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Recognition of Summary Procedures under the ICC Rules: Considerations, Comparisons and Concerns

Kartikey M. and Rishabh Raheja (NALSAR University of Law) · Monday, December 4th, 2017

On 30 October 2017, the ICC Court [announced yet another measure](#) to tackle the twin problems of time and costs in arbitration, through the immediate disposition of manifestly unmeritorious claims commonly known as *summary determination*. The ICC Court implemented this measure in the form of an update to its [Practice Note to Parties and Arbitral Tribunal on the Conduct of Arbitration](#) (the “**Practice Note**”), and has thus joined other institutions like the Singapore International Arbitration Centre (“**SIAC**”) and the Stockholm Chamber of Commerce (“**SCC**”) in explicitly recognising the arbitral tribunal’s power of summary determination. However, as we describe below, the ICC’s procedure for summary determination ? while possibly inspired by its counterparts ? varies in some key aspects, thus warranting further analysis.

Background

Barring the ICSID rules, there has been some reluctance among institutions in recognising tribunals’ power to dispose claims in a summary manner. In fact, a 2007 ICC Task Force report on “Evidence, Procedure and Burden of Proof” advised against the recognition of the power of summary dismissal in the ICC Rules, concluding that “[*it is*] *likely a summary judgment vehicle would not work in the ICC context and culture*”. This was followed by the conspicuous absence of a provision on summary dismissal in the ICC rules of 2012 and 2017.

However, tribunals and courts dealing with the ICC rules have affirmed this power as inherent in a tribunal’s decision-making capacity (see ICC Case No. 11413 (2001) and ICC Case No. 12297 (2003)). The English High Court in *Travis Coal v. Essar Global* [2014] EWHC 2510 (Comm) also cited Article 22 of the ICC rules in upholding an ICC tribunal’s power to deal with the case before it by way of summary determination – an aspect that has been endorsed by many arbitration practitioners dealing with ICC rules.

More recently, the tide has tilted heavily in favour of expressly recognizing this power under the

rules of various institutions due to the [increasing dissatisfaction of parties with the length and costs of institutional arbitration](#), particularly in the context of straightforward and low-value claims. Thus, in August 2016, the SIAC introduced a new set of rules with provisions on summary dismissal, with the SCC following suit on 01 January 2017, followed by the SIAC once again [?] in its Investment Arbitration Rules. Thus, the express recognition of this power by the ICC comes as no surprise, and foreshadows more such measures in the procedures of other institutions, [with the HKIAC too now contemplating the possible introduction of summary dismissals](#).

Features

The summary determination procedure under the ICC rules [?] like its SIAC and SCC counterparts [?] contemplates the disposition of *both claims and defences* that are *manifestly* unmeritorious upon the application of either party. This is much broader than the the ICSID rules, which only provides for the summary disposition of claims, and not defences. Further, unlike the ICSID rules which contain a deadline for the making of such an application, the ICC, SIAC, and SCC rules either provide no specific deadline for submitting a summary determination application or state that it should be filed ‘*early*’ and ‘*as promptly as possible after the filing of the claims or defences*’. Further, tribunals under the ICC, SIAC, and SCC Rules may consider relevant circumstances and deny a hearing on such applications by way of either an order or award.

Leaving aside the above similarities, there are some key differences. *First*, is the *form* of recognition of the tribunal’s summary determination power. Whilst the SIAC and SCC have introduced provisions on summary dismissal, the ICC Court has identified this power as forming part of a tribunal’s broad case-management powers under Article 22 of the Rules – a proposition endorsed by *Travis Coal* and some ICC tribunals (see above). Moreover, the fact that this procedure is not explicitly stipulated in the Rules, emphasizes the tribunal’s inherent power [?] and responsibility [?] to dispose of disputes in the most efficient and appropriate manner possible, thus highlighting the adaptiveness of the ICC’s summary dismissal procedure.

Second, the flexibility of the summary determination *process* [?] right from the application through to the award. The Practice Note stipulates neither any application formalities nor any procedural deadlines, stating instead that the tribunal “*shall adopt the procedural measures it considers appropriate, after consulting the parties... and shall decide the application as promptly as possible.*” On the other hand, the SIAC Rules requires an elaborate application process and a decision on the outcome of the summary application to be rendered by the tribunal within 60 days of the application (unless the Registrar extends this period due to exceptional circumstances). Fixing a deadline undoubtedly makes the SIAC procedures more attractive to clients as it prioritises the expeditious dismissal of manifestly unmeritorious claims in all scenarios. To others, however, a deadline could appear rigid as it fails to account for the peculiarities of each case, thus undermining the tribunal’s discretion and, possibly, even the wishes of the party applying for early dismissal. It is here that the ICC rules may be seen as preferable for its flexibility. The SCC procedure takes a similar approach to the ICC.

