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## The Emergence of Early Disposition Procedures in International Arbitration ↓

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**ABSTRACT**

International arbitral institutions have begun adding early disposition procedures to their rules. This began as a trickle in 2006 when the ICDR became the first institution to add an early disposition rule. It has turned into a flood, with seven major institutions adding procedures in the past five years. There are important differences among the early disposition procedures adopted by various institutions, but those procedures share certain characteristics. They generally impose a high standard of review that must be satisfied to obtain early disposition. Further, many institutions' procedures are limited in the types of issues that can be raised and the time within which an application for early disposition must be made and disposed of. The absence of early disposition procedures has long been a weakness of international arbitration. The advent of these procedures is one of the most significant shifts in international arbitration procedure in recent memory. This article charts the emergence to early disposition procedures and the arguments for and against them. It reviews the procedures adopted to date and compares them with one another. Finally, it concludes with some reflections on current early disposition procedures and ideas for their further development.

In the last few years, international arbitration institutions have begun adding provisions to their arbitration rules allowing parties to seek disposition of claims, defenses and other non-jurisdictional issues prior to a full evidentiary hearing. This is a potentially seismic shift in arbitral procedure. Early disposition procedures allow hopeless claims and defenses to be disposed of early in the proceeding. Until 2006, no major set of international arbitration rules provided an early disposition procedure. The broad procedural discretion typically bestowed on arbitral tribunals arguably would have allowed them to use early disposition mechanisms without explicit authorization. In practice, however, early disposition has been vanishingly rare, most likely because of unfounded fears that it would invite a challenge to the tribunal's award on the ground that the party whose claim was dismissed did not have a fair opportunity to present its case. As a consequence, absent a jurisdictional or other foundational objection, parties to arbitration generally had no way to dispose of hopeless claims or defenses short of a full merits hearing. ●

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Change began slowly. In 2006, the International Centre for Settlement of Investment Disputes (ICSID) introduced an early disposition procedure to its arbitration rules. No other international arbitral institution followed suit in the next decade. In the past five years, however, seven major institutions have added early disposition rules.

Early disposition rules vary significantly in scope and content, and many rules—both institutional and non-institutional—still have not adopted early disposition provisions. As a result, the extent to which early disposition procedures will be available in a given case turns on the rules selected by the parties to govern their dispute. Some rules provide relatively broad opportunities to seek early disposition of hopeless claims and defenses. Others allow early disposition only of narrowly defined issues or on a highly compressed time-frame. Yet others—including the UNCITRAL Rules and the rules of the World Intellectual Property Organization (WIPO), the China International Economic and Trade Arbitration Commission (CIETAC), and the German Arbitration Institute (DIS)—do not address early disposition at all.

The availability and scope of early disposition can have a profound impact on the course of an arbitration. Accordingly, users of international arbitration—and their legal advisors—should be aware of the differences in early disposition procedures among arbitration rules and should carefully consider which procedures are most appropriate to their transaction before stipulating to a particular set of rules in an arbitration agreement.

**1. WHAT IS MEANT BY EARLY DISPOSITION PROCEDURES?**

It is important to define what early disposition means. For purposes of this article, early disposition procedures refer generally to procedures for the resolution and disposition of claims, defenses or other issues at a preliminary stage before a full merits hearing, without prejudice to what form those procedures may take. Early disposition procedures may be limited solely to written submissions or could involve a hearing. If a hearing is involved, it could be limited to argument or include the taking of evidence. The only necessary limiting factor is that early disposition procedures must involve something less than a full merits hearing.

Some commentators refer to 'summary disposition' rather than 'early disposition'. (1) |

P 837 prefer the latter to avoid the suggestion that issues will be given less attention than ● they would receive in a full merits hearing. The purpose of early disposition is not to decide issues with a lower level of scrutiny, but rather to address important issues that do not depend on the consideration of evidence, or that depend on only limited evidence. In addressing issues on early disposition, matters to be decided should be given every bit as much attention as they would receive after a full merits hearing. Indeed, they may receive more focused attention for having been severed from the rest of the case and highlighted for separate treatment.

Early disposition procedures should be distinguished from sequencing an arbitration into phases, such as liability and damages. Sequencing is historically common and uncontroversial; early disposition is not. Sequencing involves separation of severable sets of issues where one set of issues is presented and determined in the normal course after which the next set of issues is presented and determined in the normal course. When an arbitration is sequenced into phases, it typically involves a full evidentiary hearing for each phase. In contrast, early disposition procedures are aimed at resolving important issues that are capable of being decided without a full evidentiary hearing.

## 2. EARLY DISPOSITION PROCEDURES IN INTERNATIONAL ARBITRATION

Until 2006, none of the major sets of arbitration rules included early disposition procedures. This changed when ICSID amended its rules to add Article 41(5) (among other changes), which allows a party, within 30 days of the constitution of the Tribunal, to file an objection that a claim is ‘manifestly without merit’.

