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Summary Determination under Rule 19 – An Arbitrator’s Perspective

ASIA ADR WEEK 2022

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RULE 19 AIAC

SUMMARY DETERMINATION

A Party to an arbitration may submit a Summary Determination Request to **dismiss, in whole or in part**, a claim/ counterclaim/ defence where:-

19.1(a)

The claim/ counterclaim/ defence is **manifestly without merit**.

19.1(b)

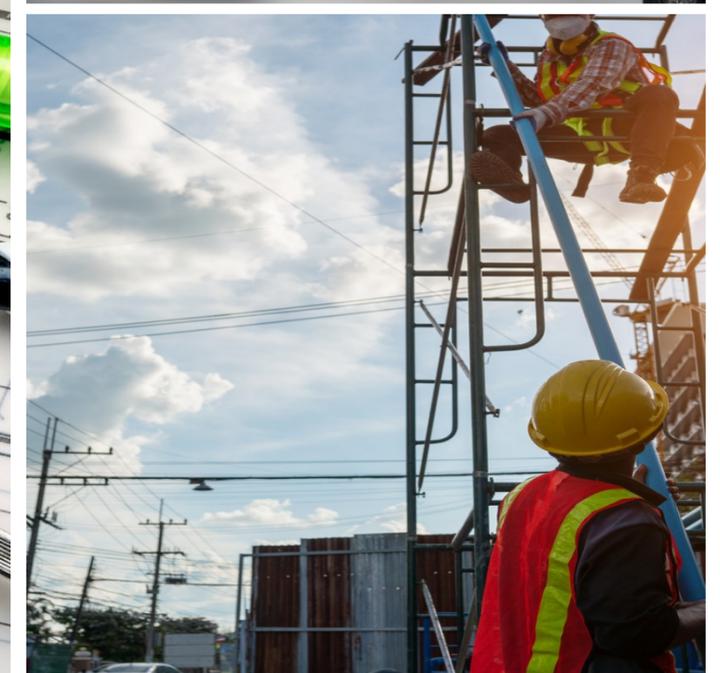
The claim/ counterclaim/ defence **manifestly falls outside the Tribunal's jurisdiction**.

19.5

Tribunal shall decide whether to **allow or dismiss** the request, **in whole or in part**, no later than 45 days from the Tribunal's receipt of the final submission.

Summary Determination v Other Procedures

- Interim/Partial Awards – Allow or Dismiss Claims/Counterclaims: Bifurcation or Preliminary Issue (Rule 33.1)
- Fast Track Procedure – Expediting the Whole Arbitration Proceedings
- Interim Measures/Emergency Arbitrator – In assistance to the Arbitration Proceedings
- Jurisdiction – Previous AIAC Rules: Discretion of Tribunal whether to determine as preliminary question or Final Award (Art.23 R.3)
- Summary Determination – No discretion to avoid Determination on Application

