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SUMMARY DISMISSAL IN ARBITRATION: A NEED FOR REFORM TO THE ARBITRATION ACT 1996?

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Abstract

This article considers the United Kingdom Law Commission's recent proposal to amend the Arbitration Act 1996 so as to expressly empower arbitral tribunals to make orders for summary dismissal of meritless claims/defences (among several other reforms to the Act). Noting the summary dismissal procedures available in the English courts and the provisions for summary dismissal now included in the procedural rules of the major arbitral institutions, this article concludes that such an amendment to the 1996 Act would be a very welcome development, promoting efficiency in London-seated arbitration and thereby further securing London's position as one of the most popular seats of arbitration.

Keywords: summary dismissal; summary judgment; Arbitration Act 1996.

[A] INTRODUCTION

As an alternative form of dispute resolution, arbitration offers several potential advantages over other binding dispute resolution mechanisms. Through an agreement to arbitrate, parties can establish a private and confidential process to resolve their disputes before a neutral and bespoke tribunal, with a robust international legal framework for enforcing any resulting award (pursuant to the New York Convention). Owing to these benefits, arbitration has increasingly become a preferred dispute resolution mechanism for a wide range of disputes, particularly disputes under cross-border contracts.

At least in theory, arbitration also offers the potential for a more efficient dispute resolution process. Free from the constraints of the

prescriptive procedural codes that often apply in national courts, parties and tribunals have more autonomy and flexibility to tailor the process to their specific dispute and to adopt procedures that are as time- and cost-efficient as possible. In practice, however, arbitration is generally perceived as having failed to live up to its potential for efficiency. Whether as a result of “due process paranoia” or a lack of procedural rigour (on the part of practitioners, as well as tribunals), there is ample anecdotal, if not empirical, evidence of disputing parties finding arbitration to be as unwieldy and inefficient as litigation before some national courts.

Of course, such criticisms have not gone unnoticed, and the arbitration community is increasingly focused on ways to ensure that arbitration is efficient not only in theory, but also in practice. To that end, over the last decade or so, one mechanism that has increasingly gained attention is “summary dismissal”, namely, a procedure enabling a party to obtain speedy dismissal of a meritless claim or defence raised in the proceedings. Such procedures can be akin to the “summary judgment” or “strike-out” procedures generally available in the domestic courts of common law jurisdictions.

Tribunals have arguably always had an inherent power to adopt summary dismissal procedures, as part of their broad procedural powers. Nonetheless, the existence of such a power has been a matter of considerable debate, with some commentators suggesting that summary dismissal runs counter to the duty of tribunals to afford parties a reasonable opportunity of presenting their case. This may perhaps be because of that debate and because tribunals are naturally wary of giving any party a basis for complaining that it has not been given a reasonable opportunity to present its case (for fear that the complaining party will challenge the award or resist enforcement under the New York Convention), summary dismissal procedures in arbitration have historically been a relatively rare phenomenon. In turn, this has led commercial parties in certain sectors, where summary dismissal is of particular value, to prefer court litigation over arbitration.¹

To address the limited use of summary dismissal procedures by tribunals, several leading arbitral institutions have, in recent years, amended their rules to make express provision for summary dismissal procedures. And now a further development is anticipated: the United Kingdom (UK) Law Commission is proposing to include a provision in the Arbitration Act 1996 (the legislation that governs arbitrations seated

¹ For example, in the finance sector, where the speedy resolution of a debt claim via a summary dismissal procedure may be valuable.

in England & Wales and Northern Ireland) which expressly empowers tribunals to adopt such procedures.

In that context, this article discusses the availability and use of summary dismissal procedures in arbitration, and considers whether there is a need for reform of the Arbitration Act 1996 as proposed by the UK Law Commission. Part B provides an overview of summary dismissal procedures and their historical origins in English court procedure. Part C describes the rules and guidelines for summary dismissal procedures recently introduced by leading arbitral institutions. Part D considers the issues raised by summary dismissal procedures in arbitration, including in light of case law from the English courts. Finally, Part E considers the UK Law Commission's proposed amendment to the Arbitration Act 1996.

[B] WHAT IS A SUMMARY DISMISSAL PROCEDURE?

