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Summary Disposition: The Only Way Out is Through?

LAURAN SAN ROMAN GUIJARRO*

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ABSTRACT

An unmeritorious lawsuit leaves one sprinting for the door. Being locked in dispute resolution for years against a frivolous claim causes unnecessary expense, inconvenience, and frustration. Civil procedure rules provide an exit through summary judgment or dismissal. Yet, what if there were no escape? Indeed, the best way out is not always through. International arbitration has no clear mechanism for summary disposal of unmeritorious claims and may be a trap for parties believing arbitration to be the more economical form of resolution.

This article analyzes the potential sources of arbitrators' authority to dispose summarily of a case on the merits prior to a final hearing and then assesses the obstacles that block the application of summary disposition. This article then addresses the current state of uncertainty on the subject and lastly offers a solution.

* J.D. Candidate 2012, University of Miami School of Law. I would like to express my gratitude to Professor John Rooney for his guidance with this article and to the rest of the outstanding international arbitration faculty at the University of Miami.

*“By good rights I ought not to have so much
Put on me, but there seems no other way.
Len says one steady pull more ought to do it.
He says the best way out is always through.
And I agree to that, or in so far
As that I can see no way out but through—“*¹

I. GROUNDWORK: SUMMARY DISPOSITION DEFINED

Summary disposition is a decision on the merits made before a final hearing, much like summary judgment or dismissal in common law litigation.² It involves a decision on the merits without a complete exploration of all possible evidence.³ Rather, the arbitrator⁴ makes his or her decision referring to the pleadings and other documents produced at the initial stage.⁵

Summary disposition comes in two forms: that of particular claims or that of the entire case. Arbitrator authority to dispose summarily of particular claims is largely undisputed. Accordingly, this article addresses summary disposition of the entire dispute.

II. THE MILLION-DOLLAR QUESTION: LAW APPLICABLE IN INTERNATIONAL COMMERCIAL ARBITRATION

This article speaks to summary disposition in international,⁶ rather than domestic, arbitration because most countries have distinct mechanisms for summary disposition. By contrast, in international arbitration numerous laws, rules, and treaties apply, creating layers of complexity.

First, arbitration is a creature of contract and thus the parties' agree-

1. ROBERT FROST, *A Servant to Servants*, NORTH OF BOSTON 66 (Henry Holt and Co., 1914).

2. Summary judgment, dismissal, “claim-vetting,” and “strike out” applications are generally related procedures dealing with early disposition of issues or claims. They are more prevalent in common law traditions. See Aren Goldsmith, *Trans-JGlobal Petroleum: “Rare Bird” or Significant Step in the Development of Early Merits-Based Claim-Vetting?*, 26 A.S.A. BULL. 667, 667 (2008); D. Brian King & Jeffery P. Commission, Summary Judgment in International Arbitration: The “Nay” Case, 4 (Apr. 14, 2010) (unpublished manuscript) (on file with Am. Bar Ass’n Section of Int’l Law), available at <http://www.abanet.org/intlaw/spring2010/materials/Common%20Law%20Summary%20Judgment%20in%20International%20Arbitration/King%20-%20Commission.pdf>.

3. Judith Gill, *Applications for the Early Disposition of Claims in Arbitration Proceedings*, in 14, ICCA CONGRESS SERIES (SPECIAL ISSUE THE NEW YORK CONVENTION AT 50) 515 (Albert Jan van den Berg ed., 2009).

4. Reference to a singular arbitrator also means the plural, tribunal.

5. See Gill, *supra* note 3, at 14.

6. The United Nations Commission on International Trade Law Model Law on International Arbitration defines an arbitration proceeding as international if the parties have their places of business in different states or if the seat or location of the dispute lies outside the place where both parties conduct business. Model Law on Int’l Com. Arb., U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17, at art. 1(3) (Dec. 11, 1985) [hereinafter UNCITRAL Model Law].

ment is primary, short of public policy violations.⁷ Party autonomy is a pillar of arbitration that allows the parties to define their own procedure.⁸ As such, the arbitration typically begins with an initial conference to agree on a procedure.⁹ Summary disposition is a measure that, by its nature, arises immediately. However, in almost all cases, parties make no *express* reference to summary disposition in their agreement.

Second, the parties may adopt procedural rules, typically in conjunction with the appointment of an arbitral institution to administer the dispute.¹⁰ These rules, deemed to be adopted as part of the arbitration agreement, guide the arbitrators as to the procedural intentions of the parties.¹¹ Almost no institutional rules address summary disposition, and therefore application by these means is unlikely. The institution may also have a history of published awards that can be persuasive as to general principles.¹²

National law regulates arbitration at the seat, i.e., the chosen location of the proceedings.¹³ The United Nations Commission on International Trade Law (“UNCITRAL”) drafted a Model Law on International Commercial Arbitration (“UNCITRAL Model Law”) in an effort to promote uniformity across different jurisdictions.¹⁴ The UNCITRAL Model Law represents a consensus on key aspects of international arbitration practice.¹⁵ More than seventy jurisdictions, including several states within the United States, have adopted some version of the UNCITRAL Model Law.¹⁶

Lastly, by its nature, international arbitration involves international parties or transactions.¹⁷ Parties seek the enforcement of the final award in the jurisdiction holding the opposing party’s assets or seek to set aside

7. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. II and V(2)(b) June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

8. NIGEL BLACKABY & CONSTANTINE PARTASIDES WITH ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 365 (5th ed. 2009).

9. JAN PAULSSON & GEORGIOS PETROCHILOS, REVISIONS OF THE UNCITRAL ARBITRATION RULES: A REPORT 66 n.130 (2006); INT’L CHAMBER OF COMMERCE, RULES OF ARBITRATION, art. 24(1) (2012) [hereinafter ICC RULES].

10. Appointment of an institution may occur either through specification in the parties’ agreement or by consent of both parties through a special submission after the dispute has arisen. BLACKABY & PARTASIDES, *supra* note 8, at 86.

