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NEWS

Disposing of the problem of meritless claims

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Adam Raviv, counsel at Wilmer Cutler Pickering Hale & Dorr in Washington, DC, argues that dispositive motions such as those seen in the US and English courts would be workable, enforceable and beneficial in international arbitration - and proposes some rule changes to accommodate them.

One of the widely recognised benefits of international arbitration is its efficiency. However, the alleged advantages of speedy resolution and lower costs can go out the proverbial window in cases that could have been resolved on pretrial dispositive motions had they proceeded in court rather than in arbitration.

In many national court systems, if a cause of action is legally or factually deficient, it can be dismissed long before trial. For example, in US courts, a cause of action that fails as a matter of law is subject to dismissal on the pleadings for failure to state a claim on which relief may be granted. Both US and English courts also allow summary judgment to be granted for claims that can be resolved based on uncontested facts.

By contrast, in arbitration, even if a claim is patently unsupportable, the claimant will normally be permitted to request documents from the other side, submit witness statements and expert reports, and conduct a full hearing on all the issues, including examination of the other side's fact and expert witnesses. Only at the end would the tribunal rule that the claim fails as a matter of law, or was never supported by any evidence

– a ruling that could have come earlier and obviated the need for further fact development, experts, and hearings.

Thus, the more meritless a case, the more likely that submitting it to arbitration will dispose of it less efficiently than resolving it in court. Such a result is not only wasteful, it is inequitable – it gives parties greater incentive to assert frivolous claims in arbitration than they would have if they had to bring their claims in court.

Despite these problems, the governing rules of most international arbitral institutions do not provide for dispositive motions, and in some cases pose serious obstacles to such motions. Moreover, there is a longstanding expectation among arbitration practitioners that an arbitral claim will normally go through the full arbitral process before being resolved on the merits.

A solution, then, is to find a workable system of dispositive motions that fits into the existing framework of international arbitration practice and institutions. This article addresses some of the most commonly raised objections to the practice of dispositive motions in international arbitration, and explains why they do not pose a major stumbling block. Possible rule changes and clauses to be used in international arbitration agreements are also proposed.

Current governing rules on dispositive motions in arbitration

In contrast to the courts of the US, England and elsewhere, the procedural rules of most international arbitral institutions are not conducive to early resolution of arbitrations. For example, the UNCITRAL, WIPO, and JAMS international rules all require arbitrators to hold evidentiary hearings with testimony if any party requests it. Other institutional rules, including those of the LCIA, ICC, and ICDR, are potentially more flexible, in that they require the tribunal to hold a hearing if a party requests it, but do not specifically require a hearing to include testimony by experts and other witnesses. Even these institutions, however, are not particularly welcoming to dispositive motions; for example, the ICC Task Force on Arbitrating Competition Issues recently advised against amending the ICC Rules to provide for summary judgment, concluding that “a summary judgment vehicle would not work in the ICC context and culture.”

The one international institution that does expressly provide for dispositive motions of a sort is the International Centre for the Settlement of Investment Disputes in Washington, DC. ICSID Arbitration Rule 41(5) allows a party to file a preliminary “objection that a claim is manifestly without legal merit.” The rule first took effect in 2006, but the first dismissals of claims under the rule came in December 2010, when in the course of ten days, two separate tribunals did so: the first in Global Trading Resource Corp. & Globex International Incorporated v Ukraine, and the second in RSM Production Corporation v Grenada.

The close timing of the Global Trading and RSM awards may have been just a coincidence, or may indicate a developing trend. Moreover, both cases were not resolved based on the substantive legal merits of the claims asserted – rather, they were disposed of on jurisdictional grounds in Global Trading and on preclusion in RSM. No ICSID tribunal has yet publicly dismissed a claim under Rule 41(5) based on the cause of action itself being

substantively inadequate.

Why, then, are dispositive motions so uncommon in international arbitration? Commentators have offered a number of objections to their use. Although these objections do raise legitimate concerns, they do not on balance weigh against the use of these motions, and the potential problems they highlight are avoidable.

Objection 1: dispositive motions will make arbitration less, not more, efficient

One argument against dispositive motions in arbitration is that the frequent use of such motions can exacerbate, rather than alleviate, the problems of delay and extra expense. Anyone with motions practice experience in UScourts will agree that this is a potential issue, as filing and responding to such motions can itself be a long and costly process.

Such a concern assumes, however, that those motions will not have the effect of resolving a case. After all, if a particular dispositive motion does end a case, then by definition that motion has not drawn it out. The real danger would be if meritless motions were filed routinely, increasing the cost and length of proceedings even where they have little chance of success.

