Party Autonomy and Default Rules: Reframing the Debate Over Summary Disposition in International Arbitration

*By Gary Born and Kenneth Beale**

A robust debate is currently ongoing among international arbitration scholars and practitioners regarding the use of summary disposition procedures in international arbitral proceedings. To many, arbitrators' authority to entertain summary disposition motions is beyond doubt and is a useful tool that tribunals can wield to reduce costs and increase efficiency. One of the decisions published in this edition of the *ICC International Court of Arbitration Bulletin*—the First Interim Award in ICC Case No. 11413—supports this view, holding that arbitral tribunals have the power to grant dispositive motions at an early stage of arbitral proceedings. For others, the use of summary disposition procedures, when not expressly authorized in the parties' arbitration agreement or in the applicable institutional rules (if any), runs contrary to the contractual nature of the parties' dispute resolution mechanism and to the parties' right to a fair hearing.

As a result of these doubts about whether summary disposition procedures can and should be used in international arbitration, a party to arbitral proceedings often will not know whether summary disposition procedures will be available to it until it obtains a ruling from the tribunal on this topic. Indeed, whether a particular tribunal will entertain a request for the summary disposition of a party's claims can sometimes seem as predictable as a pull on the handle of a casino slot machine. Ultimately, a tribunal's willingness, or lack thereof, to entertain such requests may depend on a variety of contingent factors, ranging from the cultural backgrounds of the arbitrators to their personal prejudices regarding the use of summary disposition procedures. For many parties to international arbitral proceedings—including proponents and opponents of summary disposition mechanisms—the uncertainty caused by this haphazard availability of summary disposition procedures in international arbitration is undesirable.

In this article, we discuss calls for the expanded use of summary disposition procedures in international arbitration and explain why, notwithstanding these calls, arbitrators often remain reluctant to entertain such procedures. We then provide a brief overview of the current debate regarding the desirability and permissibility of summary disposition procedures in international arbitration, observing that the debate pertains to *default* rules—i.e., to what should happen in the absence of an express agreement by the parties as to the use of summary disposition procedures. After reframing the current debate, we address the threshold issue of party autonomy, which is often ignored. We contend that, in light of recent trends, parties should consider a variety of steps to ensure that their expectations regarding summary disposition are respected. By taking these steps, parties can avoid recourse to the currently unsettled default rules, thereby obtaining a measure of predictability that otherwise would be unavailable. We conclude that the autonomy afforded to parties by international arbitration—which is

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one of international arbitration's considerable benefits—should not be forgotten in the debate over the use of summary disposition procedures, but instead offers users of international arbitration services a powerful way to achieve predictability while the debate regarding default rules continues.

A. Summary disposition procedures and arbitral efficiency

The popularity of international arbitration has continued to increase in recent decades. International arbitration is now, as detailed in the University of London's *2010 International Arbitration Survey* and other recent studies, the dispute resolution mechanism of choice for many international businesses. While numerous reasons exist for why companies routinely choose international arbitration over State court litigation and other forms of dispute resolution, recent studies suggest that the relative efficiency, neutrality, and confidentiality of international arbitration are three of the primary reasons behind corporate counsels' preference for international arbitration.[1]

While these findings might at first appear to be good news to international arbitration practitioners, they also highlight some of the pitfalls and drawbacks from which international arbitration increasingly is thought to suffer. In particular, the findings of the *2010 International Arbitration Survey* indicate that corporate users of international arbitration believe 'that arbitration must become more streamlined and disciplined to provide an entirely effective form of dispute resolution' and 'prefer pro-active arbitrators who take control of proceedings'.[2] Likewise, they indicate that corporate users believe that the effective 'control of proceedings'—both by arbitrators and by arbitral institutions—is key to reducing costs and delays associated with international arbitration.[3] In addition to blaming arbitrators and institutions for costs and delays sometimes associated with international arbitrations, the survey's participants also blame the parties to international arbitral proceedings for generating unnecessary costs and delays.

The findings of the *2010 International Arbitration Survey* regarding users' concerns about the costs and efficiency of international arbitral proceedings are not aberrational but are echoed by other recent research. For example, a recent study by the Corporate Counsel International Arbitration Group (CCIAG) found that every single corporate counsel who was surveyed thought that arbitration 'takes too long' and 'costs too much'.[4]

In response to increasing complaints by users of international arbitration services regarding the costs and timing of arbitral proceedings—such as those reflected by the *2010 International Arbitration Survey* and the CCIAG study—international arbitration practitioners have acknowledged that something must be done to confront these concerns. In the words of one practitioner, '[w]hether or not concerns about international arbitral efficiency are exaggerated, the international arbitration community must face this discontent and, more importantly, take steps to fix these problems if it is to maintain legitimacy with its users'.[5]

The summary disposal of claims—i.e., the dismissal of claims on the basis of a dispositive motion filed in advance of a comprehensive evidentiary hearing on the case's merits—is one mechanism that should in theory enable international arbitration

1 *2010 International Arbitration Survey: Choices in International Arbitration*, Queen Mary, University of London (http://choices.whitecase.com).

2 *2010 International Arbitration Survey, supra* note 1 at 32.

3 *2010 International Arbitration Survey, supra* note 1 at 32.

4 L. Reed, 'More on Corporate Criticism of International Arbitration', *Kluwer Arbitration Blog*, 16 July 2010 (http://kluwerarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration).

