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Summary Judgment in International Arbitration: The “Nay” Case

D. Brian King and Jeffery P. Commission

I. INTRODUCTION

The proposal to introduce a common law summary judgment mechanism in international arbitration is not new. In 2001, it was widely believed that while “arbitration should not become more like litigation”, there were certain procedures applicable in litigation that could be “helpful,” and one example often cited was the “availability in litigation of summary determination”. Almost ten years later, however, none of the major international arbitration rules contemplates summary judgment, at least expressly, and there is little empirical evidence of use of such a mechanism in the practice of arbitral tribunals.

There is a relatively simple reason for this – while the idea of summary judgment is attractive in principle to clients, counsel and arbitrators alike, the mechanics of incorporating such a mechanism into international arbitration remains beset with challenges and unresolved issues. Discussions and debates about the incorporation of some form of summary judgment or summary disposition have continued unabated in international arbitration circles in recent years, but no concrete and detailed proposals have emerged. While the advantages and disadvantages of summary judgment as a concept are well known, the particular details of how such a distinctly common law mechanism would operate in international arbitration, outside of the common law framework, have yet to be fully addressed and explained.


II. **THE SUMMARY JUDGMENT MECHANISM IN US CIVIL LITIGATION**

While dispositive motions in US civil litigation have different labels and different procedures across state and federal courts, there are two main categories of such motions, “motions attacking the pleadings” and “motions for summary adjudication”. Motions attacking the pleadings (such as a motion to dismiss, a motion to strike a claim or defence or a motion for judgment on the pleadings) are used to determine if a claim has been stated, while motions for summary adjudication require “that there is undisputed evidence showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law”.

In civil litigation in US federal courts, Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Rule 56 permits any party to a civil action “to move for summary judgment on a claim, counterclaim or cross-claim on the ground that there is no genuine issue of material fact and that the movant is entitled to prevail as a matter of law”. A motion for summary judgment pursuant to Rule 56 may be directed to all or part of a claim, may be made on the basis of the pleadings or other parts of the record, and may be supported by affidavits and similar materials. A Rule 56 motion assumes, in accordance with the Federal Rules of Civil Procedure, that the parties have a right to full discovery, including depositions, document requests and production, answers to interrogatories, and admissions.

III. **THE EXISTING FRAMEWORK FOR SUMMARY JUDGMENT IN INTERNATIONAL ARBITRATION**

A review of the leading systems of rules used most frequently in international commercial arbitrations reveals that none provides specifically for a summary judgment-style application. There are, however, general provisions in the leading arbitration rules that (to varying degrees) provide arbitrators with wide latitude concerning the conduct and procedure of the arbitration, such as: Article 16.3 of the AAA’s International Arbitration Rules, Article 14.2 of the LCIA’s Arbitration Rules, Article 20 of the ICC Rules, and Article 15.2 of the UNCITRAL Rules.

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5 *Id.*
6 *Id.*
7 AAA International Arbitration Rules, Article 16.3: “The Tribunal may in its discretion direct the order of proof, bifurcate proceedings, 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.”
8 LCIA Arbitration Rules, Article 14.2: “Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or
Some commentators have argued that these provisions, while general in nature, provide arbitrators with the necessary tools to incorporate some form of summary judgment application, while others advocate for the introduction of explicit rules, such as those reflected in certain specialized arbitration rules dealing with construction, employment, or investment disputes. The arbitration rules that explicitly provide for summary judgment or a similar mechanism to deal with unmeritorious claims at an early stage in the proceedings, include: Rule 32(c) of the AAA’s Construction Industry Rules, Rule 27 of the AAA Employment Arbitration Rules, Rule 18 of the JAMS Comprehensive Arbitration Rules, Rule 12504 of the Financial Industry Regulatory Authority’s Code of Arbitration Procedure for Customer Disputes, and Rule 41(5) of the ICSID Arbitration Rules.

rules of law as the Arbitral tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.”

9 ICC Arbitration Rules, Article 20: The Tribunal “shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.”

10 UNCITRAL Arbitration Rules, Article 15.2: “If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.”

11 Judith Gill, supra note 2 at 524.

12 Ned Beale, supra note 2 at 158.

13 AAA Construction Industry Rules, Rule 32(c): “The arbitrator may entertain motions, including motions that dispose of all or part of a claim, or that may expedite the proceedings, and may also make preliminary rulings and enter interlocutory orders.”