11. *Id.* at 55. For more on institutional rules, see *infra* Part V.A.

12. For, example, ICSID and Court of Arbitration of the International Chamber of Commerce regularly publish awards.

13. The seat or situs is the arbitration’s location as chosen by the parties and is typically where the hearing is held.

14. G.A. Res. 61/33, at 1, U.N. Doc. A/RES/61/33, at 1 (Dec. 18, 2006).

15. *Id.*

16. Status of the UNCITRAL Model Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Jan. 29, 2011).

17. See UNCITRAL Model Law, *supra* note 6, at art. 1(3).

the award at the arbitral seat. The respective laws of these jurisdictions govern enforcement or set aside.¹⁸

III. BENEFITS OF SUMMARY DISPOSITION

Summary disposition means faster resolution of the dispute and lower costs and related expenses. If a court can resolve a case through summary judgment within weeks, there is no logic to enduring years of arbitration without the same remedy for equally meritless cases. Why should a hopeless claim be allowed to drag on simply because the parties inserted an arbitration clause?¹⁹ The arbitration clause, possibly adopted to save time in dispute resolution, binds them to arbitrate rather than litigate.²⁰

If the resolution process extends unnecessarily over several years, users will be left unsatisfied and quite possibly penniless. As the mantra goes “Justice delayed is justice denied.”²¹ Delays and costs brought by failing to use early disposition evidences a serious deficiency in arbitration as a dispute resolution mechanism.²² Inability to achieve speedy resolution signifies for some the failure of arbitration itself.²³

IV. WHAT GOES UP: DISADVANTAGES

Of course, summary disposition has shortcomings. The arbitrator’s authority originates from parties’ agreement; the agreement must guide the arbitrator’s procedural decisions. Summary disposition in international arbitration is certainly not the norm, but rather the exception.²⁴ So when users insert an arbitration clause, they generally expect to be heard in a final hearing as a matter of custom. The arbitrators must consider this unspoken expectation when determining whether to apply summary disposition.

Parties also expect to work through complex matters fully with the arbitrators, whom they may have selected for his or her specialized knowledge on the subject.²⁵ A hearing allows for the development of evidence, the presentation of legal arguments, an opportunity to discuss those arguments. If an arbitrator were to halt the process at an early

18. See BLACKABY & PARTASIDES, *supra* note 8, at 585.

19. See Gill, *supra* note 3, at 520; Global Trading Resource Corp. and Globex Int’l, Inc. v. Ukraine, ICSID Case No. ARB/09/11 ¶ 34 (Dec. 1, 2010).

20. New York Convention, *supra* note 7, at art. II.

21. See Case No. 10947 of 2002, Interim Award, 22 A.S.A BULL. 330 (ICC Int’l Ct. Arb.); BLACKABY & PARTASIDES, *supra* note 8, at 334.

22. BLACKABY & PARTASIDES, *supra* note 8, at 334.

23. Gill, *supra* note 3, at 520.

24. See *infra* Part VI.

25. Gill, *supra* note 3, at 515.

stage, the losing party would naturally feel dissatisfied and skeptical toward the process. Also, arbitrators may be uncomfortable disposing of a case without sufficient time to become familiar with it and rightly so.²⁶ Less time in deliberation means a higher risk of a poorly reasoned decision.

Arbitration laws typically require that each party have an opportunity to present its case.²⁷ Award enforcement is problematic if the court concludes that an early decision denied a party the opportunity to present its case. This issue is elaborated in Part VI(A).

Further, arbitral awards are non-appealable so a party left unsatisfied with a summary disposition has no right to a review,²⁸ except the limited review of the enforcing court. The finality of summary disposition may be difficult to handle, especially when dealing with a complex, high-dollar dispute that requires meticulous consideration.²⁹ The consequences of summary disposition in international arbitration are therefore more serious and arbitrators will be more reluctant to apply it.

Common law summary judgment ensures effective management of judicial resources. National courts must streamline an overwhelming caseload and ensure proper application of government funds.³⁰ This justification does not translate to arbitration.³¹ Parties pay arbitrators to deal with their dispute in a personalized way³² and institutional rules often *require* that the arbitrators certify that they have adequate time to dedicate to the case.³³

Lastly, much like its judicial counterpart, summary disposition in arbitration may not always have the intended effect. Recalcitrant parties can use requests for disposition to delay the process. It is simply another layer of time and cost to make bringing a claim more troublesome.³⁴

26. King, *supra* note 2, at 4. For example, in an unpublished insurance arbitration in London, the claimant sought summary disposition after the initial exchange of pleadings. The respondent claimed that it would be procedurally unfair to decide before hearing all evidence. The tribunal agreed with respondent, despite claimant's suggestion that all evidence be viewed in respondent's favor. This example "demonstrates a certain mindset, which practitioners need to overcome." Gill, *supra* note 3, at 523.

27. See e.g., New York Convention, *supra* note 7, at art. V(1)(b); UNCITRAL Model Law, *supra* note 6, at art. 18; English Arbitration Act, 1996, c. 33, § (1)(a); LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [RS] Dec. 18, 1987, RS 291, art. 190(2)(d) (Switz.); Federal Arbitration Act, 9 U.S.C. § 10 (2006).

28. King, *supra* note 2, at 4.

29. *Id.*

30. *Id.*

31. Gill, *supra* note 3, at 515.

32. BLACKABY & PARTASIDES, *supra* note 8, at 364.

33. *Id.*

34. King, *supra* note 2, at 4; MATTI S. KURKELA ET AL., *DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION* 192 (2d ed. 2010).

V. AUTHORITY FOR SUMMARY DISPOSITION

Arbitrators and parties alike remain uncertain as to whether summary disposition is appropriate because there is a lack of legal guidance.³⁵ In a debate on whether arbitrators have authority to grant summary disposition, scholars Jan Paulsson and Albert Jan van den Berg disagreed.³⁶ Paulsson argued that there is no debate at all, citing the express authority in the International Centre for the Settlement of Investment Disputes (“ICSID”) Rules.³⁷ On the other hand, van den Berg argued that examination of other institutional rules would reveal no similar authority.³⁸

a. *Institutional Rules*

Institutional rules govern procedures such as the constitution of the tribunal, allocation of costs, and issuance of awards. The rules establish a comprehensive procedure for managing the arbitration.³⁹ If the rules require hearings, the arbitrators or court should not mandate document-based disposition.