In 2011, the International Institute for Conflict Prevention & Resolution issued a set of Guidelines on Early Disposition of Issues in Arbitration (the ‘CPR Guidelines’ or ‘Guidelines’). The Guidelines are designed to provide guidance to tribunals in crafting and employing early disposition procedures in any arbitration ‘unless the rules selected by the parties expressly prohibit summary disposition’, which the Guidelines envisioned being ‘rare’. (2) However, the Guidelines do not appear to have been widely used. Arbitrators generally have been reluctant to employ early disposition procedures absent explicit authorization. (3)

In the last five years, there has been a rapid shift toward the adoption of early disposition rules. This started with the 2016 amendments to the Singapore International Arbitration Centre’s (SIAC) International Arbitration Rules and the JAMS International Arbitration Rules. SIAC added current Rule 29, titled ‘Early Dismissal of Claims and Defences’. Rule 29 follows ICSID’s example by allowing early dismissal only of claims or defenses that are ‘manifestly’ without legal merit or outside the jurisdiction of the Tribunal. (4) However, Rule 29 also includes significant innovations, including a two-step process by which a tribunal first makes a preliminary decision on whether to allow an early disposition application to proceed before ● hearing submissions and making a determination on the merits of the application. (5) JAMS added current Article 26.1, which allows a tribunal to permit any party to file a motion for summary disposition of a claim or issue, provided the other party or parties are given a reasonable opportunity to respond. (6)

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On January 1, 2017, SIAC adopted amended Investment Arbitration Rules which included the addition of a new Rule 26 substantially identical to Rule 29 of its Arbitration Rules. On the same day, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) also amended its Arbitration Rules. Among other changes, the amendments added a new ‘Summary procedure’ at Article 39. SCC Article 39 shares many features with SIAC Rule 29, including the two-step process for considering an application. SCC Article 39 also breaks new ground with regard to the types of matters that can be resolved through early disposition and the applicable standard of review. (7) These innovations are discussed below.

In 2018, the Hong Kong International Arbitration Centre (HKIAC) adopted revised arbitration rules, which include an ‘Early Determination Procedure’ set out in Article 43. The London Court of International Arbitration (LCIA) also added early disposition provisions to its arbitration rules through amendments effective 1 October 2020. And, on 1 January 2021, the International Chamber of Commerce (ICC) issued a Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration stating that ‘[a]ny party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal’s jurisdiction’. Most recently, the International Centre for Dispute Resolution (ICDR) adopted amended rules on 1 March 2021, adding a new Rule 23 on early disposition procedures.

Thus, at this point, ICSID, SIAC, JAMS, SCC, HKIAC, LCIA, ICC and ICDR all have adopted some form of early disposition procedure. Together, this accounts for six of the eight largest arbitration institutions in terms of number of cases filed annually. (8)

Several major institutions still have not adopted early disposition procedures, including DIS, CIETAC, WIPO and the Korean Commercial Arbitration Board (KCAB). Moreover, many international arbitrations are *ad hoc* proceedings held under the UNCITRAL Rules. The UNCITRAL Rules were last amended in 2013 and they do not include an early disposition procedure. The UNCITRAL Rules give the tribunal broad power to ‘conduct the arbitration

in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case'. (9) A tribunal's broad procedural discretion coupled with its duty ● to conduct the proceedings efficiently (10) could be construed to require it to employ early disposition procedures in appropriate cases. (11)

In sum, there has been a rapid and dramatic shift towards the incorporation of early disposition procedures into international arbitration rules, though with considerable variation. These variations are discussed in detail in Section 4 below. However, many arbitration rules still do not provide early disposition procedures, and this is an area likely to see continuing rapid development in the coming years as additional institutions amend their rules to provide such procedures while others fine tune procedures as experience accumulates. The availability and scope of early disposition thus will depend on which rules the parties select as part of their agreement to arbitrate. .

### 3. THE PROS AND CONS OF EARLY DISPOSITION RULES

Commentators have made competing arguments over whether early disposition procedures are desirable. The primary argument in favor is that they will make arbitration faster and more efficient. Efficiency (actual or perceived) is one of the chief selling points of arbitration as an alternative to litigation. (12) The traditional absence of early disposition procedures made this argument difficult to maintain in certain circumstances.

At least in the courts of the United States and other common law countries, legally defective claims can be dismissed or stricken very early in the life of a case. For example, the Federal Rules of Civil Procedure allow a defendant, before filing an answer (roughly equivalent to a response to the request for arbitration in arbitration), to file a motion to dismiss the complaint on the grounds that it fails 'to state a claim upon which relief can be granted[.]' (13) This allows the court at the earliest stage of the case to dismiss one or more claims or counterclaims where the facts alleged—which are accepted as true and construed in the light most favorable to the non-moving party—fail to establish a legally sufficient cause of action. (14) Later in the case, after the parties have had an opportunity to take discovery, either party may move for summary judgment of one or more claims or defenses on the grounds that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. (15) In practice, this means that, if a party is unable to muster any evidence to establish a necessary element of a claim or defense, then that claim or defense will be eliminated from the case. The court does not weigh competing evidence or make credibility determinations. (16) It determines only whether the non-moving party has produced evidence that, if credited, could support a judgment in its favor. (17) ●

International arbitration traditionally has provided no avenue, short of a full merits hearing, to dispose of claims or defenses that are legally defective or lacking any evidentiary support. Arbitration rules have typically given tribunals broad discretion to determine procedure. (18) Several commentators argue that this discretion is sufficient to allow for early disposition procedures absent express authorization (19), but others disagree. (20) In any event, regardless of whether tribunals *could* consider applications for early dismissal of claims, defenses or issues, there seems to be a consensus that in practice tribunals very rarely do so absent express authorization.

This created an anomaly in which arbitration, while being promoted as a more efficient alternative to litigation, had no means to dispose efficiently of legally or evidentially hopeless claims. As Adam Raviv observed, 'the more meritless a case, the more likely that submitting it to arbitration will dispose of it less efficiently than resolving it in court.' (21) Claims that could be dismissed at the outset of litigation as legally flawed, or prior to trial on the grounds that they lack minimum evidentiary support, could not be disposed of in arbitration short of a full merits hearing.

