Paris Arbitration Week 2023

Summary dispositions in international arbitration: An important tool or just going through the (dispositive) motions?

Highlight points from the Reed Smith webinar

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Contents

Efficiency and cost savings are hot topics in international arbitration. The 2018 and 2021 Queen Mary University surveys on international arbitration, for example, found that 61% of the participants would forgo unlimited length of written submissions[1] and that summary dispositions should be utilized to promote efficiency.[2]

We have identified several key points of contention within the international arbitration community with respect to dispositive motions. Specifically, there is contention regarding when they are efficient and cost effective for all parties, when they may be redundant or only delay proceedings, and under what circumstances may the procedure of dispositive motions be perceived to violate due process rights pursuant to Article V of the New York Convention.

To debate and discuss these issues, we assembled a cast of stars from near and far:

Guest speakers

Patrick Baeten
Chief Legal Officer
M&A, Engie

Stefan Brocker
Partner, Mannheimer Swartling

Felix Dasser
President, Swiss Arbitration Association; Partner, Homburger

Harriet O'Neill
Retired Associate Justice of the Supreme Court of Texas; Current Arbitrator at Law Office of Harriet O'Neill

Edna Sussman
Arbitrator and Mediator, Sussman ADR LLC

Reed Smith moderators

Peter Rosher
Global Chair,
Reed Smith
International Arbitration

Daniel Avila II
Associate,
Reed Smith,
Houston

Reed Smith speakers

Antonia Birt
Partner,
Reed Smith,
Dubai

Matthew Townsend
Registered Foreign Lawyer
(England & Wales)
(Hong Kong)

Following a presentation by several of the panelists regarding the history of dispositive motions originating in the U.S. and perspectives from different regions of the world, Reed Smith Global Chair of International Arbitration Peter Rosher and Houston-based international arbitration lawyer Daniel Ávila moderated the interactive, dynamic panel discussion.

Audience members had a chance to vote on each point of contention. The results of those polls, which can be found at the end of each section, confirm the contentious nature of the debated propositions.

These highlights include a range of views expressed by members of the panel and guests. Comments are not attributable to any particular individual or their respective employers.

1 *See* Queen Mary University of London, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World (2021), available at arbitration.qmul.ac.uk.

2 *See* Queen Mary University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration (2018), available at arbitration.qmul.ac.uk.

Introduction

Since its inception – and even more so now in a globalized world – international arbitration has continued to be a battleground; a "tug and pull," if you will, among different legal systems and styles. Considering international disputes may involve different countries and different legal systems, international arbitration has been front and centre seeing these worlds collide.

The civil law system's less expansive discovery in contrast to common law's more broad discovery has seen a clash and compromise in what we now see in a "Redfern Schedule." Such compromises are further demonstrated in the different styles used in discovery, cross-examinations, and other arbitration processes. Dispositive motions are no exception.

Although national courts in several jurisdictions have their own summary disposition procedures, dispositive motions are not common in every jurisdiction. The standards to approve such motions may vary between each jurisdiction, even within the same country.

Historically, tribunals have been reluctant to hear dispositive motions because they were not expressly included in the relevant institution's rules. This has changed. Over the last five years, in response to the arbitral community's call for more efficient arbitrations, tribunals have found authority for these motions within the inherent power to administer efficiency and many arbitral institutions have expressly included them in their rules.

Some international arbitration tribunals have also been skeptical of dispositive motions for fear of an award being challenged on due process grounds under the New York Convention (i.e., if a party feels that it has not had a fair opportunity to "present its case"). Considering written submissions in arbitration have continued to increase in size and length, international arbitration has been a subject of scrutiny in resolving disputes privately and efficiently. What was once a forum to resolve highly sensitive business disputes in a private and timely manner has given way topublic and long proceedings – especially when country states are involved as respondents.

Now more than ever the international arbitration community must respond to these criticisms and create more efficient ways to resolve these complex disputes before they are sent back to the domestic courts. While interviewing task force members and the wider arbitration community, we identified other key areas of disagreement. To analyze these issues, we gathered an experienced and authoritative panel, representing arbitrators, users, and advocates. We also invited our global audience to vote on each of the disagreements prior to and post-debate.

What was the purpose of our webinar? Not to reach conclusions but to promote consideration of these important issues. We hope you find this report on our discussion useful.

Peter Rosher
Global Chair,
Reed Smith
International Arbitration

Daniel Avila II
Associate

3 ***See, e.g.***, 2018 Hong Kong International Arbitration Centre Rules, Article 43 (allowing for tribunals to make early determinations of law or fact where "such points of law or fact are manifestly without merit"); ***see also, e.g.***, 2020 LCIA Rules, Rule 22.1 ("Early Determination"); ***see also, e.g.***, U.S. Revised Uniform Arbitration Act, Section 15(b)("[a]n arbitrator may decide a request for summary disposition of a claim or particular issue"). One ICC tribunal in 2010 noted the lack of express language for dispositive motions in the ICC rules and refused to grant a dispositive motion unless it was "crystal clear" that the legal claim had no basis in law. This "crystal clear" standard continued to place a freeze on the hearing of dispositive motions until recent responses by arbitral institutions to expressly incorporate in their rules the authority for dispositive motions.

