

# Reflections on the Use of Dispositive Motions in Arbitration

By Edna Sussman and Solomon Ebere

Responding to the perception that arbitration is not sufficiently time and cost-effective, the use of all of the tools at the arbitrator's disposal to streamline the process is being urged. Summary disposition is increasingly being suggested by arbitration practitioners as such a tool.<sup>1</sup> Corporate arbitration users too are urging the greater use of early resolution of issues, noting that "early resolution of...issues could streamline the proceedings and eliminate the necessity for much evidence, briefing and pleading of factual detail and therefore reduce the cost of arbitration. At the very least, early resolution of such issues could conceivably push the parties to an early settlement."<sup>2</sup> While allowing the kind of motion practice in arbitration that prevails in court would lead to the delays and costs incurred in court and is to be assiduously avoided, an examination of the desirability of the greater use of summary adjudication in appropriate cases is warranted.

For purposes of this article, dispositive motions are motions that resemble the type of motions filed in U.S. civil litigation and that a court would consider dispositive of a case or of parts of a case, such as motions for summary judgment or motions to dismiss or strike claims or defenses. In U.S. civil litigation, these mechanisms are frequently used to set aside unmeritorious claims or defenses, and promote a faster resolution of disputes. Proponents of the greater use of dispositive motions in arbitration argue that, for similar reasons, arbitrators ought to use similar procedural tools to resolve disputes at an early stage of the arbitration proceeding where appropriate.

In practice, however, it is generally believed that arbitrators have been reluctant to hear and grant dispositive motions.<sup>3</sup> This hesitation can be caused by several concerns: many major arbitration rules lack explicit rules authorizing arbitrators to entertain dispositive motions; summary disposition of a case may render the resulting award vulnerable to challenges before courts; the absence of the right of appeal in arbitration creates a hesitation to abbreviate the process and raises concerns about the appearance of justice, or lack thereof, in a truncated proceeding. While the latter concerns cannot be ignored, users are resoundingly asking for a more muscular process. Since arbitration is a creature of party choice, the users' stated preferences should be given serious consideration.

This article reviews the arbitrator's authority to decide dispositive motions and the cases in the U.S. which have dealt with petitions to vacate an arbitrator's award on a dispositive motion. In brief, U.S. courts accord a summary adjudication the same deference as an adjudica-

tion after a full blown hearing, as long as the parties have been afforded a fundamentally fair proceeding.

## The Arbitrator's Authority

Neither the Federal Arbitration Act ("FAA"), nor the Uniform Arbitration Act ("UAA") expressly provide for dispositive motions. However, based on the flexibility and discretion granted to arbitrators,<sup>4</sup> courts have found that arbitrators have the authority to grant such motions even when the arbitral rules governing the arbitration, such as the American Arbitration Association's ("AAA") Commercial Arbitration Rules, do not expressly grant such authority.<sup>5</sup> As the Third Circuit said in *Sherrock Brothers, Inc. v. Daimler Chrysler Motors Company, LLC*:

Granting summary judgment surely falls within this standard [of broad discretion to the arbitrator] and fundamental fairness is not implicated by an arbitration panel's decision to forego an evidentiary hearing because of its conclusion that there were no genuine issues of material fact in dispute. An evidentiary hearing will not be required just to find out whether real issues surface in a case.<sup>6</sup>

Moreover, many institutional arbitration rules do provide arbitrators with express authority to entertain dispositive motions. These include Rule 32(c) of the AAA's Construction Industry Rules, Rule 27 of the AAA's Employment Arbitration Rules, and Rule 18 of the JAMS Comprehensive Arbitration Rules.<sup>7</sup> The utility of enabling the arbitrator to decide dispositive motions was recognized and arbitral authority to decide such motions was expressly incorporated into Section 15(b) of the 2000 Revised Uniform Arbitration Act ("RUAA") which provides: "[a]n arbitrator may decide a request for summary disposition of a claim or particular issue."<sup>8</sup>

