Summary Adjudication in Arbitration Proceedings: Is it Time for Arbitrators to Step Up and Start Hearing and Granting Dispositive Motions in Appropriate Circumstances?

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I. Introduction

Because arbitration is perceived as becoming a slow and expensive dispute settlement mechanism,[1] there is a strong push to introduce mechanisms for summary disposition of cases as a tool to promote efficiency and speed in the arbitration process.[2] In practice, however, arbitrators remain disinclined to hear and grant dispositive motions. This article examines the possible explanations for this reluctance and whether there are appropriate.

For purposes of this article, dispositive motions are motions that resemble the type of motions filed in US civil litigation and that a court would consider dispositive of a case, such as motions to dismiss for failure to state a claim, motions for summary judgment, motions or judgment on the pleadings, and motions for a directed verdict.

In US civil litigation, these mechanisms are frequently used to set aside unmeritorious claims or defenses, and promote a faster resolution of disputes. Proponents of the introduction of dispositive motions in international arbitration argue that, for similar

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[1] *See, e.g.*, James Lyons, *Arbitration: The Slower, More Expensive Alternative?* Am. Law., Jan.-Feb. 1985, at 107 (quoting then American Arbitration Association President Robert Coulson as stating "[p]eople used to promote arbitration (for its speed, economy, and justice)...like religious zealots...I don't think any of those words are entirely accurate"); *see also* Thomas Stipanowich, *Rethinking American Arbitration*, 63 Ind. L. J. 425, 452-76 (1988) (observing that many surveyed respondents disagreed that arbitration was faster and cheaper than litigation).

[2] *See e.g.*, International Bar Association Rules on the Taking of Evidence in International Arbitration, Article 2, which states, in relevant part: "3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues (...) *for which a preliminary determination may be appropriate.*" (emphasis added). The Commentary on the Rules further states: "While the Working Party did not want to encourage litigation-style motion practice, the Working Party recognized that in some cases certain issues may resolve all or part of a case. In such circumstances, *the IBA Rules of Evidence make clear that the arbitral tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work.*" (emphasis added), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC; *see also* Alfred G. Ferris and Biddle W. Lee, *The Use of Dispositive Motions in Arbitration*, 62 Disp. Resol. J. 17, 24 (1 August 2007) [hereinafter Ferris]; *see also* David W. Rivkin, *21st Century Arbitration Worthy of Its Name*, in Law of International Business and Dispute Settlement in the 21st Century (Liber Amicorum Karl-Heinz Bockstiegel), (Eds: Robert Briner, L. Yve Fortier, Klaus Peter Berger, Jens Bredow) (2001).

reasons, arbitrators ought to use similar procedural tools to resolve disputes at an early stage of the arbitration proceedings where appropriate.[3]

In actual practice, however, arbitrators have been unwilling to hear and grant dispositive motions.[4] Different reasons have been offered to explain this current state of affairs. First, the lack of explicit rules in the major international arbitration rules authorizing them to entertain dispositive motions.[5] Second, that the summary disposition of a case will render the resulting award vulnerable to challenges before courts, notably on the ground that an arbitrator engaged in misconduct by refusing to hear evidence.[6] Third, the differences between civil litigation and arbitration raise concerns about the appropriateness of entertaining dispositive motions.[7]

This article addresses in seriatim whether these explanations have a sound foundation, or if these areas of concern are somewhat overblown in light of the relevant existing legal framework and case law.

This article first examines whether arbitrators have the authority to hear and grant dispositive motions according to US law and the most frequently used arbitration rules. It appears that under the existing legal framework, arbitrators do have the authority, either explicitly or implicitly, to entertain dispositive motions.

So this article then turns to the grounds for vacatur of arbitration awards, and how courts have reviewed arbitration awards that make a summary disposition of a case. The applicable laws and accompanying case law reveals that, unless a panel's decision to

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[3] *See* Ferris, *supra* note 2, at 18 ("Dispositive motions in litigation frequently provide the most efficient means of limiting the scope of the litigation or even ending it, saving the client's and the court's resources and reducing or eliminating the risk of an adverse judgment, The same considerations could apply in arbitration.")

