results reported below. Outliers may never be eliminated since proceedings can derail and suffer excessive delay for all manner of reasons, whether particular to the circumstances of the case, the parties or the tribunal. If Tolstoy had been an international arbitration lawyer, he might have said "efficient proceedings are all alike; every inefficient proceeding is inefficient in its own way". So little is likely to be learned by dissecting the longer proceedings and seeking to identify a malignancy at their core, which may not even be there. "Efficiency" is also a somewhat subjective concept: what is most efficient for the claimant may be prejudicial to a respondent. For these reasons, we report only the data and our findings based upon it. We also focus primarily on average figures. No criticism is intended or implied of any individual matter since the course of individual cases is inevitably dictated by its own particular features.

The data upon which we rely is available for all to see on the ICSID website, in the ICSID Annual Reports, and in the helpful procedural summaries contained in most, if not all, ICSID awards. The data may contain errors or anomalies, in part perhaps because of the authors' own frailties, but also because of patchy reporting of rather mundane procedural matters. Even so, it is still fair to analyse the body of ICSID cases as a whole, to consider the performance of the ICSID system on average, and to take stock.

"About three years and seven months"

How long does an ICSID arbitration take? The answer from our survey is that ICSID arbitrations to date have taken 1,325 days on average. That is 3.6 years, from the date the request for arbitration is filed to the date of a final award. This figure does not factor in "cooling off" periods before the formal commencement of proceedings, or the possibility of annulment proceedings following an award.

Is 3.6 years "good" or "bad"? Who can say? It is not clear that there is an "ideal" duration for an ICSID arbitration, since they vary to such a great extent in their complexity, value, detail and sensitivity, not to mention the volume of documents involved or number of witnesses to be heard. This figure is also an average of different types of ICSID arbitrations. It includes both the long and complex cases – with discrete phases, determination of preliminary issues, and the need for numerous findings on disputed issues of fact and law – and the shorter cases such as those in which jurisdiction was denied.

Focusing purely on the more recent past, ICSID arbitrations may, on the whole, be shortening in duration. For the 32 cases commenced in the past five years that have led to an award and for which data is available, the average time from the request for arbitration to the award is closer to 3.2 years.

The longest period from request for arbitration to final award in any ICSID case is 10.5 years (3,839 days), which occurred in *Pey Casado v Chile*. The award in that case is now subject to an annulment application. Over seven and a half years elapsed in *SPP v Egypt* and *CSOB v Slovakia*. Six cases took more than six years, 13 took more than five years.

LONGEST ICSID CASES
10.5 yrs (3,839 days) *Pey Casado v Chile*
7.7 yrs (2,826 days) *SPP v Egypt*
7.7 yrs (2,812 days) *CSOB v Slovakia*
6.8 yrs (2,491 days) *Holiday Inns v Morocco*
6.3 yrs (2,301 days) *World Duty Free v Kenya*

Even the quickest cases still take more than one year. The fastest is *Cable TV v St Kitts and Nevis*, which was disposed of within 448 days of the request for arbitration (with the claims being dismissed for want of jurisdiction). The fastest case in which an award has been rendered on the merits is *CDC v Seychelles*, in which – in the interests of journalistic disclosure – the authors' firm acted for the claimant. The award was rendered in 482 days from the date of the request for arbitration. This case featured a sole arbitrator, Sir Anthony Mason, and a request by the claimant that the tribunal rule as a preliminary matter that even if the tribunal accepted all the facts as alleged by the respondent, the respondent still lacked a defence at law, which request Sir Anthony ruled on in the claimant's favour. Besides *CDC*, all of the other relatively speedy cases mentioned in the graphic (below) involved rulings declining jurisdiction.

SHORTEST ICSID CASES
1.2 yrs (448 days) *Cable TV v St Kitts and Nevis*
1.3 yrs (482 days) *CDC v Seychelles*
1.4 yrs (527 days) *Joy Mining v Egypt*
1.5 yrs (533 days) *Scimitar Exploration v Bangladesh*
1.7 yrs (612 days) *Waste Management v Mexico*

ANALYSING THE INDIVIDUAL PHASES

Registration of the request for arbitration

One of the features of ICSID arbitration is that the ICSID secretariat will scrutinise requests for arbitration to ensure that the centre does not admit claims that are manifestly outside of the jurisdiction created by the ICSID Convention. This process can take some time. On average, cases are registered within 83 days of the date a request for arbitration is filed.