At its broadest, a “summary dismissal procedure” encompasses any procedure whereby a court or tribunal considers whether a particular claim or defence can safely be dismissed at an early stage without determining all of the legal or factual points that have been put in issue, and without engaging in a process that requires a full evidentiary hearing.

The policy rationale for such a procedure is the same for courts and tribunals: to avoid delay and ensure that disputes are determined as efficiently as possible.

In the context of London-seated arbitrations, tribunals may look to English court procedure as a reference point when considering applications for summary dismissal, turning in particular to parts 3 and 24 of the Civil Procedure Rules (CPR), which apply to litigation in the English courts. Those rules of procedure provide for two specific and well-established summary dismissal procedures: a “strike-out” application (via CPR rule 3.4); and summary judgment (via CPR rule 24.1)—both of which are related, but use different tests, as set out in more detail below.

The History and Development of Summary Dismissal Procedures in the English Courts

Before considering the specific mechanics of the English court procedures for summary dismissal, it is useful to consider their origins. Unsurprisingly, the need for efficient procedures to resolve disputes was (at least in England) initially driven by demands from businesses using

litigation to enforce money claims. Summary procedures had evolved at least as early as the 13th century for use by merchants at trade fair courts in England (also known as “piepowder courts”), primarily for debt collection, owing to the desire of merchants to avoid the “unendurable” delays and technicalities of the common law courts. However, as commerce became more sophisticated, trade fair courts disappeared and merchants increasingly turned back to the common law courts for the settlement of their disputes. As a result, and by at least the early 17th century, those courts had developed a speedy procedure for the resolution of commercial disputes, using informal oral pleadings (Bauman 1956, 329-332).

For present purposes, the key event leading to the creation of modern summary procedures can be found in the introduction of written pleadings in the English common law courts between the 17th and 18th centuries. While written pleadings initially offered a potential way to help crystallize the issues in dispute (and so ensure the efficiency of the process overall, particularly in document-heavy cases), the English court rules on pleading became so complex, rigid and overly technical that they caused considerable delay, enabling “unscrupulous lawyers” to plead meritless defences in order to stall the resolution of a dispute. Indeed, by the 18th century, commercial parties were being advised to arbitrate rather than litigate, so as to avoid the frustrating delays and expense of court litigation (Bauman 1956, 332-334).

Those frustrations led to the emergence of various proposals for summary procedures during the 19th century, drawing on more sophisticated procedural mechanisms existing in Scottish, French, Dutch and Roman procedural law. In turn, those proposals led to “Keating’s Act”, also known as the Summary Procedure on Bills of Exchange Act of 1855, which allowed a claimant to obtain a court order warning a defendant that judgment would be entered against it unless the defendant either paid into court a security for the amount in dispute or presented an affidavit demonstrating that a full trial was necessary (Bauman 1956, 337-338). There were various refinements of this summary procedure over the next century, initially via the Judicature Act of 1873 and the Rules of the Supreme Court 1883, including in order to make clear that the burden of proof was on the party seeking summary judgment (Bauman 1956, 340-341; Bogart 1981, 555).

Ultimately, the English courts adopted the procedure now reflected in CPR parts 3 and 24, which has in turn been carried through to other common law jurisdictions, including the United States (Bogart 1981, 557). That procedure recognizes the need to balance the obvious care

that judges should exercise in not issuing a judgment against a party who “shows a genuine issue as to a material fact” with the “[j]ust as obvious ... obligation to examine a case with care to see that a trial is not forced upon a litigant by one with no case at all” (Clark 1952, 578). As the Court of Appeal explained in *Kent v Griffiths* (2001, para 38):

Courts are now encouraged, where an issue or issues can be identified which will resolve or help to resolve litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. ... Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible.

CPR 3.4: Strike-Out

As part of the case management powers set out in CPR rule 3.4, the English courts may strike out a statement of case, or part of a statement of case, if it appears to the court that: (a) the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or (c) there has been a material failure to comply with a rule, practice direction or court order, which cannot more appropriately be addressed via costs sanctions (CPR rule 3.4(2)). The court may exercise this power either upon the application of one of the parties or on its own initiative (CPR Practice Direction (PD) 3A.1.2).

