Dispositive Motions in Arbitration: Authority, Rules, & Practical Tips
Janice L. Sperow, Arbitrator, Mediator, Neutral. Sperow ADR Services

As companies, parties, and their lawyers across the nation debate whether they may, or even should, resolve their disputes in court or arbitration, courts and arbitrators, both faced with pandemic-generated, unprecedented backlogs, seem more willing to entertain docket clearing motions. 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, both parties have embraced them. Recently, arbitrators have witnessed an increase in requests for leave to file them as parties dealing with the economic fallout of the pandemic attempt to resolve disputes sooner, more efficiently, and more 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.

Practical Tip: Explicitly provide the arbitrator with the authority to entertain dispositive and threshold motions directly into 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.

Practical Tip: Reduce the post-dispute agreement to 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 adjudicate 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 he will not likely agree; then track the fees spent on that issue at hearing and seek to recover them if the arbitrator rules in your favor on that point. 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, which 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 2011, the pioneering the International Institute for Conflict Prevention & Resolution (CPR) specifically allowed for dispositive motion practice in the arbitral forum when it issued its 2011 Guidelines. In 2013, the American Arbitration Association also championed the arbitrator's authority to entertain dispositive motions when it amended its rules to explicitly permit the filing of dispositive motions. Likewise, CPR's first edition of Administered Rules promulgated in 2013 expressly authorized dispositive motions. Now, most arbitration associations include a dispositive motion rule. For example, JAMS' Comprehensive Rule 18 explicitly authorizes them. Only the Financial Industry Neutral Regulatory Authority (FINRA), which involves primarily customer complaints, generally prohibits them; but even FINRA allows them under a few exceptions. We will explore the AAA and CPR rules in more depth because they provide parties with the most specific and comprehensive 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: “[t]he 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: “[t]he 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: “[u]pon 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, require 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. AAA Commercial Rule 33, Consumer Rule 33, and Employment Rule 27 (“arbitrator may allow”); Construction Rule 34 (“arbitrator may permit”). 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. 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”).

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.

Practical Tip: 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, may reduce the number of exhibits, may limit the necessary scope of discovery, or may reduce 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.

Practical Tip: 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(s) 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.

CPR's Dispositive Motion Rule

In 2013, ADR industry leader CPR also issued its rules to expressly provide for dispositive motion practice. Under Rule 12.6, a party may apply to file "a motion for early disposition of issues, including claims, counterclaims, defenses, and other legal and factual questions." CPR 2019 Administered Arbitration Rules, Rule 12.6(a). Rule 12.6 then instructs the applicant to include the issues to be resolved, the basis for the motion, the relief requested, how early disposition would "advance efficient resolution of the overall dispute" and a proposed procedure for resolving the issues. Rule 12.6(b).

CPR's standard for the granting of the application differs slightly from the AAA's Rules. CPR requires the arbitrator 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." Rule 12.6(c). If the arbitrator finds the motion "appropriate," she will then establish the governing procedure, which may involve "written submissions, witness testimony by affidavit or other written form, limited hearings, or in any other manner." Rule 12.6(d).

While the CPR and AAA Rules may differ somewhat in terminology, they represent a fairly uniform standard at least in the commercial arbitration context. The AAA Commercial Rule 33 requires "likely" success whereas the CPR Rule 12.6(c) requires "reasonable" success. Yet, they essentially require the arbitrator to undertake the same analysis in evaluating the burden of proof since "likely" evokes a fair, reasonable chance of success, whereas the AAA Consumer Rule 33 and the AAA Employment Rule 27 with their "substantial cause" requirement demand a higher quantum of proof.

But the rules do differ slightly more when it comes to what the applicant must prove: under the AAA Rules, the arbitrator will determine if the applicant has shown that the motion will dispose of or narrow the issues whereas the CPR Rule requires the arbitrator to focus on the motion's overall efficiency without added delay. The CPR Rule technically does not focus on the likely success of the motion itself but rather reasonable likelihood of gaining efficiencies if the arbitrator grants the motion. The difference is nuanced, however, and may ultimately result in the same outcome as motions which dispose of or narrow the issues will necessarily promote efficiency.