However, this concern is probably overblown even in USlitigation, where dispositive motions are common. Empirical studies of summary judgment in UScourts have found that a significant share of summary judgment motions are successful, and a not-inconsiderable portion of such motions have the effect of terminating a case. Even where a successful motion does not end the case outright, rulings on dispositive motions can still improve efficiency by narrowing and streamlining cases. Non-dispositive rulings also give the parties a clearer picture of the scope and the likely eventual outcome of the case as a whole, which can move them closer to settlement.

Moreover, the two recent decisions dismissing claims under ICSID Rule 41(5), Global Trading and RSM, suggest that rules providing for early disposition can indeed speed up the resolution of a proceeding considerably. Although the plural of anecdote is not data, it is worth noting that of all the final ICSID awards published in 2010, these two cases were by far the speediest resolutions.

In any event, the possibility of drawn-out, meritless motions is less a reason to forbid dispositive motions entirely than it is a reason to craft rules and agreements that encourage parties only to bring such motions when they have a significant chance of succeeding. The problem in USlitigation is not that these motions are permitted in the first place, but rather that they are sometimes filed as a matter of course even when they have little chance of succeeding.

One obvious incentivising tool is cost-shifting. In particular, a cost-shifting rule could require the party that makes an unsuccessful motion to pay the other side's costs of

defending the motion, even where the party making the unsuccessful motion ultimately prevails in the arbitration. Because the goal is to avoid meritless motions, a cost-shifting provision relating to dispositive motions could focus on the success of the motion in particular rather than of the movant's case as a whole.

There are also other means of limiting the cost and delay that can result from dispositive motions. For example, such motions can be time-limited; the ICSID rule discussed above requires objections to be filed within 30 days after the tribunal is constituted. Similarly, a rule could require that summary judgment motions be filed a certain number of days after the parties have exchanged written submissions and witness statements. To help the parties and the tribunals focus on the key law and evidence, there could also be page or word limits to motions (generally anathema in international arbitration, to many arbitrators' chagrin).

Objection 2: dispositive motions will require enhanced discovery

A related objection to the efficiency argument is that allowing dispositive motions in arbitration would require an expansion of evidentiary discovery in arbitration, to make it closer to USstyle litigation. According to this argument, without such broad discovery, the propriety of summary awards would be questionable and their enforceability would be suspect, because a losing party could argue that it did not get a full opportunity to present its case.

This argument is not fully persuasive. As an initial matter, it applies only to summary judgment motions based on the evidence (or lack thereof), not to motions to dismiss claims that are legally inadequate on their face. In UScourts, for instance, lawsuits can be – and often are – dismissed before there has been any fact discovery. When a claim is deficient as a matter of law even if all the plaintiff's factual allegations are true, actual evidentiary development is unnecessary to the resolution of that claim.

Moreover, with respect to summary judgment in particular, the discovery issue at most demonstrates the limits of the use of summary judgment in arbitration, rather than showing that summary judgment would not work at all. In US courts, for instance, summary judgment motions are commonly raised and granted before the full discovery process in a case has been completed. Likewise, it is well established that arbitral tribunals are not required to consider all the evidence that every party wishes to obtain and present. Much of the time, although a case as a whole might involve voluminous documentary evidence and testimony, certain key aspects of it might hinge on a limited universe of undisputed facts – for example, the language in a contract or the question of ownership of a property. Summary judgment motions based on such narrow questions would be entirely feasible in arbitration, along with motions based on the limited document production and exchange of sworn witness statements that commonly takes place between arbitral parties.

Objection 3: the rules do not provide for dispositive motions and tribunals are reluctant to consider them

Although the rules of most major international arbitration bodies do not expressly prohibit

dispositive motions, they also – with the important exception of ICSID – do not expressly allow them. Moreover, certain rules, particularly those requiring an evidentiary hearing if any party requests it, make it difficult to dispose of cases using dispositive motions unless all parties consent to such motions and to the possibility of disposing of the case on the papers. With such background rules in place, it is not surprising that an arbitral tribunal may be reluctant to entertain, or grant, a motion that would resolve a case early on in the proceeding.

These concerns, however, point less to the merits of dispositive motions as a means of resolving disputes and more to the lack of governing rules and established practice that support these motions. To argue that allowing dispositive motions is a bad idea because the rules do not provide for them, or because arbitrators are reluctant to allow or grant them, is somewhat circular. The question is, should the rules provide for dispositive motions, and should arbitrators be more willing to entertain them?

Do the rules make dispositive motions possible?

In any event, it is far from clear that leading institutional rules actually prohibit dispositive motions; at best the rules are ambiguous. Nearly all institutional rules give tribunals wide discretion to structure arbitral proceedings as they see fit. As discussed above, ICSID Rule 41(5) does provide for dispositive motions in certain circumstances, and the ICDR, LCIA, and ICC rules also provide arbitrators with broad procedural authority that theoretically could include dispositive motions.

