gar
The international journal of commercial and treaty arbitration
NEWS

How long is too long to wait for an award?

18 February 2016

Credit: iStock

Information about the period that elapses between the close of the final hearing of an arbitration and the issuance of an award by the tribunal is hard to come by despite moves by institutions towards greater transparency. **Jeffery Commission**, a former practitioner at Freshfields Bruckhaus Deringer in Washington, DC, who has recently joined Vannin Capital, gives the fullest information to date in relation to investment cases under ICSID and UNCITRAL rules.

In October 2015, the Queen Mary University of London and White & Case International Arbitration Survey reported that the suggestion for a procedural innovation to reduce the "time and cost" of arbitration that met with the most positive, and least negative, response from its participants was the "requirement that tribunals commit to and notify parties of a schedule for deliberations and delivery of final award". (See section 3 of the survey, "Reducing time and cost").

Those interviewed for the survey said that they were "often kept in the dark about when awards would be rendered, and would welcome being better informed," with private practitioners in particular taking the view that such a proposal "could alleviate some of their clients' frustrations with the length and uncertainty of the award process".

To formulate a reasonable and realistic schedule for deliberations and delivery of a final award, however, parties need a transparent record of how long is typically taken by tribunals at the various institutions that administer arbitrations. Such information about current practice is hard to come by, despite moves by institutions towards greater transparency in the past few years, including in relation to the duration of arbitral proceedings.

This article seeks to redress that by presenting information about the time taken to issue awards in investment arbitrations under ICSID, ICSID Additional Facility and UNCITRAL rules, measured from the close of the final hearing.

The move towards greater transparency on duration of proceedings

Writing in the winter 1986 edition of News from ICSID about the duration of arbitration proceedings, the centre's then secretary general **Ibrahim Shihata** observed that "statistics

regarding the average duration of such proceedings have little value because of the many factors that may differentiate one proceeding from another". To recall, at that time, only five arbitration proceedings were pending at ICSID and no new case had been registered all year, as explained by Shihata in ICSID's 1986 Annual Report.

Fast forward 30 years, and, in January 2016, ICSID reported that it had registered 549 cases under the ICSID Convention and Additional Facility Rules as of 31 December 2015. This was reported not in News from ICSID (discontinued since 2009), but in The ICSID Caseload-Statistics, a bi-annual publication started in 2010 that is dedicated to featuring empirical details about aspects of international investment cases administered by ICSID.

At the same time, ICSID began publishing details of the average duration of arbitrations in its annual reports. In so doing, it calculated the duration of arbitrations from the date of a tribunal's constitution to conclusion, reporting as follows for the last six fiscal years (lasting from 1 July to 30 June):

- FY2010: 37 months
- FY2011: 25 months
- FY2012: "between three to four years"
- FY2013: "between three to four years"
- FY2014: "on average just over three and a half years"
- FY2015: "on average, 39 months".

ICSID is, of course, not alone in its efforts in recent years to increase transparency in relation to the arbitration proceedings it administers and how long they take. The SCC Arbitration Institute has, for several years, published statistical reports on arbitration proceedings under its rules from 2008 until the present.

For instance, the SCC reported in 2011 that the average length of an investment case under the SCC rules was 21 months from date of registration to final award. In 2014, it reported more generally that the majority of cases administered under the SCC rules decided that year – both commercial and investment cases – took between six and 12 months from registration to final award.

In November 2015, the LCIA reported that the average (or mean) duration of an LCIA arbitration is 20 months, with a median duration of 16 months.

Although it has given no recent report on the average duration of proceedings, the ICC International Court of Arbitration is also moving towards greater transparency, with plans to publish reasons for certain decisions and the names of arbitrators sitting in ICC cases. On 5 January this year, it sought to tackle the problem of delay by announcing costs consequences for arbitrators who delay unjustifiably in submitting draft awards to the ICC Court for scrutiny. According to the court, tribunals are expected to submit draft awards within three months of the last substantive hearing, or, if later, the last written filing, excluding costs submissions.

While these increases in transparency are welcome, the institutions have yet to meet the appetite revealed in the Queen Mary/White & Case survey for specific information on the time taken by tribunals to issue awards, either at all or in a readily accessible form.

The time taken to issue awards in ICSID Convention and ICSID Additional Facility arbitrations

In October 2009, prior to the publication of ICSID's first statistical report, an oft-cited article published in GAR ("ICSID arbitration: how long does it take?" by **Anthony Sinclair**) featured the first detailed accounting of how long each phase of an ICSID arbitration takes. There, it was reported that the average time between a hearing on the merits and an award

is 425 days. That finding was based on a review of the 115 ICSID cases resulting in an award from ICSID's creation until 1 July 2009.

