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Efficiency With Dignity: Early Dispositions and the Beleaguered Arbitrator

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Introduction: A *Mea Culpa* for Arbitrators

As an arbitrator who strives to conduct efficient proceedings and to be perceived as having this tendency, I confess my guilt and shame. In several completed arbitrations too recent to have been forgotten, I was a member of a Tribunal that issued a Final Award, upon what was essentially a dispositive question of law or contract interpretation, after the parties had expended probably more than \$20 million to present to the Tribunal what turned out to be completely superfluous issues. To those reading this article who are arbitrators, I dare say many of you have comparable culpability and could cite statistics as least as distressing. But alas, where are our outraged critics? Do we stand condemned in retrospect by the parties for our obliviousness to issues of cost? Have the provider organizations called us to account, and penalized us by reducing our compensation? Not in my experience. Process (lots of it) seems to be more or less our main product, and when we deliver it within the generous confines of the time frames the parties and the provider institutions specify (for proceedings and decisions), we meet expectations. However much we discuss efficiency in conferences and publications, the gravitational pull of our trade is toward full evidentiary hearings and full legal exposition of all issues, pre- and post-hearing.¹

When non-American observers decry the Americanization of international arbitration they are almost invariably referring mainly to pre-hearing discovery techniques, and occasionally also to "adversarial-style" cross-examination and preparation of one's own witnesses to withstand such attack ("coaching"). Much less frequently heard in the Americanization Lamentation is any attention to the adoption into international arbitration of longstanding American litigation

¹ See J. Carter, Dispositive Motions in International Arbitration and the Role of U.S. Courts, in J.N. Moore (ed.), *International Arbitration* (Koninklyke Brill NV 2013), pp. 39-45 at 41: "[T]he tradition of a single oral hearing as a key part of arbitration, with presentation of evidence through live witness testimony, remains strong." And noting that "[t]here is force to the argument... that the 'ethos of arbitration is to proceed to a hearing and to discourage if not prohibit motions to dismiss or summary judgments before claimants have presented their case.'"

efficiency devices such as motions to dismiss, motions to strike, motions for summary judgment (entire or partial). These methods have struggled to find a proper place in the efficiency-enhancing arsenal of international arbitration (or even US domestic arbitration) mainly for two reasons: first, they have been seen as creating undue risk that a meritorious claim might be rejected before the Tribunal has been able to develop a full appreciation of all material elements of the case (and indeed it was sometimes said that the merits hearing rights created in arbitration rules were an inalienable element of bargained-for arbitral due process), and second, they have been seen as contributing to the delay in final adjudication of claims in the Federal and State judicial systems in the US and therefore as being generally undesirable obstacles to efficient Arbitrations. But as provider institutions have come to more or less encourage accelerated determination of identifiable issues, at least in commentaries or appendices associated with their rules, the force of the position that accelerated issue determination is antithetical to the arbitration bargain has subsided, and the concern that the Tribunal should have a full appreciation for the material elements involved in any dispositive or partly-dispositive award stands mainly as a case management issue.

Early Dispositions in the Context of Party Strategy

The strategic choices of the parties and their counsel go some considerable distance toward explaining why arbitrators do not manage dispositive issues more efficiently. The Claimant with a high-value claim may not be much interested early on in the efficient curtailment of the proceedings through accelerated proceedings on one or more potentially dispositive or case-reductive issues. The Claimant who has – from its own resources or otherwise -- the financial means to prosecute the claim will often consider, at least in the early stages, that the best route to a favorable settlement is a two-fold strategy of impressing the Tribunal with the case’s myriad strengths and non-existent vulnerabilities, and impressing the adverse party and its counsel with the Claimant’s resolve to bear the cost of a full proceeding in which all issues will be thoroughly, perhaps exhaustively, ventilated. Respondent’s early-stages agenda, on the other hand, would seem at first blush more conducive to efficiency through early issue determination. Respondent’s mission (absent a counterclaim) is primarily to win a full victory at least cost, and, secondarily, to seize upon early opportunities to discredit the Claimant’s case and to invoke the threat of early dismissal for settlement leverage. But we as arbitrators, many of us having spent long advocacy careers advancing such agendas as defense counsel, are wary of Respondent’s motives and skeptical of self-serving assertions about efficiency. The dynamic injected by the Respondent’s agenda may well be the most prominent source of arbitrators’ reluctance to entertain proceedings on so-called “preliminary issues”²; we tend to assume, out of an abundance of caution, that the efficiency posited by Respondent is a mirage and that an invitation to determine a preliminary issue coming from a Respondent is an invitation to waste time not save it.