5 L. Reed, *supra* note 4.

to be more 'streamlined and disciplined'. National courts in numerous jurisdictions have procedures for the summary disposal of claims that have no prospect of success, so as to manage their time and costs. A number of scholars and practitioners have suggested that summary disposition procedures of this sort also should be used by international arbitral tribunals, so as to reduce the costs and increase the efficiency of arbitral proceedings. As one practitioner writes, 'when an issue may dispose of all or part of a case, such as a time limitation, the validity of a release, the application of *res judicata* or collateral estoppel or the application of law to undisputed facts, a party should seek to have arbitrators consider the issue at an early stage in the name of efficiency [and] should not have to present all of the evidence on all of the issues…'[6] To the same effect, in the words of one in-house counsel, 'rule and practice changes authorising and promoting the early disposition of key issues would be a highly positive step for international arbitration'.[7]

Given these views, it is not surprising that arbitral tribunals frequently conclude that they have the authority to make summary dispositions. As noted above, that was the conclusion in ICC Case No. 11413, as well as in a number of other recent awards under ICC and other institutional rules.

B. Hesitancy over the use of summary disposition procedures in international arbitration

Notwithstanding calls for the expanded use of summary disposition procedures in international arbitration, summary disposition remains a bridge too far for many who, despite acknowledging its attractions in theory, make several objections to its use in practice. In particular, three factors often make arbitrators reluctant to grant requests for the summary disposition of claims: (1) the absence of provisions in most leading institutional arbitration rules expressly authorizing tribunals to utilize such procedures; (2) concerns about due process and the enforceability of awards summarily disposing of a party's claims; and (3) cultural prejudices against summary disposition procedures.

First, the majority of institutional arbitration rules do not expressly permit tribunals to dispose of claims summarily at an early stage of the proceedings. A notable exception to this is Rule 41(5) of the International Centre for Settlement of Investment Disputes' Arbitration Rules, which provides:

> Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.[8]

In December 2010, an ICSID tribunal, relying on Rule 41(5), dismissed a claim brought by two US poultry exporters against the Ukraine, the first time a case has been dismissed on the basis of Rule 41(5).[9] After two rounds of written submissions and a

6 D. Rivkin, F. Davis, *et al.*, 'Current Trends in US and International Arbitration' in *The Arbitration Review of the Americas 2008* (Global Arbitration Review, 2008).

7 M. McIlwrath & R. Schroeder, 'The View from an International Arbitration Customer: In dire need of early resolution' (2008) 74 *The Journal of the Chartered Institute of Arbitrators* 1 at 11.

8 Rule 41(5) of the International Centre for Settlement of Investment Dispute's Arbitration Rules.

9 *Global Trading Resources Corp. and Globex International, Inc.* v. *Ukraine*, Award in ICSID Case No. ARB/09/11, dated 1 December 2010.

one-day oral hearing, the tribunal concluded that the contract at issue did not qualify as an investment under the ICSID Convention and accordingly dismissed the poultry exporters' claim under Rule 41(5).[10]

With the exception of Rule 41(5), few leading international arbitral institutions' rules set forth procedures for the summary disposition of a party's claims.[11] Absent this express authority, and absent other manifestations of parties' desire for such procedures (such as language in their arbitration agreement to that effect), arbitrators may feel uncomfortable imposing these procedures onto parties and may question whether they have the authority to do so.

Second, arbitrators are often concerned that dismissing a party's claims summarily during the initial stages of arbitral proceedings raises due process issues that could undermine the resulting award. A key principle of international arbitration is that parties to arbitral proceedings have a reasonable ability to present arguments regarding all of the elements of their case to the tribunal; likewise, it is widely accepted that a tribunal's mandate includes the obligation to ascertain the facts at issue in the arbitration.[12] The English Arbitration Act 1996, for instance, requires tribunals to provide 'each party a reasonable opportunity of putting his case and dealing with that of his opponent', and several leading institutional rules emphasize parties' rights to oral hearings.[13] If an arbitral tribunal unduly foreshortens a party's ability to present arguments and facts to the tribunal—by, for instance, disposing of a party's claims at an early stage of the proceedings without holding an evidentiary hearing—that party might well contend that its right to present its case was infringed. Concerns about such challenges may make some arbitrators hesitant to utilize summary disposition procedures in international arbitral proceedings.

Third, cultural factors may make it unlikely that certain arbitrators will utilize summary disposition procedures in an international arbitration, in the absence of an express agreement by the parties that they do so. For instance, arbitrators from jurisdictions where summary disposition procedures are rarely used may be less inclined to utilize such procedures than arbitrators from common law jurisdictions where summary disposition procedures routinely are employed. While cultural stereotypes at times can be misleading, there can be no doubt that, in the absence of other countervailing factors, arbitrators' backgrounds may influence their willingness to entertain requests for the summary disposition of a party's claims.

In light of these factors, arbitral tribunals often are uncertain about their authority to grant summary dispositions. And, even where tribunals conclude that they have the power to do so, they often remain unwilling to grant summary dispositions. In practice, this means that it is often very difficult to predict whether an arbitral tribunal will consider utilizing summary disposition procedures, much less whether it will robustly use such procedures.

10 *Global Trading Resources Corp. and Globex International, Inc.* v. *Ukraine*, Award in ICSID Case No. ARB/09/11, dated 1 December 2010, at 19–20.

11 The rules of some domestic arbitral institutions do expressly provide for summary disposition procedures. See, e.g., Rule 18 of the JAMS Comprehensive Arbitration Rules; Rule 32(c) of the American Arbitration Association Construction Industry Rules; Rule 27 of the American Arbitration Association Employment Arbitration Rules; and Rule 12504 of the Financial Industry Regulatory Authority's Code of Arbitration Procedure for Customer Disputes.

