2023
Volume 5, Issue 1

Institute for Transnational Arbitration
ITA IN REVIEW

ITA IN REVIEW

The Journal of the Institute for Transnational Arbitration

ITA IN REVIEW

VOL. 5 **2023** **NO. 1**

TABLE OF CONTENTS

ITA IN REVIEW

BOARD OF EDITORS

ITA in Review is

a Publication of the
Institute for Transnational Arbitration
a Division of the
Center for American and International Law

5201 Democracy Drive
Plano, TX 75024-3561

SUMMARY DISPOSITIONS: HOW PARTIES MAY ENCOURAGE ARBITRATORS TO ADOPT NEW CASE MANAGEMENT PRACTICES

by Andreina Escobar

I. INTRODUCTION

In January 2023, the International Chamber of Commerce (ICC), the Institute for Transnational Arbitration (ITA), and the Institute for Energy Law (IEL) held a joint conference titled 11th ITA-IEL-ICC Joint Conference on International Energy Arbitration-Houston. One panel—"Back to the Future or the New Normal (No, this is not a Panel on Virtual Hearings)"—focused on the new trends in case management. The conversation was moderated by Caroline Richard (Partner at Freshfields Bruckhaus Deringer in Washington D.C.), and the panelists were J. Brian Casey (arbitrator at Bay Street Chambers in Toronto), Pedro Jose Izquierdo (counsel at Sullivan & Cromwell LLP in New York), and Ema Vidak Gijković (independent arbitrator in New York). The panel discussed various new trends, including *sua sponte* bifurcation, deviations from template procedural orders, and summary dispositions, as examples of recent changes that tribunals have increasingly adopted since the beginning of the COVID-19 pandemic.

This article will focus on one particular trend: summary dispositions. First, the article covers the background of summary dispositions. Second, the article identifies the existent arbitration rules on summary dispositions. Third, the article further considers potential due process concerns arising from summary dispositions. Fourth, the author explores practices that parties may implement to help tribunals innovate in case management. Finally, the author concludes and offers suggestions.

II. BACKGROUND

Summary dispositions in international arbitration are procedures that allow parties to request arbitral tribunals to dispose of a claim or defense without a full hearing on the merits.[1] A summary disposition can take various forms, such as a

[1] David Ryan and Kanaga Dharmanda, *Summary Disposal in Arbitration: Still Fair or Agreed to be Fair*, 35 J. INT'L ARB. 31, 32 (2018).

motion to dismiss, summary judgment, or partial award.[2] After a party applies for a summary disposition, the tribunal may dismiss the claim if it finds it to be clearly meritless.[3] However, in so doing, tribunals generally will apply a high standard, thus making it difficult for movants to succeed on their application. [4]

As the panel discussed, there are many benefits and some drawbacks to summary dispositions. The article will briefly list some. On one hand, summary dispositions increase efficiency. These procedures can save costs and time, allowing tribunals to dispose of claims or defenses that are manifestly without merit or that can be resolved based on undisputed facts or legal issues.[5] In so doing, a tribunal can resolve a dispute that otherwise could have taken years to resolve in just a few months. Additionally, the availability of summary disposition procedures increases flexibility, which is already one of the advantages of international arbitration.[6] As the panel explained, summary disposition—just like other new case management tools—allows tribunals to adapt each procedure to the specific needs of the case.

On the other hand, summary dispositions have drawbacks. As further discussed below, the use of summary dispositions can raise concerns about due process, particularly if they are used to dispose of claims or defenses without providing the parties with a reasonable opportunity to be heard or to present their evidence.[7] The lack of due process can be significant given that the award could be set aside based on these concerns.[8] Additionally, summary dispositions could increase costs in the

---

[2] *Id.*

[3] *See e.g.*, ICSID Rules of Procedure For Arbitration Proceedings, Rule 41.5 (2022) [hereinafter ICSID Arbitration Rules].

[4] *See e.g.*, Mainstream Renewable Power and Others v. Germany, ICSID Case No. ARB/21/26, Decision on Respondent's Application under ICSID Arbitration Rule 41(5) (January 18, 2022), ¶ 121.

[5] Martin F. Gusy, *Saving Time and Cost – International Arbitration without Hearing on the Merits*, 41 ZDAR 36, 38 (2018).

[6] *See* Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION § 15.01(A) (3d. 2020).

[7] *See* Gusy, *supra* note 5, at 38.

