Dispositive Motions: A Step Change?

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Over the past decade, many arbitrators and international arbitration practitioners have seen a consistent increase in parties' interest in bringing dispositive motions within the context of the arbitration proceedings. Some commentators—especially from common law traditions—suggest that such motions should play a more prominent role in international arbitration. In the same time frame, as discussed below, many of the major international arbitral institutions have introduced or confirmed the possibility of dispositive motions (also referred to as requests for summary or early disposition, or early determination) under their rules. This has followed from a long evolution in international arbitration towards recognizing arbitrators' power to make early determinations arising from their inherent authority to dispose of cases or issues.

But while parties continue to bring these motions, they are still rarely granted in arbitration,[fn]*See* Edna Sussman, *The Arbitrator Survey—Practices, Preferences and Changes on the Horizon*, 26 Am. Rev. Int'l Arb. 517, 523 (2015).[/fn] as in reality it can be difficult for a tribunal to unanimously agree, at a relatively early stage in the proceeding, that one or more issues can be definitively determined without a merits hearing. Through the remainder of 2020 and in 2021, however, we may see dispositive motions gain significantly greater acceptance in arbitration procedure.

Dispositive Motions: Scope and Purpose

A dispositive motion, summary disposition, or early disposition is usually defined as a motion that would finally determine or dispose of an issue in dispute, much like a motion to dismiss or motion for summary judgment in judicial proceedings. Dispositive motions are intended to provide a relatively abbreviated procedure to narrow the scope of issues in dispute, or eliminate issues entirely, potentially even resulting in an early resolution of the entire case, in the event it causes the parties to reassess their settlement positions.

The rationale for dispositive motions wherever they appear, in arbitration or in court, is obvious: to improve the efficiency and cost-effectiveness of the proceedings, and to avoid belaboring disputed issues where one side's position does not hold up to scrutiny, even assuming the facts are as it claims, or simply as a matter of law. There are potential risks, of course, in that a party could potentially be denied an opportunity to fully present its case, imperiling the integrity of the award, or that its claims or defenses could be dismissed summarily while some as-yet undisclosed document, line of testimony, or credibility finding surfacing later in the proceeding would have reversed the outcome.

Law and Rules Concerning Dispositive Motions

In the United States, domestic arbitration law has permitted dispositive motions for some time, though some rules have only implemented them in the past decade. For example, while the Federal Arbitration Act, which was enacted in 1925, is silent on dispositive motions, Section 15(b) of the 2000 Revised Uniform Arbitration Act provides that "[a]n arbitrator may decide a request for summary disposition of a claim or particular issue." Similarly, institutional rules provide for dispositive motions. Rule 18 of the JAMS Comprehensive Arbitration Rules and Procedures has permitted dispositive motions since April 2003, but the AAA Commercial Arbitration Rules did not explicitly allow them until October 1, 2013, when Rule 33 was implemented.

While international arbitration regimes have been slower to embrace the concept, they are now increasingly doing so. In recent years, many of the international arbitration rules of the leading institutions worldwide have been revised to codify arbitrators' power to grant dispositive motions, explicitly or implicitly. In 2006,

ICSID incorporated Article 41(5) into its Arbitration Rules, which expressly granted arbitrators the power to summarily dispose of a case. On August 1, 2016, SIAC officially implemented a new Rule 29 providing that parties may request early dismissal of claims or defenses which are "manifestly without legal merit" or "manifestly outside the jurisdiction of the Tribunal." On September 1, 2016, JAMS added Rule 26 to its International Arbitration Rules and Procedures, expressly allowing "any party to file a Motion for Summary Disposition of a particular claim or issue." HKIAC, on November 1, 2018, added a new Article 43 to its Administered Arbitration Rules, empowering the tribunal to make early determinations of law or fact where "such points of law or fact are manifestly without merit" or "outside the arbitral tribunal's jurisdiction." CPR, for its part, on March 1, 2019, added Rule 12.6 to its Administered Arbitration Rules, providing that "a party may make a preliminary application to the Tribunal to file a motion for early disposition of issues." The LCIA is imminently launching their revised rules in 2020, and have indicated that they will include an early determination provision. (*See* prior Kluwer Arbitration post authored by Aaron McDonald and Jerome Temme here.)

Some institutions have withheld from offering express rules on dispositive motions, like the ICDR International Dispute Resolution Procedures, which do not expressly provide for dispositive motions but implicitly permit them by empowering the arbitrator to decide preliminary issues, bifurcate the proceedings, and exclude cumulative or irrelevant evidence. (ICDR International Dispute Resolution Procedures, Article 20(3).) Similarly, while the ICC Arbitration Rules do not expressly permit dispositive motions, on January 1, 2019, the ICC clarified in its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration that arbitrators may summarily dismiss "manifestly unmeritorious claims or defences" pursuant to Article 22 of the 2017 ICC Rules, as it views such authority as inherent in the tribunal's adjudicatory powers.

Slowly but steadily, dispositive motions are being legitimized in international arbitration, and parties are bringing them. Many commentators, too, are calling for their increased acceptance. But are these motions prevailing? In recent years, anecdotally, the most common perception among arbitrators and practitioners is that they are more often made but still not often granted. Empirical evidence, though limited in arbitration, corroborates this: in 2013, New York-based arbitrator Edna Sussman reported her survey results finding that one out of five arbitrators had never granted a dispositive motion, and nearly 50% reported having done so

but only five or fewer times. *See* Edna Sussman, *The Arbitrator Survey—Practices, Preferences and Changes on the Horizon*, 26 Am. Rev. Int'l Arb. 517, 523 (2015). Thus, despite increased interest in recent years, successfully presenting these motions in international arbitrations has remained somewhat elusive.

Emerging Opportunities for Use of Dispositive Motions

The events of this year, however, may spur a step change in the acceptance of dispositive motions in international arbitration. Amidst the COVID-19 crisis and throughout its economic fallout, parties and arbitrators will almost certainly continue to place increased emphasis on efficiency and cost-effectiveness in their proceedings. At the same time, we can expect to see a rising number of disputes—and particularly international disputes—as parties seek determinations on how to allocate increasingly scarce resources, while at the same time, international norms, relationships, and arrangements are questioned and restructured. It is also reasonable to expect increasingly complex disputes in the near future, with arcane and relatively untested contractual provisions and legal doctrines being challenged and examined in ways few expected would ever be necessary, in the areas of *force majeure*, impossibility of performance, and similar bespoke terms. Many of these disputes will be adjudicated in arbitration.

So while parties will likely have more—and more complex—disputes in the near future, and a greater need to resolve them quickly and efficiently due to pressure on liquidity, the dispositive motion will likely play a significantly enhanced role, with both respondents and claimants seeking summary dispositions on key points, in an attempt to accelerate the issuance of an award in their favor. At the same time, the pandemic has brought about enormously increased interest in virtual hearings, which may serve to reduce the international arbitration community's dependence on traditional in-person evidentiary hearings.

Of course, prediction is a difficult business, especially these days, and only time will tell whether these factors will indeed lead to arbitrators entertaining and granting more dispositive motions. Still, it seems that given the increased institutional acceptance in recent years, and the rising enthusiasm from parties and commentators, the stage is set for the dispositive motion to gain a much more tangible foothold in international arbitration, with current events acting as a

catalyst. As this dynamic plays out, arbitrators must take care to exercise this discretion judiciously, and seek to balance the exigencies of the moment with the enduring considerations of basic fairness and due process, ensuring parties are still able to fully present their cases when warranted.