The Long and the Short of It: Introducing a Summary Procedure for the Dismissal of Unmeritorious Claims in the Arbitration Act 1996

1 Introduction

A party facing a claim or defence with no real prospect of success in civil litigation has a sure, swift way of encountering it at relatively low cost, namely, making an application for summary judgment. By contrast, a party that faces such an issue, where it has committed to resolving disputes through arbitration, will most likely be stuck in a lengthy and costly process. This is because it is uncertain whether English arbitral tribunals have the power to use summary procedures. This uncertainty exists across the international commercial arbitration world, where only a handful of major arbitral institutions and national arbitration laws expressly provide for summary procedures.[1] Consequently, tribunals are hesitant to use summary procedures, even where it would be just and expedient to do so. Moreover, businesses across a range of sectors avoid arbitration due to the absence of effective case management mechanisms in the face of vexatious claims. Amending the law, specifically the Arbitration Act 1996, to confirm that tribunals can dismiss unmeritorious claims is a simple measure which modernises the law, settles this disputed issue in a way which ensures arbitrators have more effective case management powers, and serves to make arbitration a more attractive means of dispute resolution.

2 The Current Law

Generally, an arbitral tribunal has the power to summarily dispose of an unmeritorious or vexatious claim if (1) the arbitration agreement expressly grants the tribunals the power to use such procedures; (2) the incorporated procedural rules provide for specific summary procedures; or (3) the arbitration law of the seat so empowers the tribunal.[2] Since the

[1] For example, the Dutch Arbitration Act, (Article 1051(1) of the Dutch Code of Civil Procedure) empowers the tribunal or its chairperson to use summary procedures. For more information see Ned Beale, Lisa Bench Nieuwveld and Matthijs Nieuwveld, 'Summary Arbitration Proceedings: A Comparison between the English and Dutch Regimes' (2010) 26(1) Arbitration International 139

[2] Philip Chong and Blake Primrose, 'Summary Judgment in International Arbitrations Seated in England' (2017) 33 Arbitration International 63, 64

Arbitration Act 1996 does not provide for the summary dismissal of unmeritorious claims, English arbitral tribunals that wish to use summary procedures face two obstacles. First, they need to find such procedural powers in the arbitration agreement or procedural rules. Second, they need to use a summary procedure that will not render the resulting award unenforceable.

2.1 Establishing that Tribunals have the Power to use a Summary Procedure

Absence of express authorisation to summarily dispose of an unmeritorious claim is an issue for tribunals because, pursuant to section 33(a) Arbitration Act, they are under a general duty to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent". Many arbitrations will not use institutional or ad hoc rules which expressly empower the tribunal to use summary procedures.[3] Consequently, arbitrators are concerned that due to their section 33(a) duty, they do not have the power to use a summary, despite the fact that under section 33(b) they have a further duty to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined". Tribunals therefore require a broad arbitration agreement expressly granting this power or must give such agreements a wide reading. Since arbitral awards and proceedings are confidential, it is difficult to know both how many tribunals consider themselves to have these powers and if they use them.

The High Court accepted a wide reading of the arbitration agreement in *Travis Coal Restructured Holdings v Essar Global Fund Limited*,[4] where Blair J (as he then was) held that the Tribunal had not exceeded its powers by adopting a summary procedure during the arbitration.[5] The case concerned the purchase of shares by Essar Minerals Inc (a wholly owned

[3] The International Centre for the Settlement of Investment Disputes ("ICSID"), the Singapore International Arbitration Court ("SIAC") and the Stockholm Chamber of Commerce ("SCC") have express procedures for the summary dismissal of claims, whilst the International Chamber of Commerce ("ICC") Court of Arbitration has issued a practice note detailing an expedited procedure providing for a streamlined arbitration.
[4] [2014] EWHC 2510 (Comm)
[5] Ibid. [50]

subsidiary of Essar Global Fund Limited ("EGFL")) from Travis Coal Restructured Holdings ("Travis Coal"). As part consideration for the purchase, Essar Minerals Inc issued promissory notes in favour of Travis Coal which were guaranteed by EGFL. The guarantee included an arbitration agreement, which incorporated the 2012 ICC Rules, and provided, in part, that "[t]he arbitrators shall have the discretion to hear and determine at any stage of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or in part, in accordance with such procedures as the arbitrators may deem appropriate, and the arbitrators may render an award on such issue".[6] Travis Coal commenced arbitration proceedings following non-payment by Essar Minerals Inc. The latter alleged that Travis Coal had been fraudulent in representing its financial position. Travis Coal filed a motion for 'summary judgment' to dismiss the fraud defences, which was granted by the tribunal who issued an award in Travis Coal's favour. EGFL applied to vacate the award in New York while Travis Coal sought to enforce it in England. Before the English High Court, EGFL applied to adjourn judgment pending the outcome of the New York case. EGFL also disputed the award, partly on the basis that it was granted pursuant to a summary judgment procedure.