[8] *See* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V(1)(b), 330 U.N.T.S. 38, 7 I.L.M. 1046 [hereinafter "New York Convention"] ("The party against whom the award is invoked … was otherwise unable to present his case.").

long run if the tribunal does not grant the application. Given these due process concerns, summary dispositions impose a high evidentiary threshold on the movant,[9] making it hard to get the application granted. If not granted, the preparation and filing of a motion for summary disposition could incur costs additional to those that would be otherwise necessary to resolve the dispute, resulting in an increased cost of arbitration.[10]

III. ARBITRATION RULES THAT EXPLICITLY ALLOW SUMMARY DISPOSITIONS

Increasingly, international arbitration centers have explicitly included in their rules the tribunal's power to grant dispositive motions. However, the specific nature of the summary disposition procedures under these rules vary:

1. **International Centre for Settlement of Investment Disputes (ICSID):** Under the Article 41(5) of the 2021 ICSID Rules, parties may file, "no later than 30 days after the constitution of the tribunal," an application to dismiss a claim that is manifestly without merit.[11] "If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect."[12]
2. **London Court of International Arbitration (LCIA)**: Article 22.1 (viii) of the LCIA Arbitration Rules gives the tribunal 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 Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an

[9] *See e.g. Mainstream Renewable Power and Others*, at ¶ 121 ("The standard is thus set high.").

[10] *See* Caline Moauwad and Elizabeth Silbert, A *Case for Dispositive Motions in International Arbitration*, 2 BCDR INT'L ARB. REV. 77, 90 (2015) ("[T]he decision to hold hearings in these proceedings has raised the complaint that an unsuccessful Rule 41(5) procedure does nothing more than delay the case and create additional costs.").

[11] ICSID Arbitration Rules, Rule 41(5).

[12] *Id.*, Rule 41(6).

order or award to that effect."[13] The rules refer to this as "Early Determination."[14]

3. **Singapore International Arbitration Centre (SIAC)**: Under Rule 29 of the Arbitration of SIAC, "a party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that: (a) a claim or defence is manifestly without legal merit; or (b) a claim or defence is manifestly outside the jurisdiction of the Tribunal."[15] The tribunal can, "after giving the parties the opportunity to be heard, decide whether to grant, in whole or in part, the application for early dismissal under Rule 29.1."[16]
4. **Hong Kong International Arbitration Centre (HKIAC)**: Article 43.1 of the HKIAC 3028 Administered Arbitration Rules reads:

   > the arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that:
   > (a) such points of law or fact are manifestly without merit; or
   > (b) such points of law or fact are manifestly outside the arbitral tribunal's jurisdiction; or
   > (c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party.[17]

5. **Stockholm Chamber of Commerce (SCC):** Article 39 of the SCC Arbitration Rules states "[a] party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily taking every procedural step that might otherwise be adopted for the arbitration." [18]

---

[13] LCIA Arbitration Rules (2020), Art. 22.1 (viii).

[14] *Id.*

[15] SIAC Arbitration Rules (2016), Rule 29.1.

[16] *Id.* at Rule 29.3.

[17] HKIAC Administered Arbitration Rules (2018), art. 43.1.

[18] SCC Arbitration Rules (2023), art. 39.1.

IV. DUE PROCESS CONCERNS

Summary disposition procedures in international arbitration may cause due process concerns for arbitrators because they involve disposing of a case or issue without a full hearing or trial on the merits.[19] Meaning, one or more parties may not have the opportunity to fully present their case or defend themselves. This can raise concerns about the fairness of the proceedings and whether each party has been given a full and fair opportunity to presents their case—in other words, due process.[20]

This is a significant concern given that the lack of due process is one of five grounds for setting aside or vacating an award under the New York Convention.[21] The potential for set aside or vacatur for lack of due process harms the value of the potential award.[22] If a court in the seat of the arbitration sets the award aside on this ground, the enforcing party would be unable to take the award to any New York Convention jurisdiction.[23] Just as Casey noted during the panel, this is a very present concern to arbitrators, which they would want to avoid at all costs.

However, other panelists were less concerned. Although a valid concern, due process should not be an issue. As Izquierdo discussed, summary disposition procedures are not unique to international arbitration. Other legal systems, such as those of the US and UK, have similar mechanisms for disposing of cases or issues without a full hearing or trial on the merits. In the US, for example, Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedures provide for, respectively, motions to dismiss and motions for summary judgment.[24] Similarly, in the UK, Part 24 of the Civil

---

[19] Born, *supra* note 6, § 15.03.

[20] *See* James P. Duffy, *Dispositive Motions and the Summary Dispositions of Claims in International Arbitration*, IN INTERNATIONAL ARBITRATION IN THE UNITED States 275, 275–276 (2017).

[21] See *id.* ("For many years, it has been a commonly held view that dispositive motions and interim awards that summarily dispose of claims are inappropriate in international arbitration because such motions or awards prevent the opposing party from presenting its case in violation of Article V.1 (b) of the New York Convention."). *See also* New York Convention, *supra* note 8, at art. V(1)(b).

