CHAPTER 5

Too Early to Decide? An Examination of Dispositive Motions in International Arbitration

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§5.01 INTRODUCTION

Arbitration as a form of dispute resolution for international commercial matters has long been hailed as advantageous as compared to litigation. There are numerous claimed benefits, including enforceability of awards and finality of decisions; along with procedural flexibility, efficiency and cost effectiveness.[1] Despite these claimed benefits there has been a persistent voice in legal scholarship bemoaning that the attractiveness of arbitration over litigation has been eroded.[2] This voice claims that arbitration proceedings have been complicated by litigation-type processes such as multiple rounds of complex and lengthy submissions, document production, and protracted hearings.[3] One consequence arising from this phenomenon has been a perceived decrease in the efficiency of arbitration and an associated increase in the cost

1. *See*, e.g., Bernard Hanotiau, *International Arbitration in a Global Economy: The Challenges of the Future,* 28 Journal of International Arbitration 89 (2011).
2. *See*, e.g., *ibid*., 98; David W. Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited,* 24 Arbitration International 375, 376 (2008); L. Tyronne Holt, *Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation's Ill Effects,* 7 De Paul Business & Commercial Litigation Journal 455 (2009); Thomas J Stipanowich, *Arbitration the 'New Litigation'*, 1 University of Illinois Law Review 1, 1 (2010).
3. Surveys over the last fifteen years including a recent Queen Mary surveys' participants have been lamenting the fall of arbitration and it being surpassed by litigation style procedures, *see*, for example, White and Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations (accessed 2 Feb. 2018).

of taking a dispute through arbitration.[4] In short, it has been claimed that arbitration is becoming more like litigation and 'judicialized'.[5]

One recent answer to the issue of 'judicialization' has been the introduction of early dismissal and summary type proceedings (*dispositive motions*) into institutional rules.[6] The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC) have both introduced dispositive motion procedures into their rules.[7] Additionally, more recently, the International Chamber of Commerce (ICC), whilst not amending their rules, has stated clearly that summary procedures are available as a case management tool within the parameters of ICC Rules.[8] These amendments have been generally welcomed by the arbitration community as a positive development and an opportunity to address some of the perceived issues with efficiency and cost effectiveness of arbitration.[9]

However, to date there is no available information on how these rules are used in practice. Therefore, there is no indication as to whether these rules are enhancing efficiency and assisting in minimising the 'over judicialization' of arbitration. The paradox of introducing what is primarily a judicial procedure to stem judicialization is not lost. In many aspects, it appears contradictory to claim that the judicialization of arbitration is an undesirable development and propose a solution that is judicial in nature. However, the introduction of this judicially inspired procedure has the potential to assist in stemming the judicialization of arbitration and add to the efficiency and

4. *See*, e.g., Gunther J. Horvath, *The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes*, Part I: International Commercial Arbitration, Chapter 13, in *International Arbitration and International Commercial Law; Synergy, Convergence and Evolution* 261 (Loukas Mistelis et al eds, Kluwer Law International 2011).
5. Vijak K. Bhatia, *Interdiscursive Colonisation of Arbitration Practice,* 30 World Englishes 76 at 78 (2011). Additionally twenty years ago Pierre Lalive noted the 'modern disease of over-regulation' in Pierre Lalive, *Arbitration – The Civilized Solution*, 16 ASA Bulletin 483 (1998).
6. *See*, e.g., Judith Gill, *Applications for the Early Disposition of Claims in Arbitration Proceedings,* in *50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series*, Vol. 14 (Albert Jan van den Berg ed., Volume 14, Kluwer Law International 2009); Aren Goldsmith, *Trans-Global Petroleum: 'Rare Bird' or Significant Step in the Development of Early Merits-Based Claim Vetting?*, 26 ASA Bulletin 667, 680 (2008); Gary Born and Kenneth Beale, *Party Autonomy and Default Rules: Reframing the Debate Over Summary Disposition in International Arbitration*, 21 ICC International Court of Arbitration Bulletin 19 (2010); Ned Beale Lisa Nieuwveld and Matthijs Nieuwveld, *Summary Arbitration Proceedings: A Comparison Between the English and Dutch Regimes,* 26 Arbitration International 139, 140 (2010); Adam Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration,* 28 Arbitration International 487 (2012); note however, Horvath, *supra* n. 4, at 268 where he argues that institutional rules should be stripped of all but the essential rules.
7. Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules 2017 (SCC Rules), Article 39; Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules), Rule 29.
8. *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration,* 30 October 2017, *Expeditious Determination of Manifestly Unmeritorious Claims or Defences* [59]–[64], https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf (accessed 13 Aug. 2018).
9. *See*, e.g., Magdalena Berg, *New Year, New SCC Arbitration Rules Make Arbitration More Efficient* (Baker McKenzie, 17 Jan. 2017), http://www.bakermckenzie.com/en/insight/publications/2017/01/new-year-new-scc-arbitration-rules/ (accessed 13 Aug. 2018).

flexibility of arbitral proceedings. The rules have only recently come into existence and remain relatively untested.[10] As many changes in arbitration are practice driven, their effectiveness will come down to how the rules are utilised and interpreted. This chapter examines whether the addition of dispositive motion provisions will assist in enhancing cost and time effectiveness and thereby the issue of judicialization of arbitration. To address this issue, it is imperative to identify how dispositive motions work and the legal tests and procedures that may be available to tribunals when examining the application of them. The chapter is divided into the following sections:

- Section 5.02 provides an introduction to dispositive motions through examining dispositive motions available in the English domestic law jurisdiction.
- Section 5.03 examines dispositive motions in international arbitration. First, it examines the use of dispositive motions in the inherent case management jurisdiction of tribunals and considers why explicit rules are beneficial for institutional arbitration. Second, it examines Article 39 of the Stockholm Chamber of Commerce (SCC) Rules and its potential practical application with a view to determining how the rule can be used to increase efficiency. In looking at this recourse is had to case law from International Centre for Settlement of Investment Disputes (ICSID) and the English jurisdiction to see how dispositive motion provisions have been interpreted by courts and tribunals. Finally, it examines whether there are potential enforcement issues connected to awards rendered pursuant to dispositive motions.
- Section 5.04 concludes by examining whether the introduction of dispositive motions will add to the claimed judicialization of arbitration or whether they represent potential for efficient, streamlined procedures.

§5.02 DISPOSITIVE MOTION PROCEDURES IN CONTEXT: DOMESTIC ENGLISH JURISDICTION

There are numerous ways to define early dismissal/strike out and summary judgment procedures. In this chapter 'dispositive motions' is the term used to encapsulate these procedures.[11] Dispositive motions have their historical roots in the common law family and were originally introduced as a form of case management for an overcrowded court system.[12] They have been used successfully as such for well over a century. For comparative purposes, this chapter examines the available dispositive motions in the

10. SIAC Rules came into effect on 1 Aug. 16 and the SCC Rules on 1 Jan. 2017.
11. This term has been used by numerous scholars to define the procedures discussed in this paper. *See*, for example, Gill, *supra* n. 6; Raviv, *supra* n. 6; Caline Mouawad and Elizabeth Silbert, *Case for Dispositive Motions in International Commercial Arbitration*, 2 BCDR International Arbitration Review 77 (2015); Edna Sussmand and Solomon Ebere, *Reflections on the Use of Dispositive Motions in Arbitration*, 4 New York Dispute Resolution Lawyer (2011).
12. Summary judgment was first enacted in England in 1855 in the Keating's Act. *See* commentary in John A Bauman, *The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating*, 31 Indiana Law Journal 1, 1 (1956).