Of the various grounds on which an application for strike-out may be brought, parties will (in practice) typically rely on grounds relating to the adequacy of the other party’s statement of case. Where an application is brought on that ground, the court will consider that a statement of case discloses no reasonable grounds to bring or defend a claim if *inter alia*: (a) no facts are set out regarding the nature of the claim; (b) the statement of case is incoherent, unreasonably vague, vexatious or scurrilous; (c) the facts do not disclose a recognizable claim or defence; or (d) the facts—even if coherent, and true—would not amount in law to a defence to the claim (CPR PD 3A.1.2).

A strike-out application will not, however, be allowed if a claim is merely defective. In such a case, a court is obliged to consider whether the defect might be cured by an amendment to a party’s case and, if so, whether the relevant party should be given an opportunity to amend (*Soo Kim v Young* 2011). Similarly, if the viability of a claim or defence depends on a substantial issue of law, or an issue of fact which can only be determined

at a hearing, it will not normally be appropriate for a summary procedure to be adopted (Halsbury 2008, 522-523; *White Book* 2023, 3.4.1-3.4.2).²

CPR 24: Summary Judgment

Although there is substantial overlap between strike-out and summary judgment, an application for summary judgment under CPR 24 entails a slightly more in-depth analysis of a claim or defence, by requiring the court to consider evidence beyond just the parties' statements of case. CPR 24 requires that a party applying for summary judgment must show that the claim or defence has "no real prospect" of success, and that there is no other compelling reason why the claim or issue should be disposed of at trial (CPR rule 24.2). Predictably, the evidentiary bar for either of those conditions to be satisfied is high. As per the key principles for summary judgment, summarized succinctly by Lewison J in *Easyair Ltd v Opal Telecom* (2009, para 15), on a summary judgment application:³

- ◇ a court must consider whether the claimant or defendant has a "realistic" as opposed to a "fanciful" prospect of success – a "realistic" claim or defence is one that carries some degree of conviction, being more than merely arguable;
- ◇ in reaching its conclusion the court must not conduct a "mini-trial" (although this does not mean that the court must take at face value everything that a party says in its statements before the court, particularly if any statements are contradicted by contemporaneous documents);
- ◇ in reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial;
- ◇ even if the resolution of a case appears straightforward, the court should hesitate in making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts of the case would affect the outcome of the case;

² See, for example, *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7. Similarly, the English courts will typically exercise caution in striking out a claim if it would risk infringing the right of access to a court pursuant to article 6 of the European Convention on Human Rights—for example, by conferring a *de facto* immunity from civil liability on a particular group: *Osman v United Kingdom* (2000) 29 EHRR 245. But article 6 does not prevent the striking out of a claim or defence in an appropriate case: see *Z v United Kingdom* [2002] 34 EHRR 3.

³ See also *Three Rivers District Council v Bank of England* (2001) and *Swain v Hillman* (1999).

- ◇ however, it is not enough for a party simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on a question of construction relevant to the outcome of the case; and
- ◇ if a summary judgment application gives rise to a short point of law or construction and the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address it in argument, the court should “grasp the nettle and decide it”.

It is important to note that the above principles do not preclude an application for summary judgment in a dispute involving issues that depend on expert evidence. While a strike-out procedure is unlikely to be appropriate in such a case, an application for summary judgment may still be made after the exchange of experts’ reports and the production of a joint statement from those experts identifying their areas of agreement and disagreement (*White Book 2023*, 24.2.1).

[C] SUMMARY DISMISSAL PROCEDURES IN INSTITUTIONAL ARBITRAL RULES AND GUIDELINES

Echoing the same calls that led to the development of summary procedures before the English courts, in recent years a number of arbitral institutions have made express provision for summary dismissal procedures in arbitrations conducted under their procedural rules, either via amendments to their procedural rules or via “soft law” guidelines that expressly recognize the potential for a summary dismissal procedure.