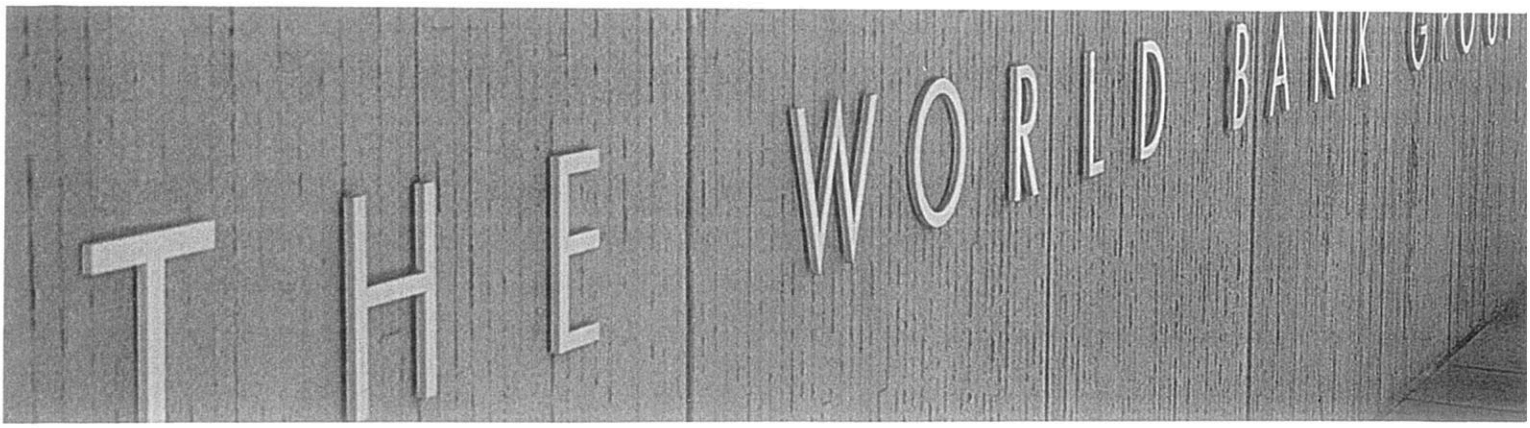
Delay is especially likely at this stage when the parties engage in lengthy observations on whether a request for arbitration should be registered. On 26 occasions registration has taken 100 days or more. In one case, *Phoenix Action v Czech Republic*, registration took 767 days. The award dated 15 April 2009 summarises the protracted process that followed when the secretariat requested certain clarifications as to the claimant's standing. This is a clear reminder that it is wrong to assume that responsibility for excessive delay in registration must lie always at the door of the administrators. Sometimes there are inherent problems with the request or supporting documents. On more than one occasion, a request for arbitration has been registered in just three days. The secretary-general at the time presumably felt sufficiently comfortable to proceed without reference to the views of the respondent, or they were conveyed with remarkable haste. Three days is extraordinarily fast, but users of the system might think that the current average of 12 weeks for registration is a little too slow. Presumably the ICSID secretariat would aspire to register most requests for arbitration more quickly than this.

Anecdotal evidence is that cases filed in 2009 have been registered in good time (an average of 27 days according to one source). But for the most recent 20 cases in the survey (ie, those which have since led to an award), ICSID registered the request for arbitration within an average of 163 days. This figure is inflated by the excessive delay

BY THE ***NUMBERS***

3.6 yrs (1,325 days)
The average duration of ICSID cases

3.2 yrs (1,171 days)
The average duration since 1 July 2003



incurred in *Phoenix Action v Czech Republic*, as well as in *Funnekotter v Zimbabwe* (686 days). Stripping these from the calculation, in the most recent of the surveyed cases ICSID took around 100 days on average to register the requests for arbitration.

BY THE NUMBERS: REGISTERING REQUESTS FOR ARBITRATION
83 Average number of days to register a request
100 Average number of days (18 of past 20 cases surveyed)
767 days The longest wait for registration
Three days The shortest wait for registration

Constitution of the tribunal

The constitution of ICSID tribunals is a responsibility that lies, in the first instance, with the parties. But once 90 days from registration have elapsed without agreement on the choice of arbitrators, under article 38 of the ICSID Convention, a frustrated party is entitled to request the institution to appoint any arbitrator not yet appointed. The chairman of the Administrative Council is obliged by Arbitration Rule 4(4) to use his or her best endeavours to appoint arbitrators within 30 days of a request to step in. But on average it takes 180 days from registration (and 263 days from filing the request) for an ICSID tribunal to be constituted. That is approximately six months, which is two months more than is envisaged on a strict reading of the ICSID Convention and Rules

