CUTTING TO THE CHASE: SECTION 39A OF THE ARBITRATION ACT 1996

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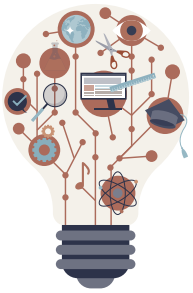
Introduction

The Arbitration Act 2025 ("the 2025 Act"), which amends the Arbitration Act 1996 ("the 1996 Act"), came into force on 1 August 2025 and the amendments apply to arbitrations commenced on or after that date. Section 7 of the 2025 Act, inserts Section 39A into the 1996 Act, a provision empowering arbitrators in English-seated arbitrations to make an award on a summary basis.



Historical Context And The Reasons For Reform

Prior to the 2025 Act, the 1996 Act did not contain any section which expressly provided for disposal on a summary basis. Section 34 provided (and still provides) arbitrators with broad procedural discretion, including power over how evidence is presented and how hearings are conducted. However, it did not explicitly authorise an arbitrator to issue an award without a full hearing of the evidence and arguments. In high-value or complex arbitrations, this did not provide a clear pathway for striking out claims or defences. Moreover, arbitrators were conscious that an award made on a summary basis may be vulnerable to enforcement challenges on the basis of a lack of due process.

The Law Commission therefore recommended the introduction of a statutory power which expressly provided for determination on a summary basis, in the interests of resolving disputes more efficiently and expeditiously, as well as mitigating the risks of enforcement challenges.

The Test For Making An Award On A Summary Basis

Section 39A provides that:

> (1) Unless the parties otherwise agree, the arbitral tribunal may, on an application made by a party to the proceedings (upon notice to the other parties), make an award on a summary basis in relation to a claim, or a particular issue arising in a claim, if the tribunal considers that—
>
> **(a)** a party has no real prospect of succeeding on the claim or issue, or
>
> **(b)** a party has no real prospect of succeeding in the defence of the claim or issue.
>
> (2) For the purposes of subsection (1), an arbitral tribunal makes an award "on a summary basis" in relation to a claim or issue if the tribunal has exercised its power under section 34(1) (to decide all procedural and evidential matters) with a view to expediting the proceedings on the claim or issue.
>
> (3) Before exercising its power under section 34(1) as mentioned in subsection (2), an arbitral tribunal must afford the parties a reasonable opportunity to make representations to the tribunal."
>
> [our emphasis]

The words "no real prospect of succeeding" at subsections 39A(1)(a) and (b) are the same as those used as the threshold test in Part 24.3 of the Civil Procedure Rules, which provides the English Courts with the power to give summary judgment.

Summary judgment applications in the English Courts under CPR 24.3 have created a very substantial body of case law on the meaning of the words "no real prospect of succeeding" and it is likely that those authorities will be relevant, if not necessarily binding, when assessing whether the threshold for summary determination has been met.

Importantly, Section 39A departs from the Court rules by omitting the additional "no other compelling reason to proceed" requirement contained in CPR 24.3(b). This modification lowers the bar for dismissal in arbitration, allowing arbitrators to dismiss unmeritorious matters at an earlier stage, solely on the ground that they lack legal viability.

Institutional Rules

The rules of the major arbitral institutions already contain mechanisms for early dismissal prior to the 2025 Act. For example, the LCIA Arbitration Rules 2020 include Article 22.1(viii), permitting the arbitrator to determine that a claim, defence, or counterclaim is "manifestly without merit." The same test for early dismissal is set by Article 47.1 of the SIAC Rules 2021, Article 43 of the 2024 HKIAC Administered Arbitration Rules and Article 41 of the ICSID Arbitration Rules.

The test under these institutional rules sets a higher threshold than section 39A, which in turn creates a tension between the two regimes. Section 39A is not mandatory, per the opening words of subsection 39A(1):

"Unless the parties otherwise agree…".

Arguably the adoption by the parties of these institutional rules "contracts out" of section 39A and the lower threshold for summary determination.

On one view, therefore, despite being heralded as a significant change, section 39A may make no difference at all to arbitrations conducted under the rules of certain arbitral institutions, such as those referred to above, although section 39A may still be relevant in the context of the ICC Arbitration Rules, which make no express provision or summary disposal. This is likely to be a question that is tested and finds its way into case law by means of section 68 challenges over the coming years.

Due Process And Enforcement

Notwithstanding the introduction of section 39A, arbitrators must still afford parties a "reasonable" opportunity to put their case, and to respond to their opponent's case (section 33(1)(a) of the 1996 Act) and the courts will set aside an award under section 68 of the 1996 Act if there has been a serious irregularity that has caused substantial injustice to the applicant, including an arbitrator's failure to comply with their general duties under section 33.

Moreover, under article V.1(b) of the New York Convention 1958, a party can resist the recognition and enforcement of a foreign award on the grounds that the party was unable to present their case.

Therefore, parties considering whether to make an application under section 39A would be wise to seek advice from counsel in the jurisdiction where they intend to enforce any award in order to ascertain the likely attitude of the local courts to the enforcement of awards obtained under a summary procedure.

Future Impact and Strategic Considerations

In principle, Section 39A enhances the arbitrator's powers, addressing long-standing concerns about the inefficiency caused by having to hear claims that were lacked merit.

Going forward, parties should review their arbitration clauses with this new landscape in mind. In ad hoc arbitrations or contracts referencing the Arbitration Act without institutional rules, Section 39A will serve as a powerful default mechanism. In institutional settings, parties may want to clarify whether they wish to benefit from the broader test in Section 39A, or remain bound by stricter institutional standards.

Additionally, counsel must carefully consider how and when to invoke the provision. Although summary disposal may be attractive, misuse could backfire, especially if the application is unsuccessful or viewed as premature. Tribunals will likely impose adverse cost consequences for tactical or frivolous applications. Aggressive use could raise enforceability concerns under the New York Convention, particularly under Article V(1)(b), where a party argues it was denied a proper opportunity to present its case, or V(1)(d), if the summary process is said to diverge from the parties' agreed procedure.