English jurisdiction.[13] The relevance of the English procedures for the purposes of this study is that they provide a solid basis for examining the potential legal thresholds that can be used in institutional rules.[14]

In domestic litigation a 'Dispositive Motion' covers a process whereby a court reaches a conclusion on either all, or part, of a claim on more limited information and evidence than would necessarily be available at a full hearing.[15] In practice, these motions usually take one of the two forms:

- a motion to dismiss;[16] and
- summary judgment.[17]

A motion to dismiss traditionally assumes that the facts pled by the claimant (or counter claimant) are true, and nonetheless the case should be dismissed as there is no valid claim to be determined.[18] This motion is filed early to avoid incurring costs and time for a case that cannot possibly succeed.[19]

Summary judgment in English domestic law is traditionally given by a court against all or some of the claim if:

(a) the court considers that the claimant/defendant has no real prospect of succeeding on/defending the claim or issue; or
(b) there is no other compelling reason why the case or issue should be disposed of at trial.[20]

The threshold test for summary judgment is somewhat broader that the motion to dismiss. There is an extensive body of English case law that demonstrates how courts have interpreted and applied the above threshold tests in the Civil Procedure Rules (CPR) in relation to summary judgment. This can be used as a guide for how dispositive motion provisions may be able to be utilised in international arbitration.[21] The case law demonstrates that there is a fine balancing act in determining whether a case should be decided summarily prior to submission of all of the evidence or a full hearing.[22] Courts

13. For a more detailed background in relation to the history of dispositive motions, *see,* for example, Constantine Partasides and Ben Prewett, *Rediscovering the Lost Promise of International Arbitration 110-132,* Chapter 5 in *Expedited Procedures in International Arbitration, Dossiers of the ICC Institute of World Business Law,* 16 (Laurent Levy and Michael Polkinghorne eds, Kluwer Law International: International Chamber of Commerce (ICC) 2017).
14. *See also* Federal Rules of Civil Procedure (US).
15. Gill, *supra* n. 6, at 513.
16. Civil Procedure Rules 1998 (England and Wales) Rule 3.4.
17. Civil Procedure Rules 1998 (England and Wales) Rule 24.
18. Civil Procedure Rules Practice Direction 3A – Striking Out a Statement of Case, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03/pd_part03a (accessed 13 Aug. 2018).
19. Mouawad and Silbert, *supra* n. 11 at 77–78.
20. Civil Procedure Rules 1998 (England and Wales) Rule 24.4(2).
21. *See*, for example, *Three Rivers v. Bank of England (No 3)* [2001] UKHL 16; *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472; *Doncaster Pharmaceutical Group Ltd & Ors v. The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661; *Easy Air Limited (Trading as OpenAir) v. Opal Telecom Limited* [2009] EWHC 339 (Ch).
22. Some of these tests were highlighted in *Easy Air Limited, ibid.,* [15] (Lewison J).

have demonstrated concern to ensure justice and fairness to the parties and will not dispose of a case easily prior to a full hearing on the facts.[23] Consequently, applying the tests for summary judgment has proven a challenging task. As Lord Justice Mummery held:

> Although the test can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the 'no real prospect of success' test on an application for summary judgment … than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal).[24]

The case law developed in accordance with these rules demonstrates that this remedy is very fact and case specific and has a high threshold test.[25] The tests developed by the courts have not always been dealing with the most straightforward of cases. However, given the growing complexity of cases in international arbitration it is unlikely that it is the simple cases that will cause tribunals the most contention in the arbitration sphere.[26] The tests developed from the cases are discussed, where appropriate, in the sections below examining the SCC rules.

In domestic litigation, dispositive motions have been seen as a useful case management tool to enable courts to either dismiss or determine unmeritorious claims without a full evidentiary hearing. The inclusion of dispositive motion provisions into institutional rules is arguably a necessary and positive development for international commercial arbitration to enable tribunals to do the same thing. The usefulness of examining the domestic remedies from an international arbitration perspective is in understanding how these procedures can benefit case management and the legal tests that have been developed through application in practice. The application of the domestic case law into the international sphere is merely to provide guidance for potential interpretation and application of the new rules.

§5.03 DISPOSITIVE MOTIONS IN INTERNATIONAL COMMERCIAL ARBITRATION

[A] Use of Dispositive Motions as an Inherent Case Management Tool

The use of dispositive motions has proven to be a useful form of case management in domestic jurisdictions. It is therefore not surprising that there has been significant commentary in relation to their potential implementation into institutional rules.[27]

23. *See*, for example, *Doncaster Pharmaceutical Group Ltd, supra* n. 21.
24. *Ibid.* [5] (Mummery LJ).
25. *Three Rivers*, *supra* n. 21 at [95] (Lord Hope); *Doncaster Pharmaceuticals Group Ltd, supra* n. 21; *Easy Air Limited, supra* n. 21 at [4] (Lewison J): *ED & F Man Liquid Products, supra* n. 21 at [10] (Rix LJ); *Swain v. Hillman* [1999] EWCA Civ 3053 at [28] (Judge LJ).
26. *See* Remy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the 'Judicialization' of International Arbitration,* 25 American Review of International Arbitration 223, 238 (2014).
27. *See* generally, Gill, *supra* n. 6; Raviv, *supra* n. 6; Mouawad and Silbert, *supra* n. 11; Philip Chong and Blake Primrose, *Summary Judgment in International Arbitrations Seated in England*, Arbitration International 1 (2016).

However, to date, only two major international commercial arbitration institutions have amended their rules to include dispositive motions.[28]

Although explicit rules only have recently been introduced, the use of dispositive motions in international arbitration in not entirely new. Numerous scholars consider there is an inherent power within institutional rules to order dispositive motions.[29] This is based primarily on the fact that institutional rules are purposively flexible and provide arbitrators and parties' significant leeway to determine the procedure of the arbitration. Institutional rules generally contain broad case management powers for the tribunal to conduct the arbitration as it sees fit, subject of course to party autonomy and providing each party with a reasonable opportunity to present its case.[30] Arbitral tribunals determining claims pursuant to the ICC Rules have agreed with this proposition. That is, a tribunal does, in limited circumstances, have an inherent power to case manage and determine a matter early and summarily.[31] However, it is clear from the scholarship and the cases publically available that there remains hesitancy from the users of arbitration in relation to the use of inherent dispositive motions.[32] One tribunal stated when examining the availability of a motion to dismiss type of application:

> a strong dose of circumspection appears to be called for since, unlike the situation before national courts, international commercial arbitration tribunals are established on a case-by-case basis and their jurisdictional authority is basically founded on a contract to refer to binding arbitration any disputes coming within the scope of the agreement to arbitrate. In the context of commercial arbitration, therefore, there could only be very little room indeed for the procedure of striking out a case.

