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Dispositive Motions in International Arbitration

New Opportunities to Save Time and Money

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Today's Speakers



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COURT UPDATES & SUMMARY DISPOSITION

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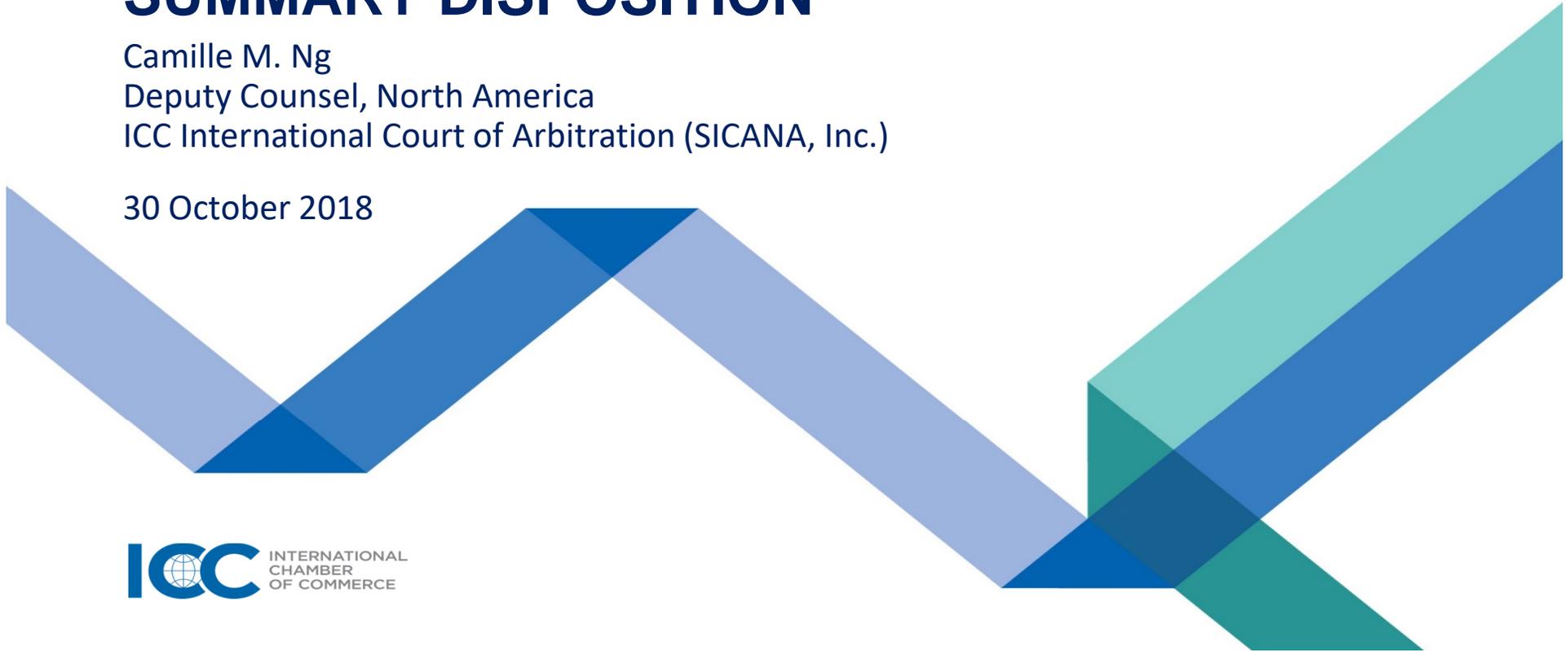
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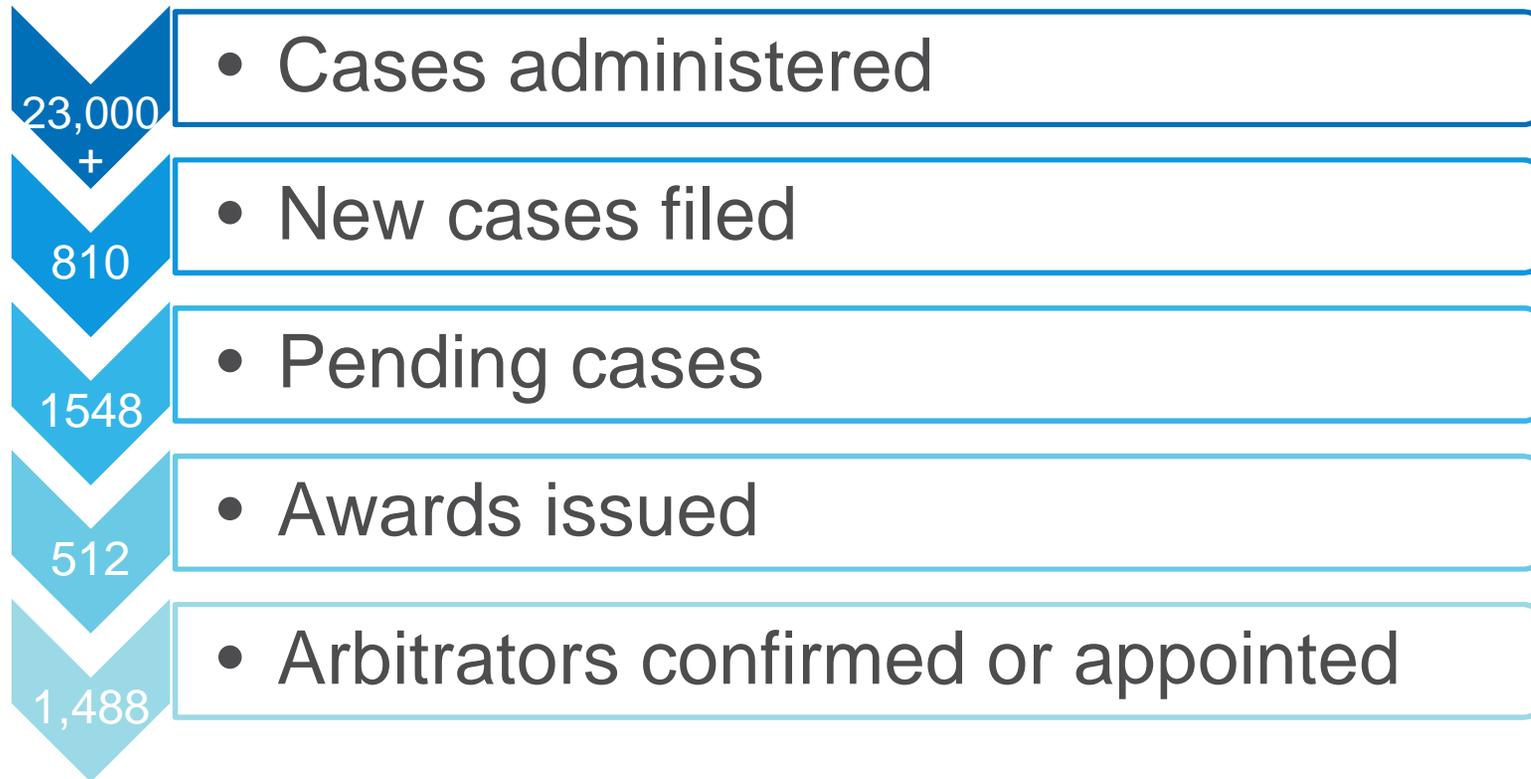
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30 October 2018