A review of the 231 ICSID Convention and ICSID Additional Facility arbitrations to result in an award from ICSID's inception to 31 December 2015 reveals that the average time between the last day of a final hearing and an award was slightly lower, coming in at 379 days. Where a final hearing was not held, the date of the final written submission (excluding those on costs) was used. The breakdown of the duration of the award phases in the 222 ICSID Convention and ICSID Additional Facility awards (for nine awards data was not available) was as follows:

Duration between final hearing and award	Number of ICSID arbitrations resulting in an award
0 – 1 year	124 (55.86%)
1 – 2 years	82 (36.94%)
2 – 3 years	12 (5.40%)
3 – 4 years	3 (1.35%)
4 – 5 years	1 (.45%)

This compares with the average duration of ICSID proceedings from registration to award, which was 1,381 days. Sinclair arrived at a similar figure in his 2009 study, concluding that the average duration of ICSID arbitrations was 1,325 days, on average, from filing of the request for arbitration to the date of the final award.

Turning to the most prevalent of the post-award remedies in ICSID Convention arbitrations, 45 decisions on annulment have been rendered from ICSID's inception through to 31 December 2015. The average amount of time between registration of a request for annulment and the issuance of a decision on annulment was 730 days, with most decisions rendered within one year of the final hearing:

Duration between final hearing and award	Number of ICSID annulment proceedings resulting in a decision on annulment
0 – 1 year	36 (80%)
1 – 2 years	9 (20%)

To put this in context, the period between the last day of an annulment hearing and a decision on annulment was 269 days, on average.

The time taken to issue awards in UNCITRAL arbitrations

There is, of course, no equivalent institution to report on all investment arbitrations conducted under the UNCITRAL Arbitration Rules. A review of the 60 publicly available investment arbitrations conducted under the UNCITRAL Arbitration Rules resulting in an award between 1990 and 31 December 2015 reveals that the average period between the last day of the final hearing and the award was 379 days (the same period as for the ICSID arbitrations). As with the ICSID arbitrations, where a final hearing was not held, the date of

the final written submission (excluding those on costs) was used. By way of summary, the composition of the award phases of the 59 UNCITRAL awards (for one award data was not available) was as follows:

Duration between final hearing and award	Number of UNCITRAL arbitrations resulting in an award
0 – 1 year	33 (55.93%)
1 – 2 years	22 (37.29%)
2 – 3 years	4 (6.78%)

The average duration of an UNCITRAL arbitration from notice of arbitration to award was 1,446 days. As post-award proceedings in UNCITRAL arbitrations vary depending on the seat of the arbitration, a review of the duration of such proceedings is beyond the scope of this article.

Bringing transparency to the award phase

Shihata's observation in 1986 that statistics about the duration of arbitral proceedings were of "little value" seems to have been contradicted by the public appetite for such statistics in recent years. He was correct, however, in saying that caution must be exercised given the factors that can differentiate one proceeding from another. These may include: the complexity of particular cases; the use of certain procedural mechanisms (such as challenges to arbitrators, bifurcation requests and amicus curiae applications); the need to translate the award in some cases; the emergence of post-hearing evidentiary or legal issues; suspensions of proceedings; changes in the composition of counsel or the tribunal; and dissents to a final award.

That said, bringing transparency to the award phase may assist future tribunals in establishing schedules for deliberations and delivery of final awards, and thereby alleviate frustrations with the length and uncertainty associated with the final phase of an arbitration. As those interviewed in the Queen Mary/White & Case survey noted, such schedules would incentivise arbitrators to deliver.

By way of summary, the duration (including both mean and median figures) of the ICSID and UNCITRAL proceedings examined are as follows:

Proceeding resulting in a final award or decision on annulment	Days between registration and award	Days between last day of hearing and award
ICSID arbitration (mean)	1381	379
ICSID arbitration (median)	1271	330
ICSID annulment (mean)	730	269
ICSID annulment (median)	720	238

Proceeding resulting in a final award	Days between notice of arbitration and award	Days between last day of hearing and award
UNCITRAL arbitration (mean)	1446	379
UNCITRAL arbitration (median)	1245	329

Appendices including data on the 231 ICSID awards, 60 UNCITRAL awards, and 45 decisions on annulment referenced in this study will be included in the forthcoming Procedural Issues in International Investment Arbitration, to be published by Oxford University Press.

Commission joined Vannin Capital as senior counsel in January. He remains based in Washington.