[4] *See* D. Brian King and Jeffery P. Commission, *Summary Judgment in International Arbitration: The "Nay" Case*, ABA International Law Spring 2010 Meeting, at 1 (Spring 2010) [hereinafter *Summary Judgment in International Arbitration: The Nay Case*] (observing that "there is little empirical evidence of use of such a mechanism in the practice of arbitral tribunals."); *see also* COLLEGE OF COMMERCIAL ARBITRATORS, *Guide to Best Practices in Commercial Arbitration*, p.106 (2006) ("Commercial arbitration generally reflects a strong proclivity to avoid court-like motion practice to refine pleadings or to dismiss a matter for failure to state a claim properly.");

[5] *See Summary Judgment in International Arbitration: The Nay Case*, *supra* note 4, at 1 (observing that "none of the major international arbitration rules contemplates summary judgment, at least expressly.")

[6] Id. ("the introduction of a summary disposition mechanism raises concerns about challenges to the resulting award or its enforcement in the courts. Such a challenge could be predicated on the right of parties to have a full opportunity to present their cases, and/or the presumptive right to an oral evidentiary hearing.")

[7] *See* Ferris, *supra* note 2.

dismiss a claim at an early stage rises to the level of depriving one party of its right to a "fundamentally fair hearing", a court will confirm a summary award.

Finally, this article discusses the challenges and unresolved issues surrounding the incorporation of these mechanisms grafted from the American litigation process in international arbitration proceedings, and whether these problems are insurmountable.

II. The Arbitrator's Authority to Consider Motions for Dispositive Motions in International Arbitration

A. The Domestic Framework

Neither the Federal Arbitration Act ("FAA"),[8] nor the Uniform Arbitration Act ("UAA")[9] speak expressly to the issue of dispositive motions. However, courts have assumed that arbitrators have the authority to grant dispositive motions.[10] This assumption was expressly incorporated in the 2000 Revised Uniform Arbitration Act ("RUAA"), which reads, in relevant part: "[a]n arbitrator may decide a request for summary disposition of a claim or particular issue."[11]

B. The Institutional Arbitration Rules

The arbitration rules of the major arbitration providers also do not speak directly on the issue of dispositive motions. But, they include general provisions that give arbitrators wide latitude to conduct the proceedings, including the authority to consider dispositive motions[12], such as: Article 16.3 of the AAA's International Arbitration Rules,[13] Article

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[8] Federal Arbitration Act ("FAA"), 9 U.S.C. 1 et seq., *available at* http://www.adr.org/sp.asp?id=29567

[9] Uniform Arbitration Act ("UAA"), Article 12(a), *available at* http://www.adr.org/sp.asp?id=29567

[10] *See* Ferris, *supra* note 2, at 18 ("as a few courts had occasion to review the propriety of a dispositive motion while considering a petition to vacate an award, it became increasingly clear that arbitrators had such authority.").

[11] 2000 Revised Uniform Arbitration Act ("RUAA"), Section 15(b), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm. As of 2007, it has been enacted in 12 states.

[12] *See e.g.*, Michael Hollering, *Dispositive Motions in Arbitrations*, 1(1) ADR Currents 1, 8 (Summer 1996) (observing that in practice, AAA arbitrators have been exercising the authority to hear and decide dispositive motions.)

[13] AAA International Arbitration Rules, Article 16:3: "The Tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."

20 of the ICC Rules,[14] Article 14.2 of the LCIA's Arbitration Rules,[15] and Article 15.2 of the UNCITRAL Rules.[16]

Moreover, other institutional arbitration rules provide arbitrators with express authority to entertain dispositive motions, such as: Rule 32(c) of the AAA's Construction Industry Rules,[17] Rule 27 of the AAA's Employment Arbitration Rules,[18] Rule 18 of the JAMS Comprehensive Arbitration Rules,[19] and Rule 12504 of the Financial Industry Regulatory Authority's Code of Arbitration Procedure for Customer Disputes.[20]

C. Recent Developments in Investment Arbitration

In the investment arbitration context, several recent developments reflect the progressive introduction of dispositive motion mechanisms in the resolution process. In 2006, the International Centre for the Settlement of Investment Disputes ("ICSID") revised its Arbitration Rules. One of the most significant amendments was the introduction of Article 41(5), which provides arbitrators with the specific power to

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[14] ICC Arbitration Rules, Article 20: The Tribunal "shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."