While the court ultimately granted an adjournment, Blair J held that the arbitration agreement gave the tribunal wide powers over the procedure as the tribunal was granted the jurisdiction to hear any issue that was *dispositive* of any claim or counterclaim, and could use such procedures as the arbitrators deemed appropriate. Blair J also held that the 2012 ICC Rules, particularly Articles 19 and 22, had been complied with.[7] These Articles permitted a tribunal to use national procedural laws in an arbitration where the Rules are silent as to procedure and required the tribunal and parties to conduct the arbitration in an expeditious and cost effective manner, while ensuring each party has a reasonable opportunity to present its case.[8] During the arbitration, the tribunal had used a "hybrid" procedure that consisted of two hearings, including one oral hearing on EGFL's fraud defences.[9] It was held that each party had been given a fair opportunity to present its case, and EGFL did "not have a realistic

[6] Ibid. [45]
[7] At the time of the arbitration, the ICC had not issued its practice note on an expedited procedure, which only came into force on 1 March 2017.
[8] *Travis Coal* (n 4) [46]
[9] Ibid. [48]

prospect of showing that the Tribunal exceeded its powers in the procedure which it adopted".[10]

Key to the court's acceptance of both the tribunal's jurisdiction to use a summary procedure and the actual procedure used by the Tribunal was that the tribunal was empowered to hear any "dispositive" issues, and the fact that the "hybrid" procedure went beyond summary procedures used by the courts in both New York and London.[11] Moreover, emphasis was placed on the fact that the dispute arose out of a guarantee. While these features are not necessarily commonplace in arbitration proceedings, the case does show that the Court is willing to give arbitration agreements and institutional rules a wide reading in appropriate cases, and so provides useful insight into when the UK courts will accept summary procedures in arbitration.

2.2 Enforceability of an Award Rendered Following a Summary Procedure

Tribunals are also concerned that using a summary procedure without express authorisation will render their awards unenforceable on the grounds of serious irregularity, pursuant to section 68(1) Arbitration Act. Under section 68(2), serious irregularity means "an irregularity…which the court considers has caused or will cause substantial injustice to the applicant" and is of a type listed therein. Awards issued following a summary procedure could be challenged under section 68(2)(a) for failure by the tribunal to comply with the duty under section 33 or under section 68(2)(c) for failure to conduct the proceedings in accordance with the procedure agreed by the parties.

The High Court considered whether summary disposal of a claim during an arbitration amounts to serious irregularity under section 68 in *BTC Bulk Transport Corporation v Glencore International AG*.[12] During the arbitration, the claimant ("BTC") applied for a strike out of the defendant's ("Glencore") counterclaim. The tribunal made a final award in Glencore's favour, allowing the counterclaim. It was held that this amounted to a serious irregularity as the

[10] Ibid. [50] (Blair J)
[11] Ibid. [48]
[12] [2006] EWHC 1957 (Comm)

tribunal determined an issue that was not properly before it. This is because the only application before the tribunal was the application for summary disposal of the counterclaim, which led BTC to make submissions on whether the counterclaim stood an arguable chance of success. Had the tribunal found that there was a chance of success, BTC would have put forward further arguments and, possibly, obtained further evidence.[13] Since BTC were deprived of that opportunity, Cooke J found there had been a serious irregularity as the tribunal were in breach of section 33 Arbitration Act.[14]

The court's focus was on the specific procedure used by the tribunal rather than whether summary procedures generally constitute serious irregularity. Yet, it highlights the concern that tribunals could be in breach of their section 33 duty by using summary procedures. Moreover, there is a risk that a section 68(2)(c) claim could succeed on the grounds that the parties had agreed to a full hearing in the express provisions of the arbitration agreement, the institutional or ad hoc rules.[15] Therefore, "the question of whether the disposal of claim in an arbitration on a summary basis is, in itself, a serious irregularity, is still undecided".[16] However, the Departmental Advisory Committee on Arbitration described section 68 "as a long stop, only available in extreme cases";[17] this description was endorsed in *The Petro Ranger*.[18] It is reasonable to conclude that if a procedure was used which allowed both parties to fairly present their case, like the tribunal in Travis Coal, the resulting award would not constitute a section 68 irregularity. Nonetheless, there remains a risk that, in the absence of a full merits hearing, the award is liable to be overturned.[19]

