**The Virtues of Episodic Justice**

By Joseph E. Neuhaus[[1]](#footnote-1)

While the arbitration world has evolved over the last 15 years, it remains the case that dispositive motions in international arbitration (sometimes called motions for summary adjudications or early disposition) are rare, and more rarely successful. Intensely focused on achieving an efficient outcome, arbitral tribunals remain reluctant to slow things down or engage in a process that may not result in shortening the overall length of the proceeding. This focus on efficiency is entirely appropriate and contributes to the speedier results that arbitration attains as compared to its U.S. litigation cousin, where such motions are routinely attempted. But I would like to suggest that the focus on efficiency overlooks less quantifiable benefits of dispositive motion practice that may be said to degrade the *quality* of justice that arbitration delivers. I think there are three such benefits, which I will call (1) the shaping effect of motion practice, (2) the focus factor, and (3) the continuous feedback phenomenon. This essay argues that arbitral tribunals, and arbitral practice generally, should recognize these intangible virtues in deciding whether to permit or pursue such motions.

Since about 2006, when the International Centre for Settlement of Investment Disputes (ICSID) revised its rules to provide for early dismissal of claims, the arbitration community has increasingly acknowledged that summary adjudication procedures have a place in international arbitration.[[2]](#footnote-2) The prevailing standard was initially very high. The ICSID Rules set the pattern early, providing for early dismissal of a claim that was “manifestly without legal merit.”[[3]](#footnote-3) It took 10 years, but in 2016 the Singapore International Arbitration Centre (SIAC) Rules followed suit, permitting the dismissal of claims and defenses under the same “manifestly without legal merit” standard.[[4]](#footnote-4) The following year, the International Chamber of Commerce (ICC) published its Practice Note that likewise suggested the same high standard should be used for “expeditious determination” of claims or defenses that “are manifestly devoid of merit or fall manifestly outside the arbitral tribunal’s jurisdiction.”[[5]](#footnote-5)

Under this high standard, motions for summary adjudication rarely succeed. For example, in recent years, motions for early disposition in ICSID case have been made in only about 6% of the cases filed. Of those, only a handful achieved even partial success.[[6]](#footnote-6)

The rules of more American-influenced institutions envision summary adjudication of part or all of a case under more permissive standards. The American Arbitration Association (AAA) Commercial Rules were amended in 2013 to permit the tribunal to allow dispositive motions “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.”[[7]](#footnote-7) The Rule does not specify the standard to be applied in actually deciding the motion, but it is presumably simply the standard of proof that would apply to the claim or issue in the final award, but made at an early stage. The International Institute for Conflict Prevention and Resolution’s (CPR) Administered Arbitration Rules are similar.[[8]](#footnote-8) Notably, these procedures call for the tribunal to play a gatekeeper role: there is no right to bring a motion for summary adjudication; the tribunal decides whether to permit one based on a preliminary application.

In practice, and sometimes by rule, the key consideration that tribunals focus on in deciding whether to permit motions for summary adjudication is “efficiency,” which is typically taken to mean that permitting the motion will shorten the overall length of the proceeding. CPR’s Rule is explicit: Rule 12.6(c) requires the arbitrator considering whether to permit a motion for early disposition to find “a reasonable likelihood that hearing the motion for early disposition may result in increased efficiency in resolving the overall dispute while not unduly delaying the rendering of a final award.”[[9]](#footnote-9) This captures what tribunals do in practice. [[10]](#footnote-10)

A similar intense focus on efficiency in arbitration drives bifurcation decisions—that is, the decision to postpone some part of the proceeding—including the full merits case—until a threshold issue or certain other issues are first addressed. Marinn Carlson has summarized the situation: “Procedural efficiency—whether bifurcation is more likely to increase or decrease the time and costs associated with the arbitration—is the overarching factor that tribunals consider when deciding bifurcation applications.”[[11]](#footnote-11) Lucy Greenwood goes further, opining that “[t]he single most important factor in deciding whether to bifurcate should be the likelihood of the bifurcated phase ending the proceedings.”[[12]](#footnote-12)

In other words, tribunals will rarely permit bifurcation unless the proponent can show that the motion will pay for itself in terms of the overall cost, or especially length, of the proceeding. If, for example, a successful summary adjudication motion (or bifurcated issue) will only narrow the issues to be decided, but won’t either materially limit the scope of disclosure that will be needed or obviate the need for a hearing entirely, tribunals will rarely allow the summary proceeding to move forward.