4 ***See, e.g.***, ICC Case No. 11413 (Dec. 2001), 21 ICC Intl. Ct. Arb. Bull. 34 (2010) (noting that the ICC rules and Section 33 of the English Arbitration Act both discussed ensuring the parties were given a reasonable opportunity to present their case).

5 ***See*** Caline Mouawad, Elizabeth Silbert, ***A Case for Dispositive Motions in International Commercial Arbitration*** (Kluwer Law 2015, Vol. 2, Issue 1), p. 78 ("Practitioners and parties have criticized international arbitration in recent years for losing its competitive edge of resolving disputes swiftly").

Overview of dispositive motions

Following welcome opening remarks from Peter Rosher, Reed Smith's Global Chair of International Arbitration, Arbitrator Edna Sussman provided a U.S. perspective and overview of dispositive motions.

Below is a summary of points she covered in her presentation.

A U.S. perspective of "motions to dismiss" (Edna Sussman)

Edna described being at an ICC conference where people did not think summary dispositive motions were permitted in ICC cases. When asked whether you can submit a dispositive motion, the ICC representative was "very surprised," responding, "**Of course you can.**" The subject of dispositive motions is timely and continues to change. Historically people did not bring such motions because a) they did not think they could and b) they were concerned a shortened proceeding would risk applying the law incorrectly with limited rights to appeal.

Edna detailed the evolution in thinking about the appropriate role of the arbitrator and whether they should be proactive or consider factors that influence the parties to settle. In a survey conducted three years ago among arbitrators, when asked whether an arbitrator should be thinking about the impact on the parties in terms of enabling them to settle the case, 78% said yes. So, what does that mean? It does not mean mediating. But there are many actions (short of mediation) that arbitrators can take in terms of establishing a process, including allowing summary disposition and motions to be made **if appropriate to facilitate settlement**.

Considering U.S. courts have historically included dispositive motions in court proceedings and motion practice, it is not surprising that in the U.S., the AAA rules were one of the first rules to expressly authorize bringing dispositive motions. This adoption was a reaction stemming from both court and corporation influence – many corporations in the U.S. urged the AAA to expressly authorize dispositive motions in order to increase the efficiency and cost effectiveness of arbitration.

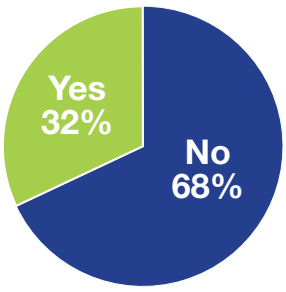
The AAA rules allow dispositive motions to occur if they are **likely to succeed and narrow or dispose of issues in the case**. This means arbitrators must consider whether the dispositive motion really does make the arbitration more efficient and economical. Interestingly, the ICDR rule is a little bit different. Rather than the "likely to succeed" standard, the threshold there is "**reasonable possibility of success**." Following the 2013 rule by the AAA, many jurisdictions have followed suit in Singapore, Stockholm, the ICC practice note, Hong Kong, and the LCIA (among others).

If an arbitrator is unsure whether the motion should be heard, in the U.S., a common practice is for the arbitrator to request a three-page letter explaining why the motion is appropriate. One would be surprised how well informed one can be as to whether the motion should be permitted to go forward based on such a short letter.

The types of issues that are raised at the beginning of arbitration are the ones you would expect and include:

- Statutes of limitations
- *Res judicata* collateral estoppel
- Standing
- Waiver
- Estoppel
- Notice procedures
- Contractual limitation of damages
- Duty owed

Poll question: Have you or a counterparty ever attempted to request summary disposition in a case?



A U.S. and Texas perspective of "summary judgment" (Harriet O'Neill)

Justice Harriet O'Neill noted that summary motions are included on her "checklist" of issues to discuss during the preliminary hearing.

She noted that although dispositive motions had been included in the rules for several years, they were not much utilized because judges would let it be known that these motions were not favored – thus, they were rarely granted. But that attitude has in fact changed. Courts are now very comfortable with granting dispositive motions when appropriate.

"Traditional summary judgment"

One type of dispositive motion in Texas is the **traditional summary judgment**, where the movant attempts to defeat or prevail on a claim **as a matter of law**. The general standard requires the movant to show there's **no genuine dispute as to any material fact**, and the movant is entitled to judgment as a matter of law. In deciding whether to grant the motion, the court views **the facts in the light most favorable to the non-movant**.

"No-evidence summary judgment"

The second type of dispositive motion in Texas is called a "**no-evidence motion**" where the moving party argues there is no evidence and there are no facts to support one or more of the claims or required elements. A no-evidence motion can only be filed after an adequate time for discovery has passed. The motion has to be specific as to the evidentiary challenge. You cannot simply lodge a general, no-evidence objection to the claimant's case. To defeat the motion, the non-movement is not required to marshal its proof. It simply has to point out evidence that supports the challenged element of the claim.

While there was considerable controversy when the no-evidence practice was first approved, it is now firmly embedded in U.S. jurisprudence.