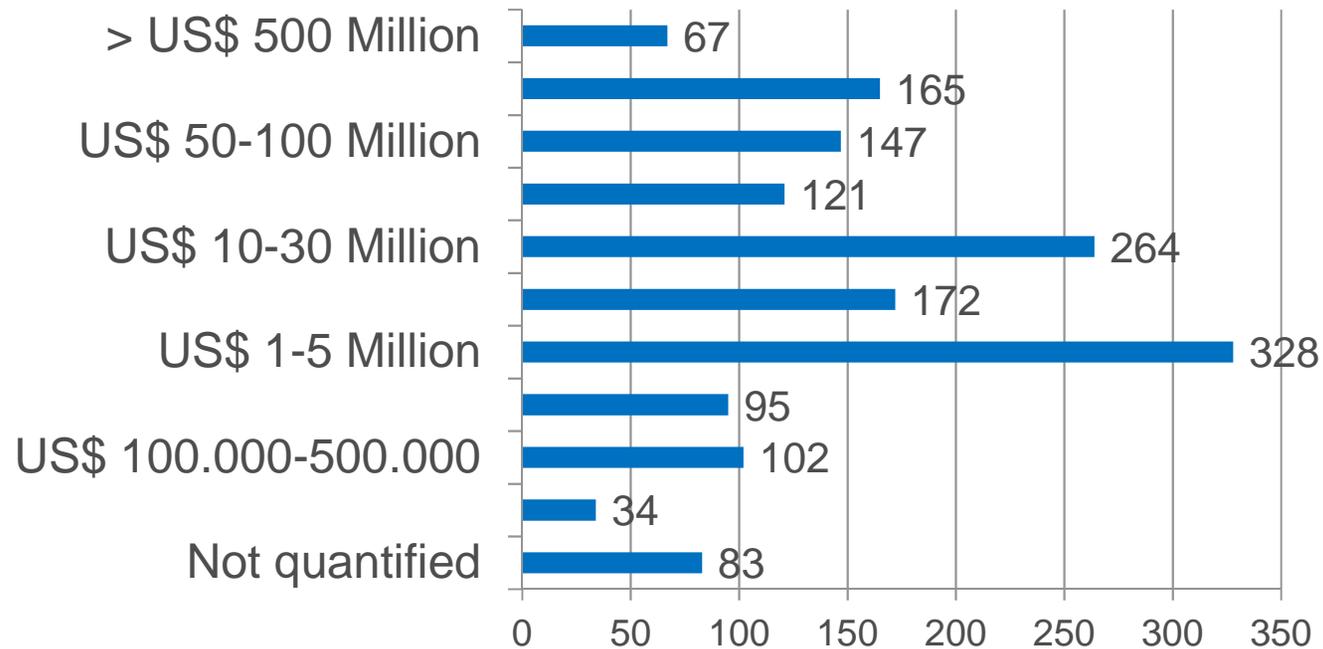




GENERAL STATISTICS (2017)



AMOUNTS IN DISPUTE IN PENDING CASES AS OF JANUARY 2018



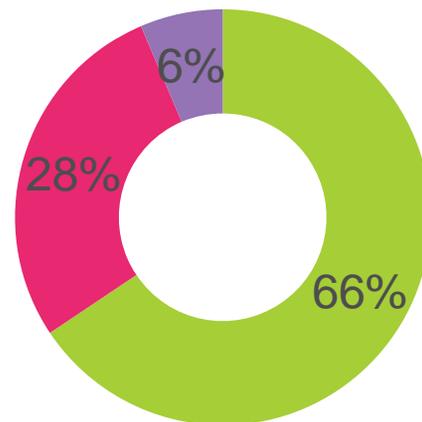
Average amount in pending cases: US\$ 137,325,630

Amount in dispute < US\$ 2 million in 32% of cases

2017 AWARDS



- 512 awards approved
- 99.6% of the approved awards were approved with comments (“subject to modification”)
- 46 awards sent back (8.2% of awards)



- Final Awards
- Partial Awards
- Awards by Consent



EMERGENCY ARBITRATIONS

1. 90 EA applications to date (2012-2018)
2. 85 set in motion (in 3, EA held that s/he did not have jurisdiction)
3. 79 Orders – 16 days in average
4. 7 cases involving States and/or State entities (always as Respondents), including 1 BIT
5. 24 October 2018