A Quick Look at Arbitration Rules and Soft Law Guidance

With the possible exception of very recent initiatives by the leading arbitral institutions in Sweden and Singapore, discussed below – and whose impact will be much-debated and closely -

² “Preliminary Issues” has historically been the nomenclature in international arbitration for any substantive issue that might be finally determined in a less-than-final Award.

watched – the rules of the major arbitral institutions historically have been mired between reluctance and ambivalence on the question of accelerated partial dispositions³ (hereinafter "APDs").⁴ ICC Rule 22 (2) states: "In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties." The ICC Rules refer to the possibility of multiple awards on multiple issues only by implication, as certain procedures are applicable only to final awards (time limit for issuance, decision as to allocation of costs) while many others apply to all awards (ICC Court scrutiny, correction and interpretation, notification to the parties, decision by majority, closing of proceedings). Rule 24 (2) now provides: "When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV." The intrepid arbitrator who probes that deeply will find among the techniques the Tribunal may use: "*[R]endering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.*" On a spectrum from reluctance to ambivalence to encouragement, with regard to APDs, where exactly are the ICC's Rules and what are we as arbitrators to glean about the intentions or preferences of parties who agree to use them?

I do not mean to single out the ICC for lavishing only faint praise on APDs. Consider Article 20(3) of the AAA's International Dispute Resolution Procedures, wherein APDs may be understood to be one tool among many that are available, but appear to have no particular endorsement: "The tribunal may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case." The quest in the ICDR Rules for further guidance on the ICDR position (and in turn the intentions of the parties who agree to these Rules) yields only Article 29.1: "In addition to making a final award, the arbitral tribunal may make interim, interlocutory, or partial awards, orders, decisions, and rulings."⁵ It seems that the most the rules drafters have been willing to do,

³ For heavily-annotated surveys of applicable laws, rules and judicial and arbitral decisions in a variety of jurisdictions, see, e.g., N. Beale, L. Nieuwveld & M. Nieuwveld, Summary Arbitration Proceedings: A Comparison Between the English and Dutch Regimes, 26(1) Arb. Int'l 139 (2010); A. Raviv, No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration, 28(3) Arb. Int'l 487 (2012).

⁴ APD is my own coinage. It may have an advantage over "Preliminary Issue" for at least two reasons. First, "preliminary" implies that some issues necessarily will be decided after the preliminary issue. This will not always be the case, as the focus may be on eliminating issues rather than sequencing them. Second, "preliminary" does not necessarily entail acceleration in a significant way. If our objective is greater efficiency, acceleration should be at the center of the discussion. Third, calling such dispositions "preliminary" or "early" rather than "summary" avoids a label that itself raises questions of due process and also calls to mind judicial summary judgment procedures that are not necessarily a suitable reference point.

⁵ For example ICC Rule 20.6 requires that a hearing if requested by a party. One commentator notes that some Tribunals have considered that oral argument on a motion for summary judgment in an ICC Case satisfies that requirement. See J. Fellas, A Fair and Efficient International Arbitration Process, PLI Course Handbook: International Arbitration 2007 (www.pli.edu/emktg/all_atar/Intl_Arb13.doc) The ICC's publication recently of its Appendix encouraging Tribunals to address preliminary issues should reinforce that view.

at least prior to the Stockholm and Singapore initiatives within the past nine months, has been put the question back to the arbitrators, case-by-case.⁶

Before we turn attention to the main idea of this article, which is to advocate as a best practice an arbitrator-initiated early identification of issues for potential APD treatment, let us examine to newest rule-drafting initiatives, from Singapore and Stockholm, to see if the rule-drafting pendulum has carried us already in this direction.