Another powerful argument in favour of early disposition procedures is that they facilitate settlement. (22) An early arbitral resolution of discrete claims, defenses or issues can go a long way to narrowing parties' respective assessments of the value of a case. To be sure, disputed issues will sometimes involve competing evidence and be inherently unsuited to early disposition. Often, however, parties will disagree on points of law, or on whether the evidence is (or is not) sufficient to support a given claim or defense regardless of credibility issues. Although reliable statistics are not available, it is reasonable to conclude that procedures that make it possible to resolve these types of issues without a full evidentiary hearing will often pave the way for settlement.

It also has been argued that procedures for early disposition will discourage parties from pleading frivolous claims and reduce the number of strike suits, but these arguments seem more attenuated. (23) Unlike US litigation, the general practice in ● arbitration is for the unsuccessful party to bear the reasonable costs and attorneys' fees of the prevailing party. (24) This creates a strong disincentive to asserting frivolous claims. However, this disincentive is not effective where the claimant is judgment-proof or in arbitrations subject to the 'American Rule' under which the parties bear their own costs and legal expenses regardless of which party prevails. Early disposition procedures may not dissuade claimants in these circumstances from pursuing frivolous claims in the hope

of obtaining an early settlement, but they may provide a relatively speedy and inexpensive way to dispose of such claims.

The arguments against early disposition are less compelling. Some fear that early disposition procedures may result in a denial of due process. (25) While it is certainly legitimate to demand that no party is deprived of its right to due process, there is no reason to think that appropriately crafted early disposition procedures would result in such a deprivation. As noted, early disposition procedures are widely available in litigation. In federal and state courts in the United States, parties can move to dismiss legally defective claims and for summary judgment of claims lacking essential evidentiary support. This author is not aware of any court having denied enforcement to a US judgment on the grounds that these procedures constitute a denial of due process or of any serious argument having been made to that effect.

Concern also has been expressed that early disposition procedures would add to the complexity of proceedings and result in longer and costlier arbitrations. (26) This is not borne out by available data. An analysis of ICSID cases from 2006 through 2017 found that parties availed themselves of the summary disposition procedure in only 6.1 per cent of cases. (27) Approximately 15 per cent of applications were wholly successful and another 15 per cent were partially successful. (28) These figures are broadly consistent with data from federal litigation in the United States. An analysis has shown that parties file summary judgment motions in only approximately 20 per cent of cases, and that in more than one-third of those cases the motions were successful in terminating the matter. (29)

Even when unsuccessful, early disposition applications in ICSID cases are correlated with shorter arbitrations. The average duration of an ICSID case in which a Rule 41(5) application was filed was more than a year shorter than the duration of ICSID arbitrations generally. (30) There are several possible explanations for this counter-intuitive phenomenon. One explanation is that Rule 41(5) applications tend to be filed in cases that are weaker. (31) It also is plausible that Rule 41(5) applications ● focus the parties' and Tribunal's attention on key issues early on, which leads to more efficient proceedings. (32) Further, as discussed below, an application for early disposition under the ICSID rules must be filed and disposed of very early, and therefore is unlikely to significantly delay further proceedings. Whatever the ultimate explanation, however, a decade of experience with ICSID's early disposition procedures shows that they are correlated with faster and more efficient arbitrations.

Some commentators also have expressed concern that early disposition procedures would represent an 'encroaching Americanization of international arbitration'. (33) However, if early disposition procedures make international arbitration more efficient, just, speedy and attractive to users, surely they should not be rejected for being too 'American'. Nor is it clear why such procedures are properly characterized as uniquely American. Early disposition procedures are available in many litigation systems.

On the whole, the potential benefits of early disposition procedures appear to outweigh their drawbacks. Whatever commentators may think of early disposition procedures, there is no doubt that many current and potential users of international arbitration prefer them to be available. As discussed above, most of the major arbitral rules already have adopted some form of early disposition procedures. The ICC found in a 2016 report that the absence of early disposition procedures is one of the reasons that financial institutions have generally preferred litigation in London or New York over international arbitration. (34) A 2018 survey found that 'expedited procedures for claims' and 'summary determination procedures' were considered the most favoured improvements and innovations to arbitration procedure for the banking and finance industry, and were also rated highly by other key industries. (35) Similarly, a 2019 survey of the construction industry found that summary disposal of unmeritorious claims or defenses at an early stage ranked highest among proposed innovations to improve efficiency in international arbitration. (36)

There is little doubt that badly crafted early disposition procedures could fail to provide due process and could be overused and lead to more complex, longer and costlier arbitrations. But there are ways to mitigate these risks. Leave of the Tribunal can be required before an application for early disposition may be brought. A party bringing an unsuccessful application can be required, or presumed, to be responsible for the costs incurred by the other party and Tribunal in connection with the application. The grounds for early disposition may be limited to dissuade applications except in relatively clear cases involving key claims, defenses or issues. Limits also can be imposed on the time for filing or ruling on an application. ●

The appropriate combination of limitations will depend on how the benefits of early disposition procedures are weighed against their potential drawbacks. Limitations will inevitably be added, removed, tightened or loosened as experience accumulates. However, it should be possible without too much difficulty to achieve a reasonable balance that retains the main advantages of early disposition while avoiding its most serious drawbacks.

