

EARLY DETERMINATION PROCEDURE IN LCIA ARBITRATION: AN UPDATE

As addressed in a previous briefing,¹ one of the most significant developments in the latest Rules of Arbitration of the London Court of International Arbitration (LCIA) that took effect on 1 October 2020 (the **LCIA Rules 2020**) was the introduction of an early determination procedure.

This procedure gives tribunals the power to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the tribunal, or is inadmissible or "manifestly without merit"; and where appropriate to issue an order or award to that effect (an **Early Determination**). An Early Determination may be made upon the application of a party, and after giving the parties a reasonable opportunity to state their views (Art. 22.1(viii)).

This briefing provides an update and commentary on the Early Determination process under the LCIA Rules 2020.

BACKGROUND

The Early Determination process puts on an express footing a tribunal's power to dismiss claims or defences on an accelerated basis at an early stage (or "summary" basis, to use the language of the courts). Under the previous LCIA Rules, such a procedure was available under the broad case management powers afforded to a tribunal. However, in practice, it was rarely used.

The formalisation of the Early Determination mechanism was a signal by the LCIA to encourage tribunals to apply the early determination route where appropriate. The LCIA's development of its rules demonstrated a market awareness of, and responsiveness to, user feedback for procedural efficiency; and solidifies its status as a key institution for dispute resolution.

This development ensures the LCIA's competitiveness not only as against other arbitral institutions such as SIAC, HKIAC and SCC that have similar

Guidance on LCIA Early Determination Process

- The Early Determination process, introduced in the LCIA Rules 2020, puts on an express footing a tribunal's power to dismiss claims or defences on an accelerated (or "summary") basis at an early stage.
- Clifford Chance recently secured a victory for a major client via the Early Determination process.
- By way of guidance, tribunals will exercise the power only sparingly.
- Tribunals are likely to proceed on the assumption that genuine conflicts of evidence are resolved in favour of the respondent or party opposing the application.
- For a deficiency to be "manifest", tribunals are likely to say that the deficiency must be obvious, certain or clearly apparent on the material before the tribunal as it stands, without the need for further evidence or material.
- In our experience, the tribunal's power extends to making an affirmative award for a sum of money, as opposed to simply dismissing a particular defence on the basis that it is manifestly without merit.

¹ [Updated LCIA Arbitration Rules promote use of technology, early determination of claims and consolidation of proceedings](#), August 2020.

mechanisms, but also as against the English court, which has a robust and established summary judgment procedure.²

EARLY DETERMINATION – GUIDANCE

Clifford Chance recently secured a victory for a major client via the Early Determination procedure under the LCIA Rules 2020. While the details of the arbitration are confidential, Clifford Chance successfully persuaded the arbitral tribunal that the Claimants should be awarded sums due under two agreements, on the basis that the defences advanced by the Respondent were manifestly without merit.

Given the confidential nature of arbitration, and the fact that Article 22.1(viii) of the LCIA Rules 2020 was only introduced in October 2020, there is little by way of precedent or detailed commentary to indicate when an application for Early Determination might succeed. Indeed, the LCIA's 2021 Case Report indicates that, in 2021, there were 15 applications for early determination, seven of which were granted, two were rejected, one was superseded by the parties' settlement of the case, and five were yet to be determined at the end of 2021. The most common grounds cited for the applications were that the claims or defence to the claims were manifestly without merit, and/or that the tribunal had no jurisdiction to decide the dispute.

We, therefore, set out below a number of points that clients should keep in mind when considering whether to pursue an application for Early Determination:

- Given the limited history of the Early Determination procedure under the LCIA Rules 2020, tribunals are likely to be assisted by precedents generated under other institutional rules (including the International Centre for Settlement of Investment Disputes), for the purposes of assessing whether the "manifestly without merit" test has been met on the facts of the case.
- While the Early Determination process may involve detailed submissions, the more difficult or complex the relevant issues are, the less likely it is that an application for Early Determination will succeed.
- Tribunals will exercise the power only sparingly, in cases where the deficiency in the claim or defence may be clearly demonstrated without further material or evidence.
- Tribunals are likely to proceed on the assumption that genuine conflicts of evidence are resolved in favour of the respondent or party opposing the application.
- For a deficiency to be "manifest", tribunals are likely to say that the deficiency must be obvious, certain or clearly apparent on the material before the tribunal as it stands, without the need for further evidence or material.

One important issue under the Early Determination process is whether the tribunal's power extends to making an affirmative award for a sum of money,

² The absence of an early determination provision in the Arbitration Act 1996 can leave London-seated tribunals, if not conducted under institutional rules containing such a mechanism, reluctant to issue awards on a summary basis or to strike out meritless claims or defences, due to concerns around possible challenges to awards. Recently the Law Commission of England and Wales released provisional proposals for updates to the Arbitration Act 1996, including the introduction of an explicit, non-mandatory provision that a tribunal may adopt a summary procedure to dispose of a claim or defence. For more information, see our briefing: Law Commission proposals for updates to Arbitration Act 1996.

as opposed to simply dismissing a particular defence on the basis that it is manifestly without merit.

In our experience, the answer to this question is "yes". Article 22.1(viii) does not restrict permissible orders or awards to declaratory relief. The opening words of Article 22.1 also suggest that a tribunal has discretion to decide the form of award. Alternatively, the powers in Article 22.1 can be taken together with 22.1(viii), meaning that, when an obligation to pay money crystallises as a result of a determination under 22.1(viii), that obligation may be enforced by an award issued under Article 22.1(vii) and 22.1(ix). In addition, for arbitration seated in England and Wales, the Arbitration Act 1996 gives the tribunal an express power to make an award at an interim stage rather than simply dismiss a defence at an early stage.

In any event, the purpose of the Early Determination process is (where appropriate) to resolve a dispute or material claim swiftly, without the need for the full arbitral process (with all the attendant time and cost consequences). Depriving tribunals of the ability to issue an affirmative award for a sum of money would run counter to that purpose.

CONCLUSION

The Early Determination process can be an effective tool for resolving disputes swiftly in appropriate circumstances. While the bar for successful applications is necessarily a high one, our experience tells us that tribunals will use the procedure where the issues in dispute are narrow, not complex, do not require detailed factual enquiry, and the claim/defence as presented is clearly or obviously deficient on the basis of the material presented to the tribunal.

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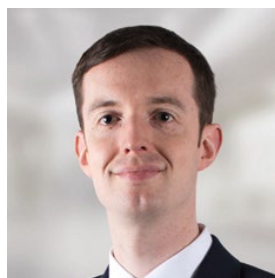
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