3 Criticism

As the law currently stands, it is uncertain when tribunals have the power to order the summary disposal of a claim, and what summary procedures should be used to ensure that

[13] Ibid. [14]
[14] Ibid. [15] – [16]
[15] Chong and Primrose (n 2) 70
[16] Beale, Nieuwveld and Nieuwveld, (n 1) 148
[17] Departmental Advisory Committee on Arbitration Law, 'Report on the Arbitration Bill' (1996)
[18] *Petroships Pte Limited of Singapore v Petec Trading and Investment Corporation of Vietnam and Others* [2001] 2 Lloyd's Reports 348, [2005] 5 WLUK 562 351
[19] Chong and Primrose (n 2) 70

the resulting award if enforceable, making it difficult for parties to predict if and how such procedures will be used. Beyond this, there are then essentially three problems with the law. First, the use of such procedures, and their form, become arbitrary as between arbitrators and tribunals. It is reasonable to suppose that arbitrators from jurisdictions which rarely use summary disposition procedures may be less likely to permit such procedures.[20] Equally, more risk averse arbitrators may refuse to use such procedures, not just on the basis of their cultural or personal preference, but also for fear that the awards they render will be set aside. This problem is only slightly mitigated by the fact that parties can choose their arbitrators as it does not solve the inherent ambiguity in the law.

Second, the uncertainty in the law means that it is difficult to assure individuals, and particularly commercial actors, that they will not be drawn into full arbitration proceedings for an unmeritorious or vexatious claim. This makes civil litigation more appealing than arbitration as a means of dispute resolution because courts have wide case management powers. Tribunals' comparative lack of effective case management powers has long prevented the banking and finance sector from embracing arbitration.[21] The International Arbitration Survey also found that four industries (Energy, Construction/Infrastructure, Technology, and Banking and Finance) selected summary determination procedures as a measure which would make arbitration a better fit for each sector.[22] Moreover, for the banking and finance sector, summary procedures and expedited procedures for claims were thought to have the most impact on the appeal of arbitration for the sector.[23]

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[20] Gary Born and Kenneth Beale, 'Party Autonomy and Default Rules: Reframing the Debate over Summary Judgment Disposition in International Arbitration' (2010) 21(2) ICC Intl Ct Arb Bull 19, 22

[21] Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (QMUL and White & Case LLP, 2018) < http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 17 September 2019 ("International Arbitration Survey") 29; See also Clair Morel de Westgaver, 'Summary Disposal in Arbitration and Tribunals' Ability to Order Summary Procedure without Express Authority' (*Kluwer Arbitration Blog*, 23 May 2018) <http://arbitrationblog.kluwerarbitration.com/2018/05/23/summary-disposal-arbitration-tribunals-ability-order-summary-procedure-without-express-authority/> accessed 16 September 2019

[22] International Arbitration Survey (n 21) 30

[23] Ibid.

Third, the uncertainty of the law can have negative cost implications. That is, it is costly to become a party to a full arbitration over a vexatious claim. Also, there is a risk that if the issue is disposed of summarily, the respondent party will appeal the award before the courts. Furthermore, one party could take advantage of the uncertainty in the law by beginning arbitration proceedings for a vexatious claim to increase their bargaining power if, as is likely, the opposing party attempt to settle. More generally, cost is overwhelming seen as the worst characteristic of international arbitration, closely followed by the tribunal's lack of effective sanctions during the arbitral process.[24] The International Arbitration Survey found that when asked for suggestions on how to improve efficiency in arbitral proceedings, "a considerable number of respondents pleaded for the broadening of arbitrators' powers related to arbitral proceedings, as well as encouraging them to make better use of these powers".[25] While this criticism is broader than simply a lack of power to summarily dispose of an unmeritorious claim, it serves to highlight the costly consequences of the inefficiencies in arbitration.

4 Proposal for Reform

4.1 Summary Procedure in the Arbitration Act

To give clarity to the law, the Arbitration Act 1996 should be amended to include a procedure for the summary disposal of unmeritorious claims, in a way which ensures that each party has the opportunity to present its case. Broadly speaking, the Act can be amended to echo both the test for summary judgment used by English courts, as set out in the Civil Procedure Rules,[26] and the rules used by international arbitral institutions, such as the SIAC,[27] or the

[24] Ibid. 8
[25] Ibid. 27
[26] CPR 24.2, "The Court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if – (a) it considers that – (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) the defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial".
[27] Rule 29 of the SIAC Procedural Rules provides for the early dismissal of claims and defences. Available at 'SIAC Rules 2016' (*SIAC*) <http://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule29> accessed 24 September 2019

SCC.[28] The following provision could therefore be inserted as an additional provision following section 34 (on procedural and evidential matters).