No institutional rules grant express authority for summary disposition, but many provide that the arbitrator must to manage the case efficiently, suggesting a duty to dispose of an unmeritorious case in advance of the final hearing.⁴⁰ Most rules also grant broad authority to the arbitrator to decide procedure, providing power to decide summarily within the bounds of the agreement.⁴¹

Some major institutions that leave the issue open include the International Court of Arbitration of the International Chamber of Commerce (“ICC”), the London Court of International Arbitration (“LCIA”), and the American Arbitration Association (“AAA”).

The ICC Task Force for Arbitrating Competition Issues contemplated a summary disposition mechanism, but concluded that “a summary judgment vehicle would not work in the ICC context and

35. This point is exacerbated by the fact that in international arbitration many layers of treaties, laws, and rules apply. *See infra* Part. II.

36. Prof. Jan Paulsson, Co-head Int’l Arb. Grp., Freshfields Brukhaus Derringer, LLP & Prof. Albert Jan van den Berg, Partner, Hanotiau & van den Berg, *Debate on The Life of a Young Arb. Lawyer in Miami: Arb. Inside and Out* (Nov. 6 2010) [hereinafter *Future of Arb.: Miami! Debate*].

37. *Id.*; *see* International Centre for the Settlement of Investment Disputes Convention, Regulations and Rules, Apr. 2006, ICSID/15, art. 41(5) [hereinafter *ICSID Rules*]; *see infra* Part V.A.

38. *Future of Arb.: Miami! Debate*, *supra* note 36.

39. BLACKABY & PARTASIDES, *supra* note 8, at 55.

40. Gill, *supra* note 3, at 520; King, *supra* note 2, at 2.

41. Gill, *supra* note 3, at 520.

culture.”⁴² Institutions must adapt their rules for parties from a wide variety of legal systems so the Task Force therefore discouraged including a rule for summary disposition.⁴³

The 2012 ICC Rules of Arbitration nevertheless make substantial steps in improving efficiency and lowering costs for users by implementing case management rules. The tribunal and parties must make “every effort to conduct the arbitration in an expeditious and cost-effective manner” having regard to the complexity of the case⁴⁴ and a case management conference at the outset is required.⁴⁵ The case management conference allows the tribunal and the parties to consider procedural measures like summary disposition in the initial stages. The Rules further allow the tribunal to decide the case solely on the documents unless any party requests a hearing, making hearings less of a default rule than in the past.⁴⁶ Finally, when assessing the costs, the tribunal may consider the extent to which each party has conducted the arbitration in an expeditious, cost-effective manner.⁴⁷ The steps the ICC has taken are substantial in reducing time and costs of arbitration to the benefit of the ultimate users.

Similarly, the LCIA Rules contain no direct provision for summary disposition but insist on prompt resolution. Arbitrators must “adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute.”⁴⁸ Moreover, the tribunal has the “widest discretion” in conducting the proceedings under the law as the “tribunal may determine to be applicable.”⁴⁹

The AAA Rules grant the arbitrator much broader authority to decide a case summarily, giving discretion to “exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.”⁵⁰ This Rule highlights the need for a swift and efficient resolution and grants authority to reach a conclusion by whatever means

42. *Id.*, at 524.

43. *Id.*

44. ICC RULES, *supra* note 9, art. 22(1) (emphasis added).

45. *Id.* at art. 24(1).

46. *Id.* at art. 25(6).

47. *Id.* at art. 37(5). Other case management provisions like deadlines to submit the Terms of Reference and notification to the institution and parties when the award will be issued further urge efficiency and cost-saving in the 2012 ICC Rules.

48. LONDON COURT OF INT’L ARBITRATION, ARBITRATION RULES, art. 14.1 (1998) [hereinafter LCIA Rules].

49. *Id.* at art. 14.2; King, *supra* note 2, at 2 n.8.

50. AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES, at art. 16.3 (2009) [hereinafter AAA RULES]; King, *supra* note 2, at 2 n.7.

appropriate. Unfortunately, no published cases are available to elaborate on this rule.

Only the ICSID Rules, which apply to investor-state arbitrations, expressly allow summary disposition. ICSID adopted the Rules in 2006 in response to criticism regarding the absence of a procedure to screen patently unmeritorious claims brought against respondent governments,⁵¹ with the obvious policy reasons being the avoidance of excessive depletion of state resources. The Rules allow a party to “file an objection that a claim is manifestly without legal merit”⁵² and if “all claims are manifestly without legal merit,” the tribunal shall render an award accordingly.⁵³

Few decisions have applied the Rule. The first occurred in *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*.⁵⁴ The tribunal consulted various texts to decipher the appropriate interpretation of the broad phrase “manifestly without legal merit” in application to Trans-Global Petroleum’s claims.⁵⁵ It denied the respondent’s request to dismiss the case under Rule 41(5), but the analysis did prompt the claimant to withdraw one of its three claims under the strict analysis.⁵⁶

The second decision, *Brandes Investment Partners, LP v. Venezuela*,⁵⁷ came to a similar result. The respondent asserted a jurisdictional defense that the claimant was not an “investor” as defined in the Venezuela-US bilateral investment treaty (“BIT”) and therefore the claims were manifestly without legal merit.⁵⁸ The tribunal concluded that the Rule covered jurisdiction and competence defenses⁵⁹ and ultimately rejected the request because it involved consideration of “complex legal and factual issues” incapable of summary resolution.⁶⁰

51. Goldsmith, *supra* note 2, at 668.

52. ICSID Rules, *supra* note 37, at art. 41(5). Rule 41(5) states the following:

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.

