

Early Dismissal in Arbitration: Is There a Need?

Dharshini Prasad

ASA Below 40 Seminar
Zurich, 18 November 2016

WILMERHALE® 

WILMER CUTLER PICKERING HALE AND DORR LLP®



What is Early Dismissal?

- Two forms of early dismissal commonly used in common law jurisdictions – striking out and summary judgment
- Decision makers adjudicates on the basis of limited material before factual and legal issues are fully aired
- Contrast other procedures that enable an early resolution of a dispute
 - Expedited Procedures
 - Determination of Preliminary Issues / Bifurcation

Need for Early Dismissal in Arbitration?

- Inefficiency and increased costs are common complaints amongst users in arbitration
- Queen Mary Survey 2015
 - 68% of sampled arbitration users found "Cost" as the worst feature of arbitration
 - 36% found the "Lack of speed" as the fourth worst feature
- Existence and prevalence of early dismissal in litigation makes it an attractive alternative to arbitration



Need for Express Rules?

- Tribunals have the implied power to conduct summary proceedings under most arbitral rules
 - Duty to ensure the expeditious resolution of a dispute
 - General power over the conduct of proceedings
- For instance, LCIA Rules, Article 14
 - “[T]he Arbitral Tribunal’s general duties ... shall include 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 Arbitral Tribunal shall have the **widest discretion** to discharge these general duties”...



Need for Express Rules?

- Tribunals have adopted summary procedures
 - First Interim Award in ICC Case No. 11413 (2001)
 - Procedural Order No.1 in ICC Case No. 12297 (2003)
- Courts have recognized this power
 - *Travis Coal Restructured Holdings v. Essar Global Fund* [2014] EWHC 2510 (Comm) – English High Court



Need for Express Rules?

- Nonetheless, early dismissal processes are not widely adopted by Tribunals
 - Cultural inclinations
 - Due process concerns
- Express rules as a way to address these concerns
 - Reduce the risk of due process challenges
 - Encourage Tribunals to resort to early dismissal mechanisms
 - Make parties aware of their rights



Arbitral Rules: State of Play

- Investment arbitration
 - ICSID Rules, Rule 41(5) (2006)
 - The original innovation
 - Draft SIAC Investment Arbitration Rules, Rule 25 (2016)
 - Investment Treaties (e.g. TPP, Investment Chapter, Article 9.23(4))

- Commercial arbitration
 - SIAC Rules, Rule 29 (2016)
 - First major international arbitration centre to introduce early dismissal provisions
 - Draft SCC Rules, Article 39 (2016)



The SIAC Example

29 Early Dismissal of Claims and Defences

- 29.1 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 or defence is manifestly outside the jurisdiction of the Tribunal.
- 29.2 An application for the early dismissal of a claim or defence under Rule 29.1 shall state in detail the facts and legal basis supporting the application. The party applying for early dismissal shall, at the same time as it files the application with the Tribunal, send a copy of the application to the other party, and shall notify the Tribunal that it has done so, specifying the mode of service employed and the date of service.
- 29.3 The Tribunal may, in its discretion, allow the application for the early dismissal of a claim or defence under Rule 29.1 to proceed. If the application is allowed to proceed, the Tribunal shall, after giving the parties the opportunity to be heard, decide whether to grant, in whole or in part, the application for early dismissal under Rule 29.1.
- 29.4 If the application is allowed to proceed, the Tribunal shall make an order or Award on the application, with reasons, which may be in summary form. The order or Award shall be made within 60 days of the date of filing of the application, unless, in exceptional circumstances, the Registrar extends the time.



The SIAC Example

- Genesis – ICSID Rule 41(5)
- Early dismissal of claim or defence
 - Analogous to striking out and summary judgment
- No time limit for application
 - Does the standard of review vary depending on stage of the proceedings?



The SIAC Example

- Grounds for early dismissal
 - Manifest lack of legal merits or jurisdiction
 - Compare Draft SIAC Investment Arbitration Rules
 - Jurisdiction, admissibility and merits
 - Admissibility objections?
- SIAC scrutiny of the early dismissal award
- Factors affecting recourse to early dismissal procedures
 - Complexity of the case? Value in dispute? Nature of the objection – jurisdiction, merits, admissibility?



Conclusion: Future Trends?

- Early dismissal provisions a common feature of major institutional rules
 - Absent express rules, parties should incorporate express terms in their arbitration agreements permitting early dismissal procedures
- Greater use of early dismissal procedures