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Early Dismissal Possibilities in Practice: Assessment and Outlook

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ASA Below 40 Seminar
Zurich, 18 November 2016

Outline

- Procedural aspects
- The scope of summary procedures
- The standard of review adopted by tribunals

Rule 41(5) of the ICSID Arbitration Rules

Rule 41 Preliminary Objections

(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. The party shall file the objection in its memorial, or, if the rejoinder is filed, in its rejoinder, or, if the rejoinder is unknown to the party, in its final memorial.

(2) The Tribunal shall fix a time for the objection within the jurisdiction of the Centre or for other reasons, is not within

(3) Upon the constitution of the Tribunal, the President of the Tribunal shall fix a time for the objection.

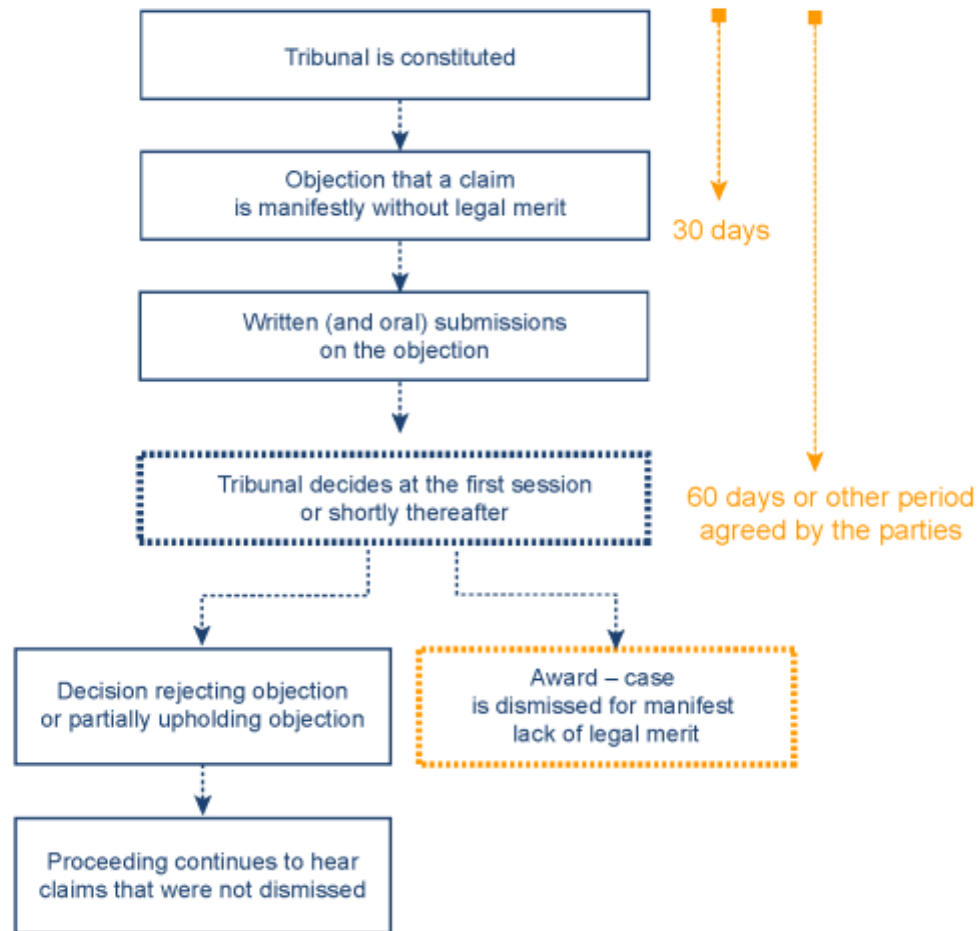
(4) The Tribunal shall, in its decision on the objection, state the reasons therefor. It may do so in its decision on the merits or promptly thereafter.

(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.

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The procedure



Source: ICSID website

The scope of the procedure

- Jurisdiction, merits, or both?
 - ICSID Rule 41(5): “claim...manifestly without legal merit”
 - The relationship with the Secretary General's screening power under the ICSID Convention
 - How have ICSID tribunals interpreted the scope of the Rule?
 - SIAC Rules 2016 (Art. 29.1)
 - “claim or defence...manifestly without legal merit”; and
 - “claim or defence...manifestly outside the jurisdiction of the Tribunal”
 - Draft SCC Rules 2017 (Art. 39)
 - “A request for summary procedure may concern issues of jurisdiction, admissibility or the merits”

The standard of review

- The standard for succeeding in an objection is high
 - ICSID 41(5): “manifest” lack of legal merit
 - SIAC Rules: “manifest” lack of legal merit/jurisdiction
 - Draft SCC Rules: objection may concern (*inter alia*):
 - “an allegation of fact or law...[that] is, on its face, unsustainable”; or
 - “an assertion that...even if the facts alleged by the other party are assumed to be true, no award could be rendered in favor of that party under the applicable law”

The standard of review in the ICSID cases: *MOL v. Croatia*

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

In the arbitration proceeding between

MOL HUNGARY

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44. The Tribunal begins with a brief observation on the standard to be applied for determining a Rule 41(5) Objection. There is no dispute between the Parties that the standard is a high one,³⁵ and that must be right. The Rule, as introduced in 2006, plainly envisages a claim that is so obviously defective from a legal point of view that it can properly be dismissed outright. By contrast, an objection to the jurisdiction or substantive defence (in terms, that a claim “lacks legal merit”³⁶), which requires for its disposition more elaborate argument or factual enquiry, must be made the subject of a regular preliminary objection under Rule 41(1) or a regular defence on the merits. This distinction seems to stem from the very nature of

Members of the Tribunal
Sir Franklin Berman, President
Professor William W. Park, Arbitrator
Professor Brigitte Stern, Arbitrator

Assistant of the Tribunal
Dr. Peter Webster

Secretary of the Tribunal
Mr. James Claxton

Date: 2 December 2014

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The standard of review in the ICSID cases: *PNG v. Papua New Guinea*

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THE TRIBUNAL'S DECISION ON THE
RULE 41(5) OF THE ICSI

Gary Born, Presid
Duncan Ker
Michael Pryl

Secretary of
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Assistant to the Tribunal
Valeriya Kirsey

Date of dispatch to the Parties: 28 October 2014

88. Several ICSID tribunals have found that “manifest,” as used in Rule 41(5), is equivalent to “obvious” or “clearly revealed to the eye, mind or judgment.”¹³⁴ Under Rule 41(5), the respondent must establish its objection “clearly and obviously, with relative ease and despatch.”¹³⁵ The Rule is intended to capture cases which are clearly and unequivocally unmeritorious,¹³⁶ and as such, the standard that a respondent must meet under Rule 41(5) is very demanding and rigorous.¹³⁷ In the opinion of the Tribunal, a case is not clearly and unequivocally unmeritorious if the Claimant has a tenable arguable case.

89. 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.

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Conclusions

- Are summary procedures working in arbitration?
 - Investment arbitration?
 - Commercial arbitration?
- Efficient tool to wipe out unmeritorious claims or additional layer to already costly and lengthy proceedings?