12 R. Bamforth & K. Maidment, 'Reasonable Opportunity to Present One's Case—Recent English Case Law' (2010) 28: 3 *ASA Bulletin* 485.

13 English Arbitration Act 1996, s. 33(a). See Article 20 of the International Chamber of Commerce Rules of Arbitration; Rule 19.1 of the Arbitration Rules of the London Court of International Arbitration; see also N. Beale, L. Nieuwveld & M. Nieuwveld, 'Summary Arbitration Proceedings: A Comparison Between the English and Dutch Regimes' (2010) 26: 1 *Arbitration International* 139.

Uncertainty surrounding the availability of summary disposition procedures in international arbitration has provoked substantial debate. Two issues in particular form the heart of this debate: (1) whether the use of summary disposition procedures in international arbitration is a good or bad thing; and (2) whether the rules of the leading arbitral institutions should be changed to facilitate the use of summary disposition procedures in international arbitration. As we outline below, no clear consensus exists regarding these issues.

C. Debating the merits of summary disposition in international arbitration

The most hotly debated issue regarding the availability of summary disposition in international arbitration is whether the availability of such procedures is a good or bad thing.

Those who think that the use of summary disposition procedures in international arbitration is a good thing typically justify their position on the basis of cost and efficiency savings.[14] According to proponents of summary disposition, the use of such procedures in international arbitration often would shorten the length of arbitrations, thereby reducing the parties' costs and legal fees and ensuring speedier justice. In addition, supporters of summary disposition procedures in international arbitration sometimes contend that the availability of such procedures would reduce the number of frivolous claims, since a party contemplating such a claim would know that it likely would be dismissed at the outset of the proceedings. This, in turn, could reduce the number of arbitral strike suits, where parties commence unmeritorious arbitral proceedings solely for the purpose of coercing a private settlement.

Those who think that the use of summary disposition procedures in international arbitration is a bad thing often justify their position on the grounds that such procedures risk a denial of due process, threaten the enforceability of the resulting arbitral awards, and represent an encroaching Americanization of international arbitration.[15] In addition, some opponents argue that the use of summary disposition procedures in international arbitration actually could make international arbitration more costly and less efficient.[16] If, for instance, the parties to an international arbitration spend time and resources arguing a motion to dismiss at the outset of the proceedings while the rest of the case is stayed, and if the motion to dismiss is denied, then the parties will have wasted considerable amounts of time and money and must resume the arbitration at the point they were at before the motion to dismiss was filed. Concerns about inefficiencies of this sort have led one commentator to conclude that summary disposition procedures are 'likely to lead to an additional procedural layer, thereby delaying proceedings and increasing costs'.[17]

No consensus currently exists about whether the use of summary disposition procedures in international arbitration is a good or bad thing, and we do not pretend

14 See, e.g., A. Ferris & W. Biddle, 'The Use of Dispositive Motions in Arbitration' (2007) *Dispute Resolution Journal*; J. Gill 'Applications for the Early Disposition of Claims in Arbitration Proceedings' in *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series No. 14 (Kluwer Law International, 2009) at 513–525; M. McIlwrath & R. Schroeder, *supra* note 8 at 11.

15 See, e.g., D. King & J. Commission, 'Summary Judgment in International Arbitration: The "Nay" Case', paper presented at ABA International Law Spring 2010 Meeting, <http://apps.americanbar.org/intlaw/spring2010/materials/Common%20Law%20Summary%20Judgment%20in%20International%20Arbitration/King%20-%20Commission.pdf>; C. Brower, 'W(h)ither International Commercial Arbitration?' (2008) 24: 2 *Arbitration International* 181–197.

16 D. King & J. Commission, *supra note* 15 at 3; see also C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2009) at 41.102.

17 C. Schreuer, *supra* note 16 at 41.102; see also D. King and J. Commission, *supra* note 15 at 3.

to resolve this dispute in this article. We note, however, that this lack of consensus is exacerbated by the variety of ways that commentators appear to define 'summary disposition'. While much ink has been spilled about whether summary disposition procedures are desirable or not, no singular definition of 'summary disposition' currently exists. As a result, commentators discussing this subject sometimes are like ships passing in the night; while they superficially appear to be addressing the same topic, they actually are talking about two different things. To help clarify this terminological confusion, it is worth understanding what summary disposition procedures entail in two jurisdictions where such procedures routinely are used, the United States and England.

In the United States, there are two principal mechanisms for summarily disposing of a party's claims: (1) the motion to dismiss; and (2) the motion for summary judgment. Both of these types of summary disposition can have *res judicata* effect, and it is common for a party's claims to be dismissed by a US court on the basis of one of these motions.

Motions to dismiss typically are filed at the outset of civil litigation in US federal courts, usually as a defendant's first response to the plaintiff's complaint.[18] Under Rule 12(b) of the Federal Rules of Civil Procedure, a party can request that claims against it be dismissed for a variety of reasons, ranging from a lack of subject matter jurisdiction to the failure to plead an intelligible cause of action.[19] Only if a defendant's motion to dismiss is denied will the defendant then file an answer to the plaintiff's complaint.

