

Summary Dismissal

15 November 2016

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STREET

ICSID Convention, Article 36(3)

“The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.”

ICSID Arbitration Rules, Rule 41(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 of 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) [i.e. an objection to jurisdiction] or to object, in the course of the proceeding, that a claim lacks legal merit.”

(1) Procedure: opportunity to be heard

Rule 41(5)

“...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....”

Globex v Ukraine

“in principle, it would not be right to non-suit a claimant under the ICSID system without having allowed the claimant (and therefore the respondent as well) a proper opportunity to be heard, both in writing and orally.”

Usual practice to permit one or two rounds of written pleadings, together with an oral hearing, usually at first session.

(2) Procedure: prompt notification of the decision

Rule 41(5)

“...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....**”

Some tribunals have given decision at first session, with reasons following.

In five cases in which Rule 41(5) application was successful, time between close of pleadings on Rule 41(5) and decision has been between three weeks and five months.

(3) Scope of Rule 41(5): jurisdiction or only merits?

Rule 41(5)

“...file an **objection that a claim is manifestly without legal merit**. The party shall specify as precisely as possible the basis of the objection...”

Brandes v Venezuela:

“There exist no objective reasons why the intent not to burden the parties with a possibly long and costly proceeding when dealing with such unmeritorious claims should be limited to an evaluation of the merits of the case and should not also englobe an examination of the jurisdictional basis on which the tribunal’s powers to decide the case rest.”

Therefore, there are three potential jurisdictional hurdles for every case:

- (1) Article 36(3) – before registration
- (2) Rule 41(5) – within 30 days of constitution of tribunal
- (3) Article 41(2)/Rule 41(1) i.e. jurisdictional objection in usual course

(4) Scope of Rule 41(5): factual issues

Rule 41(5)

“...file an objection that a claim is manifestly without **legal merit**. The party shall specify as precisely as possible the basis of the objection...”

Trans-Global v Jordan

“... as regards disputed facts relevant to the legal merits of a claimant’s claim, the tribunal **need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous or vexatious or inaccurate or in bad faith: nor need a tribunal accept a legal submission dressed up as a factual allegation**. The Tribunal does not accept, however, that a tribunal should otherwise weigh the credibility or plausibility of a disputed factual allegation.”

(5) Scope of Rule 41(5): “manifestly”

Rule 41(5)

“...file an objection that a claim is **manifestly** without legal merit. The party shall specify as precisely as possible the basis of the objection...”

Trans-Global v Jordan

“... the ordinary meaning of the word [manifestly] requires the respondent to establish its objection **clearly and obviously, with relative ease and dispatch. The standard is thus set high.** ... The exercise may thus be complicated; but it should never be difficult.”

Rule 41(5) in practice

- 382 ICSID proceedings registered since 10 April 2006
- Rule 41(5) invoked in 22 (known) cases: less than 6% of cases
- Of 22 cases: 2 upheld for entire claim; 3 upheld in part

Rule 41(5) in practice: successful applications

- *Globex v Ukraine*: objection that no investment within meaning of Article 25(1) ICSID Convention; accepted and award dismissing all claims.
- *Grynberg and RSM Production v Grenada*: objection on basis that claims already decided in ICSID contract proceedings; accepted and award dismissing all claims.
- Three cases in which Rule 41(5) partially successful:
 - *Trans-Global v Jordan*: claim based on inter-State obligation to consult
 - *Accession Mezzanine v Hungary & Emmis International v Hungary*: non-expropriation claims outside consent in BIT(s)

Rule 41(5) in practice: unsuccessful applications

- objection that the claimant had waived all claims by prior agreement;
- objection that there was no consent to arbitration was given in the relevant domestic law;
- objections that the substantive claims were without legal merit;
- objection on the basis of a forum selection clause in a contract;
- objection on the basis that the investor had failed to obtain the requisite approvals for his investment; and
- objection that the investment had been acquired illegally.

Rule 41(5) in practice

1. Rule 41(5) deployed effectively in over one-fifth of proceedings where it has been used.
2. As applied, it sets a high bar for respondents: must establish objection clearly and obviously; difficult where there are disputed issues of fact or novel legal issues.
3. Practice does not suggest Rule 41(5) is being invoked abusively or routinely; rather that it is providing an effective filter and saving time and costs.

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