In *Funnekotter v Zimbabwe*, it took 1,251 days from filing the request for arbitration for the tribunal to be constituted, including 565 days from the date the request was registered. This is the slowest case for the constitution of the tribunal in the surveyed sample. That observation does not take account of the many occasions when tribunals are reconstituted, sometimes even when the proceedings are well advanced. Conversely, tribunals have been constituted in 17 days (*OKO Pankki Oyj and others v Estonia*), 20 days (*Astaldi & Columbus v Honduras*) and 28 days (*Gruslin v Malaysia*) from the date of registration.

"Deliberations": from the end of the hearing to the award

Some arbitrators are known to publish in their CVs data about the time it took from the hearing on the merits until the award was rendered in cases in which they have acted as sole or presiding arbitrator (since of the members of a three-member tribunal, arguably responsibility for any undue delay, or credit for efficiency, lies mostly with the presiding arbitrator). Although in many (if not all) respects, the parties "own" the procedure for their arbitration, once all the evidence is in and the arguments have been made, further delay is in the arbitrators' hands. Tribunals may request post-hearing briefs, but such further written briefing and its scope is within the discretion of the tribunal. Costs submissions may also be filed, but typically these would not be expected to delay deliberations or the production of an award. No doubt more unusual developments can and do occur. Broadly speaking, however, while the award is being prepared there are fewer ways in which one party or both can cause delay. The time it takes from the hearing on the merits until a tribunal produces its award can be considered the tribunal's time and, in a sense then, is a measure of its efficiency.

Following the final hearing on the merits (for cases where such a hearing took place), an ICSID tribunal will on average take 425 days, or just under 14 months, to render its award. One doubts whether that is the message being conveyed to exhausted and expectant party representatives when the dust of a hearing has settled. Admittedly, however, there are extreme examples affecting this average figure. It is also true, as already noted, that further submissions may be filed after the hearing and this may delay an award.

Dissents

As logic would suggest, awards are longer forthcoming where there is a dissenting opinion to contend with. (In addition, a future survey might consider whether cases take longer where there has been third party intervention in the form of amicus briefs. We defer publishing the results for another day when there is a larger pool of such awards.) In cases where the tribunal has proceeded to the merits, but there is a dissenting or separate opinion, the average time from the merits hearing to the award is 472 days. In other words, the parties wait on average a month and a half longer for the award where the tribunal is divided. The awards in *AMT v Zaire* (809 days), *Fraport v Philippines* (717 days), *SPP v Egypt* (625 days), *Sempra v Argentina* (599 days) and *Tokios v Ukraine* (556 days) all took considerably longer than average. In each case, there was a dissenting or separate opinion.

BY THE NUMBERS: WAITING FOR THE AWARD
1.2 yrs (425 days) The average time between hearing on merits and award
1.3 yrs (472 days) The average time (same phase) if there is a dissenting/separate opinion

1,860 days elapsed from the May 2003 hearing on jurisdiction and the merits in *Pey Casado v Chile* until the award was rendered in 2009. In the intervening period the tribunal was reconstituted. The tribunal also held a short hearing, in January 2007, at which the parties addressed the tribunal on specific questions. There may be other good reasons to exclude this case from the calculations. Even then, the average tribunal takes 404 days from the date of the hearing on the merits to render its award. The next most delayed award was in *SOAB v Senegal* (941 days) and *LG&E v Argentina* (913 days).

MOST DRAWN-OUT DELIBERATIONS
5.1 yrs (1,860 days) *Pey Casado v Chile*
2.6 yrs (941 days) *SOABI v Senegal*
2.5 yrs (913 days) *LG&E v Argentina*
2.3 yrs (852 days) *MINE v Guinea*
2.3 yrs (847 days) *Duke Energy v Peru*

Falling just after the cut-off date for the survey is the award in *Pantechniki v Albania*, rendered just 72 days after the hearing. That is

Comparison of ICSID phases

In summary, the data surveyed reveals an "average" ICSID arbitration divides into the following timings:

currently the swiftest delivery of an award in ICSID history. The tribunal in *AGIP v Congo* was also efficient, rendering its award in 92 days. The tribunal in *Klöckner v Cameroon*, presided over by Eduardo Jiménez de Aréchaga, took 95 days. More recently, the award in *Maffezini v Spain* stands out as having been rendered just 120 days after the final hearing. The awards in *Azinian v Mexico* and *Salini v Jordan* were each forthcoming 133 days after the hearing.