A US federal judge deciding a motion to dismiss must construe the facts of the case in the light most favourable to the non-moving party.[20] Accordingly, a claim cannot be dismissed pursuant to a motion to dismiss solely on the basis that the underlying factual evidence is weak. In the words of the US Supreme Court, '[w]hat Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations'.[21]

Traditionally, when deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, American federal courts have followed the rule that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'.[22] Recently, the US Supreme Court has refined this test, holding that a plaintiff's claims should not be dismissed if, assuming all of plaintiff's factual allegations were true, they would 'raise a right to relief above the speculative level'[23] and 'state a claim to relief that is plausible on its face'.[24] Under this standard, federal district courts can grant motions to dismiss under two sets of circumstances. First, if a judge identifies 'pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth',[25] the judge can dismiss the claims contained within them. Second, if a judge, assuming the 'well-pleaded factual allegations' of a case to be true, concludes that they do not 'plausibly give rise to an entitlement to relief',[26] the judge may dismiss the claims.

18 Rule 12(b)(6) of the Federal Rules of Civil Procedure.

19 Rule 12(b)(1)–(7) of the Federal Rules of Civil Procedure.

20 See *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

21 *Neitzke* v. *Williams*, 490 U.S. 319, 328 (1989).

22 *Conley* v. *Gibson*, 355 U.S. 41, 45–46 (1957).

23 See *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 545 (2007).

24 See *Iqbal*, 129 S. Ct. at 1937.

25 *Iqbal*, 129 S. Ct. at 1950.

26 *Iqbal*, 129 S. Ct. at 1950.

A US federal judge who grants a motion to dismiss can do so 'with prejudice' or 'without prejudice'.[27] When a judge dismisses a claim 'with prejudice', the judge's ruling finally disposes of that claim with *res judicata* effect, and there is no opportunity for the party who brought the claim to re-litigate that point in the future. Conversely, when a judge dismisses a claim 'without prejudice' (e.g., on the basis of insufficient service of process), the party opposing the motion may correct the mistakes that it made and re-file its claims again in the future.

Motions for summary judgment—unlike motions to dismiss—typically are filed towards the end of civil litigation in US federal courts, usually shortly before a case is scheduled to go to trial. Under Rule 56 of the Federal Rules of Civil Procedure (which, to an extent, has been borrowed from the English courts[28]), any party to civil litigation in a US federal court may move for summary judgment on all or part of the claims brought by or against it 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law'.[29] Because Rule 56 requires that a judge review 'the pleadings, the discovery and disclosure materials on file, and any affidavits' when deciding a motion for summary judgment, it generally is not possible to obtain summary judgment before the parties' briefs have been filed and the discovery process is complete.

Courts deciding motions for summary judgment must evaluate the underlying facts of the case. Because of this, if a party files a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted but asks the court to consider facts outside the complaint, the court may treat the motion as a Rule 56 motion for summary judgment.[30] When deciding a motion for summary judgment, if the pleadings, affidavits, and disclosure materials on file indicate that no material facts are in dispute and show that one party clearly is entitled to judgment as a matter of law, the judge must decide the case with prejudice in that party's favour.[31] Conversely, if one or more material facts remain in dispute, or if it is unclear which party should prevail as a matter of law even though no material facts remain in dispute, the judge must deny the motion for summary judgment and the case will proceed to trial.

In England, the most common type of dispositive motion is the motion for summary judgment. While English motions for summary judgment bear some resemblance to American motions for summary judgment, they are not equivalent, and English law contains no clear analogue to the American motion to dismiss.

Under the English Rules of Civil Procedure ('CPR'), Part 24, a court may render judgment on all or part of a claim or issue if:

> (a) it considers that
> (i) [the] claimant has no real prospect of succeeding on the claim or issue; or
> (ii) [the] 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.[32]

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27 See *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001); *Vasquez* v. *Bridgestone/Firestone Inc.*, 325 F.3d 655, 678 (5th Cir. 2006).

28 See Federal Rules of Civil Procedure Advisory Committee Notes, note to Rule 56 (as amended 1987).

29 Rule 56(c)(2) of the Federal Rules of Civil Procedure.

30 See Rule 12(d) of the Federal Rules of Civil Procedure.

31 See *Tuley v. Heyd*, 482 F.2d 590, 594 n.2 (5th Cir. 1973); *Langdon* v. *County of Columbia*, 1999 WL 504911, at *1 (N.D.N.Y. 1999).

32 Civil Procedure Rules, Part 24, Rule 24.2.

This test has been interpreted to mean that the party applying for summary judgment must show that the claim is no stronger than fanciful;[33] in other words, the test is 'not one of probability; it is an absence of reality'.[34] While in theory an application for summary judgment may be brought at any time after the defendant has acknowledged the claim or provided its defence,[35] in practice parties typically commence such applications prior to disclosure and the exchange of witness statements, with a view towards saving time and costs.

The main question that arises in relation to summary judgment proceedings in England is the scope of the inquiry that a judge must conduct in order to ensure that the prerequisites for summary judgment have been met. As the English Court of Appeal has explained, 'the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini [trial]'.36 This explanation still leaves open the question of what types of claims are susceptible to summary disposition. This question was finally answered by the House of Lords in the *Three Rivers* case, [37] which defined what is meant by 'summary' disposition:

> The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain* v *Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.[38]

It is clear from the *Three Rivers* judgment that, under the English system of summary judgment, cases that will be suitable for disposal by way of summary proceedings are limited to those where the claim is barred as a matter of law (e.g., where a claim clearly falls outside an applicable limitation period or is excluded by the terms of the applicable agreement between the parties) or where the factual basis for the claim is, as the House of Lords described it, 'fanciful'. It also is clear from the *Three Rivers* judgment that cases involving complex issues of fact and/or law will be less susceptible to summary judgment than cases involving less complex issues, although the complex nature of a case is not an absolute bar to summary judgment.[39]

33 See *Swain* v. *Hillman* [2001] 2 All ER 91, 92; *Berezovsky* v. *Abramovich* [2010] EWHC 647, ¶146.

34 *Three Rivers District Council* v. *Bank of England* (No. 3) [2001] UKHL 16 *per* Lord Hobhouse of Woodborough at ¶158.