53. ICSID Rules, *supra* note 37, at art. 41(6); Gill, *supra* note 3, at 516.

54. *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25 (May 12, 2008).

55. *Id.* ¶¶ 83–105.

56. *Id.* ¶ 119.

57. *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3 (Feb. 2, 2009).

58. *Id.* ¶¶ 71–72.

59. *Id.* ¶ 52.

60. *Id.*

Only two ICSID decisions, published within weeks of each other, have granted summary disposition. The first was *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*.⁶¹ Much like *Brandes*, the respondent asserted a jurisdictional defense that the agreement for the sale of poultry products was not an “investment” as defined by the Ukraine-US BIT.⁶² The tribunal recognized the novelty of the dismissal and was “particularly conscious of its responsibility to contribute to shaping both an understanding of the Rule itself and of the procedure which ought to be followed under it.”⁶³ It also noted the importance of allowing the claimant a “proper opportunity to be heard, both in writing and orally” and recognized an obligation to consider all of the relevant materials before reaching a decision.⁶⁴

The *Global Trading* tribunal ultimately dismissed the claim because there was nothing else that could possibly be submitted to shape the legal argument or the evidence.⁶⁵ The *Global Trading* decision is unsatisfactory because, in reality, it took multiple rounds of written submissions and two oral hearings to conclude.⁶⁶ The tribunal recognized that in some cases a clear conclusion may be reached on written submissions alone, but “they will be rare.”⁶⁷ Document-based decisions would also tend toward rejection, given that the objection may be resurrected after a full argument.⁶⁸

*RSM Production Corporation and others v. Grenada*⁶⁹ also involved a summary dismissal. The claimant’s contractual claims had already been rejected in previous proceedings, but the claimant argued that the Grenada-US BIT provided an independent source of rights, allowing it to bring the same claims under the BIT.⁷⁰ Grenada demanded a dismissal, arguing that the claims were precluded by previous findings and therefore manifestly without legal merit.⁷¹ Recognizing the seriousness of a dismissal, the tribunal decided to construe the claimant’s claims liberally and resolve any uncertainties in favor of the claimant.⁷² Ultimately, however, the tribunal found the conclusions of the previous

61. *Global Trading Resource Corp. and Globex Int’l, Inc. v. Ukraine*, ICSID Case No. ARB/09/11 (Dec. 1, 2010).

62. *Id.* at ¶ 31.

63. *Id.* at ¶ 29.

64. *Id.* at ¶ 33.

65. *Id.* at ¶ 34.

66. *Id.* at ¶ 33.

67. *Id.*

68. *Id.*

69. Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Prod. Corp. v. Grenada, ISCID Case No. ARB/10/6 (Dec. 10, 2010).

70. *Id.* at ¶ 6.1.3.

71. *Id.* at ¶ 4.6.7.

72. *Id.* at ¶ 6.1.3.

ICSID tribunal had bound the claimant and it dismissed the case.⁷³ Unlike the *Global Trading* tribunal,⁷⁴ the *RSM* tribunal assessed all costs and fees to the claimant for advancing its unmeritorious claims again in new proceedings.⁷⁵ Similar to *Global*, however, *RSM* held an oral hearing to reach this decision.⁷⁶

While the dismissals in *Global Trading* and *RSM* cases saved the tribunals from delving into all of the merits of the case, they still involved substantial time, preparation, and oral arguments to reach a conclusion. If the tribunals had denied the objection, those submissions and hearings would have been a massive waste of time and resources. Though these cases encourage the use of dismissals and help to set a standard for Rule 41(5), they also continue the trend to hold hearings even for the most unfounded claims.

b. *National Law*

In addition to institutional rules, national arbitration law may also provide legal support for summary disposition. National law applies upon a party's attempt to enforce, set aside, or recognize an award in court.

UNCITRAL Model Law jurisdictions apply the UNCITRAL Rules by default if the parties have not agreed otherwise. The 2010 Rules provide that unless any party requests otherwise, the arbitrator "shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials."⁷⁷ However, because the parties must consent to document-based resolution *after* the dispute has arisen, this measure unlikely to be applied.⁷⁸

Some national courts, like those in the United States, accord broad deference to the arbitrator in his or her procedural decisions.⁷⁹ U.S. courts have had little difficulty finding that arbitrators may grant summary disposition,⁸⁰ reasoning, for example, that "no one has the right to

73. *Id.* at ¶ 7.2.1.

74. *Global Trading Resource Corp. and Globex Int'l, Inc. v. Ukraine*, ICSID Case No. ARB/09/11 ¶ 59 (Dec. 1, 2010) (finding that given the newness of the procedure, the "appropriate outcome is for the costs of the procedure to lie where they fall.").

75. *RSM*, ARB/10/6 at ¶ 8.3.4.

76. *Id.* at ¶ 1.3.6.

77. UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/465 at art. 17.3 (Dec. 6, 2010) [hereinafter UNCITRAL Rules]; Gill, *supra* note 3, at 521; King, *supra* note 2, at 3 n.10.

78. *See supra* Part II; *see* Goldsmith, *supra* note 2, at 684.

79. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2578–79, 2579 (2009); *see, e.g., Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 749 (8th Cir. 1986); *see also United Steelworkers of Am. v. Ideal Cement Co.*, 762 F.2d 837, 841 (10th Cir. 1985) (greater deference to arbitrators on procedural issues).