#### 4. EARLY DISPOSITION PROCEDURES IN CURRENT ARBITRAL RULES

As discussed above, early disposition procedures have now been adopted by ICSID, JAMS,

SIAC, SCC, HKIAC, LCIA, ICC and ICDR. Each institution's procedure is unique, reflecting how each has attempted to balance the benefits and drawbacks of early disposition. This section identifies and discusses the main differences among these procedures.

### A. Matters that can be raised for early disposition

ICSID is most restrictive in the types of issues that can be resolved through an application for early disposition. ICSID allows an application only on the basis that 'a claim is manifestly without legal merit'. (37) This imposes two requirements that any issue must satisfy to be eligible for early disposition. First, the issue must be dispositive of a 'claim'. The ICSID rules do not allow early disposition of a defense or any other issue not dispositive of a claim. Secondly, the issue must go to the 'legal merit' of a claim. This includes defects of jurisdiction, admissibility, legal viability or the underlying theory of recovery under applicable law. (38) However, the ICSID rules have been construed not to permit early disposition on factual or evidentiary grounds. (39)

The SIAC, LCIA and ICC provisions are broader in that they allow an application for early disposition of either a claim or defense. (40) SIAC limits challenges to a lack of 'legal merit'. Following ICSID, this likely will be construed to prohibit challenges on factual or evidentiary grounds. In contrast, the LCIA rules and the ICC Note allow challenges based on any lack of 'merit', not just a lack of 'legal' merit. This suggests that early disposition under the LCIA rules and ICC Note can be sought on factual or evidentiary grounds as well as purely legal grounds. (41)

P 844 The SCC, HKIAC, ICDR and JAMS early disposition rules are broader still. Respectively, they allow an application for early disposition to be brought regarding ● 'any issue of fact or law material to the outcome of the case', (42) 'one or more points of law or fact', (43) 'any issue presented by any claim or counterclaim in advance of the hearing on the merits' (44) and any 'particular claim or issue'. (45) These formulations encompass both factual and legal issues. Further, they are not limited to issues that are dispositive of claims or defenses, but also extend to issues that may significantly impact further proceedings without fully disposing of any claim or defense. The ICDR formulation—'any issue presented by any claim or counterclaim in advance of the hearing on the merits'—could be construed to exclude issues raised by a defense. However, it also could be argued that a claim or counterclaim implicitly puts at issue any potential defenses to it. It is not clear how these arguments will play out in practice.

In summary, institutions have confronted three broad questions in limiting the types of matters that may be decided through an application for early disposition: (i) whether early disposition applications are confined to the legal merits or also may reach the factual merits? (ii) Whether an application properly may challenge only a claim or also may challenge a defense? And (iii) whether an application may properly be brought only to dispose of one or more claims or defenses, or also may seek the determination of significant but non-dispositive issues?

### B. The standard of review

Most institutional rules require a defect to be 'manifest' to be subject to early disposition. Article 41(5) of the ICSID rules requires a showing that a claim is 'manifestly without legal merit'. The SIAC rules allow early disposition if a claim or defense is 'manifestly without legal merit' or 'manifestly outside the jurisdiction of the Tribunal'. (46) The ICC Note allows early disposition of claims that are 'manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction'. (47)

P 845 The requirement that a defect must be 'manifest' appears to create a very high standard for obtaining early disposition. ICSID tribunals have interpreted the requirement as demanding that the objecting party 'establish its objection clearly and obviously, with relative ease and dispatch'. (48) This does not require the matter at issue to be simple. It may be complicated and, in rare cases, require 'successive rounds of written and oral submissions'. (49) However, the ultimate resolution 'should never be difficult'. (50) This seems to preclude early disposition on the basis of close questions with regard to which both sides have reasonable arguments. Although there is no extant case law addressing the meaning of 'manifest' in the SIAC rule and ICC Note, it ● is likely that tribunals will find persuasive the ICSID cases construing very similar language.

There are exceptions—or potential exceptions—to the requirement that a defect must be 'manifest'. First, ICDR and JAMS do not articulate any standard of review, leaving it entirely within the discretion of the arbitral tribunal. (51)

Secondly, the LCIA rule allows summary disposition of claims that are "inadmissible," without the qualification that they must be *manifestly* inadmissible. (52) The omission of this qualification appears to denote a lower standard, particularly when contrasted with other parts of the same rule that allow for disposition of claims that are 'manifestly outside the jurisdiction of the Arbitral Tribunal' and 'manifestly without merit'. This is a curious choice because there is no obvious reason that defects regarding admissibility should be subject to a different standard of review. Further, making the standard of review turn on the distinction between jurisdiction and admissibility has practical problems. The distinction has only recently been recognized in many leading jurisdictions, (53) there is no universally accepted test for distinguishing jurisdiction and



admissibility, (54) and courts and tribunals frequently characterize as jurisdictional matters that arguably should be considered questions of admissibility. (55)

Third, the SCC and HKIAC create explicit exceptions to the ‘manifest’ requirement. While the SCC and HKIAC Rules allow early disposition of claims or issues that are ‘manifestly unsustainable’, (56) ‘manifestly without merit’ (57) or ‘manifestly outside the arbitral tribunal’s jurisdiction’, (58) they each also allow early disposition of an additional category. The SCC rules allow early disposition where:

P 846 even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law. (59) ●

And the HKIAC rules allow early disposition where

even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party. (60)

These formulations are similar, but the SCC rule requires the tribunal to accept as true only the facts as alleged by the non-applying party, while the HKIAC rule requires the tribunal to accept both the facts and points of law alleged by the non-applying party. (61) Both rules appear to allow dismissal for certain defects that are not ‘manifest’, and neither rule specifies the standard to be applied under this exception, implicitly leaving it to the discretion of the tribunal. These exceptions apply only where the purported defect is such that it would make it impossible for any award to be rendered in favor of the opposing party. This may be construed to require that the defect must undermine a party’s entire case, and not just a particular claim, defense or other issue.