The contrast with U.S. court proceedings is stark. In a very large number of significant civil cases today, the case starts with a motion to dismiss, which tests whether (among other things) the facts stated in the complaint are within the court’s jurisdiction or “state a claim”—that is, whether the facts as stated give rise to a claim for relief.[[13]](#footnote-13) These motions often rest on particular pleading standards, such as the rule that claims of fraud must be pled with particularity[[14]](#footnote-14) or that antitrust claims plead a relevant market,[[15]](#footnote-15) or test the sufficiency of the legal theory.[[16]](#footnote-16) A 2009 study of 7700 federal district court cases found that motions to dismiss (or motions to strike, or for judgment on the pleadings, which are similar) were made in about 1800 cases—or 23% (almost four times the rate in the small ICSID sample noted above). Over 44% were granted in their entirety and another 10% were granted in part (compared to about 17% in the ICSID sample).[[17]](#footnote-17)

If the case proceeds, in whole or (as often happens) only in part, the parties proceed to discovery on the possibly slimmed down claims. After discovery, there will very frequently be a motion for summary judgment. That tests whether, with the facts now fully developed, there is still a viable legal claim or whether there are any disputed issues of material fact that require a trial.[[18]](#footnote-18) Along the way, there are numerous other motions. There can be motions to dismiss for *forum non conveniens*, for example, or motions over the scope of discovery. These motions necessarily touch to some extent on the merits as well. In discovery motions, for example, a frequent question is whether the material being sought is sufficiently relevant to justify the costs,[[19]](#footnote-19) or relevant at all. That requires the parties to explain their theories and the court to consider those theories, at least preliminarily.

Without question, all of this motion practice adds costs to, and lengthens, court proceedings in the United States. It is not uncommon for motions to dismiss alone to consume the better part of a year in a reasonably complex case. Summary judgment motions are similar. If the motions are successful, the cases end early. But if they are not, they can contribute to a significantly longer overall time to decision.[[20]](#footnote-20)

So I am not arguing here that arbitrators’ focus on efficiency is wrong, or that we should blithely import into arbitration the delays and costs that come with federal court motion practice.[[21]](#footnote-21) But I do think something more is happening in all this motion practice than lengthening procedures. The frequent opportunity for the courts to consider and address the merits of the claims gives rise to important functions that can improve the quality of the final judicial product—the ultimate fair resolution of the dispute in accordance with the applicable law. In particular, these motions serve to shave off bad theories or claims; allow the parties and the court to bring more focus to bear on the dispositive issues; and assist parties in refining their cases and presentations, and increase the chances of settlement, through repeated testing of the claims and defenses. I outline each of these benefits below.

1. **The Shaping Effect of Motion Practice**

Arbitration cases tend to go all the way to hearing more or less as they were pled. If there were two or three theories for recovery in the Request for Arbitration, for example, those same two or three theories will be presented in the final prehearing memorial. Say the disappointed buyer of property or a company alleges both a breach of a representation or warranty and fraud; the chances are high that the fraud claim will still be pressed at the hearing. There is no realistic opportunity for the respondent to get the tribunal to strike out the claim, the way there would be under court pleading standards, because the respondent is unlikely to be able to convince the tribunal that striking out the fraud claim will markedly change the shape of disclosure or avoid a hearing.

Or suppose the respondent asserts that the claims are beyond the tribunal’s jurisdiction because pre-filing negotiation procedures required in the contractual arbitration clause were not fulfilled (*e.g*., “meetings” between senior officers of both sides were not held). It is theoretically possible to get the tribunal to dispose of the argument early on. But in part because such jurisdictional objections rarely succeed, few tribunals will think it worth the time and effort to have the issue separately briefed.

And then there are factual disputes that do not get fully fleshed out until late in the process and thus end up still being “in play” going into the hearing. This process is more subtle and has as much to do with pre-hearing disclosure processes as motion practice. Not infrequently, the parties will debate in witness statements a particular factual issue, such as who was responsible for some particular aspect of the delay in developing a manufacturing process. In the back and forth of the witness statements, the issue may get thoroughly aired and evolve into insignificance: it may become clear, for example, that the initial accusations that it was all respondent’s fault are largely rebutted and there was really shared fault. But the claimant, having staked out the position and “publicly” presented it with witnesses who would appear at the hearing, can’t very well abandon the point, and so hearing time is taken up exploring the now pretty marginal point. If all this had played out earlier in the proceeding—either because of discovery conducted without the involvement of the arbitrators—or in some motion practice of one kind or another, the issue would likely have not been in the case at the hearing.