80. Michael M. Collins, *Summary Disposition in International Arbitration*, in 14, ICCA

force a tribunal to hear irrelevant evidence that cannot save an otherwise hopeless claim.”⁸¹

Similarly, English law utilizes the “strike out” rule which addresses the facial validity of a claim similar to a motion to dismiss in the United States.⁸² Scholars and case law suggest that arbitrators likely have authority to decide summarily under English law, but the law is unclear. Stephen Netherway opines that “there is no reason why arbitrators, if empowered to determine their own procedures cannot agree to hear an application for summary judgment.”⁸³ In one case, the English Court of Appeal upheld a Swiss ICC award where the arbitrator refused to hear oral evidence, stating that “where both parties have had more than ample opportunity to present and argue the case, . . . it was completely unnecessary to collect testimonies and hear witnesses.”⁸⁴ The court concluded that “the arbitrator is under no obligation to allow a party to lead evidence when . . . he has come to the conclusion, that . . . this is entirely unnecessary.”⁸⁵

French courts also give broad procedural latitude to arbitrators.⁸⁶ Measures such as hearing witnesses, calling a hearing, or entertaining oral arguments in arbitration are viewed with less necessity and, accordingly, arbitrators may refuse to utilize such procedures.⁸⁷ If an arbitrator deems a claim to be facially invalid “no matter the volume of evidence, . . . a tribunal’s decision to dismiss that claim . . . should in principle represent a valid exercise of procedural discretion under French curial law.”⁸⁸

CONGRESS SERIES (SPECIAL ISSUE THE NEW YORK CONVENTION AT 50) 532, (Albert Jan van den Berg ed., 2009).

81. Goldsmith, *supra* note 2, at 682–83; *see also* Sheldon v. Vermonty, 269 F.3d 1202, 1207 (10th Cir. 2001) (“[I]f a party’s claims are facially deficient and the party therefore has no relevant or material evidence to present at an evidentiary hearing, the arbitration panel has full authority to dismiss the claims without permitting discovery or holding an evidentiary hearing.”).

82. Goldsmith, *supra* note 2, at 683.

83. Stephen Netherway, *The Arbitration Act 1996 And Its Potential Impact On Insurance And Reinsurance Dispute Resolution*, 5 INT. I.L.R. 276, 280 (1997).

84. *Dalmia Dairy Indus. Ltd. v. Nat’l Bank of Pakistan*, [1978] 2 Lloyd’s Rep. 223 at 269–70 (Eng.).

85. *See id.* at 223, 269.

86. Goldsmith, *supra* note 2, at 684.

87. *Id.*

88. *Id.*

VI. FEAR TO APPLY: WHY AVOID SUMMARY DISPOSITION
WHEN THERE IS EVIDENT AUTHORITY?

Based on broad authority in institutional rules and a general deference of courts to arbitrators in regard to procedure, it would seem that arbitrators have the necessary tools to apply summary disposition. It is curious then why summary disposition is not used more regularly.

The primary obstacle is possible impairment of a party's right to present its case. If an arbitrator dismisses a case before a party is fully heard, a reviewing court may find that procedural fairness, known as due process in some jurisdictions,⁸⁹ has been violated.⁹⁰

a. *Fair Play: Law Requiring Procedural Fairness*

Most treaties, national laws, and institutional rules on international arbitration contain provisions mandating some measure of procedural fairness. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), perhaps the most important legal instrument in international arbitration, requires the courts of signatory countries to enforce foreign arbitral awards, except under limited exceptions.⁹¹ One of those exceptions is where a party was "unable to present his case."⁹² This provision of the Convention, which also requires notification to all parties of the initiation of proceedings, has been referred to as the due process rule of international arbitration.⁹³

Most national arbitration laws, including the UNCITRAL Model Law, the Federal Arbitration Act of the United States ("FAA"), the English Arbitration Act, and the Swiss Law on Private International Arbitration, also require examination of the award for procedural fairness before its enforcement.

The UNCITRAL Model Law provides that "each party shall be

89. Debate exists as to the proper terminology. Some use the term "due process." See, e.g., KURKELA, *supra* note 34, at 189; PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS 18 (2000). Others coin the term "natural justice." See, e.g., Gill, *supra* note 3, at 520, 522. Procedural fairness should be distinguished from "due process," to avoid implying that the same domestic standards apply to international awards. BORN, *supra* note 79, at 2576.

90. BORN, *supra* note 79, at 2576; King, *supra* note 2, at 4.

91. New York Convention, *supra* note 7, at arts. III & V. This is unlike typical practice where a court may choose whether it will enforce a foreign court's judgment. The New York Convention, in contrast, requires that its signatories' courts enforce foreign arbitral awards, except under limited exceptions. *Id.* at art. V.

92. *Id.* at art. V(1)(b); see also Inter-American Convention on International Commercial Arbitration, art. 5(1)(b), Jan. 30, 1975, 104 Stat. 448, O.A.S.T.S. No. 42; European Convention on International Commercial Arbitration, art. IX(1)(b), Apr. 21, 1961, 484 U.N.T.S. 364.

93. BINDER, *supra* note 89, at 34; see also BORN, *supra* note 79, at 2573; HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 915 (1989).

given a *full* opportunity of presenting his case.”⁹⁴ If an arbitrator violates this provision, the award may be set aside.⁹⁵

The English Arbitration Act requires that the arbitrator “giv[e] each party a reasonable opportunity of putting forward his case and dealing with that of his opponent.”⁹⁶ The Swiss Law on Private International Law recognizes the parties’ “right to be heard in adversarial procedure.”⁹⁷ The FAA states that an award may be set aside if the tribunal refused to hear evidence “pertinent and material” to the controversy.⁹⁸ Under the FAA, if an arbitrator decides a case before hearing witness testimony or expert opinions, a party may argue that the arbitrator neglected to consider relevant substantive information. National provisions vary, but each uniformly requires that parties be given an equal chance to present their respective cases. Though the arbitrators may decide procedure, courts will nonetheless review an award for procedural fairness.⁹⁹

Institutional rules also provide for procedural fairness. The UNCITRAL Arbitration Rules grant discretion to the tribunal to decide procedure, so long as “each party is given a *full* opportunity of presenting his case.”¹⁰⁰ Likewise, AAA Rules mandate that “the parties are treated with equality and that each party has the right to be heard and is given a *fair* opportunity to present its case.”¹⁰¹

The ICC and LCIA Rules limit presentation to only a *reasonable* opportunity.¹⁰² LCIA Rules also state that “parties shall do everything necessary for the fair, efficient and expedited conduct of the arbitration,”¹⁰³ further limiting the parties in the presentation of their cases.

b. *Procedural Fairness Defined*

Debate exists as to whether procedural fairness mandates an oral

94. UNCITRAL Model Law, *supra* note 6, at art. 18 (emphasis added); Gill, *supra* note 3, at 520. This provision, which also requires equal treatment of the parties, has been called the “Magna Carta of arbitral procedure.” KURKELA, *supra* note 34, at 187; BINDER, *supra* note 89, at 122.