[15] LCIA Arbitration Rules, Article 14:2: "Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration."

[16] UNCITRAL Arbitration Rules, Article 15.2: "If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials."

[17] AAA Construction Industry Rules, Rule 32(c): "The arbitrator may entertain motions, including motions that dispose of all or part of a claim, or that may expedite the proceedings, and may also make preliminary rulings and enter interlocutory orders."

[18] AAA Employment Rules, Rule 27: "The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."

[19] JAMS Comprehensive Arbitration Rules, Rule 18: "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."

[20] FINRA Code of Arbitration Procedure for Consumer Disputes, Rule 12504 (Motions to Dismiss Prior to Conclusion of Case in Chief): allows for the filing of motions to dismiss on very limited grounds, including: "(a) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or (b) the moving party was not associated with the account(s), security(ies), or conduct at issue."

summarily dispose of a case.[21] This mechanism was for the first time used by two very distinguished panels in the recent cases *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*,[22] and *RSM Production Corp. v. Grenada*.[23] In *Global*, an ICSID panel composed of Sir Franklin Berman QC, Professor Emmanuel Gaillard and Mr. Christopher Thomas QC granted a motion to dismiss a claim early in the proceeding, after only two rounds of short written submissions by each side, followed by two rounds of oral argument, completed within a day.[24] Nine days after the *Global* Award was issued, the panel in *RSM* upheld Grenada's objection that the claimant's claim was "manifestly without legal merit" after only one round of written submissions and one round of oral submissions.[25] The *RSM* Tribunal consisted of J. William Rowley QC, Professor Pierre Tercier and Edward W. Nottingham.

Another relevant development is the evolution of multilateral and bilateral investment treaties ratified by the US. While Chapter 11 of the North American Free Trade Agreement ("NAFTA") is silent with respect to dispositive motions, recent accords, including the Central American Free Trade Agreement (CAFTA)[26] and the 2004 U.S. Model Bilateral Investment Treaty,[27] have established a procedural framework for the handling of motions for summary disposition.

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[21] ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), Article 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 notify the parties of its decision on the objection." (emphasis added).

[22] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, Award, ICSID Case No. ARB/09/11 (Nov. 23, 2010), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C660

[23] *RSM Production Corp. v. Grenada*, Award, ICSID Case No. ARB/10/6 (Dec. 10, 2010), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded

[24] *See Global*, *supra* note 22, at para 18.

[25] *See RSM*, *supra* note 23, at para. 1.3.

[26] *See* CAFTA-DR, Article 10.20 ("Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26."), *available at*: http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

[27] *See* U.S. Model Bilateral Investment Treaty, Article 28 (contains identical language than CAFTA Article 10.20), *available at*: http://www.state.gov/e/eeb/ifd/bit/index.htm

III. Judicial Review of Summary Awards

The authority of arbitrators to decide motions for summary disposition is generally challenged at the award enforcement stage, but in the vast majority of cases, without success. There is a relatively simple reason for this. While courts have the authority to review arbitration awards to ensure that parties to arbitration are not deprived of a fair and just hearing,[28] the strong federal policy favoring arbitration[29] has led both federal and state courts to confirm summary awards in the vast majority of cases.[30]

A. Grounds for Vacatur

According to Section 10(a) of the FAA, and the corresponding arbitration laws of virtually every state,[31] a court may vacate an award:

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators, or either of them;
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*; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. *where the arbitrators exceeded their powers*, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[32] (emphasis added)

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[28] *See* William W. Park, *Why Courts Review Arbitral Awards*, in FESTSCHRIFT FUR KARL-HEINZ BOCKSTIEGEL 595, 596 (2001), *available at* www.williamwpark.com/.../Why%20Courts%20Review%20Awards.pdf ("Efficient arbitration implicates a tension between the rival goals of finality and fairness...Freeing awards from judicial challenge promotes finality, while enhancing fairness calls for some measure of court supervision...To this end, legislators and courts must engage in a process of legal tuning that seeks a reasonable counterpoise between arbitral autonomy and judicial control mechanisms.").

[29] *See generally* the FAA's legislative history, as per, e.g., H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924) ("Arbitration agreements are purely a matter of contract, and the effect of the bill is simply to make the contracting party live up to his agreement.")

