What To Know When Making Dispositive Motions In Arbitration

By **Janice Sperow** (September 9, 2020, 3:42 PM EDT)

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Courts and arbitrators across the nation, faced with pandemic-generated, unprecedented backlogs, seem more willing to entertain docket-clearing motions.

While for some practitioners, dispositive motion practice in arbitration presents a new challenge. Yet, dispositive motions have existed in arbitration almost as long as arbitration itself. Now, however, parties appear to be truly embracing them.

Recently, arbitrators have witnessed an increase in requests for leave to file dispositive motions as parties dealing with the economic fallout of the pandemic attempt to resolve disputes more quickly, efficiently and cost-effectively.

As more practitioners turn to arbitration to resolve disputes, they increasingly look to dispositive motion practice to promptly adjudicate them.

Still, some arbitrators have questioned their authority to entertain dispositive motions. Others hesitate to dispose of the arbitration before it really starts when it may well be the claimant's only course of redress. Still others, like the author, view dispositive motions as a potential opportunity to narrow and resolve issues fairly and efficiently for both parties. So, where do arbitrators obtain the power to consider dispositive motions?

The Parties' Contract

Like the arbitration itself, the authority often starts with the parties' contract. The arbitrator can and will allow dispositive motions if the parties' arbitration clause provides for them. Many litigants now specifically provide in their arbitration agreements that the arbitrator shall have the authority to resolve jurisdiction, arbitrability, and many other threshold or dispositive issues.

Indeed, astute drafters will frame their arbitration clauses to include the right to bring a dispositive or threshold motion to avoid the arbitrator's exercise of discretion. Arbitrators will typically enforce such clauses if both parties may reciprocally invoke them.

Practitioners should explicitly provide the arbitrator with the authority to entertain dispositive and threshold motions directly in the parties' arbitration agreement rather than incorporating them indirectly by reference to court rules, civil procedure rules or forum administration rules. Court, civil procedure and forum rules might include other provisions, which the parties may consider less desirable and which they may not want to incorporate wholesale into their agreement.

The parties should also determine if they want to have the automatic right to bring such motions or merely grant the arbitrator the authority to entertain them at her discretion or upon a specified showing. If the parties intend to provide contractually for the application of a specific arbitral forum's rules, review that forum's dispositive motion rule and determine if the parties wish to modify it in the contract.

Most arbitral fora expressly allow the parties to modify in writing the application of any rule. Finally, provide for reciprocity to enhance the clause's enforceability.

Post-Dispute Agreement

If the contract itself does not mention the authority to hear dispositive motions, the parties may always agree to them in a written stipulation or even orally after the dispute has arisen or after the arbitration has begun.

Contentious litigants may yet find common ground and agree to resolution of a threshold issue upfront if it will save time and expense. They will also routinely agree post-dispute to motions to resolve choice of law, jurisdiction, contract formation, forum rule applicability and other threshold issues, which will govern the rest of the case moving forward.

Practitioners should put the post-dispute agreement in writing whether by stipulation or in the arbitrator's order.

Identify the specific scope of the agreement including the precise issues to be determined by motion, page limits and a briefing schedule. Decide if, pending the motion's resolution, discovery should be stayed, continued or restricted to information necessary to the motion. Agree upon an early deadline for the resolution of the motion to maximize its cost savings and efficiency.

Also, set a cutoff date by which all dispositive or threshold issues must be brought. Early resolution saves the most time and expense; a dispositive motion brought on the eve of arbitration merely disrupts the process and often adds to, rather than minimizes, the costs of arbitration.

Finally, proffer a dispositive motion agreement in writing to opposing counsel, even if it will likely be rejected. Then, track the fees spent on that issue at hearing and seek to recover them if the arbitrator rules in your favor. Even if your side loses on the ultimate merits of a claim, the arbitrator may offset the prevailing party's fee award if the other side incurred unnecessary fees on an issue that could have been summarily adjudicated.

The Arbitral Forum's Rules

The arbitration rules applicable to the dispute will usually permit dispositive motion practice. For example, in 2013, the American Arbitration Association amended its rules to explicitly permit the filing of dispositive motions. Likewise, the International Institute for Conflict Prevention and Resolution expressly contemplates dispositive motions, and JAMS explicitly authorizes them.