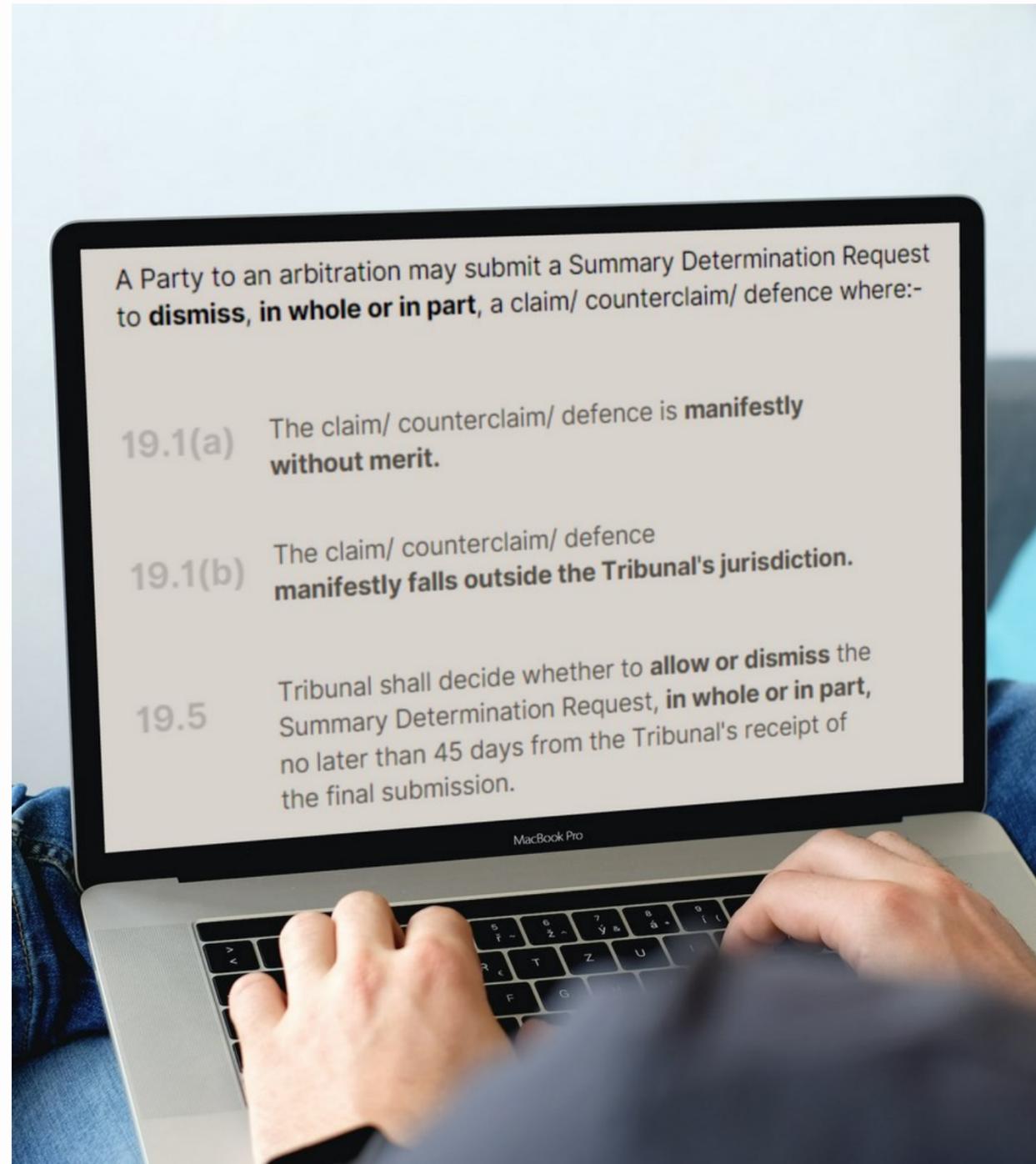


“Manifestly” without Merit or Outside Jurisdiction

- ICSID Arbitration Rules in 2006 & SIAC Rules 2016 – manifestly without legal merit
- Stockholm Arbitration Rules – allegation of fact or law material to the outcome which is manifestly unsustainable
- HKIAC Arbitration Rules 2018 – such points of law or facts are manifestly without merit
- Summary Judgement in Court – allow claims not dismiss claims



- Only Dismissal and Not Granting
- Must consider Law and/or Facts
- Resist a mini-arbitration – far more than 45 days period
- Meaning of “Manifestly”
- Clear and Obvious



ISSUES

Power to dismiss, not to grant claims

- Defence wholly dismissed, Tribunal still proceed to hear the Claimant's case
- Determine whether burden of proof is discharged
- Putting a party to strict proof cannot be dismissed.

“Manifestly”

- Must be clear and obvious that claim/defence cannot succeed.
- Be capable of being established with relative ease and despatch.
(Trans-Global Petroleum v Jordan (ICSID))
- Fundamental flaw in the way the claim is formulated that must inevitably lead to its dismissal.
(Lotus Holding Anonim Sirketi v Turkmenistan (ICSID))
- Claim was lost before it left the start line.
(Mainstream Renewable Power & Anor v Colombia (ICSID))
- Could also include abuse of process cases.
(RSM Production Corp v Grenada (ICSID))

ISSUES

“ Manifestly”

- Not a fine-toothed comb exercise.
- If issue requires examination of complex legal and factual issues, it is not "manifestly" outside the Tribunal's jurisdiction.
(Brandes Investment Partners LP v Venezuela (ICSID))
- Not suitable when Tribunal has to consider complex or novel issues of interpretation and analysis.
- Tribunal must be able to reach conclusion with little difficulty of interpretation.
- It can be complex, but it must not be difficult



QUERY

Second bite at the cherry

- If not “Manifestly” – Dismiss the Request
- Can still be re-considered at Final Award
- Some jurisdictional issues are complex and require detailed analysis, interpretation and factual considerations
- Tribunal has the right to reconsider the merits and/or its jurisdiction later in the substantive award, when the Tribunal has had an opportunity to do a full legal and factual assessment.
- Dismissal of Request is merely on the basis it is not “manifest”.



WILL TRIBUNALS USE THIS POWER?



Tool now at Tribunal's disposal to be robust on frivolous claims, and save time and costs.

However, likely to witness conservative approach on dismissal due to manifestly without merits.

More likely used for jurisdictional challenges.

Calls for high degree of assurance at a very early stage of proceedings when Tribunal may only have limited understanding of the factual and legal matrix.

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