S34A Summary Procedure

(1) A party may apply to the tribunal to decide on a claim or issue by way of summary procedure if –

(a) A claim or defence has no real prospect of success; and

(b) There is no other compelling reason why the claim should proceed to a full arbitration.

(2) An application for a summary procedure must specify the grounds relied on and the form of procedure proposed.

(3) Where a summary procedure hearing is fixed, the respondent must be given at least 30 days' notice of

(a) The date fixed for the hearing; and

(b) The issues which it is proposed that the tribunal will decide at the hearing.

(4) The tribunal may fix the time within which any directions given by it are to be complied with, but in any event, an order or Award on the application must be made within 60 days of the date of filing the application, unless, in exceptional circumstances, the tribunal extends the time.

(5) If the summary procedure is granted, the tribunal shall comply with its general duty as specified in subsection 33.

Given that party autonomy and the tribunal's discretion over its own procedures are key principles in arbitration,[29] the Arbitration Act should not include an overly prescriptive summary disposal procedure. This suggestion for reform has the advantage of mirroring the test in the CPR which provides a useful symmetry in the law while still being in tune with international developments in arbitration.

[28] Article 39 of the SCC Procedural Rules details a summary procedure. Available at '2017 Arbitration Rules' (Arbitration Institute of the Stockholm Chamber of Commerce) <https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf> accessed 24 September 2019

[29] Gary Born, *International Commercial Arbitration* (Kluwer Law International 2009)

4.2 Reasons for this proposal

Such an amendment to the Arbitration Act would confirm that tribunals have the power to summarily dispose of unmeritorious claims, thereby clarifying and simplifying the law. Issues as to the enforceability of the award would also be minimised, as the procedure used would require the tribunal to comply with its duties under section 33. This certainty would then remove the arbitrariness inherent in the current law and provide a safeguard against parties being drawn into long and expensive proceedings for vexatious claims. In this way, it could also alleviate some of the complaints about costs in arbitration proceedings. Moreover, clarifying that summary procedures can be used in arbitration gives parties greater choice over the procedures used in arbitration. This further bolsters the principle that party autonomy is a fundamental characteristic of international commercial arbitration.[30]

Introducing such a mechanism has the further advantage of keeping England at the forefront of developments in international commercial arbitration. While the availability of summary judgment procedures in international arbitration is an ongoing debate, there appears to be greater support for expressly granting tribunals these powers. This is evidenced, in part, by the fact that the SIAC, SCC, and ICC only recently amended their Rules: the SIAC's new rules came into force on 1 August 2016; the SCC's rules came into force on 1 January 2017; and the ICC's revised practice note on an expedited procedure came into force on 1 March 2017. Equally, courts in multiple jurisdictions continue to find that tribunals have these powers even in the absence of express authorisation.[31]

In this respect, it is useful to note that London is currently the most popular seat for international commercial arbitration, followed by Paris, Singapore, Hong Kong and Geneva.[32] Further, the London Court of International Arbitration ("LCIA") is the second most popular arbitral institutions; the ICC is the first.[33] The LCIA does not currently have rules on the summary disposal of claims but, by amending the Arbitration Act in the way suggested above,

[30] Ibid. 1747 – 48
[31] For example, see the American case *Weirton Medical Centre Inc v Community Health Systems Inc* (N.D. W. Va. Dec, 12, 2017)
[32] International Arbitration Survey (n 21) 9
[33] Ibid. 13

there would be no need to wait for the LCIA to amend its rules. Consequently, England, and especially London, can continue to attract international business across different sectors, maintain its competitive edge in the market and endure as an attractive seat.

5 Conclusion

Under the current law, if parties wish to ensure that tribunals have the power to summarily dispose of an unmeritorious or vexatious claim, they need to take a series of strategic steps: (1) ensure there is express language in the arbitration agreement; (2) choose procedural rules which have a summary procedure; and (3) select arbitrators who are open to using summary procedures, and can use them in a way which does not render the award unenforceable. This is an undesirable way for the law to operate. First, it presupposes that parties will have in mind the possibility that they will want to use summary procedures when negotiating arbitration agreements. Second, it limits parties to using a small number of arbitration institutions. Third, if other arbitral rules are used, there is no guarantee that following steps (1) and (3) will result in a summary procedure being successfully used.

Amending the Arbitration Act 1996 to permit a summary procedure for the disposal of unmeritorious claims would simplify the law and add certainty. By giving tribunals more effective case management powers, arbitration can appear more attractive to certain sectors, and England is able to maintain its position a leading jurisdiction in international commercial arbitration.

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