Only the Financial Industry Regulatory Authority, which handles primarily customer complaints, generally prohibits them; but even FINRA allows them under a few exceptions. Most other arbitration fora also have some form of dispositive motion rule.

The following analysis focuses on the AAA rules because the organization spearheaded the inclusion of dispositive motions in arbitral rules, and provides the most specific guidance.

The AAA Dispositive Motion Rules

Notably, the AAA did not adopt a uniform dispositive motion rule. Instead, it wisely chose to tailor its rules to the type of arbitration. The AAA Commercial Rule 33 now provides: "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."

Likewise, the AAA Consumer Rule 33 and Employment Rule 27 state: "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."

The AAA Construction Rule 34 provides: "Upon prior written application, the arbitrator may permit motions that dispose of all or part of a claim or narrow the issues in a case."

Interestingly, the dispositive motion rule applicable to consumer and employment cases, which involve individuals arbitrating against companies, requires a higher initial showing than the dispositive motion rule applicable to commercial cases, which involve two companies arbitrating against each other.

The consumer and employment rules require the moving party to show substantial cause that the motion is likely to succeed while the commercial rule only requires the moving party to show that the motion is likely to succeed. Substantial cause suggests more ample, considerable or abundant cause whereas "likely to succeed" evokes mere feasibility and reasonableness — a fair chance rather than a good chance.

Conversely, the construction rule does not require proof of a likelihood of success, but merely a written application showing that the motion will "dispose of all or part of a claim or narrow the issues in a case." Of course, the written application itself will be more persuasive if it demonstrates the motion's likely success.

Unlike the construction rule, the AAA employment, commercial and consumer dispositive motion rules do not technically require a written application. However, most arbitrators require them, nonetheless. At a minimum, arbitrators will expect an email requesting leave, not just an oral request.

While the specific rules differ in some key respects, they also share some important commonalities. For example, all the AAA dispositive motion rules — and indeed many, if not most, arbitral fora rules — allow dispositive motion practice only at the arbitrator's discretion.[1]

Unlike civil litigation, arbitration does not include an automatic right to file a dispositive motion. Parties must request leave to file a motion, which the arbitrator may grant or deny within her discretion.

The three rules all also require the moving party to make some initial showing to convince the arbitrator why she should exercise her discretion to permit the dispositive motion.[2]

All three also require the moving party to show that the motion will "dispose of or narrow the issues in the case." Hence, in addition to the required degree of success, the moving party must demonstrate that the motion, if granted, will eliminate an issue, or at least narrow the scope of the hearing. Basically, the AAA's rules all require two different types of proof: merit and efficiency — some likelihood of success and some cost savings over a hearing on the issue or claim.

But the AAA's rules all require only either disposition or narrowing of the issues, not both.

Accordingly, if the motion will achieve some economies of scale, the arbitrator can and should properly entertain the motion even if it does not completely dispose of an issue.

Practitioners who wish to use the rules to narrow, rather than dispose of, issues should still present adequate proof of efficiency. For example, the moving party may want to demonstrate that early resolution of the issue may eliminate the need for expert or other witnesses who would not otherwise testify, reduce the number of exhibits, limit the necessary scope of discovery or shorten hearing time in some other way — or even encourage settlement.

Arguably, the rules do not require the complete disposition of a claim. For example, Construction Rule 34 explicitly provides that the motion may dispose of all or part of a claim. While the AAA's commercial, employment and consumer rules do not contain the same express language, they likely also permit partial disposition of a claim because they all permit the motion if it would narrow an issue and an arbitrator will likely find that partial resolution of a claim will indeed narrow the issues in the case.

As noted, the parties can choose to include the right-to-file motions in their arbitration clause or post-dispute agreement rather than leave it to the arbitrator's discretion. They can also set the applicable standard that they want to govern the grant or denial of the motion if they do so in writing.

If the rules apply as written, consider a two-step proffer to save costs. During the first step, the moving party shows the rule's satisfaction in a short letter or email without a response from the opposing party during which time the case and discovery proceed. Then, in the second step, if the arbitrator finds that the moving party has satisfied the applicable standard, the parties set a full briefing schedule and suspend all or some discovery pending the motion's resolution.

