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How summary adjudication can promote fairness and efficiency in international arbitration

It is beyond cavil that international arbitration has enjoyed enormous success, particularly over the past decade. The neutrality and fairness of the international arbitration forum – along with the near universal enforcement mechanism provided by the New York Convention – have facilitated cross-border investments and transactions, particularly in regions of the world where the local courts are mistrusted by parties. The international arbitration scheme also has allowed parties to engage in multi-billion dollar transactions while secure in the knowledge that they could bring to bear the most sophisticated experts in the relevant field to serve as arbitrators in the event of a dispute. So it is unsurprising that a 2008 survey of corporate counsel conducted by PricewaterhouseCoopers and Queen Mary College, University of London, indicated that major corporations continue to prefer international arbitration as the dispute resolution mechanism for cross-border disputes.

Accompanying this success, however, is the perhaps growing skepticism among users that international arbitration can achieve its other basic promise – efficiency. The corporate counsel in the PwC survey who were unsatisfied with international arbitration cited 'increased costs' and 'delays to proceedings' as the major problems. In 2009, 44 prominent corporations incorporated the Corporate Counsel International Arbitration Group, which aims to provide recommendations related to international arbitration, including how to make it more timely and cost effective. Such concerns have prompted Debevoise & Plimpton LLP to issue a public Protocol to Promote Efficiency in International Arbitration, identifying 25 specific procedures that the firm commits to discuss with clients to make arbitration more efficient in each case.

It is against this backdrop that the *ABA Journal* published an article in its April 2010 issue asserting 'International Arbitration Loses Its Grip', and posing the question, 'Are US lawyers to blame?' The ABA article suggests that arbitrations have become unwieldy, expensive, and time-consuming, and that American-style litigation tactics are at the root of the problem. As is often the case, the truth of the matter is far more complex than the stark dichotomy between US-trained counsel on the one hand and counsel from civil law jurisdictions on the other. Depending on the posture of the case and the strategic considerations specific to a client, counsel from all jurisdictions can find themselves in the position of considering whether to ask for expansive discovery or further briefing. But perhaps more importantly, the blanket indictment of US-style procedures misses a basic point: the practice of summary adjudication, as seen in the American (and English) legal systems, can actually promote efficiency in international arbitration.

The twin goals of fairness and efficiency

The ideal international arbitration meets the twin, equally fundamental goals of fairness and efficiency. In the revised UNCITRAL Arbitration Rules, for example, proposed Article 17 contains new language providing that '[t]he arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.' The classical approach views fairness and efficiency as competing objectives on the assumption that each additional measure of process may also lengthen the proceeding and make it more expensive and perhaps inefficient. Therefore, the logic goes, meeting the two objectives of fairness and efficiency requires a constant balancing. However, this approach assumes that fairness requires the most process available, typically defined as a full evidentiary hearing, which is not always the case. As many practitioners familiar with summary adjudication procedures are aware, it is frequently possible to narrow or entirely dispose of a case short of a hearing while respecting basic fairness.

Sequential versus summary disposition

Not all early dispositions are created equal. As Judith Gill points out in her 2009 article in the *ICCA Congress Series*, early disposition can take

two forms: sequential disposition and summary disposition. In sequential disposition, the tribunal determines the issues in sequence, such that a potentially dispositive issue is resolved early in the process, after full fact-finding related to that particular issue. In summary disposition, the tribunal determines the issues on an expedited, summary basis, with more limited information and evidence. While sequential disposition is seen as a common occurrence in international arbitration, summary disposition has garnered a fair amount of criticism.

Few would argue with the idea that some potentially dispositive issues are ripe for early disposition without a hearing; for instance, where resolution of a claim hinges upon a purely legal interpretation of a contractual provision, or the application of law to undisputed facts, such as a time limitation, or the validity of a release. For example, the preamble of the IBA Rules of Evidence encourages early identification of issues 'where a preliminary determination may be appropriate', and Article 16 of the AAA International Arbitration Rules state that parties should 'focus their presentations on issues the decision of which could dispose of all or part of the case.' In such instances, the arbitrator has heard all the evidence relevant to that particular issue without the need for an oral hearing, and even if that issue disposes of the entire case, the losing party can hardly argue that full process has not been provided. For example, a recent case handled by Debevoise involving political risk insurance presented the factually complicated question of whether certain assets had been expropriated. Rather than start there, however, the tribunal accepted the suggestion of Debevoise (who was representing the Overseas Private Investment Corporation in the dispute) that it first ascertain the net asset value at the time of the alleged expropriation, which would have been the compensation if an expropriation had occurred. This value turned out to be negative, resolving the case without the need for extensive and likely complex fact-finding regarding whether an expropriation had occurred.

