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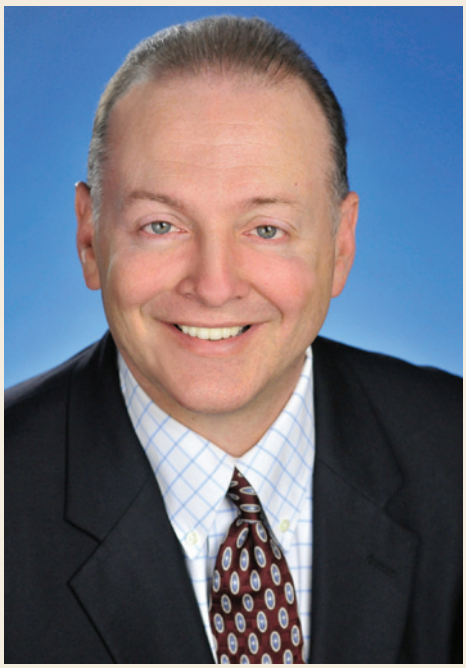
Quick, Fast and in a Hurry: Summary Disposition in Arbitrations

Commentary by Humberto Ocariz

Arbitrations are supposed to offer a faster, more cost-effective, and arguably preferable alternative to litigation, but many reputable arbitral organizations have been reluctant to encourage summary disposition of claims, defenses or issues. This is mostly because of a pesky little thing known as due process. The concern has been that a summary disposition could be set aside as having violated a party's due process right to present its case.

Yet, according to a 2015 survey conducted by the Queen Mary's School of International Arbitration, the cost and length of arbitrations remain top concerns for parties. More than 40 percent of survey participants indicated summary procedures would be a welcomed change, and numerous organizations have finally adopted rules allowing for such dispositions.

In 2016, the Singapore International Arbitration Centre (SIAC) adopted the Sixth Edition of its rules, adding Rule 29, "Early Dismissal of Claims and Defences." Under the rule, a party may seek disposal of a claim or defense if it is "manifestly without legal merit" or if the tribunal lacks jurisdiction over it. The tribunal decides whether the application will proceed. If so, the parties are given an opportunity to be heard. The tribunal then determines the scope of relief, if any, and it generally has 60 days to decide.



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Similarly, on Oct. 20, 2017, the International Chamber of Commerce (ICC) revised its "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules

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of Arbitration" to clarify that, under Article 22 of its rules, tribunals have the power to determine "manifestly unmeritorious claims or defenses" on an expedited basis. If an application is accepted, "further presentation of evidence will be allowed only exceptionally." The tribunal also decides whether a hearing is necessary, and it may award costs associated with the motion.

On Jan. 1, 2017, the Stockholm Chamber of Commerce adopted Article 39, "Summary Procedure." The rule is broader than its SIAC and ICC counterparts, authorizing a tribunal to "decide one or more *issues of fact or law* by way of summary procedure ... ." Interestingly, the panel does not "necessarily [need to] undertake every procedural step that might otherwise be adopted for the arbitration. And the rule applies to admissibility issues, making it similar to a motion in limine.

In the United States, several organizations have dispositive motion rules. In its Commercial Arbitration Rules and Mediation Procedures, the American Arbitration Association has Rule 33, which states that an arbitrator may allow the filing of dispositive motions "only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." JAMS has an even simpler rule; Rule 18 vests in the arbitrator(s) the discretion to permit a party to file a "Motion for Summary Disposition of a particular claim *or issue*." (emphasis added) Parties must be afforded notice and the opportunity to respond.

Courts have approved of summary dispositions by arbitrators. Issues that have been summarily dealt with include:

- Res judicata/collateral estoppel (Sherrock Brothers v. DaimlerChrysler Motors. (3rd Cir. 2008));
- The meaning of a contract (*Global Int'l Reinsurance v. TIG Insurance,* (S.D.N.Y. 2009));
- Statute of limitations (*Ozormoor v. T- Mobile USA Inc.* (E.D. Mich. 2010));
- Standing and preemption (Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes (S.D.N.Y. 1999));
- Waiver and estoppel (*LaPine v. Kyocera Corp.* (N.D. Cal. 2008));
- Failure to comply with contractual claim or notice procedure (Pegasus Construction Corp. v. Turner Construction Co. (Ct. App. Wash. 1997));
- Evidence insufficient to permit a rational inference by a trier of fact (Hamilton v. Sirius Radio (S.D.N.Y. 2005)); and
- Failure to state a claim because no duty was owed (Warren v. Thacher (W.D. Ky. 2000)).

An alternative dispute resolution setting is no longer a reason to avoid summary disposition of issues. So long as the parties' due process rights—of notice and an opportunity to be heard—are protected, summary disposition should be used to simplify and narrow cases.

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