95. UNCITRAL Model Law, *supra* note 6, at art. 34(2)(a)(ii); BINDER, *supra* note 89, at 124; BORN, *supra* note 79, at 2572.

96. English Arbitration Act, 1996, c. 33, § (1)(a).

97. LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [RS] Dec. 18, 1987, RS 291, art. 190(2)(d) (Switz.).

98. Federal Arbitration Act, 9 U.S.C. § 10 (2006).

99. BORN, *supra* note 79, at 2579.

100. UNCITRAL Rules, *supra* note 77, at art. 15.1 (emphasis added); *see also* Gill, *supra* note 3, at 519.

101. AAA RULES, *supra* note 50, at art. 16.1 (emphasis added).

102. LCIA RULES, *supra* note 48, at art. 14.1; ICC RULES, *supra* note 9, at art. 22.4.

103. LCIA RULES, *supra* note 48, at art. 14.2.

hearing or whether a party's case may be fully presented in written submissions alone.

1. FAIRNESS IN ORAL HEARINGS

Some scholars assert that there is a "presumptive right to an oral evidentiary hearing,"¹⁰⁴ which has been called "the most fundamental rule of due process and *ordre public*."¹⁰⁵ If users want a personalized resolution process suitable to their needs,¹⁰⁶ it may follow that the parties' right to be "heard" includes an oral hearing.¹⁰⁷ Scholar Gary Born calls an arbitrator's refusal to conduct a hearing a "classic instance of denial of a party's opportunity to be heard."¹⁰⁸ Many consider such opportunity to be heard orally as a mandatory procedural guarantee.¹⁰⁹ For example, the Uniform Arbitration Act, adopted by many U.S. states, makes a hearing a right that the parties may waive only by mutual agreement.¹¹⁰

After all, the ideal is that "the two parties both present their case" and are encouraged to "bring all the relevant evidence which supports their position before the impartial arbitrator, who may intervene in the proceedings when necessary."¹¹¹ In this way, the parties ensure that the arbitrator finds a proper balance after hearing all the evidence.¹¹² Additionally, if the parties feel they have exhausted all disputes at once, they are less likely to return with further issues.¹¹³

2. FAIRNESS IN WRITTEN SUBMISSIONS ALONE

However, the boundary of procedural fairness may stop, as some contend, at the opportunity to submit written arguments and respond to the opposing party's submissions.¹¹⁴ In jurisdictions like the United

104. King, *supra* note 2, at 4; Howard M. Holtzmann, *Report on U.S. Arbitration Law*, INT'L HANDBOOK COM. ARB., Sept. 1992, at 1, 19 ("[I]t is generally recognized to be a fundamental right which should not be denied.").

105. KURKELA, *supra* note 34, at 189. *Ordre public* is loosely translated as public policy.

106. Gill, *supra* note 3, at 515.

107. BORN, *supra* note 79, at 2580; MATTI S. KURKELA ET AL., *DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION* 183-85 (2005).

108. BORN, *supra* note 79, at 2580; *see* Cour d'appel [CA] [Court of Appeal] Paris, Jan. 19, 1990, Rev. arb. 1991, 125 (Fr.); *Guandong Overseas Shenzhen Co. v. Yao Shun Group Int'l Ltd.*, [1998] 1 H.K.C. 451(C.F.I) (H.K.) (annulling where tribunal issued award on the merits on the same day as party submitted because party did not have opportunity to present substantive case).

109. BORN, *supra* note 79, at 2588; *Global Trading Resource Corp. and Globex Int'l, Inc. v. Ukraine*, ICSID Case No. ARB/09/11 ¶ 33 (Dec. 1, 2010).

110. *See, e.g.*, UNIF. ARBITRATION ACT § 15, 7 U.L.A. 35 (2000); *see* Holtzmann, *supra* note 104, at 19; KURKELA, *supra* note 107, at 184-85.

111. BINDER, *supra* note 89, at 18.

112. *Id.*

113. *Id.* at 19.

114. *Future of Arb.: Miami! Debate*, *supra* note 36.

States and England that utilize summary judgment, the party's right to be heard is fairly embodied in its written pleadings alone. If each party has a chance to present its arguments and respond to opposing arguments, it may not be necessary for the parties to appear for an oral hearing or for the arbitrator to move beyond those submissions.

The arbitrator has the authority, and further the obligation, to consider whether hearings are necessary.¹¹⁵ The arbitrator dictates the procedure and makes the decision as to the relevancy of evidence and hearings.¹¹⁶ Arbitrators are not "obliged to conduct hearings on every issue that arises in an arbitration and in practice are afforded substantial discretion in determining whether and how to hear the parties on particular issues or evidence."¹¹⁷

Accordingly, "where a tribunal deems a claim to be facially invalid and incapable of being upheld no matter the volume of evidence . . . , a tribunal's decision to dismiss that claim as patently unmeritorious should in principle represent a valid exercise of procedural discretion"¹¹⁸ In many cases, national courts have held that if the arbitrators conclude that a hearing is unnecessary, they are under no obligation to hold one.¹¹⁹ Thus, some assert that if the parties were given a reasonable opportunity to present their respective cases by written submissions, the standard of procedural fairness has been sufficiently met.¹²⁰