Justice O'Neill emphasized the importance of including the possibility of filing a dispositive motion in the parties' contract because it serves as the consummate source of the arbitrator's authority. The arbitration clause in the contract can be broad and include no-evidence motions, or strictly limit motions to traditional summary judgment – but by including the clause in the contract, the parties can decide on what dispositive motions are allowed rather than leaving the decision to the arbitrator's discretion. If the parties follow Justice O'Neill's advice and decide to cover dispositive motions in their arbitration clause, it would be a good idea for the clause to adopt by reference a specific set of rules governing disposition. These rules can guide the parties' submissions and the arbitrator's deliberations.

Justice O'Neill included a practice pointer: If a party requests permission to file a dispositive motion and the other side successfully contests it, then track the legal fees spent on that issue during discovery and at the hearing. If the arbitrator rules in your favor on the point you wanted to present later in the case, you can seek to recover these fees as the prevailing party on that point, even if you ultimately lose the case on the merits. You may be able to offset the prevailing parties' fee award if the other side incurred unnecessary fees on an issue that could have been summarily adjudicated.

If a dispositive award is going to be reversed, it is most likely going to be on the grounds of depriving a party of the opportunity to be heard and to present relevant and material evidence and arguments. **For that reason, if the arbitrator is going to grant a motion, it's always best to spell out the reasons for their decision in the award. This is true even if the motion is only a partial disposition. Summary disposition should always be reasoned.**

> *"Summary disposition should always be reasoned."*
> *– Justice Harriet O'Neill*

Now, if a party wants to present an argument on a motion, some arbitrators allow a party to do so. **But a hearing is not required.** The failure to hold a hearing on the party submissions **has been held not to be a basis to vacate an award**. But if a party wants an oral hearing and the arbitrator decides not to allow it, it is best practice for the arbitrator to state their reasons why no oral hearing was permitted in the award.

Another practice pointer for practitioners: When a practitioner is working on the scheduling order and they include dispositive motion practice, **it is essential to request a deadline for the arbitrator or panel to rule on the practitioner's motion**. Nobody wants their disposition to linger.

Justice O'Neill noted that, at a minimum, the request can educate the arbitrator about the case. Approximately 10 to 12% have been granted on specific claims rather than the whole case. In Justice O'Neill's experience, about a third of those have settled shortly after the ruling. In sum, every case is different, and arbitrators should never use a cookie cutter approach to their case management. **There is no one-size-fits-all; dispositive motions will be helpful and appropriate in some cases, but will be counterproductive in others.**

The Swedish perspective – the Stockholm Chamber of Commerce (Stefan Brocker)

Stefan Brocker provided an overview from the perspective of the Stockholm Chamber of Commerce. He explained that legally defective or manifestly unsubstantiated claims brought before a Swedish court could easily be disposed of at a very early stage of a case – even before a motion has been dismissed, and even before the respondent has submitted any answer.

The same has not been true for arbitration cases. Case in point, the Arbitration Act does not provide any explicit provision empowering a tribunal with summary procedure. **However, in 2017, the Arbitration Institute of the Stockholm Chamber of Commerce amended its rules and introduced Article 39 on summary procedure.**

Article 39 of the SCC rules provides that a party may request the arbitrator to decide one or more issues of fact or law through means of a summary procedure. The rule applies to both claims and defenses. The article is available to both parties throughout the arbitral proceedings.

The summary procedure may concern issues of jurisdiction, admissibility, or the merits; it need not be limited to legal thresholds or tests. Article 39 provides three non-exhaustive examples:

1. An allegation of fact or law material to the outcome of the case is manifestly unsustainable.
2. Even if all the facts alleged by the other party are assumed to be true, no award could be rendered in favor of that party under the applicable law.
3. Any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

The second hypothetical differs from the first one. There is no requirement of manifest unsustainability in the second hypothetical; rather, the tribunal takes as true the facts alleged by the non-requesting party.

Where a summary procedure is available, it might be appropriate in certain scenarios depending on the scope of what is being determined. Subsection 3 of Article 39 discusses the steps to apply for summary procedure.

As a starting point, the requesting party should specify the grounds relied on as well as the form of summary procedure proposed. They then must demonstrate that the procedure is efficient and appropriate with regard to all the circumstances of the case. If those prerequisites are fulfilled, the arbitral tribunal will offer the other party an opportunity to present its arguments.

Finally, Article 39 emphasizes the provision in Article 23(2) of the SCC rules, namely that both parties should have been given the opportunity to present their respective cases. This reminder addresses the tension that exists between efficiency and equity. While Article 39 aims to efficiently dismiss claims that have no remedy in the law (as shown in example 2 above), it also reminds the tribunal to ensure that each party has an equal and reasonable opportunity to present their case.

When practitioners were asked whether they had applied Article 39, the responses were varied. **However, no one answered that they had used it successfully.**[6]

Stefan noted the possibility of narrowing down cases and facilitating settlement if Article 39 is applied correctly. He closed with a call to action: There need to be **more bold arbitrators who are prepared to use Article 39**.

6 Stefan also noted that he did identify cases under the SCC rules where a summary disposition was considered.

The Swiss perspective – Swiss Arbitration Association (ASA) and UNCITRAL Working Group (Felix Dasser)

In providing a Swiss perspective, Felix Dasser presented an overview on the Swiss Arbitration Association (ASA) and his experience from the UNCITRAL Working Group. Felix explained that dispositive motions likely developed in U.S. procedure, not least in order to avoid jury trial and to minimize pretrial discovery. **These two enormously disruptive and expensive concepts do not exist in arbitration**.