EPP EXPERIENCE SO FAR



EPP

92+ requests to opt in

13 disputes arising out of post-March 2017 contracts

22 opt in cases (2 opt-ins after CMC and SA's proposal)

23 on-going/fully administered cases / Avg. US\$ 1.7M

1 case where Court fixed 1 but clause said 3 (Singapore)

Parties mostly agree to SA and nominate

2 Partial Awards / 7 Final Awards (40-70 pages)

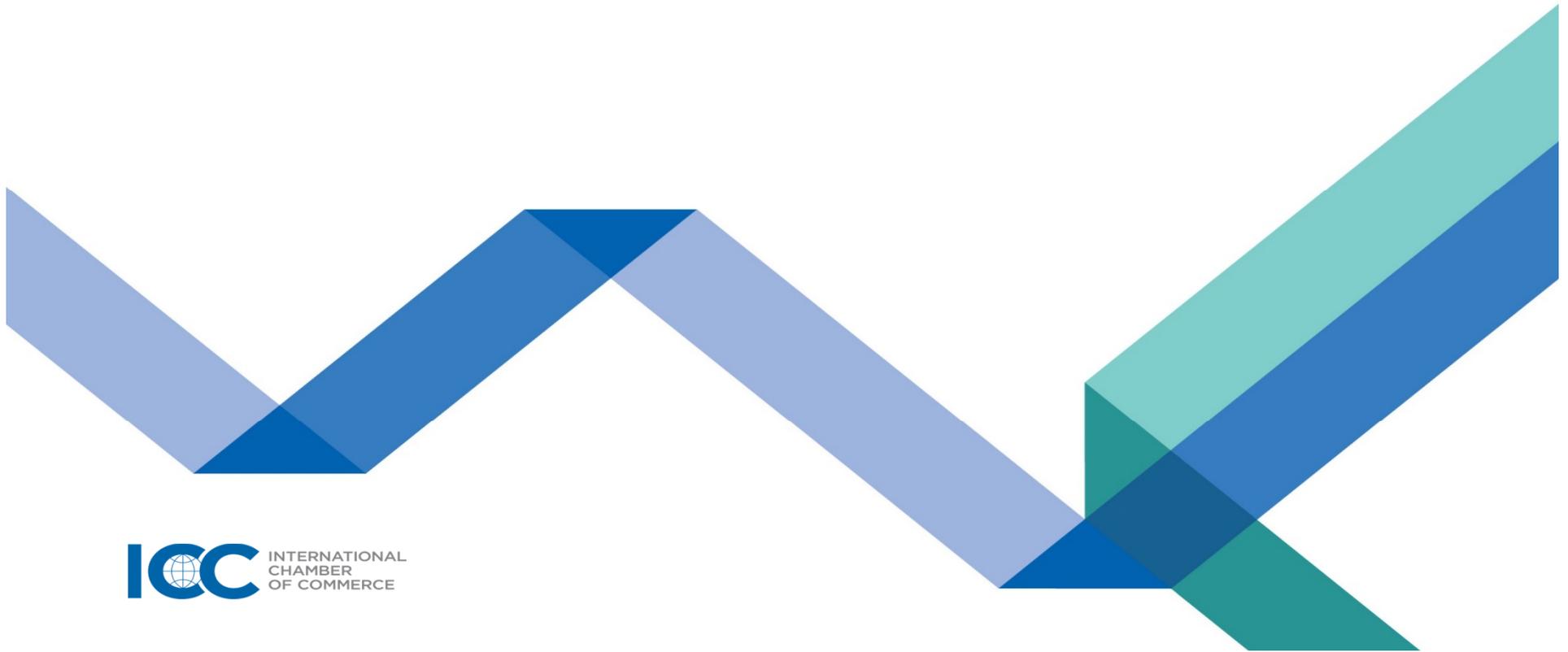
Duration: 4.5 to 5.5 months from CMC.

