

Insights

MANIFESTLY WITHOUT MERIT: IS EARLY DETERMINATION THE SOLUTION FOR UNMERITORIOUS CLAIMS?

Oct 15, 2026

In *Time is Money and the ICC is Getting Faster* we considered whether recent changes to the ICC Rules would increase the use of expedited arbitration procedures. In this insight, we consider early determination in the light of the LCIA's recently published Annual Casework Report 2025 which shows a rise in applications for early determination.

What is early determination?

Early (or summary) determination allows a tribunal to dispose of claims or defences that are manifestly without merit or manifestly outside its jurisdiction. The 2025 International Arbitration Survey by Queen Mary University of London (the "**QMUL Survey**") found that 49% of respondents identified early determination as one of the mechanisms that would most improve the efficiency and lower the cost of arbitration proceedings, close behind expedited arbitration procedures (50%). Most major arbitral institutions now offer some form of early determination procedure. The 2026 revision of the ICC Rules has moved the procedure out of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration and into Article 30 of the Rules themselves, removing any remaining doubt about a tribunal's power to use this tool.

Why is it important?

Early determination has traditionally been considered particularly important in banking and finance disputes, where it offers arbitrators the opportunity to dismiss unmeritorious claims or defences early, matching the speed of court litigation. It has frequently been cited as having the potential to bridge a gap that has historically led financial institutions to choose litigation over arbitration.

How often is it used in practice?

Early determination has been available for a long time, yet despite it being touted as a cure-all the statistics tell a similar tale to that of expedited arbitration in terms of uptake. SIAC received just 6 early dismissal applications in 2025, of which 4 were allowed to proceed. Over the ten years since the procedure's introduction in 2016, SIAC has received 84 applications, 44 of which were allowed

to proceed and only 18 ultimately granted (9 in whole, 9 in part). HKIAC received 5 early determination applications in 2025, of which 1 was granted, 3 were rejected and 1 remained pending at year end. The total number of applications filed with HKIAC since the procedure's introduction in 2018 to date stands at 21. Since its introduction in the 2020 LCIA Rules, and up to 2024, there have been only 71 early determination applications, representing around 5 – 8% of the LCIA cases, with a similarly low rate of success.

The LCIA's most recent figures, however, suggest this may be starting to change. In 2025, the LCIA received 38 applications for early determination, more than double the 17 received in 2024. Of the applications decided by the reporting cut-off, 33% were granted in 2025, compared with just 11% in 2024. The LCIA appears to link this rise to the entry into force of the new section 39A of the Arbitration Act 1996 on 1 August 2025. Even so, two in three decided applications were still unsuccessful. These figures are still far from showing that early determination is replacing the full merits process but it appears to be becoming more common.

Why early determination struggles in arbitration

The gap between early determination's theoretical popularity and its use in practice seems to come down to two structural factors.

The first is complexity. Many international commercial arbitrations involve dense facts, complex contracts and expert evidence. Tribunals routinely conclude that these cannot be safely resolved on a summary basis. At the early stage of a case, before document production or witness and expert evidence, it is often genuinely difficult to conclude with confidence that a claim or defence is without merit. The material needed to make that assessment may simply not yet be available.

Early determination is best suited to a narrower category of case than its popularity in survey responses might suggest. The substantial cost of commencing arbitration may itself act as a filter, meaning parties are less likely to invest in a claim unless they believe it has genuine merit. If correct, that suggests the pool of truly unmeritorious claims made in arbitrations is narrower than the demand for the mechanism implies. This is consistent with the LCIA's 2025 data, as most of its early determination applications were filed before or during the arbitration's written phase. Early determination remains most useful where a flaw is apparent on the face of the pleadings, rather than as a general substitute for a full hearing on the merits.

The second (and probably more significant) factor is the threshold itself. Institutional rules require proof that a claim or defence is "manifestly without merit" or "manifestly outside [a tribunal's] jurisdiction". The flaw must be obvious, requiring almost no factual investigation. This is a markedly higher bar than the "no real prospect of success" test that now applies to summary disposal procedure in London-seated arbitrations under the 2025 addition of section 39A of the Arbitration Act 1996, which mirrors the test the English courts apply under CPR Part 24.

By contrast, the standard is supported by a solid body of developed English case law, and the Law Commission deliberately chose to mirror that test in section 39A rather than adopt the higher "manifestly without merit" bar used in most arbitral rules. An arbitrator applying the "manifestly without merit" standard has comparatively little to draw on as arbitral awards are rarely published.