[30] *See* Ferris, *supra* note 2, at 20-22.

[31] The relevant state laws have incorporated similar narrow grounds, based on the language found either in Section 12(a) of the UAA, or Section 23 of the RUAA.

[32] FAA, 9 U.S.C. 10(a). It is interesting to note that other jurisdictions that often host international arbitration cases have adopted grounds for judicial review that echo the ones found in the FAA, such as: the English Arbitration Act, Section 68, *available at* http://www.legislation.gov.uk/ukpga/1996/23/contents, the French New Code of Civil Procedure, Article 1504, *available at* http://www.iaiparis.com/lois_en.asp#t5, and the UNCITRAL Model law on International Commercial Arbitration, Article 34, upon which

In addition to the statutory grounds quoted above, courts have created two extra-statutory grounds: vacatur for "manifest disregard of the law",[33] and vacatur for "violation of public policy".[34]

Generally, parties challenging an arbitration panel's decision to grant a dispositive motion have contended either that the arbitrators in doing so had exceeded their power, and/or that they engaged in misconduct by improperly refusing to hear evidence pertinent and material to the controversy. It has been suggested that arbitrators are particularly wary of the latter ground because the early dismissal of a case generally does not permit a full evidentiary hearing, which might expose the resulting award to a challenge on the basis that the arbitrators engaged in misconduct by refusing to hear evidence.[35] Is this fear legitimate? Or is it misplaced?

B. Vacatur of Arbitral Awards Based on the Arbitrator's Refusal to Hear Evidence

An overview of the relevant case law teaches us that both federal and state courts have responded negatively to the contention that granting a disposition motion justifies vacating the resulting award on the ground that the arbitrators refused to hear evidence.[36] Out of all the challenges of summary awards based on the arbitrator's refusal to hear

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an important number of jurisdictions have based their corresponding domestic provisions, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

[33] *See Wilko v. Swan*, 363 U.S. 427, 436-37 (1953) ("the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation."); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("parties [are] bound by [an] arbitrator's decision not in 'manifest disregard' of the law.")

[34] *See* Gabriel M. Wilner, 1 DOMKE ON COMMERCIAL ARBITRATION 34:07, at 14 (Rev. ed. 1998).

[35] Michael D. Young and Brian Lehman, *Arbitrators Are Less Prone to Grant Dispositive Motions Than Courts*, New York Law Journal (June 26, 2009) (noting that "arbitrators are sensitive to the fact that one of the grounds for vacatur under the Federal Arbitration Act is the arbitrator's refusing to hear evidence that is pertinent and material to the controversy at issue. Sensitivity to this ground for vacatur frequently leads arbitrators to admit even arguably duplicative or irrelevant evidence at a hearing, and causes them to be all the more concerned about deciding a case without any kind of evidentiary hearing.").

[36] *See* Ferris, *supra* note 2, at 21(observing that "courts have not been receptive to arguments that granting a dispositive motion, by itself constitutes an arbitrator error that would warrant a judicial decision to vacate an arbitration for refusing to hear matieral evidence or exceeding arbitral powers."); *see e.g.*, the seminal case *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (Cal. Ct. App. 1995), and *Goldman Sachs & Co. v. Patel QDS:224S164*, 222 N.Y.L.J. 35 (S. Ct., N.Y. Cty. 1999)

evidence, only one case has been found in which a court vacated a summary award on that ground.[37]

Moreover, the case law consistently signals that a court may rely upon this ground to set aside a summary award only if the early dismissal of the case deprived a party of its right to a fundamentally fair hearing.[38] It also consistently signals that arbitration panels need not schedule oral evidentiary hearings to ensure the parties' right to present their case, but may do so through other means, such as declaration, affidavit or transcript.[39]