I am not saying that in each of these examples the case in fact would have been slimmed down if the arbitrators had permitted dispositive motion practice, or that the courts would have succeeded in slimming the case down so that only significant material issues survived to trial. My point is that the longer, slower processes in court provide *opportunities* for such slimming down. The arbitral calendar and one-shot nature of the typical arbitral hearing rarely presents such opportunities. The result is that arbitration cases tend to present at the end a plethora of subsidiary issues and weak claims and defenses that the tribunal must sort out in the final award.

What’s wrong with that? Two things, which are related to the next two points I make below. First, and most important, these subsidiary issues dilute the tribunal’s attention. All the issues need to be considered and dealt with. And I submit that that diffused focus lowers the quality of the arbitral work product. Second, the fact that no issues are, as a practical matter, decided until the final award reduces the chance that a case will settle. If the fraud claim suggested above or the jurisdictional objection were more or less definitively rejected at an early stage, the parties might well be more likely to be able to resolve the case on their own.

I can’t prove any of this, but some evidence that it occurs can be found in *functus officio* cases, which sometimes arise because a tribunal is alerted to something it overlooked. On occasion, there is an indication in the published court opinions that the relevant issue was lost in the welter of more important issues and did not get sufficient attention. For example, in *General Re Life Corp*. v. *Lincoln Nat. Life Ins. Co.,* a 2017 case heard in federal court in Connecticut,[[22]](#footnote-22) the primary issue was whether a reinsurance company was entitled to alter the reinsurance premiums on certain life insurance policies. If so, the primary insurer could “recapture” the policies—that is, terminate the reinsurance contract, which the primary insurer wanted to do if the alterations were valid. A subsidiary issue was, if the alterations were valid, how should the companies calculate how much the reinsurance company had to pay back on account of the recapture. The tribunal laid out a rule for that reimbursement in its award, but the rule turned out to have ambiguities, which led to a “clarification” (with a different majority). The district court weighing whether to enforce the clarification noted that the critical botched issue received little attention in the briefing or at the hearing:

The vast majority of the hearing was devoted to the core issue in the dispute, the question of whether there had been a change in anticipated mortality and whether General Re was, therefore, entitled to a rate increase. The parties' discussion of how recapture would proceed was limited to brief comments repeating what little information on the subject was included in the parties' pre-hearing briefs and proposed awards. *See* Full Hearing Trans. 1248:3-8, 1248:25-1249:15, 1255:22-1256:16.[[23]](#footnote-23)

It is fair to assume that the limited attention devoted to the issue (1-1/2 transcript pages out of more than 1,260 pages) was a result of the complexity of the case as presented at the hearing.[[24]](#footnote-24)

Would the parties have given less cursory treatment if the case had been slimmed down? Would numerous rounds of motions have slimmed the case down? Would a court have done better? We’ll never know. And of course there are numerous appeals from trial court judgments that overturn decisions on points that received limited attention in the trial court. But the difficulty of knowing whether arbitral decision-making suffers because of the relative inability to slim cases down before the final award is in part a result of the fact that arbitral errors are rarely exposed. Arbitral awards are, for most practical purposes, final and unappealable. And that, in a way, heightens the stakes and calls for the arbitration community to be particularly sensitive to the mere possibility that things are getting lost in the sauce.

1. **The Focus Factor**

The second virtue of episodic decision making is the flip-side of the messy cases that go to arbitral hearings: considering discrete issues in discrete motions under discrete pleading or summary judgment standards allows the tribunal to focus on precisely what a party needs to show to prevail on a claim or defense. The example of the fraud claim noted above is a good one for this. If a claim that a purchaser was intentionally misled is made in a federal court complaint, the defendant will very frequently have a reasonable basis to assert in a motion to dismiss that the fraud claim does not plead fraud with particularity.[[25]](#footnote-25) That will require an in-depth look at exactly what inferences can legitimately be drawn from a particular set of facts. In United States securities cases, a nuanced body of law has built up, developed largely in motions to dismiss, around, for example, whether particular claims in the prospectus about the company’s processes and procedures constitute false statements of material fact.[[26]](#footnote-26) Respondents in arbitration may well similarly have a reasonable ground for moving to strike or narrow a case based on legal standards regarding, for example, what duties a bank owes an investor or, for that matter, whether a pre-arbitration negotiation requirement is or is not jurisdictional.

In each of these cases, if the issue is dealt with separately in an early motion, the tribunal will be given 10 or 20 page briefs focused on that discrete issue. It will deliberate on that issue alone or with a few others. That allows much more focused attention than if the same issue were addressed only in prehearing memorials and oral argument at the hearing, along with all of the major factual issues and numerous other legal issues (damages, interest, etc.). It stands to reason that the arbitral product is likely to be better and more fully reasoned and explained in a separate decision on the point than on page 97 of a 165-page final award.