35 Civil Procedure Rules, Rule 24.4(2)

36 *Swain* v. *Hillman* [2001] 2 All ER 91, 95.

37 *Three Rivers District Council* v. *Bank of England* (No. 3) [2001] UKHL 16.

38 *Three Rivers District Council* v. *Bank of England* (No. 3) [2001] UKHL 16, ¶95.

39 In this regard, Lord Hope stated: 'The most important principle of all is that which requires that each case be dealt with justly… A trial in this case will be lengthy and it will be expensive. There is only so much that astute case management can do to reduce the burdens on the parties and on the court. Nevertheless it would only be right for the claim to be struck out if it has no real prospect of succeeding at trial. I do not think that one should be influenced in the application of this test by the length or expense of the litigation that is in prospect. Justice should be even-handed, whether the case be simple or whether it be complex.' *Three Rivers District Council* v. *Bank of England* [2001] UKHL 16, ¶106.

In addition to the summary disposition procedures discussed above, courts in other jurisdictions utilize procedures for expedited proceedings and for making preliminary determinations. While expedited procedures often are much faster than non-expedited procedures, they do not necessarily involve reaching a final determination on the merits on an abbreviated basis, as often happens as a result of the summary disposition procedures found in the United States and England. Similarly, preliminary determinations involve sequentially addressing certain issues before others but again do not necessarily require abbreviated proceedings or entail the resolution of the parties' dispute with finality.

In the Netherlands, for instance, summary disposition procedures exist that offer litigants expedited proceedings and allow for the making of preliminary determinations, but these procedures differ significantly from the summary disposition procedures utilized by American and English courts. Specifically, the *kort geding* procedures available in the Netherlands can be used in emergency situations where a final determination of the dispute between the parties cannot wait until the conclusion of a regular trial.[40] Although *kort geding* proceedings are referred to as 'summary proceedings', there are significant differences between them and the sort of summary judgment procedures routinely utilized by American and English courts. Among other things, a successful litigant in a *kort geding* procedure only can obtain a limited range of remedies, such as an injunction or order.[41] More importantly, *kort geding* proceedings do not dispose of a party's claims with finality, meaning that any remedy given at the end of a *kort geding* procedure is interim in nature.

While at first blush no clear consensus appears to exist about whether the use of summary disposition procedures in international arbitration is a good or bad thing, this sweeping conclusion may be bit premature. When commentators talk about summary disposition procedures and mean something akin to US motions to dismiss, there is little disagreement amongst them that such procedures can be a good thing in international arbitral proceedings. Few commentators would object to the summary disposition of claims in international arbitral proceedings if the claims in question clearly must fail as a matter of law regardless of the underlying facts of the case (i.e., if the claims clearly must fail even when the facts are construed in the light most favourable to the non-moving party). If, for instance, a claimant frivolously commences an action to recover damages for the 'deprivation of affection', and if no such cause of action exists under the relevant governing law, few would oppose the tribunal dismissing this hopeless claim at the outset. Likewise, if a party brings a contractual breach claim for a breach that allegedly occurred one hundred years ago, and if the relevant statute of limitations for contractual breach actions is ten years and no basis exists for tolling this period, most commentators would agree that the tribunal should dismiss this hopeless claim at the outset of the proceedings, so as to prevent the unnecessary waste of the parties' time and resources. A similar analysis would apply to the summary disposition of claims on numerous other grounds, ranging from *res judicata* and collateral estoppel to the existence of a contractual exclusion clause preventing claims from succeeding regardless of the underlying facts.

Accordingly, the real disagreement about whether the use of summary disposition in international arbitration is desirable or not pertains to the use of summary disposition procedures akin to the summary judgment procedures found in the United States and England. A wide range of opinions exist about whether an arbitral tribunal should, in the absence of express instructions from the parties, summarily decide a case—possibly at an early stage of the proceedings and without a full evidentiary hearing or

40 N. Beale, L. Nieuwveld & M. Nieuwveld, *supra* note 13 at 151.

41 N. Beale, L. Nieuwveld & M. Nieuwveld, *supra* note 13 at 151.

exchange of pleadings—simply because it thinks that one party's evidence is so weak that it has no chance of success on the merits. No clear path to obtaining consensus on this issue appears to exist. Rather, disagreements about the suitability of summary disposition procedures of this sort to international arbitration likely will continue for years to come. Recognizing the existence and intractability of these disagreements is an important first step for parties who desire a measure of control and predictability over their arbitral proceedings, as discussed below.

D. Debating the need for rule changes to expressly permit summary disposition in international arbitration

Aside from the question of whether the availability of summary disposition procedures in international arbitration is a good or bad thing, the most hotly contested issue regarding summary disposition in international arbitration is whether the rules of leading arbitral institutions should be amended to expressly provide tribunals with the authority to utilize at least some summary disposition procedures.