In ICC Case No. 11413, the tribunal examined the ICC rules and the English Arbitration Act (the relevant *lex arbitri*) to determine that the tribunal did have the

28. *See*, however, other institutions that have dispositive motion type procedures, including: Judicial Arbitration and Mediation Services Comprehensive Arbitration Rules and Procedures (2014) Rule 18; AAA Construction Industry Arbitration Rules and Mediation Procedures (2009) Rule 31(b) and Rule 32(c); SIAC Domestic Arbitration Rules; Netherlands Arbitration Institute Arbitration Rules (2015).
29. *See*, for example, Mouawad and Silbert, *supra* n. 11, at 78; Chong and Primrose, *supra* n. 27, at 1 (2016). *See also IBA Rules on the Taking of Evidence in International Arbitration* (2010), Article 2(3): 'Each arbitral tribunal is encouraged to identify to the parties as soon as it considers to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a *preliminary determination* may be appropriate.'
30. *See*, e.g., The Arbitration Rules of the International Chamber of Commerce 2017 (ICC Rules), Article 22; The Arbitration Rules of the London Centre for International Arbitration 2014, Article 14.4; Philip Clifford Shai Wade and James Clanchy, *A Commentary on the LCIA Arbitration Rules 2014*, 14-1015 at 176 ((Sweet & Maxwell 2015) where it states: 'The Arbitral Tribunal enjoys the widest discretion to decide the most appropriate procedure for the conduct of the arbitration. Provided its powers have not been curtailed by the parties, and that it complies with Art 14.3 and any applicable mandatory laws, it can adopt any procedures it deems appropriate.'
31. *See*, for example, Procedural Order No. 1 of 22 August 2003 in ICC Case No. 12297 (2003). More recently the ICC has stated in its practice note to parties that dismissing unmeritorious claims falls within the broad power of case management pursuant to Article 22 of the ICC Rules, *see* Note to the Parties and Arbitral Tribunals on the conduct of the Arbitration under the ICC Rules of Arbitration, *supra* n. 8.
32. *See* comments in Procedural Order No. 1 of 22 August 2003 in ICC Case No. 12297 (2003), *see also* Primrose, *supra* n. 29, at 2; Raviv, *supra* n. 6, at 494–508.

jurisdiction to grant a motion to dismiss.[33] However, the tribunal noted that the fact there is no appeal on the merits from an arbitral award makes the position in relation to dispositive motions fundamentally different in arbitration as compared to the domestic court. The tribunal held:

While the Respondent is right when it notes that parties entering into an arbitration clause know that no appeal shall be allowed, it results from this circumstance that arbitrators should apply more *stringent tests* than might otherwise be applied by a court and that they should not adopt a decision without an *extensive* examination of the various elements of the case, factually and legally. Accordingly, a motion to dismiss, which is grounded on assumptions of facts and prevents the parties from submitting elaborated memorials and submitting evidence should not be granted unless the arbitrators are confident that it is *crystal clear* that the claim may have no legal basis.[34] (emphasis added)

Due to the broad case management provisions in arbitral rules there is arguably nothing preventing the use of dispositive motions in arbitration. However, some barriers to adopting dispositive motions inherently have been identified. The first obvious uncertainty is whether the tribunal considers it has the jurisdiction to entertain such a motion and whether the parties have agreed to the management of the case in that way. [35] Due to the principle of party autonomy and the jurisdiction of the tribunal arising from the parties' agreement there is a potential argument that absent an express rule the tribunal lacks jurisdiction to dismiss a case or claim summarily.[36] Examining such an argument could significantly delay the proceedings, and it is understandable that a tribunal may display reluctance in granting a dispositive motion if its jurisdiction to do so is not sufficiently certain.[37] Second, the scope and nature of the procedures to be adopted may be uncertain due to the absence of an explicit power. A further issue is a concern that an award made without a full evidentiary hearing will be set aside or not enforced owing primarily to due process concerns.[38] Uncertainty as to how far a tribunal can proceed down the path of dispositive motions and the process that should be used without infringing due process rights is one of several reasons why there may be a disinclination to utilise any available inherent power in the rules.[39] The barriers identified are not insurmountable and have been overcome in some cases.[40] However, concerns are less likely to arise during proceedings that have adopted rules that

33. First Interim Award in ICC Case No. 11413 (2001) at [48].
34. *Ibid*.
35. Born and Beale, *supra* n. 6, at 19.
36. *See Travis Coal Restructuring Holdings LLC v. Essar Global Fund Limited* [2014] EWHC 2510 at [43]. *See* Chong and Primrose, *supra* n. 15.
37. *See* arguments made by the respondent in *Travis Coal, ibid*., at [44]–[45] which ultimately were not accepted due to the specific facts and arbitration agreement in that case.
38. Chong and Primrose, *supra* n. 29 at 2. *See also* Klaus Peter Berger and J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 Arbitration International 415, 415 (2016).
39. Michele Potesta and Marija Sobat, *Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily*, 2(1) Journal of International Dispute Settlement 137, 151 (2012).
40. ICC Case No. 11413, *supra* n. 33; ICC Case No. 12297, *supra* n. 31; *Travis Coal, supra* n. 36.

specifically provide for dispositive motions. Consequently, for dispositive motions to be more routinely used in international arbitration explicit rules are beneficial. If parties have agreed to institutional rules that contain explicit dispositive motion provisions then use of dispositive motions fall within the agreement to arbitrate. Consequently a number of the potential barriers identified are negated. However, whether efficiency is enhanced is a further issue. Analysis of the practical application of the tests, the scope and nature of the procedures and enforceability issues are all relevant to an analysis of whether these rules will enhance efficiency. Examination of these issues forms part of the analysis in the following sections.

[B] Dispositive Motions in Institutional Rules

As discussed above, there is arguably an inherent power in the broad case management provisions of institutional rules to determine all or part of cases through dispositive motions where appropriate. However, it is clear from both scholars and practitioners that either this inherent power has not been utilized to its full extent or there is sufficient uncertainty in how dispositive motions should and can be applied that institutional rules explicitly dealing with dispositive motions have been called for.[41] The SCC and SIAC have both now introduced explicit rules. The form and nature of the rules differ and the focus in this chapter is on Article 39 of the SCC rules. The analysis in this section examines how the rule can be utilized in practice with a view to determining whether it will potentially assist with efficiency. Issues such as the nature, timing and procedures to be followed must be ascertained to determine this.

Article 39 provides as follows:

> (1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.
> (2) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:
> (i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable;
> (ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or
> (iii) 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.
> (3) The request shall specify the grounds relied on and the form of summary procedure proposed, and demonstrate that such procedure is efficient and appropriate in all the circumstances of the case.
> (4) After providing the other party an opportunity to submit comments, the Arbitral Tribunal shall issue an order either dismissing the request or fixing the summary procedure in the form it deems appropriate.
> (5) In determining whether to grant a request for summary procedure, the Arbitral Tribunal shall have regard to all relevant circumstances, including

41. Chong and Primrose, *supra* n. 29 at 1.

> the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.
> (6) If the request for summary procedure is granted, the Arbitral Tribunal shall seek to make its order or award on the issues under consideration in an efficient and expeditious manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case pursuant to Article 23.

It is clear that the intention of the SCC rules that the aim is to increase efficiency,[42] however, the rules must be used as intended for this to occur. There is little guidance in relation to their use in practice and no available statistics so analysis of its potential application is timely.

Owing to the private nature of arbitral proceedings and the fact that the awards are, in general, not publicly available it will be difficult to ascertain how tribunals are applying these new rules unless there is a challenge to enforcement or a set aside proceeding of one of the awards. It is nonetheless possible to examine the potential scope and procedures in the rules to ascertain their application in practice and how they might be best used to enhance efficiency.

In undertaking this analysis, guidance from an international arbitration perspective can be obtained from the ICSID system of arbitration. Although the rules are drafted differently, examination of how tribunals in ICSID have used the 'preliminary objections' in Rule 41(5) can assist in examining the potential scope and practical application of dispositive motions under the SCC rules. As there are some similarities in the SCC rule to English dispositive motion rules contained in the CPR, case law from this jurisdiction can also be examined for guidance in analysing the potential application of dispositive motions in international arbitration.