The first institution to adopt express provisions for summary procedures was the International Centre for Settlement of Investment Disputes (ICSID) in 2006.⁴ Commercial arbitration institutions followed suit some time afterwards, drawing inspiration from the ICSID Rules,

⁴ ICSID Arbitration Rule, 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 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.” See also Gill 2009, 517-519.

with the Singapore International Arbitration Centre (SIAC) being the first to amend its Rules in 2016. Examples of such provisions include:⁵

- ◇ The 2016 Arbitration Rules of SIAC, rule 29.1, the “early dismissal of claims and defences”:

A Party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that:

- (a) a claim or defence is manifestly without legal merit; or
- (b) a claim of defence is manifestly outside the jurisdiction of the Tribunal.

- ◇ The London Court of International Arbitration (LCIA) Arbitration Rules 2020, article 22.1, “additional powers”:

The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub- paragraph (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:

...

- (viii) to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an “Early Determination”).

- ◇ The 2023 Arbitration Rules of the Stockholm Chamber of Commerce Arbitration Institute (SCC), article 39, “summary procedure”:

- (1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily taking every procedural step that might otherwise be adopted in the arbitration.
- (2) A request for summary procedure may concern issues of jurisdiction, admissibility, or the merits. It may include, for example, an assertion that:
 - (i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable;
 - (ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or

⁵ The Hong Kong International Arbitration Centre Administered Arbitration Rules 2018, article 43, also allows for early determination: “[the] arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that (a) such points of law or fact are manifestly without merit; or (b) such points of law or fact are manifestly outside the arbitral tribunal’s jurisdiction; or (c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party.”

- (iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

As the above rules demonstrate, the major arbitral institutions are broadly aligned in terms of the nature and scope of the summary dismissal powers granted to tribunals and the flexibility given to tribunals to determine the appropriate procedure. In particular, all of the relevant rules set a high threshold, in similar terms, for a successful application for summary dismissal, requiring a claim or defence to be “manifestly without legal merit” or “manifestly outside the jurisdiction of the Tribunal” (SIAC Rules 2016, rule 29.1(a)-(b)); “manifestly outside the jurisdiction of the Arbitral Tribunal” or “inadmissible or manifestly without merit” (LCIA Rules 2020, article 22); or to relate to an allegation of fact of law that is “manifestly unsustainable” (SCC Rules 2023, article 39(2)(i)).

One leading arbitral institution, the International Chamber of Commerce (ICC) International Court of Arbitration, has taken a slightly different approach. Rather than expressly providing for summary dismissal powers in the ICC Rules 2021, the ICC Court has provided guidance via a Practice Note issued in 2021, which makes clear that a tribunal’s broad case management powers under the ICC Rules include the “expeditious determination of manifestly unmeritorious claims or defences” (ie using a test similar to other institutions), in order to ensure the “expeditious and cost-effective” conduct of the arbitration (ICC Note to Parties 2021, D-109). The ICC’s Practice Notice also makes clear that a tribunal constituted under the ICC Rules will have “full discretion to decide whether to allow the application to proceed, taking into consideration any circumstances it considers to be relevant, including the stage of the proceedings and the need to ensure time and cost efficiency” (ICC Note to Parties 2021, D-111).

[D] SUMMARY DISMISSAL IN ARBITRATION: PERCEIVED RISKS AND RECENT ENGLISH CASE LAW

Despite the steps taken by leading arbitral institutions to expressly empower tribunals to adopt summary dismissal procedures, the (relatively limited) data available indicates that such procedures are still only adopted in a small number of cases. For example:

- ◇ The LCIA’s 2021 Annual Casework Report records that 15 applications were made for summary dismissal in 2021, set against a total caseload of 322. Seven of those applications were granted,

two were rejected, one was superseded by the parties' settlement of the case and five remained pending at the end of 2021 (LCIA Annual Casework Report 2021, 27).

- ◇ The 2022 SIAC Annual Report records that ten summary dismissal applications were received in 2022, set against a total caseload of 336. Five of the applications were allowed to proceed. Two applications were not allowed to proceed, one remains pending, and the other two were withdrawn. Of the five applications allowed to proceed, three applications were rejected and two remained pending when the report was published (SIAC Annual Report 2022, 29).