New Initiatives In Singapore and Stockholm

Rule 29 of the Singapore International Arbitration Centre (SIAC) rules that came into force August 1, 2016, entitled “Early Dismissal of Claims and Defenses,”⁷ permits a party to apply for early dismissal of a claim or defense in the basis that it is “manifestly without legal merit.”⁸ The Tribunal is given discretion to decide whether to allow the application to proceed. If the application is allowed, then it is to be resolved by a reasoned order or award (which “may be in summary form”) within 60 days of the application date, “after giving the parties the opportunity to be heard.” This is quite apparently not a ticket for passage to the Promised Land for advocates of a more systematic approach to APDs. It is limited to early *dismissals* of claims and defenses, which by its terms excludes early affirmative determination of the validity of a claim or defense.

⁶ Leading “Soft Law” have made efforts to fill the void, but with only limited results, if results are measured by increased and more systematic attention to APDs. JAMS International in its 2011 “Efficiency Guidelines” reluctantly conceded that dispositive motions might, exceptionally, advance rather than delay effective arbitral adjudication, and advocated the type of letter-motion pre-screening typically used by US District judges to discourage summary judgment motions that have low probability of success. See JAMS Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations, www.jamsadr.com/files/Uploads/Documents/JAMS-International-Efficiency-Guidelines-Arbitration.pdf. Such guidelines are helpful but incomplete. Because they proceed from a premise of reluctance to entertain dispositive motions, they include no recommended method for the Tribunal to require the parties to identify issues that might warrant accelerated attention. An excellent synthesis of the competing considerations into a helpful manual for arbitrators is the CPR’s Guidelines on Early Disposition of Issues in Arbitration (2011), www.cpradr.org/resource-center/protocols-guidelines/guidelines-on-early-disposition-of-issues-in-arbitration. Notably Section 1 of these guidelines is entitled “Arbitrator Initiatives” and Section 1.1 provides: “Arbitral Tribunals should take an active role in promoting early identification and disposition of issues. Early in an arbitration proceeding, and thereafter, the tribunal should consider inquiring of the parties as to issues that might be appropriate for early disposition.” The pro-APD position also finds support in the IBA Rules on the Taking of Evidence In International Arbitration, Article 2: “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 Working Party Commentary on this IBA Rule noted the drafters’ desire to “make clear that the Arbitral Tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work.”

⁷ [print full text of rule]

⁸ The SIAC Rule takes its critical phrase “manifestly without merit” from Rule 41(5) of the ICSID Arbitration Rules, which had been the rare example of an expressly stated international arbitration institutional rule concerning summary disposition. See Born-Beale, *supra*, at 22.

It is limited to determining manifest lack of “legal merit,” appearing thus to exclude any dismissal of a claim or defense that would turn on a determination of fact. Further, the term “*manifest*,” it will surely be argued, equates to frivolousness, and Tribunals that are quite confident that the applicant is correct on the proffered point of law may nevertheless reject the application because the opponent has an arguable albeit unpersuasive position. And the narrow confines of this Rule clearly exclude accelerated determinations of contract interpretation issues that might limit the triable issues of fact or establish whether particular categories of damages are recoverable. Finally, there being little doubt that a Tribunal applying the SIAC Rules prior to this new adoption of Rule 29 had power as a matter of discretion to identify and resolve “preliminary issues,” it remains to be seen whether the new Rule 29’s adoption will have a negative consequence of making arbitrators more reluctant to adopt APD procedures that cannot fit within Rule 29. *Expressio unius...?* Thirteen years ago your author as Claimant’s counsel in a SIAC Rules arbitration received an unsolicited procedural order from the Tribunal setting an accelerated timetable for separate determination of a key merits issue: whether a contract amendment had been procured by economic duress visited upon Claimant by Respondent. An evidentiary hearing was held and the issue was resolved in Claimant’s favor in a partial award. Such an issue clearly does not fall within new SIAC Rule 29, and one may wonder whether Tribunals will view Rule 29’s narrow focus as an implied discouragement of more ambitious efficiency initiatives like the one I have just described.⁹