In international arbitration, as in domestic arbitration, the general grant of discretion to the arbitrator under institutional rules supports the authority of the arbitrator to make summary adjudications. See, ICDR Rules Article 16:3; ICC Rules Article 20; LCIA Rules Article 14:2; UNCITRAL Rules Article 15.2. In 2006 ICSID revised its Arbitration Rules and included Article 41(5), which expressly provided arbitrators with the power to summarily dispose of a case.<sup>9</sup>

The view of the international arbitration bar as to the arbitrator's authority is also reflected in the International Bar Association Rules on the Taking of Evidence in Inter-

national Arbitration, Article 2, which states, in relevant part: “3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues (...) for which a preliminary determination may be appropriate.” The Commentary on the Rules further states: “While the Working Party did not want to encourage litigation-style motion practice, the Working Party recognized that in some cases certain issues may resolve all or part of a case. In such circumstances, the IBA Rules of Evidence make clear that the arbitral tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work.”<sup>10</sup>

## Judicial Review of Summary Adjudications

Summary dispositions by arbitrators have been sanctioned by the courts. Generally, parties challenging an arbitration panel’s decision to grant a dispositive motion have contended either that the arbitrators had “exceeded their power,” and/or that they engaged in “misconduct in...refusing to hear evidence pertinent and material to the controversy,” two of the grounds for vacatur stated in Section 10(a) of the Federal Arbitration Act.<sup>11</sup> In addition to these statutory grounds, parties have raised challenges based on manifest disregard of the law and violation of public policy.

A court’s review of challenges to summary adjudications is grounded in the same premise as that applicable to all other arbitral awards. The court’s “scope of... review is narrow” and the analysis is not an “occasion for a de novo review of an award.” Arbitration awards, including summary adjudications, are to be “be enforced despite a court’s disagreement with the merits, if there is a barely colorable justification for the outcome reached.”<sup>12</sup> But the courts do review arbitration awards, including summary adjudications, to ensure that parties to arbitration are not deprived of a “fundamentally fair proceeding” which requires that a party receive “notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers.”<sup>13</sup>

In *Global Int’l Reinsurance Co. Ltd. v. TIG Ins. Co.*, Judge Rakoff of the Federal Court in the Southern District of New York was not persuaded to vacate an award based on claims that the arbitrator had resolved factual disputes without discovery or an evidentiary hearing. The court stated that “arbitrators have great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings” and “need not compromise the speed and efficiency goals of arbitration by allowing the parties to present every piece of relevant evidence.”<sup>14</sup> The court concluded that the arbitrator was well within his discretion when he determined that the contracts were clear on their face and that further evidence or testimony was not necessary to resolve the issue of contract interpretation before

him. The court found that by permitting the losing party to fully brief the issue and submit all evidence it believed to be relevant, conducting a four-hour oral argument and reviewing all of the relevant contracts, the arbitrator had afforded the losing party an adequate opportunity to present its evidence and argument.

Other courts have similarly stated that a refusal to hear all evidence is not enough to vacate an award. “The law only requires that the parties be given *an* opportunity to present their evidence, not that they be given every opportunity” (emphasis in original).<sup>15</sup> Those seeking to vacate an award must show that the excluded evidence was material to the panel’s determination and that the refusal to hear the evidence was so prejudicial that the party was denied fundamental fairness.<sup>16</sup> If complaining about a denial of discovery, in order to prevail on a vacatur, a party must show that the evidence that would have been obtained in discovery would overcome the panel’s decisions.<sup>17</sup> Parties are not entitled to full discovery that would not change the outcome when the matter can be decided on a pre-hearing motion.