[22] *See* Gusy, *supra* note 5, at 38.

[23] *See id.*

[24] *See* Fed. R. Civ. Pro. 12(b)(6); *see also* Fed. R. Civ. Pro. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

Procedure Rules allows a party to apply for summary judgment. [25]

In the US, procedures for dispositive relief have been widely accepted as useful tools that do not offend due process.[26] In particular, courts in the US routinely receive and consider summary disposition motions.[27] And even further, courts have a long line of precedent allowing domestic arbitral tribunals to decide cases on summary disposition motions.[28] Only in rare instances have US courts not upheld an award decided in a summary proceeding. [29] These exceptions usually involved unfair proceedings, like the tribunal ignoring the existence of a material factual dispute.[30]

Despite due process concerns, it is important to consider that other legal systems, in particular common-law systems, have had similar summary dispositions mechanisms for years. These mechanisms, like in domestic courts, can be useful tools for disposing of cases or issues efficiently without violating due process rights, subject to appropriate safeguards and procedural rules.

V. PRACTICES THAT MAY ENCOURAGE SUMMARY DISPOSITIONS

Overall, the panelists noted that there is still a lot of uncertainty around summary disposition procedures in international arbitration. Although there seems to be an increasing trend towards allowing more summary proceedings, there is still some

---

[25] *See* Eng. Civ. Pro. R. 24 ("The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if (a) it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.").

[26] *See* Duffy, *supra* note 20, at 277 ("The U.S. judicial system has a long history of permitting dispositive motions.").

[27] Joe S. Cecil *et al.*, *Trends in Summary Judgment Practice*: 1975–2000, Federal Judicial Center at 20 (2007) *available at* https://www.uscourts.gov/sites/default/files/summary_judgment_1975-2000.pdf (finding that in six federal district courts, movants filed summary judgment motions in 21% of the cases).

[28] *See e.g.* Ozormoor v. T-Mobile USA, Inc., 2010 WL 3272620, at *4 (E.D. Mich. Aug. 19, 2010) (affirming an arbitration decision issued on summary disposition); Glob. Int'l Reins. Co. Ltd. v. TIG Ins. Co., 2009 WL 161086, at *5 (S.D.N.Y. Jan. 21, 2009) ("[T]he Arbitrator acted well within his discretion when choosing to entertain TIG's motion for summary judgment.").

[29] Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co., 232 F.3d 383, 388–40 (4th Cir. 2000) (holding that in an arbitration where there is a factual dispute, the arbitrator had exceeded its authority by denying a full and fair hearing).

[30] *See, e.g, id.*

reluctance from arbitrators to accept these motions. Again, due process concerns, and perhaps arbitrator's individual background, may be playing a role in this slow change. But parties may adopt practices that may help to encourage this change. Although this article does not purport to offer a solution to this complex question, it does provide some suggestions that may help to increase a party's probability that procedures, such as summary disposition, will be adopted in their arbitrations. In particular, there are three things that could help the tribunal be more innovative: 1) arbitration rules, 2) seat of arbitration, and 3) arbitrator selection. The article will now explore each in that order.

A. *Arbitration Rules*

One-way parties seeking innovation may empower their arbitrators to use summary dispositions by adopting rules that explicitly allow tribunals to do so. Although this seems like an obvious avenue, it is actually not that obvious. Tribunals generally have extensive procedural powers to lead the case as they see fit,[31] and it could be argued that this power includes allowing for summary dispositions.[32] But some arbitrators are not willing to take that risk.[33] Most arbitrators do not want to grant themselves powers that are not clearly provided by the applicable rules or laws.

To ameliorate this concern, parties wishing arbitrators to take a more innovative standpoint could adopt rules that explicitly allow for summary dispositions. As earlier stated, many arbitration centers already allow in their rules for dispositive relief, including those of ICSID, HKIAC, SIAC, LCIA, and SCC. [34] By adopting one of these centers' rules, parties are in effect consenting to the tribunal's power to dispose of claims in summary proceedings. This, in turn, could make tribunals more comfortable with the idea of addressing claims in this manner.[35] They would be explicitly

[31] *See* Born, *supra* note 19, § 15.08.

[32] *Id.*

[33] *Id.*

[34] *See e.g.*, ICSID Arbitration Rules, *supra* note 3, at Rule 41.5; LCIA Arbitration Rules (2022), *supra* note 13, at art. 22.1(viii).

[35] Born, *supra* note 19, §15.09.

empowered to do so and would be behaving within the boundaries of their power.