There is a strong feeling amongst some proponents of summary disposition that amendments to leading institutional arbitration rules are necessary if summary disposition procedures are to become commonplace in international arbitral proceedings. As the co-authors of one article addressing this topic write: '[A]rbitrators have, for the most part, been reluctant to rely on implicit, gap-filling or inherent powers to introduce such a procedure. Failing a change in this trend, modifications to the leading systems of rules would be necessary to promote the use of any summary judgment mechanism.'[42] Proponents of rule changes of this sort frequently justify them on psychological grounds, arguing that, regardless of whether or not arbitrators currently have inherent powers to utilize summary disposition procedures, expressly authorizing such procedures in institutional rules would relieve any hesitations arbitrators might have, thus encouraging the use of such procedures. Others disagree that rule changes of this sort are necessary, arguing that arbitrators should be encouraged to fully utilize the powers already implicitly granted to them by most institutional rules. In the words of one commentator, '[i]t is perhaps more a question of the existing powers being fully utilized in appropriate cases so as to bring about the expedited resolution of issues or claims in an appropriate case'.[43]

Again, we do not intend to resolve the debate over whether international rules should be amended to expressly authorize arbitrators to utilize summary disposition procedures. We do, however, make two observations regarding this topic, the first pertaining to the feasibility of systemic rule changes in the immediate future and the second pertaining to some arbitral tribunals' current use of summary disposition procedures in the absence of such changes.

First, regardless of whether it would be desirable to amend existing institutional rules to expressly authorize the use of summary disposition procedures, the reality is that changes of this sort are unlikely to be made in the immediate future. Among other things, the rules of many leading institutions recently have been updated, making it unlikely that they will be updated again any time soon.[44] In addition, the fact that most recent updates to the leading institutional rules did not include express authorizations

42 D. King & J. Commission, *supra* note 15 at 4.

43 J. Gill, *supra* note 14 at 525.

44 The United Nations Commission on International Trade Law Arbitration Rules, the Singapore International Arbitration Centre Rules and the Stockholm Chamber of Commerce Rules were updated in 2010. The American Arbitration Association and International Centre for Dispute Resolution Procedures, the Nederlands Arbitrage Institut and the American Arbitration Association Commercial Arbitration Rules were updated in 2009. The Hong Kong International Arbitration Centre Rules were updated in 2008. The International Centre for Settlement of Investment Disputes Rules and the Vienna International Arbitral Centre Rules were updated in 2006.

of summary disposition procedures likely reflects a lack of consensus about whether such language should be included. Indeed, a report on evidence, procedure and burden of proof drafted by members of ICC's Task Force for Arbitrating Competition Law Issues specifically recommended that the ICC Rules not be amended to allow for summary judgment because it is 'likely a summary judgment vehicle would not work in the ICC context and culture'.[45] As such, it is wishful thinking to believe that there will be systemic changes any time soon to leading institutional rules authorizing the use of summary disposition procedures.

Second, even in the absence of express provisions authorizing the use of summary disposition procedures, some tribunals nevertheless have concluded that they implicitly have the authority to utilize such procedures. A 2001 decision published in this issue of the ICC *International Court of Arbitration Bulletin*—the First Interim Award in ICC Case No. 11413[46] —demonstrates this, as does another decision recently published by ICC, Procedural Order No. 1 of 22 August 2003 in ICC Case No. 12297.[47]

In ICC Case No. 11413, the claimant, an Italian company, initiated arbitral proceedings to obtain a second extension of the completion date of a construction project on the grounds of *force majeure* and claimed that the respondent's behaviour amounted to economic duress. The substantive law of the arbitration was New York law, and the seat of the arbitration was London. When it filed its answer, the respondent moved to dismiss the claimant's economic duress claim, contending that 'because the claim of duress that is the foundation of the second supplement is utterly without any legal basis… this claim should be dismissed by the Tribunal as a matter of law'.[48]

As an initial matter, the tribunal held that '[i]n the view of the Tribunal, the first issue that needs to be dealt with is whether or not an Arbitral Tribunal has the power to grant a motion to dismiss'.[49] The tribunal noted that '[n]either the ICC Rules, nor the English 1996 Act provide specific provision with respect to motions to dismiss'.[50] The tribunal then cited Article 15 of the ICC Rules, as well as Section 33 of the English Arbitration Act 1996, which states, among other things, that a tribunal shall 'adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'.[51] The tribunal concluded that, '[i]n light of the above provisions, the view of the Tribunal is that it is empowered to grant a motion to dismiss if it is reasonable to do so in the circumstances of a case'.[52] The tribunal noted, however, that '[t]he fact that [the tribunal's] decision on the merits cannot be appealed is of serious concern and makes its position fundamentally different from that of a New York court'.[53] Accordingly, the tribunal stated that 'a motion to dismiss, which is grounded on assumptions of facts and prevents the parties from submitting elaborated memorials and submitting evidence should not be granted unless the arbitrators are confident that it is crystal clear that the claim may have no legal basis'.[54] Unfortunately for the respondent, the tribunal then concluded that this standard was not met and that the claimant's duress claim would not, therefore, be summarily dismissed.

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45 J. Gill, *supra* note 14 at 525.

46 See hereinafter, p. 34.

47 Published in *Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders issued by Arbitral Tribunals acting under the ICC Rules of Arbitration (2003–2004)*, ICC ICArb. Bull., 2010 Special Supplement (ICC, 2011) 47.

48 See hereinafter, p. 34.

49 See hereinafter, p. 40.

50 See hereinafter, p. 41.

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 *Ibid.*

In ICC Case No. 12297, the claimant, a Nigerian company, requested an order for rescission and damages of $22.5 million. According to the claimant, during the negotiation and signing of an amendment to a supply contract, the respondent, a Canadian company, failed to disclose that it had decided to cease manufacturing and selling wireless communications equipment to be supplied under the terms of the agreement. In response, the respondent submitted an answer and an application to dismiss the claimant's claims (the 'Application to Dismiss') on the grounds that (1) the contract excluded the remedy the claimant was seeking and (2) the claim could not succeed as a matter of law. According to the respondent, under Canadian law, which governed the contract, the failure to disclose information during contract negotiations cannot give rise to a cause of action for a violation of the duty of care or good faith. The claimant responded that the Application to Dismiss should fail because the facts presented in the claimant's statement of claims disclosed a cause of action for deceit.