Parties are not entitled in every case to a full-blown evidentiary hearing. In *Schlessinger v. Rosenfeld, Meyer & Susman*, the court (applying California law) stated that a party is entitled to cross-examine if a witness appears at a hearing, but the law does not give a party an absolute right to present oral testimony in every case. The court recognized that a legal issue or defense could possibly be resolved on undisputed facts, and the purpose of arbitration to deliver a speedy and inexpensive means of dispute resolution would be defeated by precluding summary adjudications and requiring a full scale evidentiary hearing in all cases.<sup>18</sup> At least one court has even said that self-serving conclusory statements rejected by the arbitrator as insufficient to create a genuine issue of material fact to defeat the summary judgment motion need not block the granting of a motion.<sup>19</sup>

There are many fact patterns in which a summary adjudication of all or part of the claims and defenses asserted in an arbitration may be appropriate.<sup>20</sup> To illustrate, summary adjudications by arbitrators were granted and confirmed by the courts on the following grounds: *res judicata* and collateral estoppel,<sup>21</sup> plain meaning of the contract,<sup>22</sup> statute of limitations,<sup>23</sup> standing and preemption,<sup>24</sup> waiver and estoppel,<sup>25</sup> employment at will,<sup>26</sup> failure to comply with a contractual claims or notice procedure,<sup>27</sup> evidence insufficient to permit a rational inference by a trier of fact,<sup>28</sup> and failure to state a claim because no duty was owing.<sup>29</sup> The availability of summary adjudication and its enforcement for international arbitrations under the New York Convention has also been confirmed.<sup>30</sup> While there have been cases in which a summary adjudication has been vacated,<sup>31</sup> those cases are few, and they present facts in which the arbitrator failed to allow for the presentation of material non-cumulative evidence.

## A Cautionary Note

As the cases instruct us, while arbitrators have the authority to consider motions for summary disposition and courts have generally affirmed summary adjudications, arbitrators must take great care in exercising this power.

First, the avoidance of increasing the costs of the proceedings and/or delaying its conclusion must be paramount. How sound is the motion and what is its likelihood of success? Are there issues of fact that would preclude ruling in favor of the motion? Will the motion, if granted, really reduce costs and expedite the arbitration, or will it lead to just the opposite result?

In many cases, striking a few unmeritorious claims or defenses of several asserted would not serve to abbreviate the proceedings. Consideration of a motion not likely to succeed will waste time and money. The cost and dilatory impact of court-style motion practice, where the making of dispositive motions is the norm, is precisely what arbitration should avoid. In order to deflect inappropriate motions, arbitrators often discuss the issue of motions in the first preliminary conference to determine the parties' plans in this regard and consider with the parties whether there are appropriate motions to be made. Arbitrators also often require that a letter application for leave to file motions (other than discovery motions) be submitted before a motion is made and afford the opposing party an opportunity to respond to the application.

Second, arbitrators must ensure that they apply the appropriate standard for summary disposition, *i.e.*, that the facts upon which the dispositive motion is made are not in dispute. If there are genuine issues of fact material to the decision, granting a dispositive motion would likely be viewed as depriving the party of a fair proceeding. Arbitrators must also ensure that they have carefully considered any discovery requests by the opposing party. If a party is denied requested discovery that is material to the motion and could alter the result, there would likely be a finding that the party was denied its right to a fundamentally fair proceeding. Issuing an award that is vacated for failure to provide a fundamentally fair proceeding thus requiring the parties to relitigate the matter is the worst result an arbitrator can deliver.

Accordingly, arbitrators must carefully balance the possible benefits to be derived from allowing a dispositive motion to be made against the costs and potential delays occasioned by the motion before allowing the motion to be made. Arbitrators should be confident that the movant is entitled to the relief sought based on undisputed facts and the opponent has had the benefit of any relevant and material discovery sought before granting a dispositive motion.

If a summary adjudication is granted, the arbitrator would serve the parties well and diminish the likelihood of vacatur by writing a reasoned award explaining the basis for the decision and why any evidence that was not considered or discovery not permitted was not material and would not have changed the result.

