Kluwer Arbitration Blog

Early Determination: A Secret Recipe for Arbitral Efficiency?

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The practice of early determination, already customary to common law, has increasingly gained ground in investment and commercial arbitration, being introduced to various arbitration rules. It aims to enhance efficiency by narrowing the issues in dispute or rejecting the whole claim at an early stage, saving both time and cost in a proceeding. In practice, it can also be strategically used by respondent to leverage its position in settlement discussions.

That said, there has been an increasing scepticism and debate in the arbitration community regarding the coexistence of arbitration and efficiency. Although arbitration practitioners advocate for efficiency in their academic writings, for merits issues, they generally tend to prefer having a full evidentiary hearing dealing with all issues in dispute.

For early determination proceedings to be successful, arbitrators must ensure a constant balance between efficiency with procedural fairness. However, fairness often presupposes an evidentiary hearing in which both parties can be fully heard. In particular, to avoid unenforceability of an award, tribunals tend to address every argument, which results in lengthy hearings. As a consequence, early determination provisions are employed sparingly in practice.

So, is there room to fill in gaps and enhance the efficiency of arbitration with the given tools?

Early Dismissal in ICSID

Early determination in arbitration first made its presence in arbitration through Rule 41(5) of the 2006 ICSID Arbitration Rules (now found in Rules 41 and 43 of the amended ICSID Arbitration Rules (2022)). This rule set out the well-known ‘manifestly’ without legal merit standard, but did not include any dismissal of a claim based on determination of defence, facts, and evidence. The first ICSID case, *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/07/25), invoking the ‘manifestly without legal merit’ standard interpreted it to mean ‘clear and obvious.’ Uniformity has been maintained by succeeding tribunals applying the ‘manifestly without legal merit’ test to restrict its allowance to clearly and unequivocally unmeritorious objections.

Recently, ICSID tribunals have declined to dismiss complicated objections that raise novel or elaborate issues on the ground that Rule 41(5) was meant for “undisputed or genuinely indisputable rules of law to uncontested facts.” In *Lotus Holding v. Turkmenistan* (ICSID Case No.

ARB/17/30), the tribunal rigidly noted that if there is a fundamental flaw in the way a claim is formulated then that must inevitably lead to its dismissal, irrespective of any evidence adduced. It further noted that the claim cannot proceed further if the claimant fails to point to an arguable case in his submission, which is also subject to the tribunal's discretion. The Tribunal went a step further in *Mainstream Renewable v. Germany* (ICSID Case No. ARB/21/26) when it required the respondent to prove that "the claim was lost before it left the start line."

This high threshold might render early determination effectively useless as a procedural device since it would minimize the number of successful applications, although the ideal goal is not necessarily more use but instead the rational use of early determination.

Key Benefits of Early Determination in International Commercial Arbitration

Early determination in commercial arbitration can have several decisive benefits, including:

1. Streamlining the proceedings: parties can challenge certain aspects of the dispute before it progresses further, which can help streamline the proceedings and make them more efficient. Even the dismissed applications will help narrow or at least identify the key legal issues and promote settlement as both the parties and tribunal will focus on disposition from an early stage.
2. Narrowing the scope of the dispute: parties can challenge the jurisdiction of the tribunal or the admissibility of certain evidence, which can help to narrow the scope of the dispute as claims are dependent upon a series of legal and factual premises. This can simplify and expedite the dispute because the parties will be able to focus on the most important issues in an arbitral proceeding.
3. Improving the quality of the award: parties can bring important legal or procedural issues to the attention of the tribunal, which can help ensure that the award is well-reasoned and based on a correct understanding of the applicable law. In particular, the practice of summary disposition will avoid creation of any misleading list of issues.

Overall, early determination can play a crucial role in ensuring that the arbitration proceedings are fair, efficient, and of high quality, which can help enhance the credibility of the outcome and improve the chances of it being enforceable.

Wider Application of Early Dismissal in International Commercial Arbitration

Arbitral tribunals in commercial arbitrations often rely on ICSID decisions for jurisprudential guidance. The 'manifestly without legal merit' test, as interpreted by ICSID tribunals, has become a guideline for commercial arbitration tribunals. The wording of other institutional rules was aligned to some extent with the relevant provision in the ICSID Rules. For instance, the SIAC Rules (2016) refer to the 'manifestly without legal merit' standard, explicitly referring to the ICSID standards.

However, not all early determination rules have the same wording. There are various attempts to further expand the scope and standard, departing from the 'manifest' requirement. For instance, the SCC Arbitration Rules (2023) have introduced the standard of 'fact or law material to the outcome of the case is manifestly unsustainable' and further extended the scope of early determination to 'admissibility.' The HKIAC Administered Arbitration Rules (2018) and the LCIA Arbitration

Rules (2020) both state 'manifestly without merit,' with the exclusion of 'legal' suggesting that factual and evidentiary grounds are also subject to early determination. The LCIA Rules allow early determination of inadmissible claims. The ICDR Rules (article 23) and the JAMS Rules (article 25.1) even allow tribunals to choose their own standard of review, as they do not expressly articulate any standard.

Some go even further by assigning *sua sponte* power to the tribunals to determine early determination. UNCITRAL has adopted this approach in its legislative options, and thereby appears to be recommending that the best practice (as inferred from A/CN.9/1114) would be to permit tribunals to move on their own and then allow parties a reasonable opportunity to present their views. Currently, the LCIA is the only institution expressly providing tribunals with *sua sponte* power, through Article 22.1 of LCIA Arbitration Rules.

Different scopes of application of early determination procedures could lead to uncertainty in its application. Therefore, institutions should publish data on early determination applications and their outcomes, to the extent publishable, in order to enhance consistency regarding this procedure. The ideal scenario would be for institutions to create a database that publishes anonymised and summarised procedural decisions, such as HKIAC Case Digest, so that it could provide guidance to both counsels and future tribunals and thereby increase certainty in the outcome of future decisions.

Conclusion

Arbitrators have often been reluctant to exercise their wide discretion in adopting early determination due to a fear of challenges against their decisions. However, a well-drafted early determination procedure and standard by an institution would hardly result in the deprivation of such rights. Arbitrators should constantly reassure parties of fairness and find a balance between efficiency and due process.

Parties should opt for rules that explicitly refer to this procedure, as this will curb the risk of unenforceability of decisions. The courts will want to ensure that the parties were afforded due process (see here, a discussion on due process paranoia) and a reasonable opportunity to present their case. Therefore, the courts are likely to view institutional rules more confidently than party-agreed rules when determining abuse of due process, as proceedings under party-agreed rules have been tested less and are therefore potentially more vulnerable in ensuring that the parties are provided with a fair and equal opportunity to be heard.

Due process is not only a right to be heard but also entails the right not to be dragged into disputes where the other side's claim is manifestly without merits. Recent amendments of institutional rules have shown even broader scope than the well-established ICSID standards. The rules demonstrate that there is willingness and readiness for more disputes to be settled in early determination proceedings. Therefore, we believe it is time to have more of it in the practice of commercial arbitration.

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