Finally, the SCC Rules include a broad, catch-all exception, stating that early disposition may be granted on a showing that:

any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure. (62)

This appears to allow a tribunal to grant early disposition of any issue, without the requirement that a defect be ‘manifest’, provided that it determines that the issue is ‘suitable’. As discussed below, however, Section (3) of Article 39 of the SCC Rules requires a party to demonstrate in its application that early disposition ‘is efficient and appropriate in all the circumstances of the case’, and Section (4) allows the tribunal to dismiss the application for failure to convincingly make such a showing. Accordingly, before any application may proceed, the tribunal must make a determination that the issues are suitable for early disposition. It is not clear what additional showing or determination is required for an application to proceed under Article 39(2)(iii).

In summary, existing rules typically incorporate exacting standards of review under which an issue may be subject to early disposition only if a defect is ‘manifest’, which has been construed to mean ‘clear and obvious’. Although exceptions exist, they tend to be either narrow (HKIAC), unclear (SCC), or both (LCIA). ICSID and JAMS are outliers in that they do not prescribe a standard of review—exacting or otherwise—and instead leave the tribunal with full discretion on what types of inquiry may be appropriate.

### C. Leave of the tribunal

P 847 Most early disposition rules establish a two-step process by which the tribunal first makes a preliminary decision on whether to allow an application to proceed and then, after further submissions and, potentially, a hearing, rules on the merits of the application. SCC Rule 39 is typical. Section (3) states that an application for early disposition must specify ‘the form of summary procedure proposed and demonstrate that such procedure is efficient and appropriate in all the circumstances of the case’. (63) Section (4) states that the tribunal must provide the other party or parties an opportunity to comment, after which it must decide whether to dismiss the application or fix the procedure for it to proceed. (64) In deciding whether to allow the application to proceed, the tribunal must ‘have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute’. (65) The HKIAC and ICC early disposition provisions are similar in this regard. (66) The JAMS rule states that a tribunal ‘may permit’ a ‘Motion for Summary Disposition’, but provides no guidance as to the form for requesting leave to file such a motion or the criteria under which a request should be evaluated.

In contrast, the ICDR Rules set out criteria that must be met for an application to be allowed to proceed. Article 23(1) states that ‘[t]he tribunal shall allow a party to submit an application for early disposition if it determines that the application (a) has a reasonable possibility of succeeding, (b) will dispose of, or narrow, one or more issues in the case, and (c) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits’. (67) While not required, it is likely that tribunals applying the SCC, HKIAC and ICC provisions will consider these or similar criteria.

The ICSID and LCIA early disposition rules are atypical in that they do not establish the

tribunal as a gatekeeper to determine whether an application may proceed before briefing and consideration on its merits. Instead, they state only that, before ruling on the application, the tribunal must provide the other party or parties an opportunity to present their views.

#### D. Time limits for filing an application

Early disposition rules vary significantly with regard to time limits within which the parties and tribunal must act. The SCC, LCIA, ICDR and JAMS Rules do not establish any time limit either for a party to file an application for early disposition or for the tribunal to dispose of it. The absence of an explicit time limit, however, should not be taken as an invitation to delay, as a tribunal is likely to be more favorably disposed to an application brought promptly.

P 848 In contrast, ICSID imposes a strict deadline requiring any application for early disposition to be filed 'no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal'. (68) The ICSID rule states ● that the tribunal must dispose of the application 'promptly', but does not establish a particular deadline within which it must act. (69)

The SIAC and HKIAC Rules do not create specific deadlines by which an application must be filed, but they impose strict deadlines for the tribunal to dispose of an application. The SIAC rule requires the tribunal to dispose of the application within 60 days of the date it is filed unless, in exceptional circumstances, the Registrar extends the time. (70) This is a very truncated timeline given the two-step process discussed above. Once a party files an application, a tribunal has just 60 days to decide whether to allow it to proceed, order a briefing schedule, schedule and hold any necessary hearings, and issue an order or award.

The HKIAC procedure is similar but slightly less compressed. Although HKIAC does not impose a strict deadline for filing an application, it states that an application must be filed 'as promptly as possible after the relevant points of law or fact are submitted'. (71) The tribunal has 30 days from the date of filing to decide whether to allow the application to proceed and, if it does, to fix the procedure that will apply to the application. (72) Starting from the date of its decision to allow an application to proceed, the tribunal has 60 days to decide the merits of the application. (73) Thus, in total, an application must be resolved within 90 days of filing. These deadlines can be extended by agreement of the parties or by the HKIAC. (74) The tight deadlines imposed by the HKIAC and SIAC Rules seem to make it very difficult—if not impossible—to resolve issues of significant complexity through the early disposition procedure.