1. **The Continuous Feedback Phenomenon**

The third virtue of episodic decision-making is that it provides multiple opportunities for parties to test and refine their theories and presentation of the case. This happens in arbitration as well: parties frequently sharpen their presentations as a case evolves from request for arbitration to statement of claim to prehearing memorial to reply memorial to opening statements and so on. That sharpening can be a result of the responses of the adversary or simply further thinking about the claims.

But having real tribunal feedback enhances that phenomenon. Seeing how a judge or arbitrator reacts to a particular theory when expressed in a discovery motion or motion to dismiss, even when the claim itself is not at stake or when it survives scrutiny, can improve the presentation. It can also provide more definitive information on the ultimate chances of success, information that both sides receive at the same time. That information can, and often does, facilitate settlement. A rejection of a strained fraud claim can sober up a claimant real quick. And so can a judge’s refusal to allow discovery on a particular theory, which may well reflect the judge’s view that the theory is pretty marginal.

Again, I am not urging that arbitral tribunals routinely permit dispositive motions to proceed in every case, or that arbitrators should cede their gatekeeping function. But in weighing such applications arbitrators should recognize that there can be benefits to dispositive motions that go beyond efficiency. Indeed, the benefits I suggest here—the narrowing of the case, the increased focus and the early feedback—may in some cases be worth a *sacrifice* in efficiency. Even if allowing for such motions means a longer arbitration schedule—building in a time for briefing and consideration into Procedural Order No. 1—in the right case that may well be worth doing.