The Southern District Court's decision in *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*[40] is illustrative of the courts' consistent jurisprudence on challenges of summary awards based on the arbitrator's refusal to hear evidence. In that case, the court recognized the NASD arbitrators' authority to grant dispositive motions and affirmed the summary award challenged. By way of background, claimants sought compensation for ERISA violations, unauthorized and excessive trading, fraudulent concealment and excessive frauding, fraudulent concealment, negligent misrepresentation, constructive fraud, violation of NASD fair conduct rules and lack of supervision.[41] Respondents moved to dismiss on the grounds of lack of standing and preemption.[42] The arbitral panel invited the parties to submit memoranda and documents for consideration of the motions, scheduled oral argument and ordered that no witnesses would be permitted to testify or to present evidence during the oral argument.[43] After hearing the oral arguments, the panel granted the motions to dismiss all claims. Following the panel's decision, claimants moved to vacate the award pursuant to FAA Section 10(a)(3). They contended, among other thing, that the Panel was guilty of misconduct because it refused to hear evidence relevant and material to the controversy.[44]

The District court first noted in its decision that "federal courts will not pursue evidentiary review of arbitration proceedings unless fundamental fairness is violated."[45] The court further explained that arbitrators have "*broad discretion as to whether to hear evidence at all and need not compromise speed and efficiency, the very goals of arbitration, by allowing cumulative evidence. What is required is that each party be*

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[37] *See Prudential Secs. v. Dalton*, 929 F. Supp. 1411 (N.D. Okla.1996).
[38] *See Tempo Chain Corp. v. Bertek, Inc.*, 120 F. 3d 16, 20 (2nd Cir. 1997) (citing *Hoteles Condado Beach v. Union De Tranquistas Local 901*, 763 F. 2d 34 (1st Cir. 1985).
[39] *See* Ferris, *supra* note 2, at 21 ("The cases make clear that in the appropriate circumstances an arbitrator does not need to hear live testimony in a full evidentiary hearing and that the parties do not have an automatic right to cross-examine witnesses.")
[40] *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248 (S.D.N.Y 1999).
[41] Id. at 250.
[42] Id.
[43] Id.
[44] Id. at 251.
[45] Id.

given an opportunity to present its evidence and argument."[46] (emphasis added) Looking at the evidence at issue, the court observed that it "had already been presented to the Panel in respondents' written submissions."[47] The court continued, "[i]t is precisely this sort of cumulative presentation that an arbitration panel need not hear."[48] The court concluded therefore that "there was nothing unfair in the Panel's decision not to hear testimony at the [...] hearing and thus no misconduct for purposes of *Section 10(a)(3).*"[49] Consequently, it denied the claimants' petition to vacate the arbitration award.[50]

By contrast, *Prudential Secs. v. Dalton*[51] is the rare exception to the courts' consistent practice on the matter. In this case, the District Court of Oklahoma found that the summary disposition of the case denied the claimant of a fundamentally fair hearing. Consequently, it vacated the award on the ground that "the arbitration panel was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy and exceeded its power in granting the motion to dismiss without hearing such evidence."[52]

Dalton, a former employee of Prudential, alleged in the arbitration that the company included damaging information that would stigmatize him and prevent him from obtaining another position in the securities industry. Prudential filed a motion to dismiss Dalton's claim, which the arbitration panel granted after holding a hearing at which it heard arguments but accepted no evidence. Following the panel's decision, Prudential moved to affirm the summary award while Dalton sought to vacate it. The district court found that Dalton had raise material issues of fact relevant to the Dalton's claim, which if were taken to be true would entitle him to some form or relief.[53] It reasoned that the summary disposition of the case denied Dalton the opportunity to present factual evidence relative to the factual issues presented by his claim.[54] Consequently, the court concluded that "the arbitration panel improperly denied claimant the right to a fundamentally fair hearing," and vacated the award pursuant to Section 10(a)(3) FAA.[55]

It appears, therefore, that courts will refuse to vacate an award that grants a dispositive motion without a full evidentiary hearing where the arbitrators took steps to ensure that the parties, particularly the one opposing the dispositive motion, had been afforded a fair opportunity to present their case.[56]

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[46] Id.
[47] Id. at 252.
[48] Id.
[49] Id.
[50] Id. at 255.
[51] *Prudential Secs. v. Dalton*, 929 F. Supp. 1411, 1417 (N.D. Okla.1996).
[52] Id.
[53] Id. at 1417.
[54] Id.
[55] Id. at 1418.
[56] *See* Ferris, *supra* note 2, at 22 ("The case law suggests that court will not disturb an award that grants a dispositive motion without a hearing on the merits where the