## Conclusion

As in so many aspects of the arbitrator's role, the exercise of good judgment is crucial. Each case must be reviewed in light of its particular facts. An ill-advised consideration of a dispositive motion or a grant of a dispositive motion later vacated by a court will occasion even more cost and delay and deny the parties the benefits arbitration is intended to provide. But dispositive motions are a powerful tool available to streamline proceedings, and arbitrators should not shy away from meritorious dispositive motions that will reduce time and cost. If arbitration is to deliver on its promise of offering a faster and cheaper dispute resolution mechanism, arbitrators should be proactive in considering with the parties the possible advantages of addressing claims or defenses that are legally insufficient at the earliest opportunity.

The College of Commercial Arbitrators protocol for arbitrators with respect to dispositive motions strikes just the right balance in urging arbitrators to "discourage the filing of unproductive motions; limit motions for summary judgment to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those."<sup>32</sup>

## Endnotes

1. See Catherine M. Amirfar, Claudia D. Salas, *How Summary Adjudication Can Promote Fairness and Efficiency in International Arbitration*, International Bar Association, Arbitration Newsletter (2010); see also Alfred G. Ferris and Biddle W. Lee, *The Use of Dispositive Motions in Arbitration*, 62 Disp. Resol. J. 17, 24 (2007); Mark Friedman and Steven Michaels, *Is It Summary Judgment Time?*, Global Arbitration Review, Vol. 1 Issue 2 (2008), available at <http://www.globalarbitrationreview.com/journal/issues/issue/173/volume-1-issue-2/>
2. See Lisa Davis George, *The Case for User Feedback in Arbitrator Selection*, 65 Disp. Resol. J. 18 (2011).
3. See D. Brian King and Jeffery P. Commission, *Summary Judgment in International Arbitration: The "Nay" Case*, ABA International Law Spring 2010 Meeting, at 1 (Spring 2010), available at <http://apps.americanbar.org/intlaw/spring2010/materials/Common%20Law%20Summary%20Judgment%20in%20International%20Arbitration/King%20-%20Commission.pdf> (observing that "there is little empirical evidence of use of such a mechanism in the practice of arbitral tribunals.").
4. See *e.g.*, American Arbitration Association, Commercial Arbitration Rules, Rule R-30(b).
5. Of course, if summary adjudication is precluded in the contract's arbitration clause, it is not available.
6. *Sherrock Brothers, Inc. v. DaimlerChrysler Motors Co., LLC*, 260 Fed. Appx. 497, 502 (3rd Cir. 2008).