Insofar as the above statistics reflect any ongoing reluctance on the part of parties and tribunals to use summary dismissal procedures in arbitration proceedings, that reluctance may be attributable to a continuing concern that the adoption of such a procedure could increase the risk that the tribunal's award may be challenged and set aside at the seat of arbitration, or not enforced under the New York Convention.⁶

So far as the English courts are concerned, relatively recent case law has given parties and tribunals some comfort in this regard. In particular, at least two High Court decisions provide reassurance that the adoption of a summary dismissal procedure should not, in principle, give rise to any basis for challenge or resisting enforcement in England & Wales.

The first of those cases is *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* (2014). In that case, the High Court indicated that where the parties to an arbitration agreement expressly agree that the tribunal will have the power to adopt a summary procedure, the tribunal's adoption of such a procedure will not, in and of itself, give rise to grounds for challenging the award under the Arbitration Act 1996, or resisting enforcement in the English courts.

The dispute in *Travis Coal* arose out of a share purchase transaction between Essar Minerals (as buyer) and Travis Coal (the seller). As part of the consideration for the sale, Essar Minerals issued promissory notes to Travis Coal. A guarantee for the notes was provided by Essar Minerals' parent entity (Essar Minerals Global Fund Ltd (EGFL)). That guarantee contained an arbitration clause that referred disputes to New York-seated ICC arbitration, subject to New York law. When Essar Minerals defaulted under the notes, Travis Coal initiated arbitration proceedings under the

⁶ See New York Convention, article V(1)(b). See also Arbitration Act 1996, section 103, which governs the refusal of recognition or enforcement of New York Convention awards in the English courts. Section 103(2) reads: "Recognition or enforcement of the award may be refused if the person against whom it is invoked proves— ... (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

guarantee. The tribunal adopted a summary procedure and rendered an award in favour of Travis Coal. EGFL (the guarantor) subsequently applied to the New York courts to set aside the award, while Travis Coal applied to the English High Court to enforce the award.

Before the High Court, EGFL argued that the arbitration clause in the guarantee did not provide the tribunal with jurisdiction to adopt a summary dismissal procedure. In considering this argument, Blair J noted that the real question under the Arbitration Act 1996 was whether “the procedure adopted by the Tribunal was within the scope of its powers, and was otherwise fair”. This was described by the court as “a question of substance, rather than how it was labelled” (*Travis Coal* 2014: para 44). In considering this point, Blair J noted that the procedure adopted by the tribunal was expressly permitted by the arbitration agreement set out in clause 7.7 of the guarantee, which was in the following terms (emphasis added):

The 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 part, in accordance with such procedure as the arbitrators may deem appropriate, and the arbitrators *may render an award on such issue*.

On its proper construction, Blair J held that this provision expressly allowed the tribunal to determine dispositive issues at any stage of the arbitration. Blair J also noted that the tribunal made “every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the nature of the dispute it had to decide. In doing so, it gave each party a fair opportunity to present its case” (*Travis Coal* 2014: para 50). Moreover, Blair J rejected EGFL’s broader submission that summary dismissal was “strongly disfavoured in international arbitration” and that there was “an important distinction between empowering a tribunal to conduct proceedings efficiently and exercising a summary judgment power” (*Travis Coal* 2014: para 43).

Following the reasoning in *Travis Coal*, nothing prevents parties from expressly agreeing to empower a tribunal to adopt summary dismissal procedures in an appropriate case. In particular, parties may do so by incorporating, in their arbitration clause, the procedural rules of an arbitral institution that expressly include such a power.

The second case is *Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd* (2018), which arose out of a challenge to an award rendered by a London-seated sole arbitrator regarding a dispute over delivery and payment for a shipment of nickel. The dispute arose between Gunvor, the “seller” (a

Singaporean nickel supplier) and Uttam Galva, the “buyer” (an Indian steel producer). Gunvor applied to the tribunal for a partial final award—essentially seeking summary dismissal—requesting payment of the bills of exchange on the basis that the “general rule is that the Court will give summary judgment for a claimant on a bill of exchange save in exceptional circumstances” (*Uttam Galva* 2018: para 16).

The tribunal refused to render a partial award on the basis that this would result in the “total loss of the opportunity” to consider the defences raised, and instead ordered the buyer to make an interim payment on account of the monetary award which the tribunal considered was likely to be recovered. The buyer then challenged the award under section 67 of the Arbitration Act 1996 on the basis that the tribunal had exceeded its jurisdiction in making the payment order (*Uttam Galva* 2018: para 25).

