Dispositive Motions in Arbitration: Cracking Open the Black Box

By DENISE PETERSON

Arbitration has the feeling of a black box because of its inherent confidentiality. Motions, pleadings, and arguments go in one side and rulings and orders out the other. What occurs in the middle often feels much like a mystery, especially where dispositive motions are concerned. I would like to crack open that black box to shed some light on the mysteries of dispositive motions and their hidden value to the legal practitioner.

The ongoing COVID-19 pandemic has clogged arbitration dockets and further delayed case resolutions that arbitration was designed to forestall. While not historically a strategy with a high success rate, arbitrators' personal opinions concerning entertaining and granting dispositive motions may bend to the practicalities and limits of time and the parties' pressing needs for finality.

In court-based litigation (as opposed to arbitration), dispositive motions are a standard step in most civil suits. Once a petition is filed and answered, the natural next step is for the defendant to file a motion to dismiss, in whole or in part, if grounds can be found. After the fact gathering process comes motions for summary judgment by either side, sometimes simultaneously, based on either lack of evidence or overwhelming dispositive evidence. The arbitral model does not work well with these motions because it is an expedited process that also ensures the parties a full hearing before a finder of fact, which dispositive motions short-circuit.

Nonetheless, not every claim or defense is factually or legally sufficient to reach a hearing on the merits. Arbitration should be inherently faster and more cost-effective, so arbitrators must be open to appropriate motions that allow for disposition. However, because of arbitration's conclusory nature, which prohibits appeals except in exceptional circumstances, arbitrators are mindful that parties obtain appropriately full and fair hearings with an opportunity to be heard. That opportunity to present their case to a third party may be an important, and perhaps overlooked, psychological need for some clients.

Discussing dispositive motions in domestic arbitrations feels like peeling an onion—there's always another layer, and sometimes you feel like crying. Even worse, peel too far, and you might be left with nothing. So let's start with the basics.

Authority for Use of Dispositive Motions in Arbitration

Both the Texas Arbitration Act (TAA) and the Federal Arbitration Act (FAA) are silent on the use of dispositive motions. This does not mean these motions cannot be used; courts have overwhelmingly held that arbitrators have the implicit power to grant these motions even without an explicit grant of authority. The American Arbitratrion Association (AAA) and JAMS both provide in their rulesets for dispositive motions.

The AAA adopted Rule 33 in its commercial rules in 2013, and courts have consistently ruled in favor of the use of dispositive motions in arbitration ever since.

AAA's Rule 33 states:

> 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.[1]

JAMS's Rule 18, which is part of the comprehensive arbitration rules and procedures effective July 1, 2014, states:

> 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.[2]

As a practical note here and a practice hint, while the "may" can feel like an impossible obstacle, the carrot for the arbitrator is that even if the arbitrator cannot dispose of the case, a dispositive motion may provide an opportunity to eliminate unsupportable claims which will streamline not just the particular case but the overall docket as well.

Convincing the Arbirator(s) to Allow the Motion

Note that both the AAA and JAMS rules on dispositive mo-

tions are permissive. It is up to the arbitrator(s) to decide if the arbitrator(s) should entertain such a motion. Generally, appending a cover letter to the appropriate motion explaining why such a motion fits the Rule's requirements or sending it in ahead of time is appropriate. I tend to prefer the motion and letter submitted together. The mechanics and timeline of such submissions should be discussed during the pre-hearing conference. The explanation of "why" a motion is appropriate must encompass, explicitly in the AAA rule and implicitly in the JAMS rule, that the motion is "likely to succeed."

"Likely to succeed" isn't just an issue about the merits of a case for an arbitrator but also requires the arbitrator to avoid violating one of the fundamental principles that underpin an arbitration: ensuring the rights of the parties are preserved. In a scheme where appeals are prohibited except in exceptional circumstances, arbitrators are naturally leery of curtailing parties from presenting their full cases.

While the avenues for appeal are "grudgingly narrow" for vacating an arbitral award,[3] they are never far from the mind of an arbitrator when dispositive motions are in play. "An arbitrator typically retains broad discretion over procedural matters and does not have to hear every piece of evidence that the parties wish to present."[4] To win on appeal, "vacatur is appropriate only when the exclusion of relevant evidence 'so affects the rights of a party that it may be said that he was deprived of a fair hearing.'"[5] In presenting a dispositive motion, the movant must show that a ruling in its favor will not abuse this standard.

Disputed issues, questions of law, or issues that require clarification are unlikely to be successful in a dispositive motion. When drafting a letter requesting leave from the arbitrator(s) to file a dispositive motion, the lawyer should be clear that none of these are in play, or if they are, provide the reasons why their existence is overcome.

Presenting the Motion

If a party is allowed to file a dispositive motion, there will be strict limits placed upon the scope of the motion by the arbitrators, from page length to the length of time to present arguments. Parties should not expect extensions of time to draft and present such arguments. Additionally, parties should ensure that dispositive motions are handled in the scheduling conference, so there are no surprises. Litigation bombshells and arbitrations do not make good bedfellows.

Chance of Success

What is the likelihood of a dispositive motion being granted? Truthfully, historically very low. Edna Sussman, a New York-based arbitrator, conducted a survey in 2015 which revealed two things: one out of five arbitrators had never granted a dispositive motion, and of those who did, they had done so only a handful of times.[6]

The Financial Industry Regulatory Authority (FINRA) publishes statistics every year on how its securities dispute resolution forum's cases are resolved. For 2019, the statistics broke down as follows: 527 (13%) after a regular hearing, 513 (13%) after mediation, 343 (9%) were withdrawn, 2,269 (57%) by direct settlement by parties, and 12 cases (0%) by special proceeding hearing, which is where dispositive motions fall (these percentages do not add up to 100% because paper submission and other unhelpful categories are excluded). So for FINRA cases, apparently only 12 resolved through dispositive motions in 2019. [7]

Further to these disheartening stats, most arbitration schemes are a loser-pays scenario; this begets the question of why, then, should such a motion be filed? To do so means driving up legal costs for your client with an exceedingly low chance of success. Risking considerable expense with little to no chance of achieving the end goals is a difficult sell to make to any client except in the most fitting cases.

I cannot speak for other arbitrators, but I personally appreciate dispositive motions even in scenarios where I know I am unlikely to grant them. This is especially true in cases with complicated backgrounds, unique facts, anticipated complex discovery issues, or that present an arcane and new area for consideration, such as how COVID-19 and force majeure clauses are going to clash. It is an opportunity to educate the arbitrators about your case and lay out a roadmap of what lies ahead should the motion not be granted.

A Note to Arbitrators: Issue a Written Decision

Speaking to my fellow arbitrators, when granting or denying a dispositive motion, it is critical here to issue a written decision setting forth the reasoning and noting in painstaking detail why excluded evidence and prevention of discovery was immaterial or absolutely material and required to prevail. Especially on the granting of a motion, the arbitrator ought to detail how, for example, the statute of limitations' expiry precluded the hearing of any evidence of the underlying cause of action. As COVID-based litigation and arbitrations kick in, expect a fair amount of cases that may be disposed of or narrowed based on the underlying contracts' restrictions as to what is covered or even standing issues.

Ultimately, requesting these motions will be like water wearing away a stubborn wall. Eventually, the wall will wear enough to let some through, and then the dam will weaken and break. Useful educational tools, potentially able to streamline claims and timelines, dispositive motions are here to stay and perhaps even modify the process permanently.

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