Rule 39 of the Stockholm Chamber of Commerce (SCC) rules, in force since January 1, 2017, permits a party to apply for a summary disposition of one or more claims, defenses, or material issues *of fact or law*. This rule is entitled “Summary Procedure.” It may be invoked with respect to “issues of jurisdiction, admissibility or the merits.” The Tribunal after receiving comments from all parties on whether the summary procedural should be invoked, and “having regard to all relevant circumstances” including efficiency, may decline to establish a summary procedure or may “fix[] the summary procedure in the form it deems appropriate.” As this is essentially the procedure invoked *sua sponte* by the SIAC Tribunal in your author’s case circa 2004 as described above, the significance of Stockholm Rule 39 perhaps lies not so much in articulation of a new procedure but in the codification and endorsement of a procedure perhaps too infrequently invoked in recent years.

Whether these new rules (and others that will emulate them) will advance or hinder the *judicious* use of summary disposition procedures now becomes a popular topic for discussion. I began this paper with the proposition that arbitration parties spend vast sums to obtain resolution of claims, defenses, and issues that could have been resolved more quickly and at less cost. But that is not to say that the sums were *necessarily* misspent. Exhaustive process may be valuable in and of itself to some parties, and may lead to greater satisfaction with the outcome. Reducing the risk of error also has value for which arbitration participants are, consciously or otherwise, willing to pay a substantial price. A systematic examination of how to make use of APDs more optimal

⁹ Gary Born writing in 2010 cited widespread (albeit not unanimous) opinion among arbitrators and arbitration scholars, including several awards under ICC and other institutional rules, for the existence of arbitral power to make summary dispositions. G. Born & K. Beale, Party Autonomy and Default Rules: Reframing the Debate Over Summary Disposition in International Arbitration (hereinafter “Born-Beale”), 21/2 ICC Bull. 19, 20-21 (2010).

calls for some attention to be paid to the factors that primarily influence arbitration procedure in the formative stages of the case.

Efficiency With Dignity: A Game Plan for Arbitrators

Consider the plight of the arbitrators. The presiding arbitrator wants both sides to be instilled with confidence that the procedure will be fair and that the Tribunal will thoroughly and objectively assess each position advanced by each side. The co-arbitrators, especially if they have been party-nominated, wish to instill similar confidence in the parties, and especially in a party that did not nominate them. The arbitration culture, pervasively influenced by post-Award litigation raising issues of impartiality and lack of independence, drives arbitrators toward reticence -- and, regrettably, not only in the case's formative stages. If an arbitrator reading a crucial provision of the contract giving rise to a commercial dispute is inclined to think the clause is unambiguous notwithstanding the contentions to the contrary of a party whose claims or defenses are heavily dependent on the clause's construction, her instinct (unlike that of a municipal judge whose impartiality is less vulnerable) will often be to suppress the inclination and not even share it with her Tribunal colleagues.

Prudent counsel may be just as disinclined as the Tribunal to bring a potential APD to the forefront, but for different reasons. Counsel may advise the client that Tribunals are naturally wary of proponents of accelerated disposition, warily regarding such proponents, as a group, as aggressive tacticians unfair advantage from a process that runs the risk of leaving important considerations, whether factual or legal, inadequately examined. Such prudent counsel may advise that bearing the cost of more process than is arguably necessary is a valuable investment in the confidence and trust of the Tribunal.¹⁰