In whatever manner litigants decide to tackle dispositive motion practice in arbitration, plan ahead and raise the issue early in the initial case management conference to allow sufficient time to schedule the motion or motions well before the hearing date in order to maximize cost savings for all parties.

Consider the desirability of two different deadlines: an early one for purely legal or threshold questions and a later one at the close of discovery, if appropriate, for remaining disputes.

Court Approval and Inherent Authority

The U.S. Court of Appeals for the Sixth Circuit recently relied upon AAA Rule 27 to uphold an arbitral tribunal's summary judgment disposition in a AAA employment arbitration in McGee v. Armstrong.[3] McGee did not explicitly address Rule 27's language. McGee merely cited Rule 27 and held "as such, the arbitrators did not exceed their power."

While the court based its decision upon Ohio's state vacatur statute, the statute contains nearly identical grounds for vacatur as the Federal Arbitration Act. Consequently, McGee teaches us that courts will not likely vacate a dispositive award by arbitrators under the FAA or state law as an excess of power if it satisfies the requirements of the applicable arbitration rules authorizing arbitrators to summarily dispose of matters.

However, even before the AAA adopted its dispositive motion rules, the courts routinely held that arbitrators had inherent authority to entertain dispositive motions.[4]

Types of Dispositive Motions

Dispositive motions typically fall into three groups: (1) threshold or pre-discovery motions; (2) post-discovery summary adjudication motions; or (3) tactical motions.

Threshold motions often raise procedural issues, such as venue, necessary parties, arbitrability, jurisdiction, applicable arbitral rules, scope of the arbitration, mootness, standing, res judicata, collateral estoppel, joinder, small claims election or consolidation.

But they can present substantive issues as well, such as contract formation, contract existence, contract validity, waiver, laches, plain meaning, estoppel, choice of law, failure to state a claim, right to punitive damages, right to attorney fees, statute of limitations, tolling, statutory construction, statute applicability, consent, irrevocable consent, contract provision enforceability, liquidated damages availability, injunctive relief and more.

Substantive post-discovery motions are akin to partial or complete summary adjudication but can also include a motion to amend the claim based upon newly discovered facts, a failure to state a claim based upon undisputed facts or even a motion on the pleadings.

Parties sometimes use tactical motions, not necessarily for their merits, but to educate the arbitrator early on about a key issue. They may seek to eliminate an expert or other witness by removing the issue from the arbitration's scope. They may simply hope to delay the proceedings, raise the costs to the underfunded party or disqualify counsel.

Some have even used Commercial Rule 57 to defeat jurisdiction: They move to amend the claim, increasing the amount of damages, which in turn increases the AAA administrative fees, which defeats jurisdiction pending payment of the augmented fees.

Regardless of the type of motion, all should result in a written award or order, which specifies the basis for the denial or grant of the motion. The moving party should craft a well-written proposed order for the arbitrator as part of the motion, but so should the opponent.

Consider whether to request an opportunity for renewal after the completion of discovery or an aspect of discovery if the arbitrator denies the motion.

The proposal should also identify the discovery completed up to the motion to circumvent an attack based on incomplete discovery or evidence. The opponent should identify the discovery still needed before the arbitrator can fairly resolve the issue. If the motion only partially disposes of the dispute, identify the remaining issues to be decided at the hearing.

Bottom line: As long as an arbitrator provides the parties a fair opportunity to present their cases, she can grant a dispositive motion without violating the right to a fundamentally fair hearing — the touchstone for whether or not a court will vacate an arbitral award. So when you can, consider threshold and dispositive motion practice in arbitration as a way to cost-effectively narrow or resolve the arbitration.

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[1] AAA Commercial Rule 33, Consumer Rule 33 and Employment Rule 27 ("arbitrator may allow"); Construction Rule 34 ("arbitrator may permit").

[2] AAA Commercial Rule 33 ("only if the arbitrator determines that the moving party has shown"); AAA Consumer Rule 33 and Employment Rule 27 ("if the arbitrator determines that the moving party has shown substantial cause"); AAA Construction Rule 34 ("upon prior written application").

[3] McGee v. Armstrong, No. 18-3886, October 29, 2019.

[4] See, e.g., Schlessinger v. Rosenfeld Meyer & Susman, 40 Cal. App. 4th 1096 (Cal. App. Ct. 1995).