[1] Interpretation of Dispositive Motions Pursuant to ICSID

Dispositive motions have been available for use in the ICSID Arbitration Rules for over a decade now. [43] Rule 41(5) contains the provision for preliminary dismissal:

> Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, *no later than 30 days* after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is *manifestly without legal merit*. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a

42. Arbitration Institute of the Stockholm Chamber of Commerce, *SCC Draft Rules 2017 in Focus* (2016), http://sccinstitute.com/about-the-scc/news/2016/scc-draft-rules-2017-in-focus/ (accessed 1 May 2018).
43. ICSID Rules came into force 10 Apr. 2006; for a detailed background in relation to the rule *see* ICSID, ICSID Secretariat Discussion Paper: *Possible Improvements of the Framework for ICSID Arbitration,* 22 Oct. 2004, www.transnational-dispute-management.com (accessed 20 Mar. 2018).

> party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

The rationale behind Rule 41(5) was to provide a party a possibility to raise a preliminary objection arguing for the dismissal of all or part of a case on the basis that the claim *manifestly lacks legal merit*. [44] This objection is dealt with at an early stage in the proceeding, shortly after registration of the dispute, prior to lengthy exchange of submissions and a hearing on the merits.[45] ICSID cases, like those in commercial arbitration, have no precedential effect. This body of arbitral awards has, however, developed sufficient guidance on how tribunals in international arbitration can, and do, approach the use of dispositive motions. [46]

Many scholars have written extensively about Rule 41(5), and this chapter does not intend to repeat that work.[47] Instead it will synthesize the tests arising from the case law to see what, if any, assistance this can provide tribunals applying the institutional rules. The wording of ICSID's Rule 41(5) is very similar to Article 39(2)(i) of the recently adopted SCC rule. Consequently, the case law examining this phrase can aid in determining the legal tests that could potentially be applied.

The test in the ICSID rule specifies that a party may object to a case that is *manifestly without legal merit* at a preliminary stage of the hearing. In the first case to test the rule, *Trans-Global v. Jordan*,[48] the tribunal examined the meaning of the word 'manifestly' by considering its use throughout the ICSID convention and by reference to extrinsic material. The tribunal concluded that:

> the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and dispatch. The standard is thus set

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44. Generally, this will be a respondent government, however, it could be used to ask for the dismissal of a counter claim as well.
45. ICSID Secretariat Discussion Paper, *supra* n. 43, at 6; Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Review – Foreign Investment Law Journal 427 at 439 (2006).
46. Full list of cases can be accessed at ICSID, 'ICSID, Decisions on Manifest Legal Merit', https://icsid.worldbank.org/en/Pages/process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx (accessed 13 Aug. 2018). The following are relevant for this discussion; *Full Dismissal*: *Global Trading Resource Corp and Globex International Inc v. Ukraine*, ICSID Case No. ARB/09/11; *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6 (19 Dec. 2010); Partial Dismissal: *Trans-Global Petroleum Inc v. Hashemite Kingdom of Jordon*, ICSID Case No. ARB/07/25 (12 May 2008); *Emmis International Holding, DV v. Hungary*, ICSID Case No. Arb12/2 Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (11 Mar. 2013); *Accession Mezzainine Capital LP and Danubius Kereskedöhlaz Vagyonkezelö Zrt v. Hungary*, ICSID Case No. ARB/12/3 (16 Jan. 2013); No Dismissal Cases: *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32 (2 Dec. 2014); *Trans-Global Green Energy, LLC and Trans-Global Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 (12 Dec. 2016).
47. *See*, for example, Chester Brown and Sergio Puig, *The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41 of the ICSID Arbitration Rules*, 10(2) Law and Practice of International Courts and Tribunals 227 (2011); Goldsmith, *supra* n. 7; Michele Potesta, *Preliminary Objections to Dismiss Claims that are Manifestly Without Legal Merit under Rule 41(5) of the ICSID Arbitration Rules*, Ch. 9 in *ICSID Convention after 50 Years: Unsettled Issues* (Crina Baltag ed., Kluwer Law International 2016); Raviv, *supra* n. 6.
48. *Trans-Global Petroleum v. Jordan, supra* n. 46.

> *high*. Given the nature of investment disputes generally, the Tribunal nonetheless recognizes that this exercise may not always be simple … The exercise may thus be complicated; but it should never be difficult.[49]

In conclusion, the tribunal stated that 'an award under Rule 41(5) can only apply to a clear and obvious case, i.e., "patently unmeritorious claims"'.[50] Numerous tribunals have followed similar reasoning in determining whether a matter is manifestly without legal merit. [51] In doing so they have developed the test further through examination of different factual scenarios. Tribunals have determined that use of Rule 41(5):

- must raise a *legal* impediment to a claim, not a factual one;[52]
- the claim must be so obviously defective from a legal point of view that it can properly be dismissed outright;[53] and
- the test should apply to undisputed or genuinely indisputable rules of law to uncontested facts.[54]

Tribunals have emphasized that a preliminary objection can succeed only where the claim is *legally* defective. Tribunals have, similar to the English courts,[55] nonetheless been required to examine some of the asserted facts to determine whether a matter is manifestly without legal merit.

Where the tribunal has been called upon to examine the facts asserted by a party or assess the credibility of facts to determine the legal claims, they have held:

- 'A request for arbitration should be construed liberally and any doubt or uncertainty as to the scope of the claimant's allegations should be resolved in favour of the claimant';[56] and
- 'For such a determination, the arbitral tribunal must not prejudge the merits of the case. The tribunal should ordinarily presume the facts which found the claim on the merits as alleged by the claimant to be true (unless they are plainly without any foundation)'.[57]

At least one limitation has been placed on accepting facts as true. This is when the tribunal regards a factual allegation as (manifestly) incredible, frivolous, vexatious, or

49. *Ibid*. at [83].
50. *Ibid*. at [92]; *see also PNG v. Papua New Guinea, supra* n. 46 at [88] that held the rules should capture cases that are clearly and unequivocally unmeritorious.
51. *Brandes v. Venezuela, supra* n. 46, at [34] agreed with this, so too did the tribunal in *MOL v. Croatia, supra* n. 46, at [25]. Notably however, the tribunal in *MOL v. Croatia* was less convinced with the second part of the test, that is, the exercise may be complicated but it should never be difficult.
52. *RSM Production v. Grenada*, *supra* n. 46, at [4.2.1].
53. *MOL v. Croatia, supra* n. 46, at [44].
54. *PNG v. Papua New Guinea, supra* n. 46, at [89].
55. *See*, for example, *ED & F Man Liquid Products v. Patel, supra* n. 21; *Doncaster Pharmaceutical Group Ltd & Ors v. The Bolton Pharmaceutical Company, supra* n. 21; *Easy Air Limited (Trading as OpenAir) v. Opal Telecom Limited*, *supra* n. 21 at [4] (Lewison J).
56. *RSM Production v. Grenada*, *supra* n. 46, at [6.1.3].
57. *Emmis International Holding v. Hungary*, *supra* n. 46, at [26].

inaccurate or made in bad faith.[58] Similar to English law, if there is a need for a detailed factual analysis or if there are numerous disputed facts a preliminary objection cannot succeed.[59] Where there are plausible arguments on both sides, a tribunal cannot use Rule 41(5) to dismiss the case.[60]

In examining dispositive motions, tribunals have developed high thresholds and construe the facts liberally to resolve any doubt in favour of the claimant.[61] This ensures that the procedure is fair and that claimants are not being deprived of their chance to plead their case.[62]

The procedures to be applied by a tribunal faced with a dispositive motion application is a determinative factor in relation to whether these procedures assist or hinder efficiency. If the procedure employed is long and thorough then efficiency is lost. The practice in ICSID tribunals has been to allow both oral and written submissions in proceedings under Rule 41(5).[63] This is primarily to fulfil the requirement in the rule to allow the parties an opportunity to present their observations (i.e., an opportunity to be heard).[64] As the tribunal in *Global Trading v. Ukraine* stated 'There may be cases in which a tribunal can come to a clear conclusion on a Rule 41(5) objection, simply on the written submissions but they will be rare, and the assumption must be that, even then, the decision will be one *not* to uphold the objection, rather than the converse'.[65] Tribunals have further noted that in determining the correct procedure they must be certain that all of the relevant materials have been considered prior to making a determination. This has been held to be best achieved through providing an opportunity for oral submissions.[66] However, the allowance for both oral and written submissions could potentially be placing a further procedural burden on the arbitration, particularly in cases that are not finally dealt with under the dispositive motion.