Given this fairly broad discretion, the real potential obstacle to dispositive motions in arbitration is the oral hearing requirement in most institutional rules, which is discussed further below. In the meantime, if the institutional rules do not change, parties themselves can give arbitrators ex ante “permission” to entertain dispositive motions by expressly providing for the possibility of such motions in their arbitration agreements, notwithstanding any contrary institutional rules.

Other reasons tribunals may be reluctant to allow dispositive motions

Apart from institutional rules, another reason why arbitrators may be more reluctant than a court to dispose of a case on a dispositive motion is that courts’ decisions, unlike those of arbitrators, are typically subject to appellate review. But in reality, the opposite of this concern may be true. Being reversed on appeal is one of the less pleasant aspects of most trial judges’ jobs. If anything, the possibility of reversal encourages caution, rather than audacity, on the part of trial judges. The extremely limited reviewability of most arbitral awards accordingly gives arbitrators less incentive than judges to refrain from disposing of cases relatively early in the proceeding.

Perhaps a more potent argument about why tribunals are reluctant to consider or grant dispositive motions is that they may not be fully focused on the case early on and may not yet be comfortable weighing on the merits of the dispute. This argument, however, may get cause and effect backward. Tribunals may not become wholly occupied with a

case in its early stages in part because there is no prospect of resolving it until much later. Judges in the USand England are routinely asked to resolve cases during their early stages, and focus on the pertinent issues in order to determine whether resolution is appropriate. Tribunals are fully capable of doing the same.

Objection 4: Enforceability

Even if a Tribunal grants a motion that disposes of a proceeding, will that "final" award be enforceable internationally? The possibility that national courts will refuse to recognise an award could dissuade arbitrators from granting even meritorious dispositive motions.

Since its adoption in 1958, the New York Convention has been the primary basis for the international recognition and enforcement of international arbitration awards. A party opposing the validity of an arbitral award based on a dispositive motion might raise several objections under Article V of the Convention.

Party unable to present its case under Article V(1)(b)

First, a party that has lost an arbitration on a dispositive motion could argue that, under Article V(1)(b) of the New York Convention, he was effectively "unable to present his case." In the absence of several procedural deficiencies, courts are very hesitant to interfere with the parties' agreed-upon procedures, and accordingly any procedural unfairness challenge under Article V(1)(b) is a difficult undertaking.

Will a court consider the summary disposition of an arbitration to be a serious procedural injustice? It seems unlikely. After all, USand English courts routinely dispose of cases on dispositive motions, and those rulings are generally enforceable internationally. It is difficult to believe a court located in a New York Convention signatory country would hold an arbitral award to a higher procedural standard, particularly when courts around the world have recognised that international arbitration procedures differ from national court proceedings in many ways – and have nonetheless been willing to enforce arbitral agreements and awards under the convention. These procedural differences include the lack of appellate reviewability, the limited allowance of evidentiary discovery, differing rules of evidence, testimonial procedures, and the general informality of the proceeding. The courts that find these procedural differences perfectly legal and unobjectionable would be unlikely to balk at summary disposition of a case.

The most likely basis for challenging an award under Article V(1)(b) is a challenge based on the denial of a party's right to be heard in an oral proceeding. Most international arbitral institutions attribute great significance to the right to hold an oral hearing. However, although tribunals may be expected to hold some sort of oral hearing, they are not generally required to hold a hearing that addresses every issue in the case and have considerable discretion to limit the scope of the hearing. A tribunal could hold a hearing only on the issues raised in a dispositive motion, on the ground that considering the other issues and evidence in the case would be superfluous at that point.

Despite this discretion, as a practical matter the oral hearing requirement in many institutional rules, and the general cultural expectation that arbitrators will hold a hearing, may effectively limit tribunals' willingness to entertain dispositive motions. Scheduling an oral arbitral hearing is more logistically difficult than scheduling a court hearing, particularly where there are multiple arbitrators, where foreign travel by the arbitrators or by the parties is required, and where a suitable space for the hearing to take place must be secured. Scheduling an extra hearing for the early consideration of a dispositive motion therefore might not appeal either to arbitrators or to the parties' representatives.

This is not the end of the story, however. For one thing, a hearing on a dispositive motion would be far less time-consuming than a full evidentiary hearing. Litigators routinely fly across the country for a motion hearing in court – arbitration practitioners can easily do the same. Courts normally hear dispositive motions in a single sitting and judges regularly hold multiple hearings in a day; there is little reason why arbitrators should require a much longer trip to hear argument on a dispositive motion. When arbitrators need a few hours of attorneys' time, it is significantly less burdensome and easier to arrange than a full evidentiary hearing which may stretch for weeks or months. Moreover, a motions hearing – unlike an evidentiary hearing with oral testimony – would not require space for witnesses to be examined and would also probably not require or benefit from the presence of experts.