Third, there appears to be a difference among the three institutions in the *scope* of matters that can be determined summarily. The SCC rules authorises applications for summary determination to be made on “*issues of jurisdiction, admissibility or the merits*”. The SIAC rules allows applications for the early dismissal of claims and defences that are “*manifestly without legal merit*” or “*manifestly outside the jurisdiction of the tribunal.*” Whereas, the ICC rules allow applications on claims and defences that “*are manifestly devoid of merit or fall manifestly outside the arbitral tribunal’s jurisdiction.*” Thus, on a plain reading, the SCC rules appears to contemplate the widest scope of matters that could form the basis of a summary dismissal? merits, jurisdiction, and admissibility. Meanwhile, the SIAC and ICC summary dismissal procedures have a conspicuous absence of issues concerning ‘admissibility’. It remains to be seen whether tribunals constituted under these rules would read the terms ‘merits’ and ‘jurisdiction’ expansively to accommodate matters of admissibility. It also remains to be seen whether the SIAC summary procedure will apply solely to issues of ‘legal merit’ as it specifies, or whether the term is interpreted more broadly to accommodate issues of factual merit as well.

Last, is perhaps the most crucial point of comparison between the ICC, SIAC, and SCC procedures? *enforceability*. Summary determination may raise due process concerns. Thus, in order to prevent the risk that this poses to summary awards, the ICC, SIAC, and SCC procedures require tribunals to grant the parties a fair and reasonable right to object to summary dismissal.

Where the ICC differs from its other counterparts is that it provides for expeditious scrutiny of orders and awards rendered under the summary determination process – “*in principle within one week of receipt by the Secretariat*”. The ICC Court’s duty to scrutinize the awards has been established as an important safeguard for checking the form of the award and even ensure that an award does not fall foul of ‘due process’ concerns. A detailed scrutiny mechanism on the lines of the ICC is absent in the SIAC and SCC Rules.[1]

Whilst the ICC summary procedure tries to placate any enforcement concerns by providing for scrutiny of summary awards, it cannot be said that such awards will be free of such concerns *per se*. For example, some users may perceive the summary procedure as a backdoor entry of truncated proceedings even in situations where the parties have chosen the full arbitral process by opting out of the ICC Expedited Rules. The Rules contemplate a remedy to this situation in Article 22 itself, which requires the tribunal to ensure that the procedure adopted by it is “*not contrary to any agreement to the parties*”. Although the summary dismissal procedure is technically not contrary to an agreement to opt out of the Expedited Rules, tribunals will be well-advised to examine the parties’ intentions in opting out before allowing such applications, lest they face challenges for exceeding their authority and the scope of the arbitration agreement.

Important differences can be summarized as follows:

	ICC	SIAC	SCC	ICSID
Summary disposition of	Claims and Defences	Claims and Defences	Claims and Defences	Claims
Time limit for application	As promptly as possible after filing of claims or defences	No	No	No later than 30 days after the constitution, and in any event before the first session
Application may pertain to	Merits and jurisdiction	Legal merits and jurisdiction	Merits, Jurisdiction and Admissibility	Legal Merits
Time Limit for Award	As promptly as possible	60 days	No	At its first session or promptly thereafter
Form of Decision	Award/Order, reasons as concise as possible	Award/Order, summary form	Award/Order	Award
Scrutiny of Award	Yes, within one week	In select cases	Not applicable*	No

Conclusion

The procedure under the ICC rules for summary determination aims to promote flexibility and efficiency in arbitration. Although, it may pose some concerns in relation to enforcement, such problems can be safely avoided by appropriate application of Article 22 of the ICC rules and the Practice Note by tribunals depending on the facts of each case. With regard to the question of which institution's summary dismissal procedure is better suited, the answer is, much like the ICC rules, *adaptable?* depending on the expectations of the parties and the circumstances of the case.

[1] SIAC has its own scrutiny mechanism but as a matter of practice, draft awards are typically only referred to the SIAC court (unlike the ICC) if they present complex or novel issues, see John Savage and Simon Dunbar, *SIAC Arbitration Rules, Rule 28 (The Award)*, in Loukas A. Mistelis (ed), 'Concise International Arbitration' (Kluwer Law International, Second Edition, 2015) p. 811.

* The SCC does not have a scrutiny process equivalent to ICC but when the SCC Secretariat identifies obvious miscalculations or similar mistakes, then it usually notifies the arbitral tribunal, see Öhrström, *SCC Rules* at p. 847, available [here](#).

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