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The New English Arbitration Act: Power to Make an Award on a Summary Basis

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One of the proposed changes to the English Arbitration Act 1996 (the "Act") introduced in the Arbitration Bill is an express power for tribunals to make an award on a summary basis in relation to any issue claim, or defence, if the tribunal considers that the party has no real prospect of succeeding on that issue, claim or defence.

While the Law Commission acknowledged in its final report (the "Law Commission Report") that arbitrators likely already have an implicit power to dispose of an issue, claim or defence on a summary basis, in reality, arbitrators have been reluctant to do so. The Law Commission noted that concerns about complying with the duty to give each party a reasonable opportunity to put their case under Section 33 of the Act was leading to "due process paranoia". This paranoia was dissuading arbitrators from issuing summary awards. The result, the Law Commission noted, was that fatally weak claims were being drawn out unnecessarily and parties were incurring increased time and costs as a result.

The ability to obtain summary judgment on a claim or issue is often considered a key benefit of litigating in the English courts, particularly for institutional clients facing numerous spurious claims from vexed litigants. Parties have the ability to obtain an early decision on issues in dispute or even to get rid entirely of obviously hopeless claims without incurring the time or cost of going to trial. The proposed amendment could eliminate this perceived advantage of litigation over arbitration and raises a number of interesting questions:

Will Parties Agree?

The proposed amendment to the Act provides the tribunal may issue an award on a summary basis "[u]nless the parties otherwise agree". As such, parties can opt out of the provision in their arbitration agreement or otherwise. This follows the majority of the responses to the Law Commission's first consultation paper which agreed that the power of summary disposal should be subject to the agreement of the parties, rather than mandatory, to protect party autonomy.

There are several factors which may determine whether parties will elect to opt out of the ability to apply for summary disposal.

Nature of Transaction: In complex transactions (such as construction projects, financings, and in

particular lender/borrower relationships), where there is significant value in obtaining a quick determination on key issues or issues that impact the position of multiple parties in the transaction, the ability to obtain a summary award may be particularly appealing.

Foreign Nexus: The location of any potential asset for enforcement is a key concern for any potential claimant to an arbitration. The Law Commission Report noted that some foreign courts may refuse to enforce an award made on a summary basis. If parties think that it is likely key assets will be located in those jurisdictions, they (or other stakeholders) may not have any incentive to agree to summary disposal, despite its potential advantages in the arbitration. This will be an ongoing consideration for parties and for the exercise of the tribunal's discretion as there is no value in an award that is ultimately non-enforceable.

Institutional Rules: Parties will need to consider how the new power will interact with their chosen institutional rules. As discussed below, this will be particularly relevant when considering the threshold that should be applied by the tribunal as some institutional rules adopt a different test (although as discussed further below some institutions may adapt their rules to reflect the proposed amendment).

What Will the Advantages for Parties Be?

The obvious advantage to parties would be the ability to strike out clearly hopeless claims in an efficient manner and parties can have greater certainty that if they apply for a summary process, the tribunal will be willing to grant it. It is possible that a summary award could dispose of entire claims without putting the parties through the costs and effort of progressing through the proceedings to a merits hearing.

The ability to obtain summary disposal will, however, depend on the procedure adopted by the tribunal. When considering applications for summary judgments in litigation, the English courts (and other courts in common law jurisdictions) will not engage in a "mini-trial" of the facts. This generally means that claims which involve complex issues of fact or require detailed expert evidence are not suitable for summary disposal (although they could still be dealt with as preliminary issues in bifurcated proceedings). For the same reason, fraud claims or claims that involve allegations of dishonesty or negligence are not suitable for summary disposal.

It seems likely that arbitrators and tribunals will take a similar approach. As discussed below, determining complex factual claims without hearing all the evidence creates an increased risk that an award could be subject to challenge. If tribunals were to order that witness evidence shall be heard or document production should be provided, then in practice, it would be hearing the case in full, creating (rather than reducing) inefficiencies and increasing costs.