Felix noted that it is "important" to make a very clear distinction between two different concepts. One is **bifurcation** of proceedings (it is usually undisputed that arbitrators have the authority to grant this) and the other is **summary disposition** of manifestly unmeritorious claims and defenses. Summary disposition raises the issue of whether the right to be heard, a mandatory requirement of arbitration, was actually granted.

Felix noted that back in 2019/2020, the UNCITRAL Working Group II thought about including provisions on early dismissal and preliminary determination in the new Expedited Arbitration Rules, but decided that such provisions would be better placed in the general UNCITRAL arbitration rules.In 2021, Working Group II initiated discussions to include a more detailed provision in the UNCITRAL Rules for the ability to bring a request for summary disposition.

The Secretariat of the 2021 Working Group provided the group with three options:

1. A detailed rule to be included in the UNCITRAL arbitration rules
2. A simple and generic rule to be included in the UNCITRAL arbitration rules
3. A detailed guidance text not for inclusion in the UNCITRAL arbitration rules

"The working group preferred the most unobtrusive option and decided to propose to the UNCITRAL Commission to add a note #21to the UNCITRAL notes on organizing arbitral proceedings. This note simply informs the arbitrators they have the power to run summary disposition, if they find it appropriate. However, the note advises that arbitrators should carefully weigh the pros and cons of taking such a step.

This low-key approach is in line with the view expressed by ASA that, maybe counterintuitively, motion practice may render arbitration more protracted and expensive rather than more efficient. There are more efficient alternatives available to the parties and the tribunal.

Commenting that "summary disposition is like medicine," Felix advised to "use it only when there is a real need, and then don't overdose."

"Parties do not want to keep frivolous claims lingering all the way to the final evidentiary hearing, distracting the tribunal and the parties from the main issues at hand."

Perceived conflicts with Article V of the New York Convention (Daniel Avila II)

Daniel Avila provided an overview of the perceived conflicts between Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and summary dispositions. He explained that although summary dispositions are very common in Texas and the United States, they were not as welcome in international arbitration, **at least initially**.

This unwelcoming attitude was due to Article V's language regarding a party's right to **present its case**.

The New York Convention provides several grounds to refuse enforcement of an award. Article V 1B provides that a court can resist enforcement if a party was otherwise unable to present its case. Initially, the view of some practitioners in the international arbitration community was that a summary proceeding with no hearing and limited evidence could be in tension with this section.

However, following growing concerns of inefficiency, cost, and length of proceedings, **international arbitration practitioners, clients, and arbitrators have pushed back on the idea that a party's right to present its case requires an oral hearing every time.**

Parties do not want to keep frivolous claims lingering all the way to the final evidentiary hearing, distracting the tribunal and the parties from the main issues at hand.

Several surveys, including the 2013 PwC Corporate Choices in International Arbitration, the 2015 ICC Commission on Decision on costs and even the latest 2021 and 2022 Queen Mary University surveys on international arbitration, all called for efficiency through dispositive motions.

Institutions such as the Stockholm Chamber of Commerce and the ICDR have provided new rules regarding dispositive motions, **but more importantly, they have also included language regarding a party's right to present its case**.

Article 39-6 of the Stockholm Chamber of Commerce rules provides that when considering summary dispositions, the tribunal should give each party an equal and **reasonable** opportunity to present its case.

In its 2021 rules, the ICDR included its first section on early disposition, but also included language to the effect that each party shall have the right to be heard and a **fair opportunity** to present its case.

These are both prime examples of institutions expressly combating concerns that summary dispositions are incompatible with the New York Convention.

It should be noted that despite these institutions requiring a party's ability to "present its case," their rules **do not require an oral hearing**.

There is a growing consensus that the parties' right to be heard can be accomplished via briefing and summary disposition. But practically speaking, even if the tribunal felt that briefing alone was insufficient, it could certainly hold a minor oral hearing – even remotely – to allow the parties to also argue their points orally.

So, aside from addressing these concerns in the underlying arbitration agreement, these are just a few points to ensure that the non-movant will not have due process grounds to refuse enforcement of the arbitration award.

An in-house view: What do users want and expect? (Patrick Baeten)

Patrick Baeten provided an in-house perspective with respect to dispositive motions. He explained that commercial arbitration is often perceived as too expensive and too slow. This has been confirmed in the most recent survey by Queen Mary University in 2022 on energy arbitration, **where all parties said that they would like to see the arbitral process become more efficient**.

Most of the respondents believed that arbitrators were in the best position to hold parties' feet to the fire.

When you're drafting, negotiating, and ultimately agreeing on the dispute resolution clause, it is fair to say that the possibility for dispositive motions, let alone the detailed procedural features of those provisions, are probably not the main concern you have right at that time.

And one question that arises out of this is whether the rules sufficiently empower arbitrators to make decisions at an early stage, **or whether it is the arbitrators who might be reluctant to utilize the powers that they have been granted. All too often it is the latter**.

