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## Litigation & Arbitration Group Client Alert: ICC Rules: Summary Determination

On 30 October 2017, the ICC revised its “*Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*” to clarify that tribunals have the power to determine “*manifestly unmeritorious claims or defenses*” on an expedited basis. This is a further step that the ICC has taken to provide greater flexibility and efficiency in resolving less complex claims, and reflects the progress made by the major arbitral institutions in ensuring that arbitration remains a convenient forum for resolving a broad range of disputes.

The key, however, will be whether tribunals feel sufficiently emboldened by the recent developments in arbitration rules to exercise their powers to make summary determinations.

### THE EXPECTATION FOR GREATER EFFICIENCY IN ARBITRATION

The extremely useful surveys carried out by the Queen Mary’s School of International Arbitration regularly suggest that the cost and length of proceedings are parties’ greatest concerns in arbitration.<sup>1</sup> In fact, 92% of respondents to the 2015 survey favoured the inclusion of simplified procedures in institutional rules for claims under a certain value and 40% of respondents welcomed the proposed inclusion of rules for summary determination.<sup>2</sup>

As we have previously described in earlier briefings,<sup>3</sup> the arbitration community recognises that there is scope for improving the efficiency of arbitral disputes, including notably those disputes that the courts might otherwise dispense with on a summary judgment basis (i.e. without the exchange of witness statements, expert reports, disclosure or a hearing to interrogate that evidence).

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<sup>1</sup> The 2015 survey can be accessed at <http://www.arbitration.qmul.ac.uk/research/2015/#>.

<sup>2</sup> On pages 25 and 26 of the 2015 survey.

<sup>3</sup> These can be accessed [here](#) (“London Arbitration: Increasing its Appeal?”) and [here](#) (“ICC Rules: New Expedited Procedure”).

The difficulty which tribunals face, but which the arbitral institutions are steadily addressing (and which the ICC's recent clarification seeks to address), is the balance between providing a reasonable opportunity for parties to present their case with ensuring that the proceedings are conducted as efficiently as possible.

#### BALANCING THE TRIBUNAL'S DUTIES

The main institutional rules already provide wide powers for tribunals to determine claims in an expedient manner, including, in theory, on a summary judgment basis. For example:

- The ICC Rules contain provisions (at Article 22) that enable tribunals to “conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute”, and “to adopt such procedural measures as it considers appropriate, provided they are not contrary to any agreement of the parties”.
- The LCIA Rules provide (at Article 14) that tribunals have “a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute”.
- The SIAC Rules require (at Article 19) tribunals to “conduct the arbitration in such manner as it considers appropriate to ensure the fair, expeditious, economical and final determination of the dispute”.

Nevertheless, tribunals have historically been reluctant to exercise these powers in such a way so as to provide for the summary disposal of unmeritorious cases. This is potentially because of the concerns that tribunals have that, if they were to do so, parties may not have had a reasonable or fair opportunity to present their case,<sup>4</sup> and that this could constitute grounds for having an award set aside or challenged at enforcement.<sup>5</sup>

One way to address that concern may be for the parties to expressly confirm, as part of the arbitration agreement, that the tribunal's powers do extend to the disposal of claims and defences in an expedited manner. In those circumstances, it is likely to be more difficult for either party to argue, at a later stage, that the expedited procedure, in

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<sup>4</sup> See, for example, the ICC Rules (at Article 22(f)), the LCIA Rules (at Article 14.4(i)), the SIAC Rules (at Rule 19), the HKIAC Rules (at Article 13.1), and the ICDR Rules (at Article 20(1)).

<sup>5</sup> For example, the English Arbitration Act 1996 provides that an award may be challenged on the grounds of serious irregularity if the tribunal fails to “conduct the proceedings in accordance with the procedure agreed by the parties” (Section 68(2)(c)) or if it does not give “each party a reasonable opportunity of putting his case and dealing with that of his opponent” (Section 33(1)). Similarly, the New York Convention provides (at Article V, paragraph 1(b)) that an enforcement court may refuse to enforce an award if a party “was otherwise unable to present its case”.

itself, meant that they had not been given a reasonable and fair opportunity to present their case.