Before addressing the merits of the respondent's Application to Dismiss, the tribunal considered whether, in the absence of procedural rules expressly authorizing summary disposition procedures, it had the inherent authority to grant the Application to Dismiss. Both parties accepted that the tribunal did have this authority, and the claimant in particular did not object to the respondent's Application to Dismiss on procedural grounds. In its decision, the tribunal noted that 'the ICC Rules are silent in respect to the specific question of a procedure for the summary disposition of pleadings, issues or claims' and that, under Article 15 of the ICC Rules, '[t]he proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration'.[55] Accordingly, the tribunal concluded that it 'falls to the Arbitral Tribunal to determine the pertinent procedure in accordance with Article 15 of the ICC Rules...'[56]

In deciding whether, and if so how, to entertain the respondent's Application to Dismiss, the tribunal stated that 'the Parties have specifically chosen to subject their contractual relationship to the laws of the Province of Alberta and the laws of Canada' and that 'both Parties operate in the context of common law jurisdictions (predominately at least), and the facts, contentions and natural expectations pertinent to their dispute related to common law principles and practices'.[57] Accordingly, the tribunal decided that '[c]onsidering the general characteristics of the present case... the Arbitral Tribunal shall proceed by way of analogy to make reference to Canadian practice [in respect of summary disposition]'.[58] In considering the relevant rules under the Rules of Court of Alberta, the tribunal determined that 'the standards for summary judgment... (i.e. "no merit" and "no genuine issue"), are simply unsuitable for the disposition of a case at the very outset of proceedings, before any investigation of the facts. The substance of the right to be heard would simply not be respected if summary judgment could be given straight off "the crack of the bat"'.[59] However, the tribunal concluded that the right to be heard is not absolute and 'circumstances may exist in which an arbitral tribunal might decide to strike out a case from its very outset, and properly do so without overstepping the bounds of the right to be heard'.[60] In drawing a distinction between summary judgment and the striking out of a claim, the tribunal stated that 'the exceptional device of striking out a case appears much better suited to the outset of proceedings than is summary judgment'.[61]

55 See *supra note* 47 at 49.
56 *Ibid* at 50.
57 *Ibid*.
58 *Ibid* at 58.
59 *Ibid*.
60 *Ibid*.
61 *Ibid*.

After determining that it had the inherent authority to utilize summary disposition procedures, and after discussing the exact nature of those procedures, the tribunal considered whether it should summarily dismiss the claimant's claims, concluding that, in light of the facts of the case, it should not. According to the tribunal, under Canadian law 'a case must be hopeless to be struck out and extreme caution must be used on such a motion'.[62] The tribunal then held that complex and unresolved issues of fact existed that precluded the summary disposition of the claimant's claims, writing that: 'What the facts and law of this matter are, and whether or not [Respondent] has good defences will need to be determined in the course of further proceedings… the alleged causes of action based on deception… or… breach of duty of disclosure… lie at the core of the present dispute and raise a complex array of difficult issues which should not be resolved in the context of a motion to strike.'[63]

The First Interim Award in ICC Case No. 11413 and Procedural Order No. 1 in ICC Case No. 12297, along with other decisions like them by other tribunals, confirm that at least some international arbitral tribunals are willing to entertain summary disposition motions notwithstanding a lack of express authorization to do so by the applicable institutional rules.

E. Party autonomy and default rules—reframing the summary disposition debate

The current debate about the use of summary disposition procedures in international arbitration fundamentally is a debate about *default* rules—i.e., about what should happen in the absence of an express agreement by the parties about the use of summary disposition procedures. Issues related to party autonomy and choice rarely feature as part of this debate. This, we believe, is a mistake. While it is important to consider what the default position should be regarding the use of summary disposition procedures in international arbitration, the threshold issue of party choice is equally, if not more, significant. Especially in light of the current trends discussed above, and in light of the unsettled nature of the current debate about whether summary disposition procedures should be used in international arbitration, party choice regarding these issues is of paramount importance, and parties should consider taking steps to ensure that their wishes regarding these matters are respected and to ensure that their arbitral proceedings are as predictable as possible.

Party autonomy and choice, including with respect to arbitral procedures, are fundamental aspects of international arbitration. As one of us has written:

> One of the most fundamental characteristics of international commercial arbitration is the parties' freedom to agree upon the arbitral procedure. This principle is acknowledged in the New York Convention and other major international arbitration conventions; it is guaranteed by arbitration statutes in virtually all developed jurisdictions; and it is contained in and facilitated by the rules of most leading arbitral institutions. The principle of the parties' procedural autonomy is qualified only by the mandatory requirements of applicable national law (subject to applicable international limits), which under most developed arbitration statutes are ordinarily limited in scope.[64]

Others likewise have stated that '[p]arty autonomy is the guiding principle in determining the procedure to be followed in an international arbitration'[65] and that

62 *Ibid* at 54.

63 *Ibid* at 56.

64 G. Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at 1747–48.

65 A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (5th ed., 2009) at 365.

'[h]owever fulsome or simple the arbitration agreement, the parties have ultimate control of their dispute resolution system'.[66]

With respect to the issue of summary disposition, parties to potential or actual international arbitral proceedings can exercise their autonomy to determine whether, and if so how, summary disposition procedures will be available to them. In addition, they have the autonomy to make other strategic decisions that could bear on the availability of these procedures. Notwithstanding this, those debating the availability of summary disposition procedures in international arbitration rarely address these issues, and other international arbitration commentators—such as those providing advice on the drafting of arbitration agreements—also rarely discuss these issues in any detail.