The ICSID dispositive motion rule has been used in approximately 7% of cases since its inception.[67] A minority of these dispositive motions have resulted in a dismissal or partial dismissal of the case.[68] Therefore, in the remaining cases having a hearing with both oral and written submissions has resulted in an additional procedural step in the arbitration, thereby potentially decreasing efficiency. As investment arbitration proceedings are generally longer than commercial arbitration proceedings

58. *Trans-Global Petroleum v. Jordon, supra* n. 46, at [105].
59. *Doncaster Pharmaceutical Group Ltd & Ors v. The Bolton Pharmaceutical Company 100 Ltd, supra* n. 21, at [18] (Mummery LJ); *Three Rivers v. Bank of England, supra* n. 21, at [95] (Lord Hope).
60. *MOL v. Croatia*, *supra* n. 46, at [46].
61. *RSM Production v. Grenada*, *supra* n. 46, at [6.1.3].
62. *Trans-Global Petroleum v. Jordan*, *supra* n. 46, at [92].
63. *Global Trading v. Ukraine*, *supra* n. 46, at [33]; *Trans-Global Petroleum v. Jordon, supra* n. 46, at [19]–[22]; *RSM Production v. Grenada, supra* n. 46, at [1.3.6]; *MOL v. Croatia, supra* n. 46, at [12], where two rounds of written and oral submissions were allowed.
64. *See* Lars Markert, *Summary Dismissal of ICSID Proceedings*, 31 ICSID Review – Foreign Investment Law Journal 690, 696, 696–697 (2016).
65. *Global Trading v. Ukraine*, *supra* n. 46, at [33].
66. *Ibid*. at [45].
67. Markert, *supra* n. 64, at 709.
68. *Ibid*. *See also* the list of full and partial dismissal cases, *supra* n. 46.

the additional procedural step of having an oral hearing for a dispositive motion application may not significantly affect the efficiency of the proceedings given the length of time.[69] However, an additional procedural step in commercial arbitration has the potential to delay the award if the dispositive motion is not granted. Therefore in order for dispositive motions to fulfil their purpose and to assist in increasing efficiency the procedures adopted to hear such applications will be crucial for their success.

[C] Application of Article 39 of the SCC Rules

As of 1 January 2017, the SCC has operated in accordance with new rules. The summary procedure in Article 39 was designed as a broad case management tool that can be used at *any stage* during the arbitral proceedings in various factual and legal situations.[70] The intention behind the rule is that it is not merely akin to a motion to dismiss but a case management tool open to the arbitral tribunal throughout the proceedings.[71] Given the intentionally extensive nature of the rule, and the absence of the word 'early' and 'dismissal', the scope of this rule is more akin to both a motion to dismiss and summary judgment proceedings from the English jurisdiction than only the early dismissal inspired proceedings at ICSID. Consequently, this rule expands the potential use and application of dispositive motions in international arbitration and takes away any uncertainty as to the use of dispositive motions pursuant to the SCC Rules. However, in examining whether this rule will assist in maintaining the efficiency, the following issues are addressed:

(a) What are the threshold legal tests likely to be applied to determine whether an application for summary procedure under this rule should be granted?
(b) What procedures should the tribunal adopt when hearing a motion under this rule?
(c) Are there any obvious issues from an enforcement perspective with dispositive motions?

[1] Legal Tests under Article 39

In comparison to the English CPR and ICSID's Rule 41(5), the SCC summary procedure provision does not specify one threshold legal test to apply to determine if an issue in dispute should be dealt with summarily. Instead, it provides a non-exhaustive list of examples where summary dismissal might be appropriate. The examples provided in Article 39(2) are indicative of situations where a tribunal could consider using the summary procedure provisions. The examples provided have similarities to both the

69. Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today?: The Lalive Lecture 2012*, 28 Arbitration International 577, 585 (2012).
70. Arbitration Institute of the Stockholm Chamber of Commerce, *Arbitration Institute of the Stockholm Chamber of Commerce 2017 SCC Rules – Key Changes* (2017), http://sccinstitute.com/media/164883/main_changes_new_rules_2017.pdf (accessed 13 Apr. 2017).
71. *Ibid*.

tests in ICSID for early dismissal and the English law for a motion to dismiss and summary judgment. The examples are examined below to determine the potential scope of this rule, with a view to seeing how it might be applied in practice.

[a] An Allegation of Law or Fact Material to the Outcome Is Manifestly Unsustainable

This example has several aspects to it. First, there is a distinction provided between law and fact which immediately makes it broader than the ICSID and English rules which are applicable only to legal claims. Second, the legal question or fact must be *manifestly unsustainable* and finally *material to the outcome* of the case. The inclusion of the phrase 'manifestly unsustainable' suggests a high threshold for disposing of a claim through summary procedure. Additional guidance can be ascertained in determining the threshold test for 'manifestly unsustainable' from the ICSID and English case law. To fall within this threshold, at least in relation to a question of law, the claim should be patently unmeritorious and obviously legally defective.[72] The legal defect should be able to be established clearly and obviously.[73]

In assessing whether legal claim or fact is manifestly unsustainable, tribunals can seek guidance from the tests developed from the English and ICSID cases discussed above, including the following:

- If all the facts asserted are assumed to be true, is there a legally recognizable claim in accordance with the applicable law? If not, then the claim/defence can be dismissed.[74]
- If all the facts are assumed to be true, would the arbitral tribunal have jurisdiction? If no, then the tribunal may be able to conclude that jurisdiction is manifestly lacking and dismiss the claim/defence.[75]
- If all the facts are assumed to be true would the party be entitled to the remedy sought? If not, then dismissal under this rule is reasonable.[76]
- Is the allegation of law or fact fanciful or patently unmeritorious?[77] In determining this, the tribunal can assume that the facts claimed are true (unless they are plainly without foundation).[78]

72. *Trans-Global v. Jordan, supra* n. 46, at [78].
73. First Interim Award in ICC Case No. 11413 (2001).
74. *See*, for example, *Swain v. Hillman, supra* n. 25; *Doncaster Pharmaceutical Group Ltd & Ors v. The Bolton Pharmaceutical Company 100 Ltd, supra* n. 21; *Easy Air Limited (Trading as OpenAir) v. Opal Telecom Limited, supra* n. 21 at [4] (Lewison J); *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472, *supra* n. 21 at [10] (Potter LJ).
75. *Ibid*.
76. *See*, for example, *ICI Chemicals & Polymers Ltd v. TTE Training Ltd* [2007] EWC Civ 725.
77. *Swain v. Hillman, supra* n. 25, at [7] (Lord Woolf MR).
78. *Emmis International Holding v. Hungary*, *supra* n. 46, at [26].