Bold moves, of course, can trigger post-arbitration judiciary disputes and reviews. **But maybe that is the price to pay for, in general, more efficient arbitral proceedings** and hence a sustainable authority to the judiciary or other means of dispute resolution.

Following presentations by the speakers, the panelists and audience were provided with different scenarios, and were tasked with determining whether summary disposition was appropriate. Matthew Townsend and Antonia Birt were pre-assigned positions to debate, and Daniel Ávila was the moderator.

"The main improvement sought by respondents relates to strengthening case management in the initial stages of the formal dispute process, e.g., by preventing mala fide delay tactics, encouraging narrow tailoring of arguments and providing avenues for summary disposal of claims."

- Queen Mary University, 2022 Future of International Energy Arbitration Survey

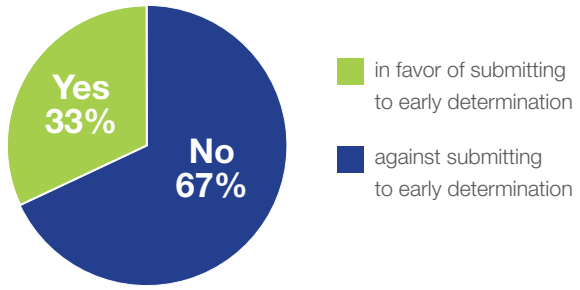
Scenario 1

Claimant Renewable Energy Company (REC) enters into a Wind Turbine Supply Agreement (the TSA) with Supplier Wind Co. (SWC) for the supply and commissioning of certain wind turbines off the coast of Sandwood Bay, UK. REC alleges that several wind turbines failed at the wind farm four years after commissioning and brings an arbitration against SWC claiming a variety of damages, including lost profits under theories of local English law after negotiations fail.

Respondent SWC files a request for early determination, seeking a determination that the limitation of damages clause in the TSA limited several of the claimed damages, if not all, and arguing that an early determination of the clause being applicable would save the tribunal and the parties from extensive briefing and from presenting extensive and expensive expert testimony.

Should the tribunal grant this request?

Poll results



Submissions of our panel

Panelists:

- Matthew Townsend (pre-assigned to debate **for** dispositive motion to be considered)
- Antonia Birt (pre-assigned to debate **against** dispositive motion to be considered)

Matthew Townsend (pre-assigned for)

Matthew explained that this would be an appropriate question to be submitted to the tribunal because the first issue of lost profits will be very expensive and time consuming to litigate.

These litigation costs and the delay in resolution itself will be unnecessary and can be avoided by an early determination if the tribunal is of a mind to order it. This scenario otherwise allows early determination for a fair and expeditious arbitration.

Matthew described the types of experts who may have to be retained to determine damages – each of whom will increase costs significantly:

- Experts to debate as to the electricity prices which would be achievable throughout the many years left to run in this contract
- Experts discussing the market changes in the energy market
- Experts determining the impact of climate change on future wind
- Quantum experts calculating the cost of maintaining this discounted cash flow methodology model
- The same experts doing an analysis on the cost of maintaining the turbines
- Fact witness testimony from witnesses, industry experts, meteorologists, and quantum experts to determine lost profits

Another important point to consider is whether the issue is a pure question of law for which no fact investigation may be necessary. For example, if the tribunal finds that under English law the limitation of damages clause is valid and enforceable, that may signal the need for early settlement if the damages were mostly lost profits, thereby avoiding this whole stage.

Antonia Birt (pre-assigned against)

Antonia Birt (in her pre-assigned role) described the summary motion as a "pesky application" given the circumstances. Rather than addressing the key issues in dispute, the respondent – by requesting early determination at this stage – is now hiding behind alleged contractual limitation of damages provisions and, on that basis, seeking to bifurcate (or request a dispositive resolution of) the proceedings.

Antonia argued that the respondent is "putting the cart before the horse" in arguing that the limitation of liability provisions limit the damages and then wishing to deal with the merits later.