#### E. Cost shifting

P 849 Cost shifting may be used as a tool to prevent the feared overuse of early disposition applications. However, the drafters of institutional early disposition rules have not done so. The ICSID, SIAC, SCC, HKIAC, LCIA, ICDR and JAMS Rules do not address cost shifting in the context of applications for early disposition. Each set of rules includes general provisions allowing the tribunal to fix and allocate the costs of arbitration. Although some of the rules permit a tribunal to apportion costs at any stage of the proceedings, others appear to require apportionment of costs to be done only in an award. (75) In any case, the absence of an express reference to cost shifting in the context of an early disposition procedure indicates that cost apportionment is not viewed as a necessary or important part of the early disposition process. ●

In contrast, the ICC Note states that, in ruling on an application, 'the arbitral tribunal may decide on the costs of the application pursuant to Article 38 or reserve this decision to a later stage'. (76) This is consistent with Article 38 of the ICC rules, which states that the tribunal may make decisions on costs '[a]t any time during the arbitral proceedings[.]'

### 5. REFLECTIONS

The accelerating adoption of early disposition rules is encouraging. The lack of a procedural means for early disposition of hopeless claims has long been a weakness of international arbitration. Early disposition procedures have both benefits and drawbacks, but the benefits outweigh the drawbacks. This is particularly so given the availability of measures that can effectively mitigate the main drawbacks.

Although a welcome improvement on the *status quo ante*, existing early disposition rules are by and large cautious and restrictive, perhaps overly so. It is understandable that some rules limit early disposition to issues that are dispositive of claims, to the exclusion of defenses or non-dispositive issues. Early disposition of defenses or non-dispositive issues may be less likely to significantly streamline an arbitration, and opening up the procedure to such issues increases the danger of overuse. As experience accumulates it will no doubt help determine which rules strike the best balance on this question.

The requirement that most defects must be 'manifest' to provide the basis for early disposition makes sense for factual issues turning on conflicting evidence, but is harder to justify for legal issues. Evidence may be supplemented or appear in a different light after a full hearing, including cross-examination. Accordingly, where there is a close

question as to whether the written evidence submitted by a party, if accepted as true, is sufficient to support a claim or defense, it makes sense to wait until that evidence has been placed in its full context before reaching a final conclusion. However, if a claim or defense stands or falls on the tribunal's determination of a contested point of law, that issue should be open to determination on early disposition regardless of whether it involves a difficult or close question. By definition, pure issues of law do not turn on the evidence. It therefore makes little sense to insist on a full evidentiary hearing before deciding difficult legal issues where doing so early could end or significantly streamline the arbitration.

The impact of the 'manifestly without merit' standard is mitigated somewhat in the SIAC and HKIAC rules, which appear to allow consideration under a lower standard where granting the application would resolve the entire case. However, there is no apparent reason why it would be inappropriate to determine a difficult issue of law early in an arbitration if it disposes of substantial parts of a case, but not the whole thing. The tribunal will need to determine difficult issues of law sooner or later unless the claim(s) to which they pertain are abandoned. Delaying a determination until the end of the proceeding will not improve the quality or efficiency of the tribunal's decision-making, and may result in the wasteful presentation of ultimately irrelevant evidence and briefing. ●

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The highly compressed time-frames established by the SIAC rules and, to a lesser extent, the HKIAC rules, may also result in an overly restrictive or unworkable process. It seems unrealistic to require a tribunal within 60 days (SIAC) or 90 days (HKIAC) to review an application for early disposition, decide whether to allow it to proceed, establish the applicable procedure, obtain further briefing from the parties, schedule and hold a hearing (if appropriate), and issue its determination on the merits. This timeframe seems likely either to produce hasty determinations or to allow early disposition only of very straightforward issues that do not require significant briefing, evidence, or argument.

On the other hand, the general absence of provisions allowing the tribunal to make an unsuccessful applicant responsible for costs and attorneys' fees incurred as a result of the application seems like a missed opportunity. The main drawback of allowing early disposition applications is the danger that they will be overused and cause arbitrations to become more costly and complex. Allowing a tribunal to assess costs against an unsuccessful applicant would provide a powerful incentive for parties to refrain from bringing weak applications or filing applications as a matter of course. Tribunals retain the general authority to fix and allocate costs at the end of the proceeding unless provided otherwise by the parties' arbitration agreement. However, final cost awards are typically made on an overall basis, rather than allocating costs based on particular applications, issues or events in the proceedings. Moreover, a tribunal's allocation of costs in its final award is likely to be dominated by more recent events, including the parties' overall levels of success and their conduct prior to and during the hearing.

The variation among institutional early disposition rules has drawbacks and benefits. On the one hand, the multiplicity of rules makes it difficult for practitioners and arbitrators to build up a common store of experience and develop a shared jurisprudence for interpreting and applying early disposition procedures. This will make the procedures less predictable and more dependent on the experience and legal background of the particular tribunal adjudicating a given matter. On the other hand, the different approaches employed by each institution may allow the arbitration community more quickly to identify the variations that work and discard those that do not. Time will tell.