– Do all the contemporaneous documents available contradict the claimed facts? If yes, then the claim may be fanciful and could be dismissed.[79]

In undertaking the factual analysis, any doubt or uncertainty should be resolved in favour of the party against whom the motion is made.[80] This, however, should not apply to facts that appear incredible, frivolous, vexatious, inaccurate, or made in bad faith.[81] Additionally, it should not apply to facts that appear fanciful on the evidence and have no real prospects of success[82] In line with both ICSID and English law, where there are plausible arguments on both sides of the case, summary procedure pursuant to Article 39 would not be appropriate.[83] The additional criteria of the fact that the legal claim or fact must be material to the outcome of the case is a limiting factor to use of this rule and should ensure that it cannot be used frivolously and is discussed further below.

[b] No Award Could Be Rendered in Favour of the Other Party under the Applicable Law

The second example provided by Article 39 is analogous to the motion to dismiss in English law and contains sufficient similarities to both Rules 3.4 and 24 of the CPR for comparison. The practice direction associated with Rule 3.4 of the CPR explains that where the claim contains a coherent set of facts but those facts (even if true) do not disclose any legally recognizable claim or defence, that claim or defence can be dismissed.

Application of this test should be uncontroversial and tribunals can be guided, where appropriate, by tests and application of these from other jurisdictions.[84] In doing so the tribunal should take the asserted facts as true, as long as they are not patently frivolous, and decide whether an award could be made based on these facts under the applicable law.[85] If an award cannot be rendered pursuant to the facts claimed and the applicable law then this rule can be applied to dismiss the matter before the tribunal.

79. *ED & F Man Liquid Products v. Patel, supra* n. 21, at [10] (Potter L).
80. *RSM Production v. Grenada*, *supra* n. 46, at [5.3.1]; *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472; *Doncaster Pharmaceutical Group Ltd & Ors v. The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661; *Easy Air Limited (Trading as OpenAir) v. Opal Telecom Limited* [2009] EWHC 339 (Ch) at [4] (Lewison J).
81. *Trans-Global v. Jordan, supra* n. 46, at [10].
82. *Swain v. Hillman*, *supra* n. 25, at [7] (Lord Woolf MR): 'The words no real prospect of succeeding do not need any amplification… The test directs the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success. A "realistic" claim is one that carries some degree of conviction, meaning a claim that is more than merely arguable and it is on the claiming party to establish no real prospect of success.'
83. *MOL v. Croatia*, *supra* n. 46, at [46]; *Swain v. Hillman, supra* n. 25, at [21] (Lord Woolf MR).
84. *See*, for example, Civil Procedure Rules Practice Direction 3A – Striking Out a Statement of Case, *supra* n. 20.
85. *Trans-Global v. Jordan, supra* n. 46 at [78].

[c] An 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

This example in Article 39 has notable similarities to Rule 24.4(2)(b) of the English CPR, a catch all provision, that states a claim can be dismissed where 'there is no other compelling reason why the case or issue should be disposed of at a trial'. Examples of situations that might be suitable to determination by way of summary procedure developed through the case law, additionally to those already mentioned are:

- where there are no uncontested facts and the issue before the tribunal consists of applying the applicable law to the facts in a simple manner; therefore, a fuller investigation into the facts is not required;[86]
- where witness statements can be relied upon by the tribunal without cross-examination;
- where the relevant period for initiating arbitration, or the relevant multi-tier dispute resolution clause, have not been complied with, this is uncontroversial and it is clear these were pre-conditions to arbitration; or
- where the documentary evidence adduced is self-explanatory.

Material to the outcome of the case

The requirement that the subject of the application must be 'material to the outcome of the case' in both Article 39(2)(i) and (iii) limits the situations where this rule will be applicable. If facts or law are pleaded that are not material to the outcome and are potentially manifestly unsustainable or frivolous these issues can also be addressed by the tribunal's broad procedural power to determine the relevant matters in the dispute.[87] Including this limitation in the examples provides a strong indication of when, and how, this rule should be utilized. It also demonstrates the intention not to have an additional procedural step to deal with matters that are not material to the case. This, in turn, minimizes the risk of procedural overregulation and increases the likelihood that this rule will assist with efficiency.

A dispositive motion is a useful vehicle to narrow the issues in dispute to those that are relevant or to dismiss claims that should not be before an arbitral tribunal. However, to increase efficiency and effectiveness and to avoid numerous procedures throughout the arbitration tribunals can utilize other tools in the rules to address matters that are pleaded but not relevant to the outcome of the dispute.[88] This limitation assists with this goal.

86. *Doncaster Pharmaceutical Group Ltd & Ors v. The Bolton Pharmaceutical Company 100 Ltd, supra* n. 21, at [15] (Mummery LJ).
87. SCC Rules, *supra* n. 7, Arts 9, 31.
88. *See*, e.g., *IBA Rules on the Taking of Evidence in International Arbitration*, *supra* n. 29, Article 9(2)(a).

[d] Other Potential Tests Tribunals Can Use to Determine Whether to Apply Article 39

Although there is no overarching threshold test in the rule the examples demonstrate that any standards utilized under this procedure should have a high threshold. This is because any award made pursuant to this rule will finally dispose of the issue or claim in dispute with only very limited procedural grounds for review by an enforcement or setting aside court. Any of the tests used in both ICSID and England could be applied as a benchmark for tribunals in determining when, and whether, it would be suitable to utilize this rule.

[2] Procedure

Article 39(1) states that a tribunal can decide an issue by way of summary procedure 'without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration'.

The tribunal has wide discretion to 'fix the summary procedure in the form *it* deems appropriate'. This provides a tribunal with significant leeway to determine appropriate procedures. This is limited by Articles 39(6) and 23(2), under which each party must be given an *equal* and *reasonable* opportunity to presents its case. How the tribunal will determine what is equal and reasonable will of course depend on each arbitration and potentially the timing of the dispositive motion application. For example, an application early in the arbitration to request dismissal of a case on the basis that a claim cannot succeed in law may require only determination on the papers whereas an application later in the proceedings based on more evidence may require oral and written submissions and assessment of evidence.

The SCC Rule does have a potentially broad application. It can apply at any stage of the proceeding to any claim/defence, jurisdiction, admissibility, merits and law or fact. However, there are limits on the use of this provision throughout the rule, all based on efficiency and expeditiousness.[89] If used correctly in determining the procedure of the dispositive motion application, these limits will go a long way to ensuring that the rule meets its purpose and provides a further tool for both parties and arbitrators to increase efficiency.

How Article 39 interacts with Article 32, which stipulates that a hearing shall be held if requested by a party, will be a determination for the tribunal to make.[90] However, it is clear it is the tribunal that should decide the procedure for Article 39. In practice, tribunals may err on the side of caution when dealing with these matters and allow an oral hearing if requested by a party as has been the case in ICSID. This is particularly the case in situations where the dispositive motion may be grated.

89. *See*, e.g., SCC Rules, *supra* n. 7, Art. 39(5) and 39(6).
90. *See* Swedish Arbitration Act 1999:116 s. 24: 'The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally. Where a party so requests, and provided that the parties have not otherwise agreed, an oral hearing shall be held prior to the determination of an issue referred to the arbitrators for resolution.'

Tribunals should be aware of the real risk that the hearing on dispositive motion applications will become a 'mini arbitration' and concerns of affording 'full procedural fairness' can take over from expediency and efficiency. If this occurs there is a risk that efficiency is diminished. For this rule to maintain efficiency, tribunals will have to use the limitations provided in the rule (e.g., Articles 39(3) and 39(5)) and work hard to ensure that the procedures, particularly late in the arbitration, do not resemble a full evidentiary hearing.

