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Leveraging Summary Adjudication: Cost-Conscious Justice In Reinsurance Arbitration

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The Historical Paradigm (1)

- Some **"Old school"** arbitrators **disfavor** summary adjudication:
  - Summary adjudication is a creature of **litigation** – it has no place in industry arbitrations.
  - The parties bargained for **a "hearing"**, which means witness **testimony**.
  - There are usually **disputed facts**, so summary adjudication briefing and argument are a waste of time and money.

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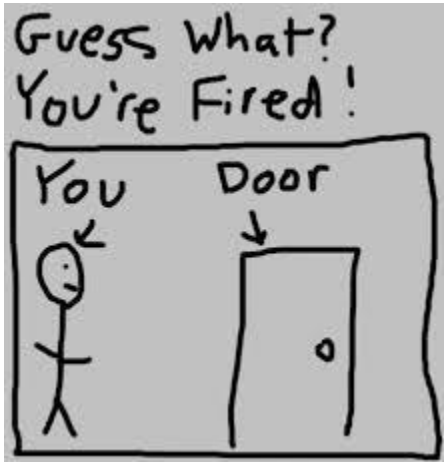
The Historical Paradigm (2)

- Some arbitrators (and lawyers) disfavor summary adjudication, because it **aborts** an **income** stream.
- Why fire yourself?



The New World Order (1)

- We've observed a **mini-trend** in the opposite direction.
- Party representatives, counsel, and Panelists increasingly see summary adjudication as a viable and attractive tool in industry arbitrations.
- More and more, Panels are:
  - Including deadlines for summary adjudication motions in approved schedules.
  - Scheduling oral arguments.
  - ***Taking motions seriously.***

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The New World Order (2)

- The traditional summary adjudication **standard**:
  - (1) No genuine dispute of material facts.
  - (2) Movant is entitled to judgment as a matter of law.
- Panels – like Courts – are sensitive to fact disputes.
- Understandable reluctance to resolve "he said, she said" disputes on the papers.
- True, even though – in many jurisdictions – there is **no "right"** to an evidentiary hearing in arbitration at which witnesses will resolve fact disputes.

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The New World Order (3)

- It is surprisingly common for there to be no material facts in dispute – instead, the dispute may turn on:
  - What a Treaty **wording** means.
  - Whether a post-settlement **allocation** is reasonable under undisputed facts.
  - Whether **aggregation** was permitted under undisputed facts.
  - Whether some **purely legal** defense is dispositive.

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Authority (1)

- It is generally accepted by Courts that – absent specific arbitration clause language or state statutes to the contrary – a Panel has the **authority** to award summary adjudication.
  - Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal. App. 4th 1096, 1104 (1995) ("We conclude that the arbitrator had implicit authority to rule on such [summary disposition] motions");
  - Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 2004 U.S. Dist. LEXIS 3494, at *42 (N.D. Ill. Mar. 9, 2004) (confirming arbitrator's summary award).

Authority (2)

- Although summary adjudication may not be common historically, reinsurance **trade groups** have long recognized the authority to grant such relief.
  - ARIAS, *Rules for the Resolution of U.S. Insurance and Reinsurance Disputes*, Rule 13.1 (**2016**) ("The Panel may hear and decide a motion for summary disposition").
  - ARIAS, *U.S. Practical Guide to Reinsurance Arbitration Procedure*, § 6.3 (2004) ("The Panel should consider whether a streamlined hearing procedure would serve the parties' best interests").
  - RAA, Insurance and Reinsurance Dispute Resolution Task Force, *Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes*, 13.1 (2004) ("The Panel may hear and determine a motion for summary disposition.").

Authority (3)

- There is an argument that some common **arbitration clauses** contain wording that requires a full-blown evidentiary hearing.
  - E.g. ("The panel **shall** make its decision based upon a hearing in which **evidence** may be introduced").
- The counter argument is that **oral argument** on a summary adjudication motion constitutes a "hearing" – because it provides the non-movant with an opportunity to be heard.
  - Non-movants also have the right to introduce evidence – affidavits, documents, deposition transcripts – in opposition to any motion.

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Authority (4)

- The **statutory framework** can also be read to intimate a testimonial imperative.
  - E.g., *Massachusetts Arbitration Act*, Section 5 ("Unless otherwise provided by the agreement, the arbitrators shall appoint a time and place for the hearing.... The parties shall have the right to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.").
- But, movants may argue that **no "right"** to cross-examination exists at motion hearings, because **no witnesses** are called for direct examination.
- This issue remains **unresolved** by U.S. courts.

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Authority (5)

- But, **who decides** whether a summary adjudication motion is procedurally appropriate?

- Courts – including the Second Circuit in its recent **"DeflateGate"** ruling – have held that:

"It is well settled that procedural questions that arise during arbitration, such as which witnesses to hear and which evidence to receive or exclude, are left to the sound **discretion** of the **arbitrator** and should not be second-guessed by the courts". NFL v. Brady (2d Cir. 2015).

- (Side note: Brady is innocent).

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Planning (1)

- **Early assessment** is essential to the implementation of summary adjudication practice.
- Following the submission of Position Statements, Panels can **triage** cases for possible early resolution.
- Counsel can **meet and confer** about potential motions prior to the Organizational Meeting.
- Summary adjudication briefs should be **hard-wired** into the schedule.

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Diverse Approaches (1)

- Since arbitration is a creature of agreement, parties have **creative** latitude with respect to summary process.
- Although the parties to an arbitration are – by definition – in a dispute, they should have a **shared interest** in a svelte, cost-effective process.
- Summary adjudication can take many forms in industry arbitration.
  - Some by agreement.
  - Some not.

Diverse Approaches (2)

- Out Of The Gate:
  - In certain cases, summary adjudication briefing may be appropriate right after the Organizational Meeting.
  - For example:
    - Cases with **no disputed facts**, and the sole issue concerns **interpretation** of the reinsurance contract.
    - Cases controlled by binding **prior** arbitration awards.
    - Cases subject to disposition on **purely legal grounds.**

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Diverse Approaches (3)

- By Agreement:
  - The parties agree to submit cross motions.
  - The parties jointly ask the Panel to **decide the case** based on the papers and oral argument.
    - Locks in the **efficiency** of avoiding trial.
    - And, **relieves the Panel** of any concern that a party will be deprived of its day in "court".

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Diverse Approaches (4)

- Partial Summary Adjudication:
  - May be by agreement or not.
  - May resolve **"easy" issues**, while reserving thornier disputes for hearing.
  - Some parties and counsel resist partial summary adjudication on the basis that efficiencies are illusory if a dispute is headed to hearing, regardless.
  - Ignores positive impacts of streamlining discovery and focusing parties and the Panel on more complex, fact intensive inquiries.

Diverse Approaches (5)

- Hybrid – An Example:
  - The parties submit cross motions.
  - The Panel then convenes a one-day hearing that will include:
    - One corporate witness per side.
    - Oral argument.
    - Panel questions.

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Diverse Approaches (6)

- "Baseball Arbitration":

  - The parties submit cross motions.
  - Each then proffers a number to represent a "fair result".
  - The parties then jointly ask the Panel – based on the briefing – to select only one of the proposed resolution amounts.
  - This approach is not in common use, but it minimizes risk and may promote settlement discussions.

End Slide Presentation

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