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1. Partner and Co-Coordinator of the Arbitration Practice, Sullivan & Cromwell LLP (New York). I would like to thank Medina M. Sadat (Yale 2020) for her very able research assistance in preparing this essay. [↑](#footnote-ref-1)
2. In 2007, by contrast, an ICC Task Force Report opined that summary disposition procedures “would not work in the ICC context and culture.” M.S. Kurleka et al., *ICC Task Force on Arbitrating Competition Disputes*, Committee Report on Evidence, Procedure, and Burden of Proof 30 (2007). [↑](#footnote-ref-2)
3. ICSID Rule 41(5). [↑](#footnote-ref-3)
4. SIAC Rule 29.1. *See also* China International Economic and Trade Arbitration Commission (CIETAC) Investment Arbitration Rule 26 (permitting application for early dismissal of claims or counterclaims in whole or part under “manifestly without legal merit” standard). [↑](#footnote-ref-4)
5. ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, ¶ 60 (Oct. 30, 2017). [↑](#footnote-ref-5)
6. Since 2012, 30 motions for early disposition were made in 512 cases (5.9%). Of these, 2 were partially successful and 3 were totally successful (a win rate of 16.6%). Since the rules were implemented in 2006, 34 motions were made in 662 cases (5.1%). Of these, 3 were partially successful and 5 were totally successful (23.5%). *See* ICSID, *Decisions on Manifest Lack of Legal Merit*, *available at* https://icsid.worldbank.org/cases/content/‌tables‌‌‌-of-‌decisions/‌‌manifest-lack-of-legal-merit. [↑](#footnote-ref-6)
7. AAA Commercial Arbitration Rule 33. The AAA Consumer, Employment and Construction Rules have long included similar provisions. [↑](#footnote-ref-7)
8. CPR Administered Arbitration Rule 12.6(a) (providing for “a motion for early disposition of issues, including claims, counterclaims, defenses, and other legal and factual questions”). The rules of the International Centre for Dispute Resolution, the AAA’s international arm, do not refer to “early disposition” as such, but have long provided the tribunal with the express power to “bifurcate proceedings . . . and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case.” ICDR Rule 20(3). [↑](#footnote-ref-8)
9. CPR Administered Arbitration Rule 12.6(c). CPR’s Guidelines on Early Disposition of Issues in Arbitration underline the point. Guideline 2.4 states, “It is important to bear in mind that even if early disposition of an issue may be accomplished quickly and fairly, it nevertheless may not be appropriate if it is not likely, if granted, to result in a material reduction of the total time and cost in reaching final resolution of the case.” [↑](#footnote-ref-9)
10. *See*, *e..g,*, Janice Sperow, *What to Know When Making Dispositive Motions in Arbitration*, LAW360 (Sept. 9, 2020), *available at* <https://www.law360.com/articles/‌1307538/‌‌what-to-know-when-making-dispositive-motions-in-arbitration>. (“Basically, the AAA's rules all require two different types of proof [for dispositive motions]: merit and efficiency — some likelihood of success and some cost savings over a hearing on the issue or claim.”). [↑](#footnote-ref-10)
11. Marinn Carlson, *Bifurcation in Investment Treaty Arbitration*, Lexology (July 23, 2020), *available at* https://www.lexology.com/library/detail.aspx?g=75049305-1fc9-4d08-b77e-e23b9541e457.  [↑](#footnote-ref-11)
12. Lucy Greenwood, *Does Bifurcation Promote Efficiency: Still a Difficult Question to Answer*, Greenwood Arbitration (Feb. 11, 2019), *available at* https://www.greenwoodarbitration.com/greenwood-energy-arbitration-blog/2019/2/11/does-bifurcation-promote-efficiency-still-a-difficult-question-to-answer. [↑](#footnote-ref-12)
13. Fed. R. Civ. P. 12(b)(6). [↑](#footnote-ref-13)
14. Fed. R. Civ. P. 9(b). [↑](#footnote-ref-14)
15. “Proof of the relevant product market is a necessary element of a cause of action for monopolization or attempted monopolization.” *Nifty Foods Corp*. v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980). [↑](#footnote-ref-15)
16. “Dismissal is proper…where there is no cognizable legal theory.” *Taylor* v. *Yee*, 780 F.3d 928, 935 (9th Cir. 2015). [↑](#footnote-ref-16)
17. *Institute for the Advancement of the American Legal System*, Civil Case Processing in the Federal District Courts 5-6 (2009), *available at* https://www.uscourts.gov/sites/‌default/files/iaals\_civil\_case\_processing\_in\_the\_federal\_district\_courts\_0.pdf. The source states that 1800 motions were filed in the 7700 cases; I am assuming that means one motion per case, which is typical. [↑](#footnote-ref-17)
18. Fed. R. Civ. P. 56. [↑](#footnote-ref-18)
19. Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”). [↑](#footnote-ref-19)
20. I once had charge of a series of arbitrations against a bank brought by investors in the Madoff Ponzi scheme that were run in parallel with essentially identical claims brought by other investors against the same bank in federal court. (The court cases were consolidated in multi-district litigation, and the bank chose not to insist on the arbitration clause in the investor’s form documents if the plaintiffs’ counsel chose to sue in court.) The arbitrations were done—to award or settlement—in two years or less; the court cases continued for several further years. [↑](#footnote-ref-20)
21. Indeed, courts are increasingly adopting some of the efficiency enhancing procedures of arbitration. For example, many judges in the Southern District of New York have adopted the practice of requiring pre-motion letters in which a litigant must summarize the motion it wishes to bring in three or so pages, with the other side responding in very short order. *See Individual Practices of Judge Loretta A. Preska*, U.S.D.C. S.D.N.Y. (Jan. 01, 2020), *available at* https://nysd.uscourts.gov/sites/default/files/practice\_‌documents/LAP%20‌Judge%20Preska%20Individual%20Rules%2001282020.pdf. While judges cannot bar a litigant from bringing a motion that is permitted by the Federal Rules of Civil Procedure, if the judge believes the motion is not likely to be meritorious or worth the effort to resolve, the judge almost always successfully persuades the litigant to desist. [↑](#footnote-ref-21)
22. 273 F. Supp. 3d 307, 310 (D. Conn 2017), *aff’d*, \_\_ F.3d \_\_ (2d Cir. 2018). [↑](#footnote-ref-22)
23. *Id.* at 310 n.1. [↑](#footnote-ref-23)
24. For another example, see *Communs. Worker of Am., AFL-CIO* v. *Southwest Bell Tel. Co.*, 2019 U.S. Dist LEXIS 58944 (W.D. Tex. 2019) (confirming an arbitral award correction where arbitrator misjudged an exhibit that was the subject of only a “short discussion” at the hearing). [↑](#footnote-ref-24)
25. The requirement that fraud be pled with particularity is a pleading standard that does not apply in arbitration, but it reflects the requirement of ultimate proof of fraud by clear and convincing evidence, which generally does. Kabir A. N. Duggal, *Evidentiary Principles in Investor-State Arbitration*, 28 Am. Rev. Int’l Arb. 3, 42 (2017) (noting that tribunals have applied a heightened standard of proof for allegations of fraud, whether denominated using the “clear and convincing” terminology or more generally referring to a “heightened standard”). [↑](#footnote-ref-25)
26. *See*, *e.g.*, *Plumbers & Steamfitters Local 773 Pension Fund* v. *Danske Bank A/S*, U.S. Dist. LEXIS 153273 at \* (S.D.N.Y. Aug. 24, 2020) (dismissing claim that corporate governance and compliance statements were false and misleading as inactionable puffery). [↑](#footnote-ref-26)