¹⁰ Michael Schneider remarked in a thoughtful article more than 20 years ago that "much of the time and costs are due to incompetence of counsel or to dilatory tactics." [Article cite] In the context of early identification of critical issues, incompetence is certainly one obstacle to efficiency but risk management by more or less able counsel is perhaps a more pervasive difficulty. Suppose a simple issue of contract interpretation would impact the amounts in dispute in a dramatic way -- such as a clause that arguably excludes recover of lost profits, or consequential damages, or specifies an exclusive remedy or provides for liquidated damages. The party claiming damages in sums substantially exceeding what a contract provision arguably permits may not see any particular advantage to an early test of the recoverability of the claimed damages. That party may instead consider that an impressive submission of factual and expert evidence concerning liability and quantum may (1) favorably influence the Tribunal in regard to interpretation of an ambiguous contract provision, and (2) motivate the adverse party toward settlement due to the certain cost associated with countering the liability and quantum case of the Claimant and the uncertain outcome if the case proceeds to a Final Award. In economic terms, the expected value of dodging the potential preliminary issue may be seen by the Claimant as exceeding the expected value of having the Tribunal address it. From the Respondent's perspective confronting the same issue, there may well be a tendency absent an invitation from the Tribunal to underestimate the Tribunal's willingness to issue a case-dispositive or case-limiting Partial Award at an early stage.

If arbitrators will not stand up for efficiency (as measured by use of APD procedures), and counsel will not stand up for efficiency (similarly measured), in a case-specific setting, then this efficiency-enhancing method needs a catalyst that leaves the Tribunal's impartiality and counsel's credibility reasonably intact.¹¹ The improvement proposed here is simply to require the parties *at a pre-preliminary conference stage* to identify all issues that might possibly be resolved without full merits hearing procedures, and to submit comments in writing on the virtues of summary procedures, issue by issue, after conferring with the adverse party. That preliminary order might be energized by a statement to the effect that, in the Final Award, cost allocation consequences might ensue (if permitted under the contract and rules) if it appears to the Tribunal that certain issues that were suitable for APD treatment were not identified as such, or if APD treatment was discouraged by an opponent of such treatment on grounds that, in retrospect, ought not to have been accepted by the Tribunal as reasons for postponing decision of the issue to the Final Award. This should culminate in the incorporation into the procedural timetable any summary disposition procedure that is agreed upon or allowed. And it reduces or eliminates the risk that such an issue will be identified in mid-course when, even though it might be perfectly suited for summary disposition, its belated introduction would disturb settled expectations about the temporal arc of the case.¹²

Such a provision in an early Procedural Order might look something like this:

"The parties are directed to submit jointly by Date X a Joint Report on Preliminary Issues which shall identify any issue of fact or law that either or both parties submit should be resolved by the Tribunal upon a timetable and in proceedings that are separate from and accelerated in relation to the merits hearing (a "Preliminary Issue"). To the extent there is agreement that an issue is a Preliminary Issue the parties shall also report upon the scope of any agreement, and the area of disagreement, as to the procedure and timetable to be adopted for the Preliminary Issue to be heard and determined. Insofar as the parties disagree that an issue should be a Preliminary Issue the report should set forth each party's position concerning why the issue should or should not be so identified, including such factors as the time required for adjudication, the extent to which resolution would or would not

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An agreement to arbitrate is not necessarily, or not entirely, a mutual decision in favor of a more efficient and less costly procedures. Sometimes in international cases the main driver of arbitration is simply to avoid the municipal courts at the adverse Party's domicile. In many arbitrations, domestic and international, privacy may be a main driver. Also, when one or more of the parties is a national of State whose judicial systems encourage accelerated full or partial dispositions – notably the United States -- the agreement to arbitrate arguably represents a trade-off: reasonable assurance of a faster more streamlined route to a full merits trial, with the sacrifice of accelerated disposition options (motions to dismiss and for summary judgment) that sometimes enhance efficiency but other times just act as bottlenecks on the road to trial.

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advance the ultimate resolution of the case (including savings of cost and time), and the nature of the evidence and/or legal authority that would need to be presented in order for the issue to be resolved. At the stage of the Final Award, the Tribunal may consider in regard to allocation of costs the costs incurred or saved by reason of the adoption or non-adoption of procedures to address one or more Preliminary Issues."