B. Seat of the Arbitration

By selecting a seat of arbitration that recognizes the availability of summary disposition in domestic civil procedures, parties can encourage arbitrators to adopt similar procedures. The availability of summary disposition procedures in domestic courts could help to alleviate or manage arbitrator due process concerns.

As described above, summary disposition procedures are neither unique nor new; rather, these are practices routinely used in the US and in the UK. In fact, as already discussed, courts in these two jurisdictions have already upheld these practices in other contexts.[36] So, although there is still a lot of uncertainty surrounding summary dispositions, choosing a seat of arbitration that already allows this type of procedures may reduce uncertainty in the arbitration context. For example, it is at least clearer that a US court is likely to uphold an award decided in a summary disposition. Given existing precedents from domestic arbitrations and the general acceptance of summary proceedings by US courts, a US court is unlikely to assume that a tribunal inherently denied a party due process because it decided the case via summary disposition procedure.

Arbitrators sitting in jurisdictions like the US or the UK could be receptive to summary proceedings because the awards are more likely to be upheld. This would eliminate—or at least reduce—concerns about an award's vulnerability and could help arbitrators be more flexible about their stance towards summary proceedings. If parties wish to be able to access case management tools such as summary dispositions, adopting a seat that already adopts summary disposition in its domestic practice would probably increase their chances of it happening.

C. Arbitrator Selection

Lastly, parties may shape their arbitration by choosing the right arbitrators. Ultimately, parties choose arbitration because it brings flexibility, autonomy, and

[36] *See e.g. Ozormoor*, 2010 WL 3272620, at*4; *see also* Travis Coal Restructuring Holding LLC v. Essar Glob. Fund Ltd. [2014] EWHC (Comm) 2510, [42]–[54] (Eng.).

predictability (to an extent), and choosing the right arbitrator is a way for a party to exert all of these benefits to lead the case as the parties wish.

If parties wish to have a more innovative arbitrator on these issues, then parties must consider the arbitrator's legal background and past dispositions. First, parties can look at the arbitrators' legal background. Although not always true, arbitrators that come from jurisdictions that allow summary dispositions may be more open and comfortable with deciding cases in that manner because they learned in a system that allows for it. Second, parties should consider an arbitrator's past written decisions and publications—if available. This could be the biggest indicator of the arbitrator's stance on summary dispositions. If the arbitrator has heard and granted summary dispositions in the past, the arbitrator is likely open to the opportunity to do so again. From there, parties can tailor—depending on their needs—who they would appoint.

VI. CONCLUSION

As discussed during the panel, new case management practices may help international arbitration be more cost and time efficient. But arbitrators alone cannot implement this change. Parties must cooperate as well. A good way to do that is by adopting practices that may aid arbitrators to smoothly lead the movement towards innovation. Parties could:

1. choose arbitration rules that provide the tribunal with explicit powers to decide on summary dispositions,
2. designate the seat of the arbitration in places where courts allow for these new practices, and
3. choose arbitrators that are more likely to side with the party's desired stance.

By combining these three, parties can push arbitrators to be more innovative. Although these practices will likely not launch arbitration into a complete change, they could give tribunals more leeway in managing cases.

ANDREINA ESCOBAR is an associate at Vinson & Elkins LLP in Houston, where she specializes in complex commercial litigation. Andreina obtained her J.D. from the University of Texas School of Law ("Texas Law") and her Bachelor of Arts in Government from the University of Texas at Austin ("UT"). At Texas Law, Andreina was a Student Attorney of the International Human Rights Clinic, where she advocated for victims of the enforced disappearances that took place during the 1970s dictatorships in the Southern Cone, and a Student Intern for the Honorable Jeffrey Boyd of the Supreme Court of Texas. At UT, Andreina was a research assistant, helping investigate the origins of democracy in Venezuela. Andreina is passionate about international dispute resolution, international relations, and human rights.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a

free subscription to ITA's quarterly law journal, World Arbitration and Mediation Review, a free subscription to ITA's quarterly newsletter, News and Notes, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

C. THE ADVISORY BOARD

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

D. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary international arbitration treaties, in ITA's quarterly newsletter, News and Notes. All ITA members also receive a free subscription to ITA's World Arbitration and Mediation Review, a law journal edited by ITA's Board of Editors and published in four

issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) A listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

Please join us. For more information, visit ITA online at www.cailaw.org/ita.

Institute for Transnational Arbitration
ITA IN REVIEW

Table of Contents

Articles

Book Review

and Much More.

www.itainreview.org

The Institute for Transnational Arbitration
A Division of The Center for American and International Law

5201 Democracy Drive
Plano, Texas, 75024-3561
USA