Parties drafting arbitration agreements, as well as parties to pending arbitrations, should consider taking several steps to ensure that their wishes with respect to the availability of summary disposition procedures are honoured. In particular, they should consider: (1) drafting their arbitration clauses to expressly provide for, or to exclude, the use of summary disposition procedures; (2) being mindful of how their choices regarding the arbitral seat and governing law might affect the availability of summary disposition procedures; (3) negotiating agreements regarding the use of summary disposition procedures during the pendency of arbitral proceedings, if no language to this effect previously was included in their arbitration clauses; and (4) selecting arbitrators who may be more or less inclined to entertain the use of summary disposition procedures, so as to promote their interests in this regard.

First, parties drafting arbitration agreements should consider including language in these agreements that expressly authorizes or forbids the use of summary disposition procedures, if they are concerned about the potential availability to them of such procedures. A clause of this sort could broadly authorize the tribunal to decide in its discretion applications for summary disposition filed by the parties. However, a broad clause of this sort would leave open a variety of issues, including what types of summary disposition applications are acceptable, when during the proceedings they can be filed, and what standard the tribunal should apply when deciding them. To clarify these issues, parties might include more specific language in their arbitration clauses. For instance, if parties want to ensure that summary disposition applications akin to American motions to dismiss are available to them, they might expressly authorize such applications in their arbitration clause and instruct the tribunal to decide them using the standard applicable to motions to dismiss brought under Rule 12(b)(6) of the US Federal Rules of Civil Procedure.

Parties can modify the language of their arbitration agreements in numerous ways, so as to obtain their objectives with respect to summary disposition. For instance, a party that is concerned about costs and efficiency, wants to ensure that summary disposition applications are available to it, and wants to be certain that frivolous claims can be dismissed at the outset of any future proceedings without delay, might add temporal language to its arbitration clause specifying when an application to dismiss can be filed (e.g., 'Within thirty days of the date of receipt of the claimant's statement of claim, the respondent may file an application to dismiss all or some of the other party's claims.'), as well as language specifying how long the other side has to reply and by when the tribunal must decide the application. Likewise, parties wishing to exclude summary disposition procedures from any future arbitral proceedings (e.g., because of due process concerns) might include language in their arbitration agreement to that effect (e.g., 'The tribunal shall not entertain any summary disposition applications, including applications to dismiss or for summary judgment, as part of the arbitral proceedings, notwithstanding any otherwise applicable institutional rules to the contrary.'). Because

66 J. Lew, L. Mistelis, *et al.*, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) at 3.

parties are free to negotiate their arbitration agreements however they see fit, there is a wide variety of language that could be included to achieve their goals with respect to availability (or lack thereof) of summary disposition procedures.

Second, when negotiating elements such as the seat of the arbitration and the governing law of the underlying contract, parties should be mindful of how these choices might affect the availability of summary disposition proceedings. In both ICC Case No. 11413 and Case No. 12297, the tribunals considered the laws of the seat and the substantive laws of the parties' underlying contracts when evaluating whether, and if so how, summary disposition procedures should be available to the parties. While other factors undoubtedly will influence parties' choice of seat and governing law, parties concerned about the availability (or lack thereof) of summary disposition procedures should consider how these choices might affect them.

Third, parties to pending arbitral proceedings might attempt to negotiate for the availability or preclusion of summary disposition proceedings, if this issue previously was not addressed in their arbitration agreements. Parties adopting this approach should consider memorializing any such agreements in writing in a way that expressly authorizes or forbids the use of summary disposition procedures by the tribunal. In the absence of express language of this sort, some arbitrators still might question whether they have the authority to utilize summary disposition procedures. For instance, in ICC Case No. 12297, the claimant did not object to the respondent's Application to Dismiss on procedural grounds. Nevertheless, because the parties had not expressly authorized the tribunal to utilize summary disposition procedures, the tribunal conducted an inquiry into whether it had the inherent authority to do so. Accordingly, parties reaching an agreement regarding the use of summary disposition procedures in their pending arbitral proceedings should clearly convey their agreement on this issue to the tribunal.

Fourth, parties concerned about the availability (or lack thereof) of summary disposition procedures can select arbitrators who are more or less inclined to utilize such procedures. At the most general level, an arbitrator from a jurisdiction where summary disposition procedures are widely used may be more inclined to entertain the use of such procedures than an arbitrator from a jurisdiction where such procedures are less routinely utilized. Parties extremely concerned about the availability of summary disposition procedures even could go so far as to select arbitrators who have taken positions in writing on the use of such procedures. For instance, a party wishing to ensure that such procedures are available to it (e.g., because it thinks that the claims against it are frivolous and should summarily be dismissed as hopeless) might consider selecting as their party-appointed arbitrator a leading advocate of the use of summary disposition procedures in international arbitration. Of course, other factors also will influence parties' choice of arbitrators, but if the availability of summary disposition procedures is important, then parties should be mindful of this issue when appointing arbitrators.

By taking some or all of the steps set forth above, parties concerned about the use of summary disposition procedures in international arbitration can—through the exercise of their autonomous choices—determine whether, and if so how, summary disposition procedures will be available to them. In so doing, they will avoid the need for recourse to the unsettled default position in international arbitration regarding the use of such procedures and will obtain a measure of certainty, predictability and control that otherwise would be unavailable.