Summary disposal in English-seated arbitrations: a potent power

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This article discusses the new section 39A of the Arbitration Act 1996, which provides expressly for English-seated arbitral tribunals to make awards on a summary basis in relation to claims or defences, which the tribunal considers have no real prospect of success. Introduced by the Arbitration Act 2025, this new power represents a potentially significant change in English arbitration law. The article discusses its potential implications.

The *Arbitration Act 2025* (AA 2025), which received Royal Assent in February 2025 (see *Legal update, English Arbitration Bill receives Royal Assent*), introduced, in *section 39A* of the *Arbitration Act 1996* (AA 1996), an express power for arbitral tribunals seated in England (or Wales or Northern Ireland) to make an award on a summary basis. A summary award can be made in relation to a claim or defence, or a particular issue arising in a claim or defence, if the tribunal considers that it has no real prospect of success.

When section 39A of the AA 1996 is brought into force (by regulations made under section 17(2) of the AA 2025), this will be a significant change, which is likely to present both tactical opportunities and procedural complexities (see *Practice note, Roadmap to amendments to the Arbitration Act 1996 : Summary dismissal* and *Commencement of new provisions*).

Summary awards are not a new frontier for arbitration

Summary dismissal (also referred to as early determination) of claims is far from a new concept in arbitration. Most major institutional arbitration rules contain express language providing the tribunal with the power to determine claims on their merits early in the proceedings. Even where express language may not exist (see, for example, the *ICC Arbitration Rules 2021*), it is generally accepted that the tribunal has an inherent power expeditiously to dispose of claims or issues that are manifestly without merit.

Summary dismissal has numerous potential benefits. It promotes efficiency, providing tribunals with a means to dismiss hopeless claims or defences in short order, without putting the parties to unnecessary time and cost. Summary dismissal also encourages the parties and tribunal to focus on the merits at an early stage of the proceedings and narrow the issues in dispute.

Crucially, however, the threshold set in institutional rules is generally high. For example, the early determination provisions in article 22.1(viii) of the *London Court of International Arbitration (LCIA) Arbitration Rules 2020* (LCIA Rules) apply to a claim that is "inadmissible", "manifestly without merit" or "manifestly outside the jurisdiction of the Arbitral Tribunal". Similar provisions can be found in the *Singapore International Arbitration Centre (SIAC) Arbitration Rules 2025* (SIAC Rules) (*rule 47*) and the *Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2024* (*article 43*). (For further discussion, see *Practice note, Summary determination in international arbitration*.)

It is likely to be, at least in part, due to this high bar that early determination applications in arbitration are made rarely, and granted even more rarely. The LCIA has reported that, in 2023, there were 25 applications for early determination, of which three were granted and one was partially granted (see *LCIA: The English Arbitration Act 2025*). Another issue is so-called "due process paranoia", which may operate to prevent tribunals from issuing awards summarily dismissing claims, through fears of subsequent challenges to the award, or issues as to enforcement in certain jurisdictions.

The new section 39A of the AA 1996 lowers the bar significantly by adopting the language of the test for summary judgment used in English civil proceedings. For example, an applicant for summary dismissal in a LCIA arbitration to which section 39A applies would no longer need to establish that the claim or issue in question was "manifestly without merit", but rather that it has "no real prospect of success". English case law indicates that this means that the claimant or defendant must have a "realistic", as opposed to merely "fanciful", prospect of success. A realistic claim is one that carries some degree of conviction (*Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)*; see further, *Practice note, Summary judgment: an overview*).

Section 39A also seeks to address the due process issue by expressly providing that, before exercising its power, an arbitral tribunal must afford the parties a reasonable opportunity to make representations to the tribunal (*section 39A(3)*).

Potential impact: observations from the English court

The effect of section 39A is, in essence, to grant English-seated arbitral tribunals the same power to summarily dismiss claims as has long been available to the English court pursuant to *Part 24* of the English Civil Procedure Rules.

Comparing and contrasting section 39A with the English court's summary judgment power, the following observations can be made:

- While it may take tribunals some time to fully embrace their new powers of summary dismissal, section 39A could ultimately lead to a considerable increase in the number of arbitration claims that are determined at an early stage. English judges regularly grant summary judgment applications, even in high value cases and cases involving allegations of fraud. This may be particularly the case where a retired English judge is appointed as arbitrator.
- Careful thought will, however, need to be given to whether it is appropriate to make a summary dismissal application. Tribunals are unlikely to accede to summary dismissal applications in circumstances where the claim or issue in question turns on disputed facts – such that the tribunal will need to hear evidence at trial - or concerns a developing area of law. Summary dismissal applications are more likely to be successful in cases that turn, for example, on simple points of contractual construction.
- Interestingly, while section 39A replicates the first limb of the Part 24 test (that there is "no real prospect of success"), it does not include the second limb (that "there is no other compelling reason why the case or issue should be disposed of at a trial"). On its face, this suggests that the test for summary disposal under section 39A is **lower** than under Part 24. It remains to be seen whether that will prove to be the case in practice.
- With respect to timing, summary judgment applications in the English court tend to be made once statements of case have been filed, so that the court can take a view on the relative strength of the parties' positions, but prior to disclosure and the filing of evidence. By contrast, as evidence is generally submitted concurrently with the pleadings in international arbitration, the parties' positions may not become clear until a later stage of the proceedings. Careful consideration, therefore, needs to be given to the timing of any section 39A application, as a tribunal is unlikely to be willing to summarily dismiss a claim or defence if it feels that it has only heard one side of the story.
- Section 39A may well promote early settlement. It is not uncommon for a potential arbitration defendant faced with a strong claim to refuse to settle and elect instead to defend the claim. They may consider that it will likely be some time before an award is ultimately issued against them, and in the meantime they might seek to engage in dilatory tactics and put the claimant to extra cost. The introduction of an express, statutory power of summary dismissal could alter this dynamic: in the same way that the prospect of a speedy summary judgment is commonly referred to in pre-action correspondence by potential court claimants, potential arbitration claimants can be expected to use the threat of summary dismissal to force defendants to the table.

Opt-out considerations

- However, section 39A is not mandatory and may be excluded by agreement of the parties (*section 39A(1)*). This is itself likely to be the focus of argument, especially where the parties have agreed to adopt a set of institutional rules, like the LCIA Rules, which themselves provide for a summary or early dismissal procedure but in different terms from section 39A. In those circumstances, it is foreseeable that a party faced with an application for summary disposal may argue that the parties' agreement to adopt the relevant rules amounts to agreement to opt out of section 39A. For example, if the parties have adopted the SIAC Rules, which provide that a party may apply for the early dismissal of a claim or defence where it is "manifestly without legal merit" (*rule 47.1(a)*), it could be argued that this amounts to the parties having agreed a different test for summary dismissal than that expressed in section 39A.
- It remains to be seen whether arguments of this kind will be successful. However, there is at least a strong policy rationale to suggest that they should not. If the adoption of institutional rules were all that was required to disapply section 39A, the amendment would be stripped of application for the majority of arbitrations. Given that this is currently untested, parties that wish to opt out of summary dismissal under section 39A (when it enters into force), would be well advised to expressly state their intention to do so in the arbitration agreement, or a subsequent amendment.
- For further discussion of the amendments made to the AA 1996 by the AA 2025, see *Practice note, Roadmap to amendments to the Arbitration Act 1996*.

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