Hearings (1-2 days), limited doc. production or none at all, 1-2 rounds of submissions, CMCs are timely

Scrutiny taking approximately 8 -15 days

Disputes almost all international / sale & purchase agreements in energy/construction industries

SUMMARY DISPOSITION OF CLAIMS



BACKGROUND



- No specific provision in the 2012 and 2017 Rules
- Inherent in an arbitral tribunal's decision-making capacity
- Article 22 of the ICC Rules
- Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration

ARTICLE 22(2) OF THE ICC RULES



“In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.”

SECTION VI(C) OF THE NOTE TO PARTIES AND ARBITRAL TRIBUNALS



C - Expeditious Determination of Manifestly Unmeritorious Claims or Defenses

60. *Any party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defenses, on grounds that such claims or defenses are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction (“application”). The application must be made as promptly as possible after the filing of the relevant claims or defenses.*

SECTION VI(C) OF THE NOTE TO PARTIES AND ARBITRAL TRIBUNALS



- Specific guidance in connection with Article 22
- Full discretion
 - Relevant circumstances: Stage, time, efficiency
- Proceed: Procedural measures + opportunity of response
 - Exceptional: Further presentation of evidence
 - If appropriate: Hearing
- Decision: prompt, reasoned and concise
- Order or award
- Award to be scrutinized, within one week of receipt by Secretariat

LEGAL BACKGROUND



Therefore,

- Claims and defenses
- Application may be made by any party
- Inherent power of the tribunal
- Flexible process: no application formalities or deadlines
- Scrutiny contributes to the enforcement



David N. Kay
ARBITRATION RULES

American Arbitration Association Commercial Arbitration Rules



- **R-33. Dispositive Motions**

- The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

ICDR International Arbitration Rules

- No specific provision addressing dispositive motions. However, ICDR Procedures implicitly permit dispositive motions as they empower the arbitral tribunal to:
 - **Conduct of Proceedings**
 - Art. 20(1) conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
 - Art. 20(3) decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case.

JAMS Mediation, Arbitration, ADR Services Comprehensive Arbitration Rules and Procedures

- **R-18. Summary Disposition of a Claim or Issue**

- The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request.

- JAMS International Arbitration Rules also permit dispositive motions:

- **Art. 26.1 Dispositive Motions**

- The Tribunal may permit any party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested parties or at the request of one party, provided other interested parties have reasonable notice to respond to the request.



LCIA Arbitration Rules

- **Conduct of Proceedings**

- Art. 14.5: The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.

Arbitration Rules of the Singapore International Arbitration Centre



- **Rule 29. Early Dismissal of Claims and Defences**

- 29.1 A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that:
 - a. a claim or defence is manifestly without legal merit; or
 - b. a claim or defence is manifestly outside the jurisdiction of the Tribunal.
- 29.2 An application for the early dismissal of a claim or defence under Rule 29.1 shall state in detail the facts and legal basis supporting the application. The party applying for early dismissal shall, at the same time as it files the application with the Tribunal, send a copy of the application to the other party, and shall notify the Tribunal that it has done so, specifying the mode of service employed and the date of service.
- 29.3 The Tribunal may, in its discretion, allow the application for the early dismissal of a claim or defence under Rule 29.1 to proceed. If the application is allowed to proceed, the Tribunal shall, after giving the parties the opportunity to be heard, decide whether to grant, in whole or in part, the application for early dismissal under Rule 29.1.
- 29.4 If the application is allowed to proceed, the Tribunal shall make an order or Award on the application, with reasons, which may be in summary form. The order or Award shall be made within 60 days of the date of filing of the application, unless, in exceptional circumstances, the Registrar extends the time.

Arbitration Institute of the Stockholm Chamber of Commerce



- **Art. 39. Summary Procedure:**

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 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 (2).