[D] Enforceability of Awards Made Pursuant to Dispositive Motion Provisions

A recurring theme in literature discussing the subject of dispositive motions in arbitration is the concern that awards made using these procedures may encounter problems at the enforcement stage.[91] The main aim of any arbitral proceeding is of course to render an enforceable award. An in-depth review of enforceability is beyond the scope of this chapter.[92] However, an analysis of dispositive motions in international arbitration and how they might increase efficiency would be incomplete without at least minimal examination of the issue of enforceability.[93]

There are two potential issues identified in relation to enforceability, efficiency, and dispositive motions. On the one hand, if an award is rendered pursuant to a dispositive motion provision that is not enforced it is hardly a time, or cost, effective procedure. On the other hand, if tribunals are so concerned with due process that they take the right to be heard to extreme levels and add additional and lengthy procedural steps to an arbitration, the purpose of using dispositive motions to assist in increasing efficiency is lost. This concern could be one of the largest obstacles for tribunals utilizing these rules in an efficient manner.

However, when examining the issue of enforcement of awards made pursuant to dispositive motions several important aspects must be considered. First, there are high thresholds for a party to reach when utilising the dispositive motion provisions in SCC rules. At a minimum, there are two steps to pass prior to an award being rendered pursuant to these rules. These steps contain significant due process protections for the parties which should be considered when examining potential enforcement concerns. For example, the party applying the summary procedure must:

(a) demonstrate that such a motion should be examined in the first place by the tribunal; and

91. *See*, for example, Chong and Primrose, *supra* n. 29, at 2; Raviv, *supra* n. 6, at 501–507.
92. For example, all possible arguments for setting aside under Article V of the New York Convention, and thorough analysis of the case law relating to the scope of the right to present the case and the right to be heard. Whether the scope of this right varies between arbitral seats and the scope of the *full* right to be heard under the Model Law.
93. Set aside proceedings are also relevant, however, are beyond the scope of this chapter.

(b) convince the tribunal that the case meets the high threshold standards for summary procedure and should be dismissed or summarily decided in the form of an award.

Second, the case law examined from other jurisdictions has demonstrated that these motions should only be granted when there are not lengthy and complicated legal arguments on both sides.[94] Consequently, dispositive motions should only be used in limited circumstances. Procedural fairness questions and the right to present one's case may not arise often due to the limited circumstances of when these rules should be utilised. Third, courts in most arbitration-friendly jurisdictions demonstrate a strong reluctance to interfere in a tribunal's procedure and will only do so in cases where there are obvious violations of procedural rules[95] or grave procedural unfairness in the proceedings.[96] This is not likely to change when courts are examining the procedures used to determine dispositive motions.

When examining enforcement issues the two most important due process concerns to consider are found in Articles V(1)(b) New York Convention (*a party is unable to present its case)* and most relevant Article V(1)(b) of the New York Convention (*a party is unable to present its case)* and Article V(1)(d) of the New York Convention (*the arbitration procedure not being in accordance with the agreement of the parties or the law of the seat of the arbitration*) and their equivalent provisions in each enforcing jurisdictions' arbitration legislation.[97] The most relevant is Article V(1)(b).

To succeed on a challenge under Article V(1)(b) of the New York Convention, a party must establish a serious procedural defect from the tribunal and that defect must have impacted the tribunal's decision.[98] The main concerns in examining this provision in conjunction with an award rendered pursuant to a dispositive motion application include the following:

- a party has not had the opportunity to submit all the evidence in relation to their claim;
- the evidence has not been properly tested and a party has not been provided with a right to cross-examine witnesses;
- the party has not had the opportunity to bring further evidence or testimony that may be necessary to fully defend a claim;
- the party has been unable to fully defend their position or develop their case further;

94. *Three Rivers v. Bank of England (No 3)*, *supra* n. 21; at [95] (Lord Hope).
95. *See Aloe Vera of Am. Inc. Aloe Vera of Am. Inc. v. Asianic Food (S) Pte Ltd* [2006] SGHC at [40] (Prakish J); Gisela Knuts, *Recourse to the Courts against an Arbitral Award,* Ch. 9 in *International Arbitration in Sweden: A Practitioner's Guide* 244 (Annette Magnusson Ulf Franke et al. ed., International Arbitration in Sweden: A Practitioner's Guide, Kluwer Law International 2013).
96. Gary B. Born, *International Commercial Arbitration (Second Edition)* 97–224 at 2163 (2nd edn, Kluwer Law International 2014); *see also* Knuts, *ibid.*, at 238.
97. *See*, e.g., UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006; Article 36(1)(a)(ii).
98. *See* UNCITRAL Secretariat, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* 169 (2016).

- the party has been unable to raise further procedural defences and objections; and
- insufficient time has been provided to prepare the case (in the situation of early dismissal).[99]

Whether these would lead to a serious procedural defect that affects an award will of course depend on the circumstances of the case and the procedures adopted by the tribunal. However, if the tribunal has provided a fair, equal, reasonable opportunity to make submissions on the dispositive motion, the requirements for procedural fairness would go a long way to being fulfilled.[100] This is particularly the case given the high threshold tests that must be met for a dispositive motions application to even be heard pursuant to the SCC Rules. Additionally, it has been well established through case law that the right to be heard does not necessarily extend to a right to be heard on every claim, particularly those that are unmeritorious or fanciful. [101]

The fact that, in a dispositive motion procedure, not all the evidence will be assessed or questioned will arguably also not be enough to reach the threshold in Article V(1)(b) of the New York Convention. The tribunal has no general obligation to address all the arguments and evidence raised by a party. Additionally, enforcing courts have held that an arbitral tribunal has a wide discretion to decide the procedure of the arbitration, the evidence admitted[102] and the weight and evaluation given to the evidence.[103] Traditionally courts will generally not interfere with a tribunal's evaluation of the evidence.[104] Additionally, if a tribunal disposes of case using dispositive motion provisions, in most circumstances the tribunal would have taken the facts to be true. Where all facts have been taken to be true there is no need to establish their existence through evidence. Therefore, several of these identified potential procedural concerns are alleviated. If the tribunal provides the party with the benefit of accepting

99. Santtu Turunen and Matti S. Kurkela, *Due Process in International Commercial Arbitration* 187–188 (2nd edn, Oxford University Press 2010).
100. Jan Paulsson, *Jurisdiction and Admissibility*, in *Global Reflections on International Law Commerce and Dispute Resolution* 91 (ICC Publishing 2005).
101. Kurkela, *supra* n. 99, at 39; *see also* ICSID cases, although decided in that regime, they are useful for this analysis. In *Global Trading v. Ukraine*, *supra* n. 46, at [34] the tribunal held, 'a balance evidently has to be struck between the right … given to the objecting party under Rule 41(5) to have a patently unmeritorious claim disposed of before unnecessary trouble and expense is incurred in defending it, and the duty of the tribunal to meet the requirements of due process'.
102. *See*, for example, SCC Rules, *supra* n. 7, Article 31: 'The admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine.' Swedish Arbitration Act SFS 1999:116, s. 25(2), *where a tribunal can refuse to admit evidence where it is manifestly irrelevant to the case. See also* UNCITRAL Model Law, *supra* n. 97, Article 19(2).
103. *See*, for example, Svea Court of Appeal Case T 5296-14, *Euroflon Tekniska Produkter AB v. Flexiboys i Motala AB: Cyprus Holdings*; *see also Oberlandesgericht* [OLG], Celle, Germany, 31 May 2007, 8 Sch. 06/06 and *Budejovicky Budvar N.P. v. Czech Beer Importers Inc.* District of Connecticut, 10 Jul. 2006, 1246 (JBA) Quoted in *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (*supra* n. 98) at 165–166.
104. *See* general discussion in Born, *supra* n. 98, at 3240–3241, FN 663 3521. *See also UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ibid*. at 163–167.

all evidence and claims as true and the case does not meet the stringent tests applied for granting a dispositive motion, then arguably there is no denial of the right to be heard.