The emergence of early disposition rules is one of the most significant developments in arbitration procedure in recent years. These rules will likely continue to be expanded and refined as institutions, practitioners and arbitrators become more familiar with them. Even in their current limited form, however, early disposition rules have the potential to dramatically alter the course of arbitration proceedings. ●

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## References

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- 1) See, eg, Gary Born and Kenneth Beale, 'Party Autonomy and Default Rules: Reframing the Debate Over Summary Disposition in International Arbitration' (2010) 21 (2) ICC International Court of Arbitration Bulletin 19; International Institute for Conflict Prevention & Resolution, 'Guidelines on Early Disposition of Issues in Arbitration' (2011) ('CPR Guidelines'); Ted Howes, Allison Stowell and William Choi, 'The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis of ICSID's Rule 41(5) on its Tenth Anniversary', (2019) 13 *Dispute Research International* 7; Charlie Caher and Jonathan Lim, 'Summary Disposition Procedures in International Arbitration' in *The International Comparative Legal Guide to: International Arbitration 2018* (Global Legal Group 15th ed); David Ryan and Kanaga Dharmananda, 'Summary Disposal in Arbitration: Still Fair or Agreed to be Fair' (2018) 35 (1) *Journal of International Arbitration* 31; Michael M Collins, 'Summary Disposition in International Arbitration' in Albert Jan Van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Conference Series, Volume 14 (Kluwer Law International 2009), 532–6; James P Duffy, 'Chapter 13: Dispositive Motions and the Summary Disposition of Claims in International Arbitration', in Laurence Shore et al (eds), *International Arbitration in the United States* (Kluwer Law International), 275–88.
- 2) *ibid.*
- 3) Collins (n 1) 533–4 (arbitrators 'are frequently unwilling to run the risk of having their award set aside on the grounds of some procedural unfairness with what they may perceive as a consequential risk of damage to their own reputation as arbitrators. Summary disposition motions therefore represent professional banana skins for an arbitrator'.)
- 4) SIAC Arbitration Rules, Rule 29.1(a) & (b).
- 5) SIAC Arbitration Rules, Rule 29.2 & 29.3.
- 6) JAMS International Arbitration Rules, art 26.
- 7) SCC Arbitration Rules, art 39(2).
- 8) <<https://globalarbitrationnews.com/how-did-arbitration-institutions-fare-in-2019/>>. The two exceptions are CIETAC, whose rules were last revised effective 1 January 2015, and the Korean Commercial Arbitration Board International Arbitration Rules, whose rules were last revised effective 1 June 2016.
- 9) UNCITRAL Rules (2010), art 17(1).
- 10) *ibid.*, art 17(1).
- 11) On the other hand, art 17(3) of the UNCITRAL Rules states that '[i]f at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument'. Therefore, absent party consent, disposition of a claim, defense or other issue without an evidentiary hearing could be seen to infringe a party's right to a hearing and impermissibly depart from the procedures agreed by the parties.
- 12) Gary Born, *International Commercial Arbitration* (3rd edn 2021) s 1.02[B][7].
- 13) Fed R Civ P 12(b)(6).
- 14) See, eg, *Navarro v Block*, 250 F.3d 729, 732 (9th Cir 2001).
- 15) Fed R Civ P. 56(a).
- 16) *Anderson v Liberty Lobby, Inc*, 477 US 242, 249–55 (1986).
- 17) *ibid.*
- 18) Born (n 12) s 15.03[C].
- 19) See, eg, Born (n 12) s 15.08[R] ('There should be no doubts concerning a tribunal's general authority (absent contrary agreement and subject to permitting the parties an opportunity to be heard) (738) to make awards based on a dispositive motion'.); see also *Sherrock Bros, Inc v DaimlerChrysler Motors Co, LLC*, 260 Fed Appx 497, 501–02 (3d Cir 2008); *Global Intern Reinsurance Co Ltd v TIG Ins Co*, 2009 WL 161086, \*4 (SDNY 21 January 2009) ('It is well-established, however, that arbitrators have great latitude to determine the procedures governing the proceedings and to restrict or control evidentiary proceedings. Accordingly, arbitrators may proceed with only a summary hearing and with restricted inquiry into factual issues'.) (citations and quotation marks omitted).
- 20) Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015), para 6.40 ('In the absence of specific provisions contemplating early disposition or the agreement of the parties, the use of summary procedures are believed by some to introduce 'due process' risk at the enforcement stage of proceedings'.); Judith Gill, 'Applications for the Early Disposition of Claims in Arbitration Proceedings' at 516 ('it is uncontroversial to suggest that tribunals generally do not possess the powers of summary disposition conferred on national courts'), in Albert Jan Van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, Volume 14 (ICCA & Kluwer Law International 2009)).
- 21) Adam Raviv, 'No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration' (2012) 28 *Arbitration International* 487, 488.
- 22) *ibid.*
- 23) Born and Beale (n 1) 23.

