

International Institute for
Conflict Prevention & Resolution

GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION



CPR

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ABOUT CPR


The International Institute for Conflict Prevention & Resolution is a membership-based nonprofit organization that promotes excellence and innovation in public and private dispute resolution, serving as a primary multinational resource for avoidance, management, and resolution of business-related disputes.

CPR Members – Our membership comprises General Counsel and senior lawyers of Fortune 1000 organizations, as well as partners in the top law firms around the world. It is a committed and active membership, diligently participating in CPR activities and serving on committees.

CPR's Panels of Distinguished Neutrals – CPR's Panels consist of the highest quality arbitrators and mediators, with specialization in over 20 practice areas and industries. As part of CPR's nomination process, we check not only the suitability, but the availability of all neutrals nominated, as well as disclose any conflicts of interest up front.

CPR Pledge Signers – More than 4,000 operating companies have committed to the Corporate Policy Statement on Alternatives to Litigation[®]. Moreover, better than 1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation[®], including 400 of the nation's 500 largest firms. This "Pledge" has been invaluable in bringing disputing parties to the negotiating table.

CPR's Commitment – As we celebrate more than 30 years of achievement, we continue to dedicate the organization to providing effective, innovative ways of preventing and resolving disputes affecting business enterprises. We do so through leadership and advocacy, and by providing comprehensive resources, such as education, training, consultation, neutrals, as well as a networking and collaboration platform for business, the judiciary, government, and other institutions.



CPR Guidelines on Early Disposition of Issues in Arbitration

CPR INTERNATIONAL COMMITTEE
ON ARBITRATION



CPR GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION

Introduction

In arbitration, as in other dispute resolution processes, there may be occasions when certain claims, defenses or other issues can and should be winnowed out from the more meritorious claims so that the disputes may be resolved more efficiently. How and when arbitrators and counsel may wish to seek this separation is addressed in these Guidelines, which are designed to strike a balance between, on the one hand, eliminating early on claims that do not justify full-blown hearings and, on the other hand, not providing encouragement to non-meritorious applications for early disposition.

The Guidelines set out the types of issues as to which early disposition may be appropriate and suggest ways they may be addressed and responded to – always providing that early disposition will result in overall efficiencies. The Guidelines also provide disincentives for the making of premature or meritless requests for early disposition by suggesting ways in which the tribunal may assess costs and fees against unsuccessful applicants.

It is hoped that arbitrators and other users of arbitration will find the balanced approach taken in these Guidelines to be of value in the management of arbitration proceedings.

These Guidelines are the product of drafting done by the Reporter, John Basinger, and the Chair and, very importantly, the scrutiny and vetting of the various drafts by the members of the Working Group listed at the end of this document.

Lawrence W. Newman
Chairman of the CPR International
Committee on Arbitration



CPR GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION

These Guidelines address the circumstances under which it may be appropriate for an arbitral tribunal to undertake early disposition of one or more issues. The Guidelines are intended to provide guidance to the tribunal unless the rules selected by the parties expressly prohibit summary dispositions – which will rarely be the case.¹

The term “early” is intended to refer to a preliminarily stage of the arbitration, before the parties proceed to a hearing of the entire dispute, before the taking of any evidence, or, where appropriate, after taking only limited evidence. The issues that may be dealt with through early disposition may be claims, counter-claims, defenses or factual or legal questions. Early disposition can have the effect of narrowing the issues in dispute in order to simplify and expedite the further hearing of the arbitration, or, where appropriate, disposing of the entire case.

The Guidelines are intended to provide guidance to the tribunal, parties and counsel on the processes by which claims, defenses and other issues may be disposed of early in proceedings, thereby streamlining the dispute resolution process. A number of principles provide a useful frame of reference for consideration of when and how applications for early disposition of issues should be entertained. In considering these principles and their implementation, it should be borne in mind that early disposition is only appropriate when greater overall efficiencies will be achieved through early disposition of one or more issues than if all issues were considered in a single proceeding.

¹ Institutional rules, such as those of the CPR, AAA, ICDR, ICC and LCIA, do not expressly authorize early disposition, but have the flexibility to permit it. JAMS Comprehensive Arbitration Rule 18(a) explicitly authorizes early disposition. Indeed, of the commonly used rules, only the FINRA rules prohibit early disposition, with certain enumerated exceptions.

Guidelines

1. Arbitrator Initiatives

- 1.1. Arbitral tribunals should take an active role in promoting early identification and disposition of issues. Early in an arbitration proceeding, and thereafter, the tribunal should consider inquiring of the parties as to issues that might be appropriate for early disposition.
- 1.2. In considering whether and how to engage in early disposition of issues, the tribunal should give appropriate deference to the likelihood that parties and their counsel will have a broader understanding than they of the legal and factual matters at issue and of the commercial, political and other ramifications of the arbitration. The tribunal should also respect the parties' choices regarding early disposition, as may be reflected in their selection of institutional rules, the *ad hoc* procedures they adopt, and the joint positions they take in the arbitration proceedings.
- 1.3. In any event, the tribunal should consider, in the manner described herein, the practicality and advisability of entertaining applications for the early disposition of issues if at least one party requests it.
- 1.4. The tribunal should also consider setting out guidelines in its first scheduling order for dealing with early disposition of issues, taking into account the principles and modes of application set out below.