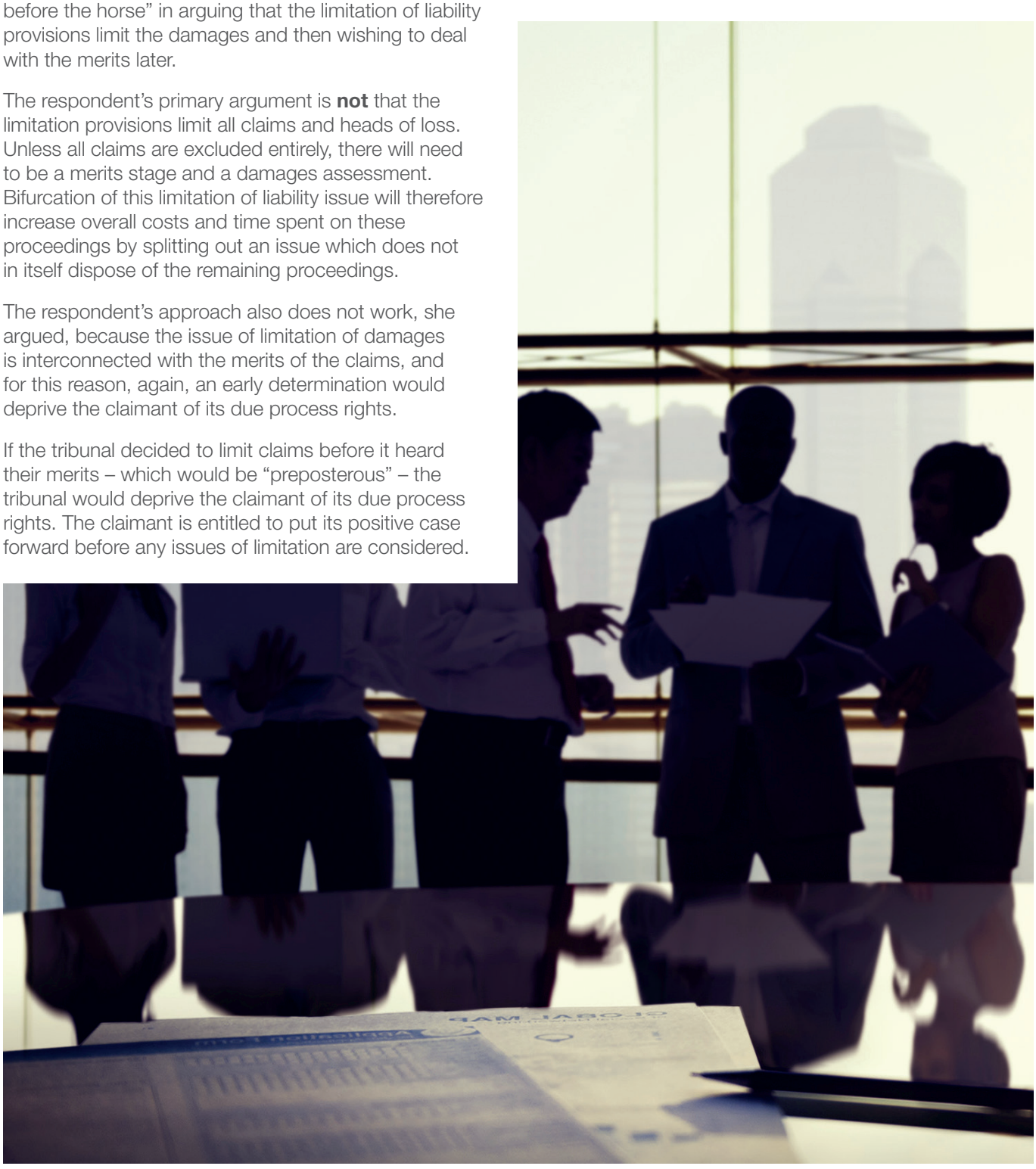
The respondent's primary argument is **not** that the limitation provisions limit all claims and heads of loss. Unless all claims are excluded entirely, there will need to be a merits stage and a damages assessment. Bifurcation of this limitation of liability issue will therefore increase overall costs and time spent on these proceedings by splitting out an issue which does not in itself dispose of the remaining proceedings.

The respondent's approach also does not work, she argued, because the issue of limitation of damages is interconnected with the merits of the claims, and for this reason, again, an early determination would deprive the claimant of its due process rights.

If the tribunal decided to limit claims before it heard their merits – which would be "preposterous" – the tribunal would deprive the claimant of its due process rights. The claimant is entitled to put its positive case forward before any issues of limitation are considered.

Stefan Brocker

Stefan sided with the vote of the audience. He felt that assessing first one part of the claim, before you have even assessed the liability, was "backward." He felt a party should use the summary procedure if it has a crystal-clear case, where you actually dispose of, if not the entire claim, then the majority of the claim (or at least an isolated issue). And he doesn't think that is the situation here. So, he would deny the request.



Scenario 1B

Now the claimant argues that the clause is inoperative under local law because the respondent acted with gross negligence.

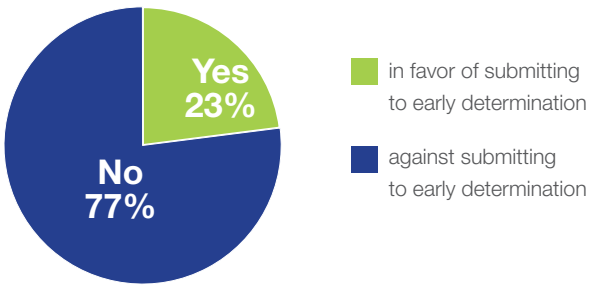
Should the tribunal grant the request?

Matthew Townsend (pre-assigned for)

Matthew argued that while it is true that in the early determination proceedings some factual evidence will need to be considered on this gross negligence point in order to ascertain whether the claimant's contentions are correct, this burden is outweighed by the benefits of early determination.

He considered this burden will quickly go again to the key benefit, an early determination of whether lost profits are excluded is in effect, and an early determination of what kind of arbitration is presented in this scenario.

Poll results



Antonia Birt (pre-assigned against)

Antonia argued that to request bifurcation on the issue of limitation of liability, in circumstances when the limitation clause is inoperative, due to the respondent's gross negligence, does not even pass the "red face test."

The issue of the respondent's gross negligence, is interlinked with the merits of the claims. For this reason, demonstrating gross negligence would depend on the same evidence that would need to be adduced with respect to the breaches of the agreement. And hence, rather than leading to any kind of efficiencies, such a bifurcation would cause duplication.

