

THE PRACTICE

Splitting the Baby in International Arbitration

In certain cases, arbitrators should consider dispositive motions and bifurcated proceedings.

BY CLAUDIA T. SALOMON

The wisdom of King Solomon fascinates me—for perhaps obvious reasons. When two women each claimed the same baby as her own, King Solomon decided to “split the baby,” a calculated threat that revealed the true mother.

Unfortunately, the wisdom of splitting the baby is scorned in international arbitration. Many believe arbitrators “split the baby” and give something to both sides, but a study by the American Arbitration Association counters this myth.

Perhaps arbitral tribunals should “split the baby” more often, not to split the relief between the parties, but to split the issues, using dispositive applications.

In *Travis Coal v. Essar Global Fund*, the English High Court recently recognized that summary procedures may be available to tribunals in appropriate cases.

The dispute arose out of the purchase of a coal mining operation, funded by a loan that Essar guaranteed. When Essar’s subsidiary failed to make a payment, Travis filed an International Chamber of Commerce arbitration, venued in New York and governed by New York law. (Disclosure: Latham & Watkins represented Travis in the ICC arbitration and the enforcement proceedings). Travis applied for “summary judgment” on the guarantee obligation. Essar argued that the guarantee



and the subsidiary's underlying obligations were void for fraudulent misrepresentation.

The tribunal's consideration of the issue was by no means what would normally be described as "summary." In the award, the tribunal commented that it "has moved beyond a simple summary judgment process, receiving witness testimony and conducting oral hearings with cross examination on all controverted questions that might support a fraud defense." The tribunal requested and considered numerous rounds of written briefing and witness statements, as well as oral witness testimony on certain points.

In the tribunal's view, the procedure complied with both the parties' arbitration agreement and the ICC rules. The arbitration agreement contained a clause granting the tribunal the discretion to hear and determine—at any stage of the arbitration—any issue asserted by any party to be dispositive of any claim or counterclaim as the arbitrators may deem appropriate. Article 22 of the ICC rules requires the tribunal to "conduct the arbitration in an expeditious and cost-effective manner," and empowers the tribunal to adopt such procedural measures as it considers appropriate.

The tribunal ordered Essar to pay Travis \$148 million plus interest and costs. Travis then sought to enforce the award in New York and London. The High Court in London entered the award as a judgment, and Essar applied to have the judgment set aside. Essar argued that the tribunal deprived it of a fair and full opportunity to be heard on its fraud defense by using summary judgment.

Justice William Blair concluded that the award could not realistically be set aside in New York for two key reasons. First, although the ICC rules do not provide for summary judgment, summary judgment does not in itself amount to a denial of due process. The arbitrators have wide power to determine issues on the basis they consider appropriate. Second, the dispute-resolution clause expressly permitted dispositive motions.

The judge described the application to set aside as a "delaying tactic in the face of what is likely to be held to be an unimpeachable award." Recently, a New York court issued a consent judgment in the matter.

Summary proceedings or dispositive motions have been perceived historically as antithetical to international arbitration, which requires that each party receive a meaningful opportunity to present its case. But if a claim could have been resolved on a dispositive motion in court, arbitration ceases to be more efficient than litigation. The more meritless a case, the more likely that submitting it to arbitration will take longer and cost more than resolving it in court; a party with weak claims may throw every issue in front of the tribunal and see what sticks.

However, *Travis* illustrates a new trend. International arbitral institutions, including the International Centre for Dispute Resolution and JAMS, now expressly permit the use of disposition applications, and other institutions accord the tribunal general discretion to adopt procedures consistent with the principle of efficiency.

When used properly, dispositive applications should become yet another tool at the tribunal's disposal to streamline the proceedings. I therefore propose a three-part test—the Salomon test—not to split the baby, but to assess when to split the proceedings.

First, is the issue raised in the application truly dispositive? In other words, will the issue end or dispose of the case (or a significant portion of the case)?

Second, if a truly dispositive issue exists, how can the tribunal assure that this issue is fully heard? In other words, what does the tribunal need to do to allow the parties to submit all evidence and make arguments on that issue? One possible solution would allow oral argument and evidence presentation on the dispositive issue alone.

Third, is resolving the dispositive issue truly efficient in the particular case? A party cannot be hindered in making its case, but neither does a dispositive application allow one party to hijack the arbitration process with a weak or meritless claim or defense.

Using the Salomon test, a tribunal should ask the parties to consider the desirability of preliminary disposition of certain issues at the start of the proceedings. And the tribunal should be under a continuing obligation to assess, as the arbitration process unfolds, whether truly dispositive issues emerge.

The use of dispositive applications—and bifurcation—is not appropriate in all cases. But like King Solomon, tribunals should wisely and fearlessly use these processes when they are appropriate.



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