3. THE UNCERTAINTY IS CLEAR

Given the uncertainty as to the correct standard for procedural fairness, especially across various jurisdictions, arbitrators understandably hesitate in applying summary disposition.¹²¹ The lack of express authority makes arbitrators hesitant to break ground. Arbitrators are "reluctant to rely on implicit, gap-filling or inherent powers [alone] to introduce such a procedure,"¹²² with the primary fear being nullification of their award.¹²³ Thus, when faced with the decision, arbitrators most likely opt

115. KURKELA, *supra* note 107, at 185.

116. *Id.*

117. BORN, *supra* note 79, at 2580.

118. Goldsmith, *supra* note 2, at 684 (considering the national arbitration law of France).

119. *See, e.g.*, *Isidor Paiewonsky Assoc., Inc. v. Sharp Prop., Inc.*, 998 F.2d 145 (3d Cir. 1993) (no due process violation for failing to hear a party in an arbitration when the party did not request a hearing); *Margulead Ltd v. Exide Tech.* [2004] EWHC 1019 (Q.B.) (Eng.) (rejecting challenge to award on grounds that claimant was not afforded opportunity to reply in oral submissions); *Compagnie Honeywell Bull SA v. Computacion Bull de Venezuela CA*, Cour d'appel [CA] [Court of Appeal] Paris, June 21, 1990, Rev. arb. 1991, 96 (Fr.) (noting possibility for arbitral tribunal to dispense with hearings and reach decision on the basis of parties' written submissions).

120. *See, e.g.*, Goldsmith, *supra* note 2, at 684.

121. Gill, *supra* note 3, at 520.

122. King, *supra* note 2, at 4.

123. Goldsmith, *supra* note 2, at 682; Collins, *supra* note 80, at 532.

for a more conservative approach.¹²⁴

c. Other Underlying Reasons for Hesitation

In addition to a fear violating procedural fairness, an arbitrator may have other reasons for being reluctant. First, custom plays a big role in international arbitration and an arbitrator may simply be more inclined to “proceed down the well-trodden procedural path of a typical arbitration.”¹²⁵ Though empirical evidence does not exist on this point, experienced arbitrators affirm that even where a party objects, “there is a tendency to adopt what is no doubt a ‘safe’ course” though it may not “provid[e] an efficient and effective dispute resolution mechanism.”¹²⁶

Second, if an arbitrator decides summarily, he or she may give the impression of taking procedural shortcuts and the parties, or at least one of them, may ultimately feel cheated.¹²⁷ The award may also be set aside. Indeed, arbitrators are “human and are frequently unwilling to run the risk of having their award set aside on the grounds of some procedural unfairness” which can bring a “risk of damage to their own reputation as arbitrators.”¹²⁸ Also, the success of an arbitrator depends on his or her reputation; parties will not appoint an arbitrator they believe to be ineffective or unfair.¹²⁹ Claimants will not appoint an arbitrator who has summarily disposed of disputes in the past. Arbitrators often hope that their decisions will generate repeat business even from the losing party¹³⁰ and as a result are further motivated to work meticulously toward a well-reasoned, enforceable decision. Thus, summary dispositions, as risky mechanisms, can represent “professional banana skins” for an arbitrator.¹³¹

Along those same lines, some arbitrators may feel that in order to make a comprehensive decision, they must engage fully in the facts and understand absolutely all issues before deciding the case.¹³² As noted, an

124. *Id.*

125. *Id.*

126. *Id.* at 520, 522.

127. *Id.* at 520 (“At its most basic, a successful party would feel understandably aggrieved if the result of a tribunal taking a bold stance on early disposition of issues was to bring into question the validity of the award.”).

128. Collins, *supra* note 80, at 532–33.

129. John E. Beerbower, *International Arbitration: Can We Realise the Potential?*, 27 *ARB. INT’L L.* 75, 79 (2011).

130. Juan Fernández-Armesto, Partner, Armesto & Asociados (Spain), Panel on Case Mgmt. in Int’l Arbitration: How to Guarantee Efficiency and Due Process, ICC Conference on Int’l Com. Arb. in Latin Am. (Nov. 9, 2010).

131. Collins, *supra* note 80, at 533.

132. *Id.* at 532 (“Arbitrators, like courts, remain slow to take this step because of a natural unwillingness to resolve a case without being seen to give both sides a full opportunity to argue their point.”).

arbitrator will not have the same pressures of caseload and allocation of resources as a judge might have¹³³ and large cases can involve complex issues requiring careful consideration.¹³⁴ For good reason, the arbitrator may not feel comfortable disposing of issues so early in the game, only to discover later that his or her decision was in error.¹³⁵ Thus, it is understandable that the arbitrators may require hearing oral testimony or pleadings to safeguard against such problems.

In one ICC case, the claimant argued for summary disposition and the respondent replied that “there should be a full consideration of the evidence.”¹³⁶ The tribunal declined to issue a summary award because the claimant could not meet the high standard, namely that the defense was so meritless “that it should be given no credence and effectively should be struck out.”¹³⁷ The tribunal adduced that such a matter “should be determined in the light of all the facts and circumstances which each party might wish to put forward.”¹³⁸ Accordingly, the tribunal refused to grant summary disposition and allowed the matter go forward to a full hearing.¹³⁹

Another obstacle lies in the mechanics of the typical process. Ordinarily, after the tribunal is constituted and a preliminary meeting is conducted, the arbitrators receive the written submissions and a hearing is scheduled.¹⁴⁰ As arbitrators are typically practitioners with their own active schedules, the custom is unfortunately to postpone reading the submissions until the last minutes.¹⁴¹ This delay leaves the tribunal with little time to realize that a hearing is unnecessary or to determine how to otherwise direct the parties to address only the most pertinent issues.¹⁴² If arbitrators took a more proactive role by analyzing the submissions at the outset,¹⁴³ they could request further written submissions on the primary issues and make a decision more easily without a hearing. As

133. King, *supra* note 2, at 4.

134. Alexis Mourre, Partner, Castaldi Mourre & Partners (Fr.), Panel on Case Mgmt. in Int’l Arbitration: How to Guarantee Efficiency and Due Process, ICC Conference on Int’l Com. Arb. in Latin Am. (Nov. 9, 2010).