Edna Sussman

Edna explained that **one of the things to consider in the context of whether to allow a motion to be made is what the impact might be on the party settlement, whether it is in favor or against**.

Edna explained that she had two cases last year where the tribunal permitted the motion to be made to interpret the contract. In the first case, both parties wanted to have the motion submitted. The second case arose from a failure to give notice in accordance with the contract.

And they both settled before the resolution of the issue by the tribunal.

This shows that simply having the case laid out for the parties early on, in detail, helped the parties settle long before they reached any other proceedings.

Summary motions can often drive settlements and that is something a tribunal should weigh when determining whether to allow the motion to proceed.

Harriet O'Neill

Justice O'Neill weighed in, stating that she would deny a summary motion on the gross negligence piece, if it would be an issue. It may be hard to see how that could be parsed out on liability.

Justice O'Neill included her thoughts on a semantic point. In U.S. practice, this would be called a dispositive motion, rather than a bifurcation. Bifurcation connotes that you're going to go ahead and litigate the issue and decide it separately, whereas a dispositive motion is a matter of law determination.

According to Justice O'Neill the issue is whether lost profits qualify as direct, or consequential, damages. That's a question of law, but it might be a question of law that depends on the facts. It is surprising how unsettled the law can be on this topic. She would ask, via a three-page request on this issue, how much will the characterization of these damages as consequential or direct depend on the facts of the case?

If that would result in a fact-intensive inquiry, she might allow a short brief on that question in the dispositive motion, so the tribunal can focus its attention on the issue throughout the proceedings. But she thought that would be more appropriate in a pre-hearing brief, as opposed to a dispositive motion.

If it's fairly clear that there are going to be consequential damages that this limitation provision would bar, she would allow the filing of a dispositive motion. She advised that her decision is based on her experience. She explained that lost-profit damages are expert witness and time intensive, and if the limitations clause wipes those damages out, then she would allow the motion for the purpose of efficiency.

Scenario 1C

Now the early determination applies to 90% of the damages requested.

Should the tribunal grant the request?

Matthew Townsend (pre-assigned for)

Matthew made two arguments for this point. The first was that early determination is still appropriate because it saves cost; the alternative to early determination is a poor use of the tribunal's and the parties' resources.

The second point was that, by hearing the arguments on this point early, they could become a driver to settlement. So, it's an efficiency argument first, but you may also get a settlement out of the process.

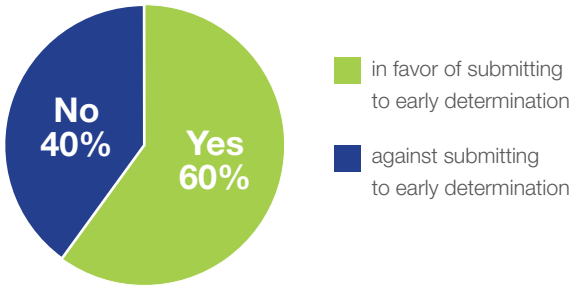
Antonia Birt (pre-assigned against)

Antonia argued that bifurcation of the issue of limitation of liability in a situation where not all damages will be limited is not an efficient use of the tribunal's time, for the reasons previously communicated.

Even if the respondent is successful, which is improbable, the merits of the claims will need to be heard as there will still be some remaining damages, even on the respondent's best case.

Therefore, better use is made of the tribunal's and the parties' valuable resources by hearing the issues in a unified proceeding, which will allow the tribunal an opportunity to first appreciate the extent of the respondent's wrongdoing, before deciding on an element of that wrongdoing. Further, this would give the claimant an opportunity to be heard, and hence, preserve their due process rights.

Poll results



Edna Sussman

Edna emphasized that summary motions may be expensive and time consuming; she warned parties to not overplay the importance of allowing these motions to be made.

While summary motions may promote a settlement, and such consideration should certainly be a part of the equation, it must not be at the expense of cost and efficiency. Summary motions are not free and they can take time, slowing down the process.

But used properly, summary motions can save time and cost. She advised broaching summary motions at the first case management conference and trying to shape the motion either on the spot or through short three-page letters so that the process is resolved quickly.

So, use your intuition and get those feelers out to see what you think is going to be helpful to the parties.

Scenario 1D

Now the early determination applies to 10% of the damages requested.

Should the tribunal grant the request?

Matthew Townsend (pre-assigned for)

Matthew argued that because the damages in question are a relatively small amount, this minor issue could distract from the main issues in the case if it kept lingering unresolved throughout the case. Also, because the issue is small, it may be dealt with in submissions rather than lengthy oral arguments.

Antonia Birt (pre-assigned against)

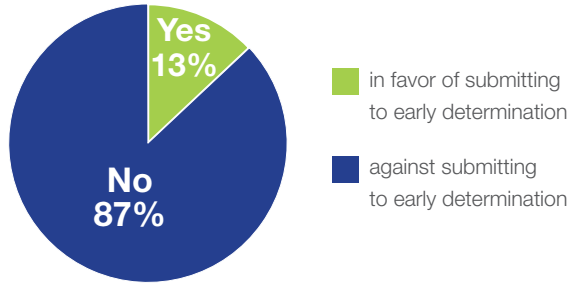
Antonia argued that this is an unarguable request, and it should never have been raised. Engaging in lengthy motion proceedings for the purposes of potentially dismissing 10% of damages is unjustifiable.