Like sequential disposition, summary disposition also can be a useful tool without compromising fairness. Unlike sequential disposition, where all of the evidence relevant to a particular issue has been heard, summary dispositions arise in contexts where there are underlying facts that one party disputes, but where there is a basis for finding that there is no genuine issue of material fact precluding resolution without a full hearing. As a result, summary dispositions involve a tribunal reaching its conclusions on more limited information or evidence. It is precisely that circumscription of the evidence heard that has made summary disposition highly contentious in some circles. The controversy is in some sense understandable. Unlike the court system, the context and culture of arbitration is one of consent – both parties must agree to arbitration and therefore if one party objects to summary disposition arbitrators may be very reluctant to proceed without allowing the objecting party to present all of its evidence. Arbitrators may also be concerned (unnecessarily) that proceeding on a summary basis may in fact risk non-enforcement under the New York Convention.

Enforcement issues

In fact, when it comes to enforcement, arbitrators and parties should be emboldened in their use of summary adjudication, because there is no empirical evidence that its use negatively affects enforcement. A search of both federal and state cases in the United States, for instance, reveals few instances of a court faced with a challenge to enforcement of an arbitral award because the tribunal had summarily disposed of claims. Recently, in 2008, a California federal district court in *LaPine v Kyocera Corp*, 2008 US Dist LEXIS 41172 (22 May 2008 NDCal), considered the question under the New York Convention and dismissed as frivolous the plaintiff's assertion that 'the lack of legal precedent regarding summary adjudication in an international arbitration automatically means that the panel exceeded its power.'[1]

Outside the context of the New York Convention, in 2009, a New York federal court in *Global International Reinsurance v Tig Insurance*, 2009 US Dist LEXIS 7697 (20 January 2009 SDNY), similarly refused to entertain a challenge to a domestic arbitral award on the basis that the arbitrator had granted a request for summary disposition, reasoning, '[i]t is well-established… that arbitrators have "great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings."… Accordingly, arbitrators may proceed "with only a summary hearing and with restricted inquiry into factual issues".'[2] These courts did not hesitate in dismissing such challenges to enforcement, and the dearth of decisions to the contrary should provide strong comfort that at least in the United States, summary adjudication does not come at the cost of the ability to enforce an award.

Summary adjudication in the ICSID context

ICSID arbitration rule 41(5), instituted in 2006, provides an indication that some form of summary disposition is gaining acceptance in the arbitration community. Rule 41(5) allows a respondent to file a preliminary objection 'that a claim is manifestly without legal merit.' Only two ICSID tribunals that have had the opportunity to consider applications for dismissal under this rule. The first tribunal, in *Trans-Global Petroleum, Inc v Jordan*, ICSID Case No ARB/07/25, dismissed one claim under rule 41(5), as manifestly without legal merit because the right the claimant asserted did not exist under the relevant bilateral investment treaty.

The second tribunal, in *Brandes Investment Partners, LP v Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/3, rejected the rule 41(5) objection, determining that the complex factual and legal issues involved could not be resolved in summary proceedings. The *Brandes* tribunal clarified that 'the factual premise [of Claimant's case] has to be taken as alleged by Claimant.' The tribunal also observed that 'manifestly' is a much higher threshold than a *prima facie* requirement and agreed with the *Trans-Global Petroleum* tribunal 'that the ordinary meaning of the word [manifest] require[s] the respondent to establish its objection clearly and obviously, with relative ease and dispatch.' It therefore seems that the bar for claimants set under rule 41(5) is low, at least as interpreted by the two tribunals to consider it. Only time will tell if the rule will be effective in weeding out unmeritorious cases early in a proceeding.

The way forward

Fortunately, while not explicitly providing for summary adjudication, the principal institutional and ad hoc rules that govern international arbitration provide great latitude to the parties and arbitrators in structuring an arbitration. And as some commentators have observed, the culture of arbitration may be shifting. For example, proposed Article 17 of the UNCITRAL Arbitration Rules (which revises current Article 15) amends the standard that '*at any stage* of the proceedings each party is given *a full opportunity* of presenting his case' to the more flexible standard that '*at an appropriate stage* of the proceedings each party is given *an opportunity* of presenting its case.' By circumscribing the timing and scope of a party's opportunity to present its case, the proposed Rules provide greater flexibility to arbitrators willing to consider summary disposition of claims. The question then is whether and how parties and arbitrators use the discretion built into most arbitration rules to increase efficiency. As David W Rivkin pointed out in his speech at the 2002 conference of the International Bar Association held in Durban, South Africa, the question may also be one of packaging; many arbitrators would perhaps be more favourably inclined towards requests to decide 'preliminary issues' that may dispose of the entire case, rather than requests termed as summary dispositions.

Of course, summary adjudication requests – whatever they are called – should not be overused in international arbitration, as arbitrators will not look kindly upon a litigation-style approach. But at the same time it would behoove the international arbitration community to bring to bear procedural options like summary adjudication, which in appropriate circumstances can further efficiency without compromising fairness.

Notes

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1 *LaPine v Kyocera Corp*, 2008 US Dist LEXIS 41172 (22 May 2008 NDCa) at *10.

2 *Global International Reinsurance v Tig Insurance*, 2009 US Dist LEXIS 7697 (20 January 2009 SDNY) at *3-4.