2. Principles Underlying Early Disposition

- 2.1. When a requesting party can demonstrate that early disposition of any factual or legal issue may be accomplished efficiently and fairly, or when all parties agree that early disposition of a particular issue would be desirable, the tribunal should ordinarily take steps to initiate early disposition procedures.
- 2.2. A variety of issues may be appropriate for early disposition. In each case, parties and the tribunal should weigh the difficulty and cost of establishing the issue in question (including the

amount of evidence and argument expected to be needed for an early decision to be reached), and the effect that early disposition of the issue can be expected to have on proceedings that will follow.

- 2.3. Issues for which early disposition may be appropriate include, but are not limited to, the following:
- 2.3.1. ***Jurisdiction and standing.*** Early disposition is generally appropriate where the tribunal must address such matters as the scope of their authority.
 - 2.3.2. ***Claims or legal theories of recovery.*** Early disposition may be appropriate for claims or theories of recovery:
 - 2.3.2.1. That can be accepted or rejected as a matter of law, without the need for an evidentiary hearing.
 - 2.3.2.2. That may be barred by defenses, such as contractual covenants, prescription/limitation periods, statutes of fraud, release, settlements, *res judicata*, or collateral estoppel.
 - 2.3.2.3. Where the claimant cannot demonstrate that it will be able to provide evidence to satisfy a required element of the claim or theory of recovery.
 - 2.3.3. ***Defenses.*** As with early disposition of claims, it may be possible to resolve certain defenses because: the defense fails as a matter of law, the party asserting the defense will not be able to establish one or more required elements of the defense, or the party is barred from asserting the defense.
 - 2.3.4. ***Damages.*** In some cases, issues relating to damages may be appropriate for early disposition. For example, early disposition of issues that significantly limit damages may help to resolve related merits issues or facilitate settlement.

2.4. 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.

3. Modes of Application

3.1. ***Discussions during early scheduling or other conferences.*** Initial conferences provide an opportunity for the tribunal and parties to focus their attention on the key elements at issue and to discuss ways of resolving them at an early stage of the proceeding. The tribunal should consider instructing the parties to come to such conferences prepared to discuss issues which might be appropriate for early disposition.

3.2. ***Discussions among parties.*** Should a party propose early disposition, the tribunal should require the proponent to confer with the other parties on whether agreement can be reached on the steps to be taken to present the issue for determination. Matters dealt with in such an agreement might include a limited exchange of documentary and other information and focused briefing. The tribunal, in considering whether and how to conduct early disposition proceedings, should defer to such party agreements.

3.3. ***Scheduling order.*** Should it be determined, as a result of these discussions, that early disposition is appropriate, a procedural order should be issued implementing the parties' agreement, providing, where necessary, for the exchange of information and presentation of evidence and supporting arguments. The scheduling order should also provide for the disposition of issues not subject to early disposition or that will have to be dealt with if early disposition should not be awarded.

3.4. ***Preliminary applications.*** Unless the parties have agreed to a process for early disposition, the tribunal should generally require that a party requesting early disposition submit a letter or other written preliminary application, subject to recognized page limits, briefly

explaining why the matter in question should be resolved before other issues in the case. The application should set forth: (1) the issue(s) to be resolved; (2) how disposition of the issue(s) will advance efficient resolution of the overall dispute; and (3) the applicant's proposal as to the procedure by which the issue(s) would be resolved. Such preliminary applications may be made before or after the parties have engaged in an exchange of documents or afforded other disclosure. Unless the tribunal concludes that the preliminary application fails to state a sufficient basis for the relief requested, they should afford an opportunity to the other parties to respond in writing to the application.

- 3.5. ***Prompt review of applications.*** The tribunal should review promptly the preliminary application and any responses and determine whether there is a reasonable prospect that hearing the application may result in increased efficiency in resolving the overall dispute. If the tribunal concludes that early disposition of the issue is appropriate, it should instruct the parties on the procedure to be followed thereafter.
- 3.6. ***Deciding early disposition issues.*** Many applications for early disposition may be resolved on the basis of written submissions. In appropriate cases, witness testimony by affidavit or otherwise in written form may be considered, or limited hearings may be held. The procedures adopted should assure a reasonable opportunity to a party opposing the motion to make factual and other presentations in opposition.
- 3.7. ***Consideration of issues under bifurcated hearing schedule.*** Where proceedings are bifurcated, such as between liability and damages, early disposition may still be appropriate to reduce issues in each of the separated proceedings.
- 3.8. ***Decision on early disposition proceedings.*** The tribunal's decision on early disposition may be to grant or deny (in whole or in part) the relief requested, or to defer decision on the issue until the arbitration proceeding has been completed. If the tribunal grants an application

for early disposition, it should give consideration to whether its decision should take the form of a procedural order, interim award, or partial final award. The tribunal should limit further proceedings in accordance with its decision.

4. Allocation of Costs

- 4.1. To the extent not barred by the parties' agreement or applicable institutional rules, the tribunal may, if it has the authority to do so, treat its award of costs (including, where permitted, attorneys' fees) attributable to early disposition separately from any award of costs relating to other elements of the arbitration proceeding.
- 4.2. In order to discourage premature or meritless requests for early disposition, or requests made for tactical advantage or delay, the tribunal may assess against the unsuccessful applicant the costs and fees attributable to early disposition proceedings, and in its decision should give its reasons for allowing or denying assessment of costs and/or fees with respect to the application for early disposition. The tribunal may require, as a condition of its considering a party's request for early disposition, that the applicant acknowledge that the tribunal may impose fees and costs attributable to unsuccessful requests against the applicant.
- 4.3. The consent of all parties to early disposition of an issue may make a separate award of costs and fees inappropriate.
- 4.4. Separate awards of costs and fees may be inappropriate when early disposition submissions, whether successful or not, substantially reduce the need for additional briefs or other submissions.

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