As such, cases that turn on one crucial point of law, such as limitation periods, debt claims or the construction of contractual terms, would be the most suitable for summary disposal. However, the proposed amendment expressly provides for summary disposal of issues, not just claims or defences. Parties may therefore seek summary disposal on key issues in dispute (for example the scope of an exclusion clause) which shape the progress of the proceedings going forward.

Parties may also look to "bank" wins on issues in dispute at an early stage in the proceedings for strategic purposes. This has the obvious advantage of gaining the upper hand in front of the

tribunal. More widely it may also increase leverage for settlement discussions, particularly if an issue has a significant impact on quantum.

What Is the Test that Will Be Applied?

The proposed amendment provides that an arbitrator or tribunal may only dispose of a claim, defence or issue if a party "has no real prospect of succeeding" on the claim, issue or defence, therefore adopting the test used by the English Courts.

In applying this test in litigation proceedings:

- The respondent must show that its defence or claim is more than merely arguable, although they do not have to show they would definitely succeed at trial.
- A case is fanciful if it is entirely without substance and clear beyond question that the claim, defence or issue is contradicted by all documents or other material available.
- The English Court will also consider whether further evidence would become available in due course which may impact the merits of the claim or defence.

The Law Commission Report acknowledged that parties could agree that the tribunal should apply a different standard or test if that was their preference. It is possible that the parties may not wish to agree to the test of "no real prospect of success" as it is rooted in English litigation proceedings rather than arbitration. Parties should consider at an early stage if their chosen institutional rules provide for a different standard, which could result in confusion (although institutions may of course adapt their rules to reflect the proposed amendments).

However, there are significant advantages to adopting the test "no real prospect of success". There is a large volume of case law setting out how the test must be applied and what will constitute "real prospects of success". The parties will have certainty prior to, and during any application for summary disposal on the test that the tribunal will apply and what they will be required to demonstrate.

Could Awards Made on a Summary Basis Be More Susceptible to Challenge?

While the proposed amendment will make it clear to tribunals they are able to make an award on a summary basis, tribunals will still be concerned to ensure any award is robust and not susceptible to challenge. This is in addition to the separate issues which may arise on enforcement, as discussed above.

The proposed amendment makes clear that an arbitral tribunal must afford the parties a reasonable opportunity to make representations to the tribunal. Parties should expect that tribunals will look to impose or seek party agreement on a fair procedural timetable, which allows for the exchange of written submissions and a hearing.

As discussed above, it seems likely tribunals will adopt a similar approach to courts and refuse to order summary disposal for complex issues of fact, which require extensive evidence, in order to minimise any unfairness or assertion that a party has been unable to present its case fully. Further,

the Bill ties this power specifically to Section 34(1) of the Act, which gives the Tribunal the power to decide all procedural matters. On that basis, it would appear difficult to challenge a summary award in practice unless there is an issue with the right to be heard or access to justice.

Practically, parties may consider that a summary award is an easier target and tribunals will need to take care to ensure that summary awards are comprehensive and make clear the steps they have taken to ensure procedural fairness. However, if tribunals agree on a fair process which allows for written and oral submissions, it is difficult to see why a summary award would be more susceptible to challenge.

Is There a Risk That the Proposal Will Be Used to Frustrate Proceedings?

It is possible that this tool could be used by parties with the opposite effect. For example, parties could seek a summary disposal of the issues to delay progressing to the merits phase or make multiple applications during the course of the proceedings to cause disruption and drive up costs.

Parties may also look to make claims or defences "summary judgment" proof by pleading factual points so that they are able to argue at a later stage that the claim, defence or issue is not suitable for summary judgment (for example, arguing that the commercial context is of particular importance when construing a contractual provision).

The proposed amendment makes clear that the tribunal has discretion over whether to determine an issue on a summary basis and a party must first apply to the tribunal. It will be important (as always) that tribunals exercise their discretion in a manner which prevents parties from disrupting proceedings, while preserving the right for parties to make representations to the tribunal.

Conclusion

Time will tell if parties agree to opt out and whether tribunals will exercise the power to issue summary awards. If popular, it could be a useful tool for parties to achieve efficient outcomes and redress one of the perceived disadvantages of arbitration.

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