SWIFTEST DELIBERATIONS
72 days *Pantechniki v Albania*
92 days *AGIP v Congo*
95 days *Klöckner v Cameroon*
120 days *Maffezini v Spain*
133 days *Azinian v Mexico* *Salini v Jordan*

It is possible to compile data on individual arbitrators, especially those who frequently preside over ICSID proceedings, and to identify those with a track record of swift awards, and those whose cases, for whatever reason, have taken longer. Such information might assist a client when seeking to constitute a tribunal. But it would be wrong to draw too much significance from these figures, since the data set for most arbitrators is limited and therefore disproportionately affected by smaller or straightforward cases, and larger or more complex proceedings. The trials and tribulations of particular cases might skew the numbers and so convey misleading or unintended conclusions.

REFLECTIONS

Now that one knows how long ICSID proceedings take, how is the news to be broken, when plainly the duration of a dispute can have direct strategic or economic consequences for a business, put jobs on the line, or even influence the timing or outcome of elections? Perhaps more importantly, for ICSID arbitration practitioners, when we look in the mirror, do we like what we see? If time savings are possible, where are they to be made?

Registration

An average of 263 days from a request for arbitration to constitution of a tribunal seems over long. Delay in registration of a request for arbitration can be avoided if requests for arbitration are well prepared and contain the basic information and supporting evidence the ICSID secretariat needs to see to ensure that the claim is not manifestly outside the jurisdiction of the centre. Here responsibility lies with the claimant and its counsel. If those basic conditions are met, it is hard to see what further inquiries the secretariat might appropriately raise. The invitation routinely extended to the respondent to make observations on whether a request for arbitration should be registered should not be permitted to develop into drawn-out correspondence as to the merits of the claims or the technical aspects of jurisdiction. If there is a legitimate debate to be had, it is hard to see how a request for arbitration could be manifestly outside the jurisdiction of the centre. The request for arbitration should be registered promptly and the debate deferred to another day, before the tribunal.

Constituting the tribunal

Constitution of a tribunal within a reasonable time frame usually requires the participation of experienced arbitrators and counsel, but a healthy measure of cooperation, trust and commitment to the process is also essential. Even where a tribunal cannot be constituted within the mandated time frame, experience suggests that ICSID is loath to move too swiftly to impose an arbitrator not of the parties' or co-arbitrators' choosing. It may be that ICSID adopts a cautious pace in the hope that a consensual solution might yet emerge. There may be merit in such an approach, but it is clear that it leads to delay.

Case preparation

From the time the tribunal is constituted to the hearing on the merits, the parties marshal the evidence and legal arguments in support of their case. On average, this process takes 637 days. Typically, two rounds of written pleadings will be exchanged, but the parties might consider whether to dispense with one of these. Parties very often agree on the timing of their filings. Where agreement is not possible, claimants are frequently heard to complain that tribunals afford respondent states excessively long periods to prepare and file their defence. On the whole it is true that time periods in ICSID proceedings are longer than typical in commercial arbitration, but the constituent organs of a state rarely function like corporations and are not usually able to react as cohesively as corporate entities might. Decision-making processes feature both the pragmatic and the political. It is also generally true that many, if not most, claimants devote substantial time and effort to preparing their claim even before they choose formally to commence proceedings. For the respondent, its preparation may only begin in earnest when it sees the case pleaded against it. A better reference point for comparison may be the procedural summaries of published UNCITRAL or other institutional awards involving state parties, not purely commercial disputes.

Producing the award

As for the production of the award, the parties expect arbitrators to engage with the evidence and build consensus. Increasingly commentators expect ICSID tribunals to develop or at least explain the law. Awards that do not do these things may be at risk of annulment. Certainly, however, arbitrators do not spend 425 days deliberating upon and actually writing their awards. The filing of post-hearing briefs is likely to delay arbitrators putting pen to paper, but these are not always required and when they are, they can be limited in scope to the issues most troubling the tribunal. A frequently heard suggestion is that busy arbitrators should be as rigorous in keeping their diaries clear for deliberations and drafting as they are for scheduled hearings, but such facile advice is hardly appropriate for eminent lawyers at the top of their game. Perhaps market awareness of individuals' track record would encourage some to produce swifter results in order to distinguish themselves. That said, the services of the best and brightest will no doubt still be in demand however long their cases take.