The concern with Article V(1)(d) of the New York Convention (*the arbitration procedure not being in accordance with the agreement of the parties or the law of the seat of the arbitration*) is not as significant a concern with awards made under the SCC Rules due to the now explicit provision of dispositive motions in the rules.[105] If parties have specifically decided upon rules that contain dispositive motions, they have consented to their potential use in that arbitration. Consequently, parties cannot state they did not agree to an award rendered pursuant to a dispositive motion if they agreed to these rules.

Although it may appear that arguments in relation to due process could be heightened due to the summary nature of examining the legal and factual issues in dispositive motions, this is not necessarily the case due to the legal thresholds of making an award pursuant to these motions.

If tribunals use the threshold tests examined in the existing case law as guidance and provide a party a reasonable opportunity to be heard (which does not mean the requirement for a full hearing) awards rendered pursuant to the explicit dispositive motion rules should not be more susceptible to a challenge to enforcement under the New York Convention than any other award.

§5.04 INCREASED JUDICIALIZATION OR STREAMLINED EFFICIENT PROCEDURE?

Do dispositive motions provide any value and additional flexibility institutional arbitration or do they merely add more procedure and regulation to a system that some already consider to be overly judicialized? Of course there are risks of a more judicialized procedure with the introduction of an additional procedural tool into the rules. With more rules comes a greater risk for misuse and further procedural hurdles. However, the procedures provided for in Article 39 are to be read in conjunction with the other provisions in the SCC Rules, and there are arguably enough safeguards to minimize any risk of judicialization. Additionally, the above analysis demonstrates that any potential legal tests and procedures to be applied when utilizing the dispositive motion provisions pursuant to the SCC Rules will have to meet a high threshold for success.

The analysis in relation to an increase of judicialization is predicated on an increase of time and decrease in efficiency if the matter is not finally decided pursuant to the dispositive motion rules. In that situation the dispositive motion application has added another procedural layer and additional time to the arbitration. However, if use of these rules resulted in a claim/defence, or part thereof, being dismissed or an award rendered without a full hearing then this question is moot. The rules would have

105. Cf., for example, *Travis Coal, supra* n. 36; *see* Beale et al., *Summary Arbitration Proceedings: A Comparison Between the English and Dutch Regimes*, *supra* n. 6, at 145–149; Gill, *supra* n. 6, at 522 for concerns regarding possibility of arbitrators being dissuaded from using dispositive motions, although noting this was in the context of the inherent jurisdiction, not explicit rules.

contributed to a more efficient and expeditious process and fulfilled their primary function. Consequently, tribunals, and arguably legal counsel to some extent, have an important role in ensuring that these rules are used appropriately.

One identified potential risk for an increase in judicialization is the absence of time limits for filing the application for summary procedure. Due to the overall rationale behind the dispositive motions provisions, that is, to prevent frivolous claims going to a full hearing or limiting the issues in dispute to those that are pertinent and relevant to the claim, the timing of the dispositive motion is important for its usefulness and effectiveness in the arbitration.[106] The ICSID rule has a clear time limit in relation to filing an application for a dispositive motion and this has arguably worked well.[107] The time limit demonstrates clearly that the dispositive motion rule is utilized early to dismiss those claims or parts of claims that are manifestly without merit and other objections can remain throughout the proceedings. The SCC Rule, however, has a broader application. Given this, the absence of a time limit for requesting summary procedure in the SCC Rules is arguably necessary. It is prioritising flexibility and allows for the dismissal of claims made throughout the proceedings that are amenable to dispositive motions.

Although there is no strict time limit there are other efficiency requirements in the rules for the applying party to meet prior to a tribunal hearing the application. There are additionally provisions within the rules at the tribunal's disposal to assist in increasing efficiency. First, there is a discretion available within the SCC rules *not* to hear the application for a dispositive motion. Second, the moving party must demonstrate that the dispositive motion is efficient and appropriate in the circumstances of the case.[108] The tribunal also has the flexibility to dismiss late applications or applications that do not fit within the stringent efficiency tests without providing the opposing party the chance to comment. In these situations any delay would be insignificant. This limitation in the SCC rules is crucial and can arguably answer most concerns about an over complicated or judicialized process. The Rule places significant responsibility on the tribunal and parties to maintain an efficient procedure whilst maintaining the flexibility to use a summary procedure late in proceedings if appropriate.

Consequently, the relative success of the dispositive motions rules will ultimately be in the hands of tribunals. As has been demonstrated in other jurisdictions, use of dispositive motions can assist in expediency and cost effectiveness; this is one of the reasons they were introduced into the domestic courts – to ensure that resources were not being used to hear claims or defences that have no prospects of success. There are numerous resources within the rules at a tribunals' disposal to assist with using these rules to increase efficiency. Tribunals should not hesitate to exercise the authority

106. Mouawad and Silbert, *supra* n. 19, at 77–78.
107. Noting that the ICSID system is different and the timeframes for a hearing may be significantly different to the commercial arbitration sphere.
108. SCC Rules, s*upra* n. 7, Arts 39(3) and 39(5).

provided, either in using the discretion not to hear the motion, or to dismiss issues that should not be taking up the tribunal's time and resources.[109]

Introducing the possibility of summary dismissal into international arbitration should be seen as a positive development. It has the potential to have both a direct and indirect impact on the efficiency of arbitral proceedings. Even if the rules are not used in a high percentage of cases one indirect consequence of the rules may be that parties start to consider reframing their claims or defences. Where there is a possibility that claims/defences could be dismissed from the outset or an award rendered early in the process parties may consider leaving out claims that would be amenable to summary procedures, thereby saving time for the parties and tribunal throughout the arbitration process. This would ensure that the parties and tribunals concentrate on the issues in dispute that can, and need to, be resolved.[110]

The addition of a further judicial procedure into institutional rules does not equate with an increase in judicialization. These provisions were introduced into domestic rules for similar fundamental purposes; to increase efficiency and effectiveness and 'access to justice'. However, as identified, care must be taken to ensure that these procedures do not merely add another step to be undertaken prior to the final award and hearing. The further judicialization of arbitration is not the intent of the rules. The practical effect, if they are utilized correctly, should arguably be the opposite. That is, a tool to enhance efficiency in certain cases where the claims/defences are not amenable to a full evidentiary hearing due to a lack of legal or factual basis.

Although it is perhaps too early to predict how the SCC's summary procedure will be used in practice, there is sufficient case law from similar provisions in both ICSID and the English jurisdiction to indicate some potentially applicable legal tests. Using case law from other jurisdictions, parties and tribunals can, and should, utilize Rule 39 to increase procedural efficiency in international arbitration.

109. Marily Paralika Anne Veronique Schläpfer, *Striking the Right Balance: The Roles of Arbitral Institutions, Parties and Tribunals in Achieving Efficiency in International Arbitration*, 2 International Arbitration Review 329 at 338 (2015).
110. Goldsmith, *supra* n. 6, at 669.