- 24) Jose Rosell, 'Arbitration Costs as Relief and/or Damages' (2011) 28 (2) *Journal of International Arbitration* 115, 116 ('There is an emerging trend for arbitral tribunals to order the losing party to bear both the procedural costs and the legal costs of the other party unless the circumstances of the case warrant a departure from such a rule'.); Micha Bühler, 'Costs' in *Guide to Damages in International Arbitration* (3d edn 2018) ('Awards applying the American Rule are less common in international commercial arbitration, but remain frequent in investor-state arbitrations').
- 25) Blackaby (n 20); see also, eg, Gill (n 20); Ryan and Dharmananda (n 1).
- 26) Born and Beale (n 1) 23.
- 27) Howes, Stowell and Choi (n 1).
- 28) *ibid* 15.
- 29) A Raviv (n 21) 494–5.
- 30) *ibid* 27.
- 31) *ibid* 32.
- 32) *ibid*.
- 33) Beale and Born (n 1) 23.
- 34) ICC Commission Report: Financial Institutions and International Arbitration, paras 15, 59 <<https://cdn.iccwbo.org/content/uploads/sites/3/2016/11/ICC-Financial-Institutions-and-International-...>>.
- 35) White & Case and Queen Mary, University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, 30–1 <<http://www.arbitration.qmul.ac.uk/research/2018/>>.
- 36) Pinent Masons and Queen Mary, University of London, *International Arbitration Survey –Driving Efficiency in International Construction Disputes*, 23 <<https://www.pinentmasons.com/-/media/pdfs/en-gb/special-reports/international-arbitration-survey-no...>>.
- 37) ICSID Arbitration Rules, art 41(5).
- 38) *Brandes Investment Partners, LP v Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/3, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (2 February 2009), paras 55 ('The Arbitral Tribunal therefore interprets Rule 41(5) in the sense that the term "legal merit" covers all objections to the effect that the proceedings should be discontinued at an early stage because, for whatever reason, the claim can manifestly not be granted by the Tribunal'.), 70 ('A preliminary objection under Rule 41(5) is an objection based on the manifest absence of legal merit of a claim, not on the absence of a factual basis'.).
- 39) *ibid* para 59 ('The Tribunal has no difficulty to conclude that the objection on an expedited basis should concern a legal impediment to a claim and not a factual one'.).
- 40) SIAC Rules, Rule 29.1; LCIA Rules, art 21.1; ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (1 Jan. 2021), ¶ 110.
- 41) *ibid*.
- 42) SCC Rules, art 39(2).
- 43) HKIAC Rules, art 43.1.
- 44) ICDR Rules, art 23(1).
- 45) JAMS International Arbitration Rules, art 26.1.
- 46) SIAC Rules, Rule 29.1.
- 47) ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (1 January 2021), para 110.
- 48) Tribunal's Decision on Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, para 88 (12 May 2008), *Trans-Global Petroleum, Inc v Hashemite Kingdom of Jordan*, ICSID Case No ARB/07/25.
- 49) *ibid*.
- 50) *Ibid*.
- 51) ICDR Rules, art 23; JAMS International Arbitration Rules, art 26.1.
- 52) LCIA Rules, art 21.1.
- 53) See, eg, *The Republic of Sierra Leone v. SL Mining Limited* [2021] WEHC 286 (Comm); *BG Group PLC v Republic of Argentina*, 572 US 25 (2014); *BBA v BAZ* [2020] 2 SLR 453; *BTN v BTP* [2020] SGCA 105.
- 54) See, eg, Iris Ng, 'Jurisdiction or Admissibility? The Status of Time Bars under the Singapore Arbitration Law' (Kluwer Arbitration Blog, August 7, 2020) (<<http://arbitrationblog.kluwerarbitration.com/2020/08/07/jurisdiction-or-admissibility-the-status-of-...>>) (contrasting the tests applied by Singapore and U.S. courts in determining whether an issue concerns admissibility or jurisdiction) (last accessed September 21, 2021).

- 55) Issues of jurisdiction go to whether the arbitral tribunal is the correct body to decide a given claim, such as whether there is a valid arbitration agreement broad enough to encompass the claim. Issues of admissibility go to whether the claim has been properly raised, such as whether the claimant has exhausted remedies or taken the required pre-arbitral dispute resolution steps (eg, negotiations and mediation). Issues of jurisdiction and admissibility are similar in that they both involve challenges that do not go to the merits. However, a finding of lack of jurisdiction means that the tribunal has no authority to determine a claim, while inadmissibility means only that the claim, though within the jurisdiction of the tribunal, has not been properly presented. See generally Jan Paulsson, 'Jurisdiction and Admissibility' in G Aksen et al (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* 601 (2005).
- 56) SCC Rules, art 39(2)(i).
- 57) HKIAC Rules, art 43.1(a).
- 58) *ibid* art 43.1(b).
- 59) SCC Rules, art 39(2)(ii).
- 60) HKIAC Rules, art 43.1(c).
- 61) The HKIAC's formulation is odd, as it must be extremely rare that a party's pleaded case will fail even if that party's view of the law, as well as the facts, is assumed to be correct.
- 62) SCC Rules, art 39(2)(iii).
- 63) *ibid* art 39(3).
- 64) *ibid* art 39(4).
- 65) *ibid*, art 39(5).
- 66) HKIAC Rules, arts 43.4 and 43.5; ICC Note, para 111 ('The arbitral tribunal has full discretion to decide whether to allow the application to proceed, taking into consideration any circumstances it considers to be relevant, including the stage of the proceedings and the need to ensure time and cost efficiency.').
- 67) ICDR Rules, art 23(1).
- 68) *ibid* Rule 41(5).
- 69) *ibid* Rule 41(5).
- 70) SIAC Rules, Rule 29.4. The SIAC Investment Arbitration Rules establish a slightly longer period of 90 days for the tribunal to dispose of the application. It is not clear why SIAC selected different periods for commercial and investment arbitration.
- 71) HKIAC Rules, art 43.3.
- 72) *ibid* art 43.5.
- 73) *ibid* art 43.6.
- 74) *ibid* arts 43.5 and 43.6.
- 75) Compare HKIAC Arbitration Rules, art 34.1 ('The arbitral tribunal shall determine the costs of the arbitration in one or more orders or awards'.) with *example* SIAC Arbitration Rules, Rule 35.1 ('Unless otherwise agreed by the parties, the Tribunal shall specify in the Award the total amount of the costs of the arbitration. Unless otherwise agreed by the parties, the Tribunal shall determine in the Award the apportionment of the costs of the arbitration among the parties.').
- 76) ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (1 January 2021), para 113.

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