7. *But see* Rule 12504 of the Financial Industry Regulatory Authority's Code of Arbitration Procedure for Customer Disputes, which allows dispositive motions but only with respect to very limited specified issues.
8. 2000 Revised Uniform Arbitration Act ("RUAA"), Section 15(b), available at <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm>. As of 2007, it has been enacted in 12 states.
9. For a discussion of these rules, see Judith Gill, *Applications for Early Disposition of Claims in Arbitration Proceedings*, ICCA Congress Series No. 14, Proceedings of June 2008 Dublin Conference (2009).
10. International Bar Association Rules on the Taking of Evidence in International Arbitration, available at [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Default.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx).
11. Federal Arbitration Act, 9 U.S.C. 10(a).
12. *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, No. 08 civ. 7338, 2009 U.S. Dist. LEXIS 7697, \*3 (S.D.N.Y. January 20, 2009).
13. *Dave Sheldon v. Jay Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001).
14. *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, *supra* note 12, at \*4.
15. See *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248, 252 n. 23 (S.D.N.Y. 1999).
16. See *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, No. 01 C 5226, 2004 U.S. Dist. LEXIS 3494 (N.D. Ill. March 8, 2004); *Warren v. Thacher*, 114 F. Supp. 2d 600 (W.D. Ky. 2000).
17. See *The Louisiana Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, No. 99-3322, 2000 U.S. App. LEXIS 1909 (6th Cir. 2000); *Warren v. Thacher*, *supra* note 16.
18. See *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (Cal. Ct. App. 1995); *accord*, *Warren v. Thacher*, *supra* note 16.
19. See *LaPine v. Kyocera Corp.*, No. 07-06132, 2008 U.S. LEXIS 41172 (N.D. Cal., May 22, 2008).
20. For a discussion of additional cases see David Raim and Nancy Monarch, *Summary Disposition in Arbitration Proceedings*, 11 Arias-US Quarterly, 12 (2004); David E. Robbins, *Calling All Arbitrators: Reclaim Control of the Arbitration Process—The Courts Let You*, 60 Disp. Res J. Vol. 9 (2005).
21. See *Sherrock Brothers, Inc. v. DaimlerChrysler Motors Co., LLC*, *supra* note 6.
22. See *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, *supra* note 12; *Intercarbon Bermuda Ltd. v. Caltex Trading and Transp. Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993).
23. See *Ozormoor v. T-Mobile USA Inc.*, 2010 U.S. Dist. LEXIS 85248 (E.D.Mich. August 19, 2010); see also *Stifler v. Weiner*, 488 A.2d 192 (Ct Spec. App. Md. 1985).
24. See *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, *supra* note 15.
25. See *LaPine v. Kyocera Corp.*, *supra* note 19.
26. See *Goldman Sachs & Co. v. Patel* QDS:2245164, 222 N.Y.L.J. 35 (S. Ct., N.Y. Cty. 1999).
27. See *Pegasus Constr. Corp. v. Turner Constr. Co.*, 929 P.2d 1200 (Ct App Wash. 1997); *The Louisiana Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, *supra* note 17.
28. See *Hamilton v. Sirius Radio*, 375 F. Supp. 2d 269 (S.D.N.Y. 2005).
29. See *Warren v. Thacher*, *supra* note 16.
30. See *LaPine v. Kyocera Corp.*, *supra* note 19.
31. See e.g. *Int'l Union, United Mine Workers v. Marrowbone*, 232 F.3d 383 (4th Cir. 2000) (arbitrator in a labor dispute where the parties had acknowledged that there were factual disputes refused evidence which he had not determined was cumulative, irrelevant or immaterial); *Prudential Secs. v. Dalton*, 929 F. Supp. 1411, 1417 (N.D. Okla. 1996) (arbitrators dismissed facially sufficient claim and failed to allow claimant to present evidence pertinent and material to the controversy); *Thomas Neary v. The Prudential Ins. Co. of Am.*, 63 F. Supp. 2d 208 (D. Conn. 1999) (arbitrators manifestly disregarded standard for summary judgment); *Andrew v. CUNA Brokerage Serv. Inc.*, 976 A. 2d 496 (Sup. Ct. Pa. 2009) (arbitrators granted summary judgment on statute of limitations ground on a fraud claim where the losing party claimed he did not know and could not have reasonably been expected to know about his investment losses until a later date and that accordingly an evidentiary hearing was required to determine the validity of the limitations defense).
32. College of Commercial Arbitrators, *Protocols for Expedious, Cost Effective Commercial Arbitration*, at 73 (2010), available at [http://www.thecca.net/CCA\\_Protocols.pdf](http://www.thecca.net/CCA_Protocols.pdf).

**Edna Sussman is a full-time arbitrator and mediator and the Distinguished ADR Practitioner in Residence, Fordham University School of Law, focusing on international and domestic business disputes. She serves on the arbitration and mediation panels of many of the leading dispute resolution institutions and chairs the Dispute Resolution Section of the New York State Bar Association. She can be reached at [esussman@sussmanADR.com](mailto:esussman@sussmanADR.com) or through her website [www.SussmanADR.com](http://www.SussmanADR.com).**

**Solomon Ebere, [se85@law.georgetown.edu](mailto:se85@law.georgetown.edu), holds an L.L.M. from the University of Paris-La Sorbonne and a Juris Doctor from Georgetown University Law Center.**