135. Gill, *supra* note 3, at 522.

136. Case No. 11307 of 2003, 33 Y.B. COMM. ARB. 30, Final award (ICC Int’l Ct. Arb). The unpublished order on the Claimant’s motion for a summary award was discussed and explained in the tribunal’s final award.

137. *Id.*

138. *Id.* at 33.

139. *Id.* “[I]n the interests of efficiency,” the tribunal did, however, “identify those issues on which it considered that it needed no further assistance from the parties,” making several findings and directing the parties to limit further arguments only to the remaining issues of uncertainty to “save time and money at the [h]earing.” *Id.*

140. BLACKABY & PARTASIDES, *supra* note 8, at 364.

141. Armesto, *supra* note 130.

142. *Id.*

143. *Id.*

stated above, the ICC Rules alleviate this problem by requiring a mandatory case management conference to assess the issues promptly.¹⁴⁴

Lastly, economic motivations may unfortunately play a role and cannot be completely discarded. Arbitrators commit to perform the arbitration and arrange their schedules to accommodate the time needed.¹⁴⁵ In most cases, arbitrators are paid more the longer the case goes and hence it is not “necessarily in the arbitrator’s own best interests” to dispose of the case and end a potential income stream.¹⁴⁶

VII. CONCLUSIONS

Summary disposition in international arbitration poses an attractive alternative for parties wishing to resolve disputes efficiently and at lower costs. When it comes to bringing a claim, however, the absolute incentive to win may replace that initial the motivation for speed and efficiency.¹⁴⁷ At that point, at least one party will prefer the opportunity to present all evidence and address all issues thoroughly before a decision is made. Such radical changes in the parties’ purpose depending on the circumstances make legal uniformity difficult. Thus, the source of much uncertainty in applying summary disposition may be party autonomy itself.

Ultimately, it falls on the arbitrator to decide what the parties intended as to procedure. However, the arbitrator fears that by granting summary disposition, the award will be set aside for lack of procedural fairness. Arbitrators need more legal guidance to determine the applicability of summary disposition without risking set aside of the award.¹⁴⁸

A few solutions exist to cure the uncertainty. The easiest solution is party agreement.¹⁴⁹ Parties are free to dispense with an oral hearing by mutual agreement,¹⁵⁰ without danger of set aside.¹⁵¹ However, after the dispute has arisen, the parties will not likely agree on whether summary

144. ICC RULES, *supra* note 9, at art. 22.4.

145. Beerbower, *supra* note 129, at 78.

146. *Id.*; Gill, *supra* note 3, at 522; King, *supra* note 2, at 4 (“[U]nlike judges faced with the pressure [of] increasing caseloads and crowded dockets, it is not necessarily in the arbitrator’s financial interest to bring an arbitration to a close at an earlier stage through a decision on summary judgment (though surely it would be the rare arbitrator who would respond to that incentive.”)).

147. Armesto, *supra* note 130.

148. PAULSSON & PETROCHILOS, *supra* note 9, at 65 n.130.

149. Goldsmith, *supra* note 2, at 684; Ned Beale et al., *Summary Arbitration Proceedings: A Comparison Between the English and Dutch Regimes*, 26 *ARB. INT’L* 144, 158 (2010); *see also* King, *supra* note 2, at 4.

150. BORN, *supra* note 79, at 2580–81; Holtzmann, *supra* note 104, at 19.

151. Holtzmann, *supra* note 104, at 19.

disposition is appropriate. As a result, an agreement before the dispute arises, usually in drafting the contract, is the most effective option.¹⁵²

The parties may either specifically draft language in their arbitration clause or they may adopt institutional rules that recognize summary disposition.¹⁵³ Where the parties have agreed on the procedure, the “tribunal may (or indeed shall) determine claims on a summary or expedited basis.”¹⁵⁴ In the absence of evidence of such consent, “arbitrators will be unlikely to endorse the remedy.”¹⁵⁵ This is especially true when the arbitrator is from a jurisdiction that does not recognize such procedures even in court.¹⁵⁶ Yet, when drafting agreements, the parties’ focus is on the contract and not what procedures will apply a dispute arises in the distant future.

Instead, institutional rules can fill this void by allowing summary disposition. When parties adopt the rules, the procedure comes with it.¹⁵⁷ Institutional rules must compromise civil and common law procedures so institutions may not be amenable to favoring summary disposition where most civilian countries do not apply it.¹⁵⁸ Institutions need to address these issues internally before a result may be reached.

If not in the rules, institutions could provide greater encouragement to the arbitrators for summary disposition of a case where appropriate.¹⁵⁹ For instance, institutions could specifically require arbitrators, or even parties, to consider whether legal merit exists before proceeding further. Such a rule does not dramatically change arbitral procedure, but forces arbitrators at least to consider the merits and it reinforces their authority to consider disposition. Arbitrators would be more comfortable applying a procedure if it is built into their role. Such a rule would also address the concerns of the users by encouraging arbitrators to step out of the customarily lengthy procedure.

Juridical power should also cede more authority to the arbitrator.¹⁶⁰ Extensive judicial review can invalidate the arbitrators’ authority to manage the procedure.

These solutions involve mere reforms in thought, whether on the part of the parties, the courts, or the institutions. Summary disposition is

152. BORN, *supra* note 79, at 2581.

153. *See id.*

154. Beale, *supra* note 149, at 143–44.

155. Goldsmith, *supra* note 2, at 684.

156. *Id.*

157. King, *supra* note 2, at 4.

158. *Id.* at 1; Goldsmith, *supra* note 2, at 667; Gill, *supra* note 3, at 524.

159. Gill, *supra* note 3, at 524 (applying the same idea to early disposition of specific claims).

160. Mourre, *supra* note 134; *see also* Gill, *supra* note 3, at 524.

not only a valuable tool in case management, but it also provides a relief from the prison of endless, meritless arbitration. With these simple reforms, perhaps the only way out is not necessarily through.