International Centre for Settlement of Investment Disputes (“ICSID”)



- **Preliminary Objections:**

- Rule 41(5): 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 party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.



Lawrence Schaner
ENFORCEMENT ISSUES

Potential Due Process Concerns

- New York Convention
- Federal Arbitration Act
- Arbitration Rules



Article V.1(b), New York Convention

- Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: ... (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

Section 10(a)(3), Federal Arbitration Act

- A district court “may make an order vacating the award upon application of any party to the arbitration – (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy”

Arbitration Rules Confer Right to Hearing

- ICC, Art. 25(2) (2017) (tribunal “shall hear the parties together in person if any of them so requests”)
- LCIA, Art. 19.1 (2014) (“[a]ny party has the right to a hearing before the Arbitral Tribunal ... unless the parties have agreed in writing upon a documents-only arbitration”)
- ICDR, Art. 20(1) (2014) (parties must be “treated with equality” and “each party has the right to be heard and [] given a fair opportunity to present its case”)
- UNCITRAL, Art. 17(3) (if any party requests, the tribunal “shall hold hearings for the presentation of evidence of witnesses, including expert witnesses, or for oral argument”)

Cases Upholding Awards – Summary Procedures

- *South City Motors v. Automotive Indus. Pension Trust Fund*, 2018 WL 2387854 (N.D. Cal. May 25, 2018)
- *Weirton Med. Ctr. v. Comm. Health Systems*, 2017 WL 6347173 (N.D. W. Va. Dec. 12, 2017), *aff'd*, 734 Fed.Appx. 896 (4th Cir. 2018)
- *TIG Ins. Co. v. Global Int'l Reinsur. Co.*, 640 F. Supp. 2d 519 (S.D.N.Y. 2009)
- *Campbell v. American Family Life Assur. Co. of Columbus*, 613 F. Supp. 2d 1114 (D. Minn. 2009)
- *British Ins. Co. v. Water St. Ins. Co.*, 93 F. Supp. 2d 506, 517 (S.D.N.Y. 2000)

Enforcement Takeaways

- US courts are supportive
- Due process concerns are reduced if parties have opportunity to be heard with respect to the issue or motion
- Agreed procedures should be followed
- Lack of objection may result in waiver
- Courts in other countries may be less supportive



Andrea Hutchison
ARBITRATION VS. LITIGATION

The Advantages of Arbitration



- Arbitration has several advantages over litigation:
 - **Enforceability:**
 - Under the New York Convention, enforcement of an arbitration award is easier than a court judgment, particularly when:
 - A judgment may need to be enforced in a different country than the country in which it was made; or
 - Assets are located in multiple jurisdictions.
 - **Neutrality:**
 - Assets are in a jurisdiction in which:
 - The courts or law are unknown or undesirable;
 - A party does not want to litigate;
 - The opposing party would have a home advantage due to familiarity with courts in its jurisdiction;
 - Language differences would require translation of the contract and evidence; or
 - Judges may not be independent and impartial, or have sufficient technical knowledge.
 - **Privacy:**
 - A party wants the proceedings, filings, and discovery to remain confidential.
 - **Flexibility:**
 - With certain limitations, the parties can tailor the proceedings to fit their needs.
 - **Expertise of decision makers:**
 - The parties can require the arbitrators to have experience in a particular area.



Choosing Between Litigation and Arbitration

- Litigation, however, provides certain advantages over arbitration:
 - **Traditionally, Summary Judgment:**
 - Speedy resolution of a dispute through summary judgment, such as exercising a promissory note or guaranty, is necessary in the event of a dispute.
 - **Multi-Party or Non-Party Disputes:**
 - A likely dispute would involve:
 - A non-party to the arbitration agreement (such as affiliates or sub-contractor) or
 - Multiple parties with disparate interests.
 - An award should bind a third party.
 - **Comfort with the Bench and Bar**
 - Certain parties are comfortable with, and are able to negotiate as a forum, New York or London courts.

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