In considering the buyer’s application, the High Court helpfully made clear that the alleged “unavailability” of summary dismissal procedures in arbitral proceedings has been “overstated” (*Uttam Galva* 2018: para 49). In particular, Picken J did not accept: (a) that “relief akin to summary judgment would not be available in arbitration in an appropriate case” (*Uttam Galva* 2018: para 49); or (b) the observation of the Singapore Court of Appeal in *CA Pacific Forex v Leong* (1999) that “the availability of summary judgment procedures in international arbitration, and specifically under the ICC Rules, appears to be a matter of controversy in England” (*Uttam Galva* 2018: paras 60-61).

Chong and Primrose note that section 33(1)(b) of the Arbitration Act 1996 (which provides that a tribunal shall “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”) may be read as providing the “appropriate key to unlock” any limitation on summary dismissal procedures arguably imposed by section 33(1)(a) (which requires each party to be given a “reasonable opportunity of putting [its] case”), by enabling tribunals to adopt summary procedures in order to avoid unnecessary delay or expense (Chong & Primrose 2017, 67).

[E] A WELCOME DEVELOPMENT: THE LAW COMMISSION'S PROPOSAL TO REFORM THE 1996 ACT

The UK Law Commission is currently conducting a public consultation process relating to reforms to the Arbitration Act 1996, and its consultation papers include a proposal for the inclusion of a provision for summary dismissal in the Act. Specifically, the Law Commission has provisionally proposed “a non-mandatory provision which gives arbitrators the power to adopt a summary procedure to decide issues which have no real prospect of success and no other compelling reason to continue to a full hearing” (Law Commission 2022, 6.2).

The Law Commission has justified this proposal on the basis that such an express provision would “reassure arbitrators who wish to manage the arbitral proceedings in an efficient manner, while also ensuring that proceedings are conducted fairly” (Law Commission 2022, 6.2). Noting that stakeholders have expressed support for reform in favour of summary procedures, and that parties are overwhelmingly in favour of innovation aimed at improving the efficiency of arbitration, especially in the banking, finance and construction sectors (Law Commission 2022, 6.9), the Law Commission’s first consultation paper has expressed the hope that making express provision for summary dismissal procedures in the 1996 Act will allay tribunals’ “due process paranoia” and enable them to adopt such procedures with confidence (Law Commission 2022, 6.21).

If such a provision is to be included in the Arbitration Act 1996, this of course leaves open several questions as to how that provision should be drafted, including the threshold test that should apply for summary dismissal. The Law Commission is proposing to stipulate the threshold for summary dismissal explicitly in the Act in order to ensure consistency of application (Law Commission 2022, 6.30) and has suggested a test that mirrors the test for summary judgment in the English courts (CPR, rule 24), namely, “no real prospect of success” and “no other compelling reason” for the issue to proceed to trial. Although that test differs from the test as articulated in the procedural rules of the majority of arbitral institutions—the “manifestly without merit” test—the Law Commission has noted that the “no real prospect of success” test has a strong basis in common law countries and a well-understood meaning, as outlined in detail in case law (Law Commission 2022, 6.33).

[F] CONCLUSION

The arbitration community continues to consider how it can ensure that arbitration remains an efficient method for the resolution of disputes, and summary dismissal procedures certainly promote that objective.

The UK Law Commission's proposal to include a provision in the Arbitration Act 1996 expressly empowering arbitral tribunals to adopt summary dismissal procedures is therefore to be welcomed; such a provision should give parties and tribunals greater confidence to use such procedures and should further secure London's position as one of the most popular seats of arbitration.

Regardless of whether or not a provision for summary dismissal is included in the Arbitration Act 1996, it should at least be clear (in light of the case law noted above) that where parties have expressly agreed to empower a tribunal to make an order for summary dismissal (including by adopting institutional rules that provide for such a power) and the tribunal exercises such a power in accordance with the terms of the parties' agreement, there should be no basis for any challenge to the validity or enforceability of the tribunal's award under the Arbitration Act 1996.

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