Further still, judges are subject to the obligation to deal with cases justly and at proportionate cost, but if a judge gets summary judgment wrong, the decision can be appealed and the judge bears little personal risk. If a tribunal gets early determination wrong, it risks the eventual award being challenged, which can, if successful, result in reputational harm for the arbitrators in question. The arbitrator who declines early determination and lets a claim proceed gives rise to increased costs but limits the risk of challenge to their award.

This is often described as "*due process paranoia*", a term first coined in the Queen Mary University of London 2015 International Arbitration Survey, which described "a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully".

Codifying the tribunal's power, whether through Article 30 of the 2026 ICC Rules or section 39A of the Arbitration Act 1996, is unlikely by itself to change much if due process paranoia, rather than any doubt about the existence of the power, is the real constraint. SIAC and the LCIA already had express early determination powers well before the ICC's 2026 revision, yet success rates of early determination applications remain low.

What tribunals can do

The availability of summary judgment procedures in the English courts is often cited as a comparator to say that tribunals are not taking sufficiently robust decisions on such applications. Solomonic's data suggests that approximately 51% of summary judgment applications before the English High Court succeed in full, with a further 13% succeeding in part, which is considerably higher than the success rates seen in early determination in arbitration. But the numbers do not tell the full story. Even in the English courts, only around half of applications succeed in full, despite the lower threshold for summary judgment compared to the "manifestly without merit" standard applied in arbitration. Summary judgment is also far more deeply embedded in English civil procedure. The culture of litigation means that applicants are unlikely to bring draconian applications unless they are reasonably confident the threshold will be met, not least because the courts are willing to impose firm cost sanctions on parties who bring weak ones. Early determination in arbitration is less mature, and, as discussed below, tribunals are generally less robust in applying immediate cost consequences for unmeritorious applications, which can encourage tactical use of the procedure and applications unlikely to succeed. The comparison should not be taken to suggest that early determination is the panacea it is held up to be.

Perhaps there is more tribunals can do to achieve the aim of minimising unmeritorious claims by using the case management tools they already have. Tools such as bifurcation, expedited procedures, requiring an early statement of the issues in dispute, and narrowing the scope of disclosure are already available to tribunals under their general case management powers. More proactive, creative utilisation of such tools may be more effective at swiftly and fairly determining unmeritorious claims, such as:

1. **Pro-active case management.** Tribunals could require parties to identify the main issues in dispute, and any claims or defences that may be suitable for determination on a faster (but still procedurally complete) track, before the first case management conference. Tribunals have wide case management powers and such an approach could force parties to consider the merits of weaker, “filler” claims or defences they make at an earlier stage and may discourage the running of all possible arguments rather than incentivising parties to focus on their best ones. Obviously that approach has parallels to the original purpose of the Terms of Reference procedure that has just been made non-compulsory in the 2026 revision to the ICC Rules. It would be interesting to see if tribunals choose to make use of a similar process to encourage more proactive case management now that they are not encumbered by the codified Terms of Reference process.
2. **Cost consequences.** Interim cost consequences for unmeritorious positions (and tactical use of the early determination mechanism) should be applied consistently. Powers to make interim cost decisions exist under most institutional rules, but they are rarely imposed. Rather than delaying cost consequences to the end of what could be a long arbitration, interim cost awards are much more immediate and their increased use may act as a deterrent to parties running applications with little prospect of success for tactical reasons.

What else could help?

Institutions could consider publishing anonymised early determination decisions, grants and refusals and the rules should require tribunals to give reasons even when refusing to let an application proceed. “Manifestly without merit” has no equivalent to the CPR Part 24 case law that gives tribunals an analytical framework and legitimate cover for their decisions. ICSID’s published Rule 41 decisions show how such a body of guidance can develop.

Parties could consider adopting the “no real prospect of success” standard by agreement. Nothing prevents parties from expressly incorporating the section 39A of the Arbitration Act 1996 threshold into their arbitration clause, regardless of the seat or institutional rules chosen.

Alternatively, institutions could incorporate the “no real prospect of success” standard into their rules. The LCIA is currently reviewing its Rules and is understood to be considering whether to adopt the lower “no real prospect of success” threshold in place of “manifestly without merit”. If it does, it would be the first major institution to align its early determination standard with that used by the English courts, and may prompt others to follow.

Conclusion

The gap between early determination's popularity in theory and its real-world utility in limiting unmeritorious claims in practice is real, but it is not simply a matter of complexity or a threshold set too high. The LCIA's 2025 figures show that both the number of applications and the proportion succeeding can move together, but even on those improved figures two-thirds of decided applications were still rejected, withdrawn or superseded. One year of data at one institution is not yet a trend, and it does not remove the need for the full merits process in most cases. Rather than relying on a specialised power that has its own challenges, tribunals could achieve the same goals by using the robust case management powers they already have to ensure the active management of unmeritorious claims.

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- International Arbitration

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