Before advancing this direction, the Tribunal will not fail to have first examined whether the enterprise is clearly foreclosed by the arbitration agreement, the applicable rules, the arbitration law of the seat, and (where possible to foresee) the arbitration law of the most likely jurisdictions of Award enforcement.¹³ The preliminary vetting should examine not only the basic question of arbitral power but also any clearly demarcated minimum procedures (disclosure? Oral hearing of witnesses?) that appear to be mandatory for any arbitral determination in the applicable agreements, rules, and laws.¹⁴ Some arbitrators will resist the initiative as too fraught with risk if these questions cannot be readily answered with high confidence.¹⁵ But a direction to the parties to identify issues for possible early disposition is far short of a commitment from the Tribunal that such procedures will be adopted. And there is ample room for the parties to draw the Tribunal's attention to "gateway issues."

This procedure when adopted will not necessarily lead to increased use of summary disposition procedures. The objective is not necessarily more use, but more rational use or non-use of early disposition methods. What should be provoked by the issuance of such a procedural order is more robust early stage understanding of the issues presented, and appreciation for the law and evidence and procedures appropriate to their resolution. It cannot always be fairly assumed that the parties have mastery over the framing of their claims, counterclaims, and defenses when the case is at the preliminary conference stage. The applicable law may not be the law in which lead counsel are trained or the law of a jurisdiction in which they practice. Counsel may be only in the earliest stages of conducting a dialogue with a potential foreign law expert witness. Surely in some cases there will be resistance: a party will report that due to various circumstances it is simply not possible within a few weeks' time to make a comprehensive identification of issues.

¹³ For a discussion focused on this "gateway issues" theme mainly from the perspective of a U.K. seat, see P.Chong and B. Primrose, Summary Judgment in International Arbitrations Seated in England, 33 (1) Arb. Intl 63 (2017).

¹⁴ At least in the United States, judicial responses to arbitral summary dispositions have been generally supportive provided that the summary disposition procedure was a fundamentally fair one. See E. Sussman & S. Eberz, Reflections on the Use of Dispositive Motions in Arbitration, Vol. 4 No. 1 New York Dispute Resolution Lawyer 28, 29-30 (2011); J. Carter, Dispositive Motions in International Arbitration and the Role of U.S. Courts, in John Norton Moore (Ed) International Arbitration, pp. 39-45 (2013).

¹⁵ A party at risk for defeat or limitation of a claim or defense by summary or accelerated adjudication may be inclined to raise to a level of "due process" its objection to use of summary or accelerated procedure - making timid arbitrators reluctant. See C. Amirfar & C. Salas, How Summary Adjudication Can Promote Fairness and Efficiency in International Arbitration, IBA Arbitration Newsletter Sept. 2010 77, 78.

I believe the most important element of this procedure is that the arbitrator takes an initiative to identify issues that might be suitable for early disposition at a stage when the arbitrator knows relatively little about the case and so the initiative cannot usually be justifiably seen as a product of a premature arbitral inclination toward a particular outcome. A major obstacle to the use of accelerated disposition methods is one that is not very much discussed in the literature – that by the time the arbitrator realizes that an issue could be resolved without going to a full merits hearing, and that its resolution could end the case or materially limit the scope of what remains, it is far too late for the arbitrator to suggest this without leaving the distinct impression on the parties that she has already formed a stable if not entirely unshakable view as to the winner and loser on the issue at hand. Just as the norm of strict neutrality-in-appearance restricts other forms of conduct in the course of an international arbitration – such as arbitrator suggestions of settlement discussions, and tendentious questioning of witnesses by party-appointed arbitrators – this norm constrains arbitrators who have “figured it out” to sit patiently through to the end if they have failed to raise the possibility of accelerated disposition in a suitably early and neutral fashion.

Conclusion

Parties pay a very high price for due process in arbitration, sometimes willingly and sometimes mainly because the arbitrators have failed to show the bargains available. Early initiative by arbitral tribunals holds great potential for more rational expenditures by the parties to achieve what they will regard a just and fair outcomes.