Harriet O'Neill

Justice O'Neill explained that she would not be inclined to allow a motion in this scenario. Although there are a lot of protestations about the expense of proving lost profits, it may not be a practical matter. A litigant is going to hire a lot of experts and put a lot of time and effort into arguing this relatively minor issue.

Justice O'Neill urged parties to track fees that are attributable to the lost profits, discovery, and trial, because at the end of the day, if that is decided as a matter of law, then they might be able to offset the award with the fees spent on that element of the damages.

Poll results



Scenario 2

Claimant files a case against Respondent Oil Company for breach of contract based on a land contract where Respondent Oil Company purported to sell and transfer certain land to claimant.

Respondent files an answer and a motion to dismiss based on lack of standing. Respondent argues that respondent never signed or otherwise entered into the agreement complained of by claimant.

Should the tribunal grant the request?

Antonia Birt (pre-assigned for)

Antonia argued that the respondent had already spent significant time, effort, and resources to defend itself in these unfounded proceedings, even though it never signed or otherwise entered into the relevant agreement.

She argued that arbitration is a **consensual mechanism** which cannot be imposed on the respondent.

This case is, therefore, a prime example in which the esteemed members of the tribunal must decide to allow for the requested **motion to hear the issue of consent**.

First, establishing whether the agreement was signed, or otherwise entered into, **would dispose of the entire claim**.

If the tribunal finds, as it must, that the agreement has not been signed or entered into by the respondent, then it must find that the lack of the respondent's consent to the agreement which contains the arbitration agreement deprives the tribunal of any jurisdiction. This issue must be determined on a preliminary basis to avoid either party incurring unnecessary costs.

If the tribunal decides in favor of the respondent, that is the end of the matter. Establishing that the agreement was not signed, or otherwise entered into, is a straightforward question.

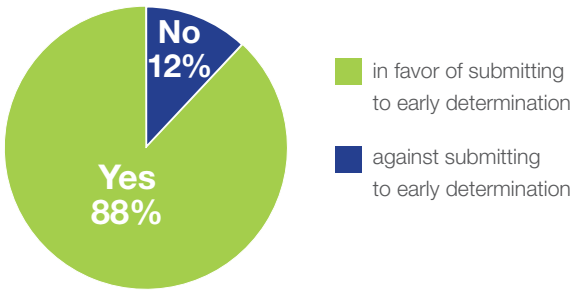
The tribunal is therefore requested to determine this issue of the respondent's lack of consent to the arbitration agreement as a preliminary issue.

Matthew Townsend (pre-assigned against)

Matthew contended that the first argument against summary procedure in this scenario is that it would lead to no real cost savings and may indeed add to the costs of this proceeding, and the second argument is that this is not a matter which lends itself to early determination. The question is whether the contract was signed or otherwise entered into. But it is not merely a question of whether the contract was signed.

In fact, the contract was signed – it was signed by the claimant's wife, and the claimant contends that his wife was acting as his agent. So, you can see that there are already some complexities involved.

Poll results



The claimant will be advancing evidence of legal arguments when it comes to questions of agency under applicable law and considerable witness testimony on this point.

So, on the question of cost, it is not simply a matter of resolving a self-contained dispute.

There will be legal arguments and tests that require considerable testimony – some of which may be duplicative of the testimony heard in the main part of the case – to be heard in the early determination portion, and, beyond the cost associated with the testimony, this hurdle is not a matter that lends itself to early determination in the claimant's view.

Felix Dasser

Felix explained that the tribunal **should strictly manage the proceedings, it does not necessarily need to hear all the witnesses or admit yet another brief. Efficiency is better served by efficient management than by motion practice**..

Here, at best, the issue is one of bifurcation. The provisions under Swiss law state that, in general, the tribunal should decide the issue of jurisdiction at the outset if it is disputed.

In practice, it depends on the complexity of the issues. Felix also advised that whether the need is urgent should be considered.

Stefan Brocker

Stefan, echoing Antonia Birt, explained that arbitration is consensual. Stefan expounded on the idea by adding that people have a psychological feeling that we need to be softer. This feeling leads to additional questions: For example, is early determination now worth the battle if we're then going to have a **fight later during enforcement**?

Unless the parties have included arbitration in their agreement, it is not mandatory.

Antonia Birt

Antonia emphasized that arbitrations are not subject to procedures of national courts (unless parties have specifically agreed so). In the context of an international arbitration proceeding, even if the enforcement court is an English court, for one party to impose English court procedural rules against the other parties' protestation is not appropriate when the logic for the decision is simply that the enforcement court is more familiar with local rules.

Patrick Baeten

Patrick explained that the ultimate point is for the arbitrator to be **bold enough to bring the issue up at an early stage to avoid reliance costs**.

Edna Sussman

Edna ended by suggesting that the tribunal should engage extensively with the parties from the beginning and continue actively managing the case. Extensive, continuous, and early engagement can obviate multiple issues, and move the case along appropriately.

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