This is supported, in principle, by a 2014 decision of the English court in *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd.*<sup>6</sup> In that case, the court confirmed that, as a matter of English law,<sup>7</sup> tribunals can dispose of claims on a summary basis, if it is clear from the parties' agreement that they intended to give that power to the tribunal.

#### CLARIFYING THE TRIBUNAL'S POWERS

Arbitration institutions have, therefore, recently sought to amend and clarify their rules in order to give greater certainty to the scope of the tribunal's powers to resolve disputes in an expedited manner. For example, many of the institutions have introduced specific expedited procedures that typically apply (absent both parties' consent) in cases that fall below a specific value and/or in cases of exceptional urgency.<sup>8</sup> Some institutions have even included specific provisions for summary disposition of claims:<sup>9</sup>

- In August 2016, the SIAC amended its rules to provide parties with the right to apply, at any time, to the tribunal for the early dismissal of a claim or defence that is “*manifestly without legal merits*” or “*manifestly outside the jurisdiction of the tribunal*”.<sup>10</sup>
- On 1 January 2017, the SCC also amended its rules to enable a party to “*request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration*”.<sup>11</sup>

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<sup>6</sup> *Travis Coal Restructured Holdings v Essar Global Fund Limited* [2014] EWHC 2510 (Comm)

<sup>7</sup> Some jurisdictions will not enforce awards (or foreign court judgments) that are made on a summary basis. Accordingly, parties should always seek local law advice in the likely enforcement jurisdiction before seeking summary judgment (whether in arbitration or litigation proceedings).

<sup>8</sup> See our briefing on the new ICC expedited procedure ([here](#)) that was introduced with effect from 1 March 2017, and which applies automatically to claims not exceeding \$2 million. Similar procedures are contained in, for example, the ICDR, SIAC, HKIAC and SCC Rules (albeit with varying financial thresholds and, in the case of the HKIAC and SIAC Rules, is not automatic). The LCIA Rules' expedited formation of the Tribunal only applies in cases of exceptional urgency.

<sup>9</sup> Many of the arbitration rules that are more commonly used in US arbitrations already include (expressly or implicitly) provision for the summary disposition of claims. See, for example, Rule 33 of the AAA Rules, Rule 18 of the JAMS Rules and Rule 13504 of the FINRA Industry Rules. The ICSID Rules also provide for summary disposition of claims that lack legal merit in investment arbitrations (Rule 41(5)).

<sup>10</sup> Article 29 of the SIAC Rules 2016.

<sup>11</sup> Article 39 of the SCC Rules 2017.

The ICC's clarification on 30 October 2017 is another helpful step in this regard. It confirms that the existing Article 22 of the ICC Rules permits applications for the expeditious determination of "*manifestly unmeritorious claims or defenses*", on the grounds that they are "*manifestly devoid of merit or manifestly fall outside of the arbitral tribunal's jurisdiction*". Any such application "*must be made as promptly as possible after the filing of the relevant claims or defenses*" but the clarification does not prescribe what 'expeditious determination' should comprise. Instead:

- The tribunal "*has full discretion to decide whether to allow the application to proceed*";
- The tribunal can then "*adopt the procedural measures it considers appropriate, after consulting the parties*";
- Notably, the "*responding party or parties shall be given a fair opportunity to answer the application*", but "[f]urther presentation of evidence will be allowed only exceptionally"; and
- The tribunal's decision shall be recorded in an order or an award, which will be scrutinized by the ICC court within one week of receipt by the Secretariat.

#### COMMENT

The ICC's clarification is certainly encouraging, and reflects the broader efforts of the arbitration community to address parties' concerns as to the time and costs of pursuing straightforward claims (which has historically deterred, for example, financial institutions from embracing arbitration as the forum for resolving debt claims).

Parties should, therefore, feel optimistic about the increasing opportunities for the efficient resolution of arbitral disputes, but it will require tribunals to be confident in exercising their powers, and, importantly, it will require courts to be robust in the enforcement of awards that are made pursuant to expedited procedures.

## LITIGATION & ARBITRATION GROUP KEY CONTACTS

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any of the members of our Litigation & Arbitration Group.

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