14 AAA Employment Rules, Rule 27: “The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.”

15 JAMS Comprehensive Arbitration Rules, Rule 18: “The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request.”

16 FINRA Code of Arbitration Procedure for Consumer Disputes, Rule 12504 (Motions to Dismiss Prior to Conclusion of Case in Chief): allows for the filing of motions to dismiss on very limited grounds, including: “(a) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or (b) the moving party was not associated with the account(s), security(ies), or conduct at issue.”

17 ICSID Arbitration Rules, Rule 41(5): “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.”
IV. **Disadvantages, Challenges and Unresolved Issues**

While time and cost savings are routinely touted as advantages in support of the introduction of a summary judgment mechanism in international arbitration, there remain significant disadvantages, challenges and unresolved issues. It is these reasons, at least in part, that explain why summary judgment procedures have not become common in international arbitration practice, and why such a mechanism is not specifically made available in the major international commercial arbitration rules.

**A. Disadvantages and Challenges**

There are at least five significant disadvantages that may be raised against the introduction of a summary judgment mechanism in international arbitration. First, the very problems (delay and expense) that prompt the call to introduce summary judgment in international arbitration could be worsened by the introduction of such a procedure. Parties might utilize such motions to delay the proceeding, making defending dispositive motions both timely and costly. Lawyers familiar with motion practice in US courts will immediately recognize this concern.

Secondly, as set out above, the major institutional commercial arbitration rules lack an express grant of power to tribunals summarily to dispose of cases. In the light of this, arbitrators have, for the most part, been reluctant to rely on implicit, gap-filling or inherent powers to introduce such a procedure. Failing a change in this trend, modifications to the leading systems of rules would be necessary to promote the use of any summary judgment mechanism.

Thirdly, the introduction of a summary disposition mechanism raises concerns about challenges to the resulting award or its enforcement in the courts. Such a challenge could be predicated on the right of parties to have a full opportunity to present their cases, and/or the presumptive right to an oral evidentiary hearing.

Fourthly, even if summary dismissal mechanisms exist, arbitrators may nonetheless be more likely to hear the case on the merits in the standard way. They may be uncomfortable disposing of all or part of a claim absent significant time to familiarize themselves with the case. Contrary to judges in US courts, there would be no right of de novo review for a party faced with an unsatisfactory summary judgment decision in an international arbitration.

Finally, unlike judges faced with pressures 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).
B. Unresolved Issues

Even assuming that these disadvantages and challenges could be overcome, there are nonetheless a number of unresolved issues that remain:

1. **What types of dispositive motions should be available and what standards should govern them?**

   As explained above, in US civil litigation there are a variety of dispositive motions available, certain of which attack the pleadings, while others are motions for summary disposition or summary judgment. Under US law, each of these motions have different standards and procedures. What standards and procedures would apply to the summary judgment mechanism in international arbitration? Would it be the only dispositive motion available, or might others be available as well?

2. **How much disclosure should the parties be allowed prior to a tribunal’s ruling on a summary judgment motion?**

   A Rule 56 summary judgment motion occurs in the context of the full range of discovery afforded to civil litigants in US courts (e.g. depositions, interrogatories, requests for admissions and extensive document discovery), in contrast to the far more restricted disclosure typical in most international arbitrations. This is particularly important in the context of any summary judgment-style dispositive motion, which requires that there be no genuinely disputed issue of material fact. Absent discovery, a disposition on summary judgment would arguably be unfair. Yet rare would be the voice arguing for US-style discovery in international arbitration.

3. **How much notice should the non-movant receive and how much of an opportunity to be heard should the parties receive?**

   There is also an issue about the basis on which a tribunal should be able to rule on a summary judgment motion. Would a tribunal be entitled to decide such a motion on written submissions alone, or would a hearing be mandatory to ensure compliance with the parties’ rule-based right to a hearing under most institutional rules.

4. **How many arbitrators would have to agree to grant a summary judgment motion?**

   Finally, given the drastic effect of a ruling on a summary judgment motion, there remains a possible issue as to what level of consensus should be required (i.e., would a simple majority of tribunal members be sufficient). This question arises given the highly circumscribed availability of review of arbitral awards.
V. CONCLUSIONS

While the idea of summary judgment remains inviting in principle, unless and until consensus can be reached on the particulars of how it (or any other common law dispositive motion) would function in international arbitration, resistance to the idea will likely – and probably rightly – preclude any extensive use of it.

More productive ground may be applications grounded on the theory that even assuming the facts as alleged by the claimant, no arguable legal claim has been stated – i.e., what US lawyers would call a motion to dismiss for failure to state a claim. The introduction of Rule 41(5) of the ICSID Arbitration Rules, referred to above, may serve as a useful experiment in evaluating the merits (and demerits) of such a procedure in international arbitration.