The real difference between the AAA and CPR rules centers on the concept of delay. CPR specifically directs the arbitrator to consider the potential delay caused by adding a dispositive motion practice to the arbitration process, while the AAA rules do not mention delay to the final award as a specific consideration. Under the CPR Rule, an arbitrator may rightfully deny an application for leave to file a dispositive motion if it would unduly delay the rendering of the final award. Thus, under the CPR Rule, an arbitrator is much more likely to deny leave to file a dispositive motion the closer the parties get to the scheduled hearing. Indeed, CPR's emphasis on "early" disposition of issues encourages the parties to use dispositive motions during the preliminary stages of the arbitration before or after limited discovery.

Practice Tip: As the applicant, counsel should consider raising issue identification and disposition, especially of legal questions, at the very first case management conference to forestall any delay argument. If the parties and the arbitrator calendar the motion from

the outset of the case, the nonmoving party will be hard pressured to argue undue delay. To further minimize delay, allow discovery to proceed on the factual issues while the arbitrator considers the legal issues. Conversely, as the nonmoving party, counsel should insist on the discovery necessary to fully adjudicate the issues before any motion practice. Be prepared to identify with particularity the discovery needed on each issue for which the applicant seeks early disposition.

CPR's Dispositive Motion Guidelines

More than just a rule, CPR provides arbitrators and parties well-considered guidelines on the process. CPR issued formal "Guidelines on Early Disposition of Issues in Arbitration," ("Guidelines"), which strike a fair balance between unmeritorious motions and issue winnowing. The Guidelines clarify that the parties may use dispositive motion practice to narrow and simplify the issues for hearing and not just to dispose of the entire case. They also encourage arbitrators to take an active role in promoting early issue identification and disposition. Guideline 1.1. They also warn the parties and the arbitrator to consider efficiency to the case overall. In other words, the arbitrator may properly deny leave to file a dispositive motion if, even if granted, it would not materially reduce the total time and cost involved in the arbitration. Guideline 2.4.

Court Approval & Inherent Authority

The Sixth Circuit recently relied upon AAA Rule 27 to uphold an arbitral tribunal's summary judgment disposition in a AAA employment arbitration. *McGee v. Armstrong* No. 18-3886, October 29, 2019. *McGee* did not explicitly address Rule 27's language. *McGee* merely cited R-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 FAA. 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 and the CPR adopted their dispositive motion rules, the courts routinely held that arbitrators had inherent authority to entertain dispositive motions. *See, e.g., Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (Cal. App. Ct. 1995).

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 attorneys' fees, statute of limitations, tolling, statutory construction, statute applicability, consent, irrevocable consent, contract provision enforceability, liquidated damages availability, injunctive relief, defenses based upon contractual covenants, statutes of fraud, release, 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 or to get a pre-mediation or pre-settlement "read" from the arbitrator on 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. Fortunately, CPR's rule specifically considers any delay caused by the motion as an explicit factor in denying leave to seek a dispositive ruling. Some have even used AAA 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.

Practical Tip: 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 movant 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.

Janice Sperow is a full-time arbitrator, mediator, hearing officer, and prevention facilitator. She serves on the CPR's mass claims, employment, commercial, banking, financial services, dispute prevention, mediation, flat fee mediation, and *pro bono* panels as well as the AAA's commercial, large case, employment, technology, healthcare, consumer, *pro se*, and workplace investigation panels. Also serves as a neutral for the San Diego Superior Court (where she sits as a Judge *Pro Tem*), the Financial Industry Neutral Regulatory Authority, the National

Arbitration FORUM, the World Intellectual Property Organization, the National Futures Association, the National Association of Arbitrators and Mediators, and the Better Business Bureau. Member, National Academy of Distinguished Neutrals. Serves as Hearing Officer for the Port of San Diego. Former President of the National Association of Women Lawyers and Vice-President of California Women Lawyers, Member, ABA Dispute Resolution and Business Law Sections. www.sperowadr.com.