In addition, if arranging an in-person hearing is simply not feasible on the relatively short notice necessary for a meaningful and prompt consideration of a dispositive motion, technological advances have made this less of a problem. A party that has lost a dispositive motion probably would not have a very good argument that he was "unable to present his case" simply because the motions hearing took place by real-time videoconference rather than in person.

Arbitral procedure violates the parties' agreement under Article V(1)(d)

If a tribunal has resolved a case on a dispositive motion, a party could also challenge the award under Article V(1)(d) of the New York Convention, alleging that "the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

In particular, the party raising an Article V(1)(d) challenge could argue that the summary disposition of the proceeding "was not in accordance with the agreement of the parties" because it violated the governing institutional rules that the parties had agreed to use. The success of such a challenge, of course, would depend on which institutional rules were mandated in the parties' arbitration agreement; some institutions' current rules are more amenable than others to dispositive motions and early resolution of claims. To the extent that otherwise legitimate awards are vulnerable to challenge under Article V(1)(d) because the tribunal violated the governing rules by disposing of the case early, this may be a reason for a rule change. Moreover, parties that enter into arbitration agreements and want to insulate an award from an Article V(1)(d) challenge may either insist on the use of institutional rules that are friendlier to dispositive motions, or include a clause in

the agreement that authorises the use of dispositive motions, notwithstanding the other governing rules.

The decision violates public policy under article V(2)(b)

Finally, a party could argue that, under Article V(2)(b) of the New York Convention, "recognition or enforcement of the award would be contrary to the public policy of [the] country" where recognition and enforcement of the award is sought. Successful "public policy" challenges to arbitral awards are uncommon, and courts in most developed jurisdictions have taken a very restrictive view of the exception.

In certain exceptional cases, national courts have denied recognition of arbitral awards on public policy grounds due to procedural improprieties. However, these rare cases usually involve problems like egregious conflicts of interest, fraudulent conduct by the parties, or withholding of key information from a party. A party would be unlikely to successfully argue that the termination of an arbitral proceeding on a preliminary motion is such a grave injustice that it violates the public policy of the country where recognition of the award is sought.

Objection 5: arbitrators have economic incentives to deny dispositive motions

One final objection that has been offered against the use of dispositive arbitral motions is that arbitrators will have an economic incentive to deny them. As arbitrators are typically paid for their time, they will theoretically have an incentive to stretch out a proceeding and therefore might hesitate to prematurely end a case via granting a dispositive motion. But in a sense, this argument proves too much: attorneys who are paid by the hour have the exactly the same incentive to stretch out proceedings, and yet if this were a major problem, then presumably arbitrations would not settle and dispositive motions, if permitted, would be under-filed (at least if they have a good chance of succeeding). If anything, arbitrators who are interested in upholding a reputation for efficiency will have an incentive to grant dispositive motions where warranted.

Conclusion: possible rule changes and clauses

Although institutional rules providing for dispositive motions could potentially be modeled on the corresponding American and English rules of civil procedure, they would require modifications that accommodate the particular characteristics of international arbitration. A rule providing for dismissal on the basis of a legally inadequate initial submission could be based on ICSID Rule 41(5), or perhaps takeguidance from USFederal Rule 12(b)(6). Such a rule could allow a tribunal to determine whether to allow the claimant an opportunity to submit a corrected pleading that might could cure the legal deficiencies, or if the legal inadequacy is likely to be insurmountable.

Likewise, a rule providing for summary judgment could be modeled onUSFederal Rule 56, which allows for 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," or rule 24 of the English civil procedure rules, which allows for summary judgment if the

court determines that the party against whom summary judgment is sought "has no real prospect of succeeding" in its claim or defence. But the key would be to ensure that the party opposing summary judgment has had an opportunity to submit all relevant evidence in support of its claim or defense, while at the same time avoiding the need for voluminous US-style discovery. The language of such a rule could read, for example:

Upon the motion of a party, the Tribunal shall grant summary judgment upon a claim or defence if, after the exchange of relevant documentary evidence and sworn witness statements between the parties, the Tribunal finds that that claim or defense can be resolved as a matter of law or on the basis of uncontested record evidence.

Similar clauses could be written into arbitration agreements themselves, as a modification to the institutional rules that are provided for. Moreover, to discourage meritless motions, a rule or clause could also include cost-shifting language: "If such a motion is denied, the moving party shall be responsible for the fees and expenses incurred by the opposing party in responding to the motion."

These are just opening suggestions. Too many parties have been able to leverage arbitration by asserting claims and defences that would not have lasted long had they been presented in many courts. Workable and enforceable rules that provide for early resolution of proceedings, where appropriate, should be an important goal of arbitration practitioners.

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