

**ABA DISPUTE RESOLUTION SECTION  
ANNUAL CONFERENCE  
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**DISPOSITIVE MOTIONS IN ARBITRATION**

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# TOPICS

1. Dispositive Motions
2. Non-Dispositive Motions
3. Legal Authority For Arbitrator's Power To Award on Dispositive Motions
4. Preliminary Showing of Likely Success of Dispositive Motions

# TOPICS

5. Screening for Dispositive Motions
6. Hearing Dispositive Motions
7. Ruling on Dispositive Motions
8. Dispositive Motions in International Arbitration

# 1. DISPOSITIVE MOTIONS

## A. What Is a Dispositive Motion?

- Motion which disposes of or narrows the issues (AAA Commercial Rule No. R-33)
- Motion which disposes of all or part of a claim or narrows the issues (AAA Construction Rule No. R-34; JAMS Comprehensive Arbitration Rule No. 18)
- *E.g.*, Motion to Dismiss (FINRA Code of Procedures for Customer Disputes §§ 12206 & 12504)

# 1. DISPOSITIVE MOTIONS

- *E.G.* Motion for Early Disposition of Issues including jurisdiction and standing, certain claims and defenses that can be accepted or rejected as a matter of law and certain issues relating to damages. (CPR Guidelines on Early Disposition of Issues in Arbitration, § 2.3; see also CPR Administered Rule 9.3(b) and its commentary)
- *E.G.* Motion For Summary Judgment/ Adjudication
- *E.G.* Motion to Strike Claim/Defense?

# 1. DISPOSITIVE MOTIONS

## B. Issues Appropriate for Dispositive Motions

- Running of Statute of Limitations or Repose? (See, e.g., FINRA Code of Arbitration Procedure § 12206(b).
- Exclusion of certain types of damages per contract?
- Limitations on scope of indemnity obligation in contract?
- Enforcement of a written release or settlement? (See, e.g., FINRA Code of Arbitration Procedure § 12504(a)).
- Bar of claims based on res judicata?

## 2. NON-DISPOSITIVE MOTIONS

### A. What is Not a Dispositive Motion?

- Consolidation Motion
- Joinder Motion
- Preliminary / Injunctive Relief Motion
- Is a Motion Challenging Arbitrability a Dispositive Motion?
- Is a Motion To Expunge Lis Pendens a Dispositive Motion?

## 2. NON-DISPOSITIVE MOTIONS

### B. Issues Not Appropriate For Dispositive Motions

- Proposed motion raises genuine issue of material fact
- Proposed motion seeks to invade privileged matters
- Are dispositive motions *in limine* appropriate?
- Are motions to exclude evidence made on the eve of hearings appropriate?



### 3. LEGAL AUTHORITY FOR ARBITRATOR'S POWER TO AWARD ON DISPOSITIVE MOTION

- RUAA Sec. 15(b) authorizes arbitrators “to decide a request for summary disposition of a claim or particular issue.”
- But the FAA is silent
- If the arbitrator bases his/her award on a motion for summary judgment, will it survive a motion to vacate?
- New York, California and federal courts will not vacate awards solely because they emanate from summary process. Arbitrators have discretion to determine which evidence to consider and to tailor the process.

### 3. LEGAL AUTHORITY FOR ARBITRATOR'S POWER TO AWARD ON DISPOSITIVE MOTION

- *Sherrock Brothers, Inc. v. Daimler-Chrysler Motors Co., LLC*, 260 Fed. Appx. 497 (3rd Cir. 2008) (Under FAA and AAA Commercial Rules arbitrator did not deny party a fundamentally fair hearing by basing award on motion for summary judgment)

### 3. LEGAL AUTHORITY FOR ARBITRATOR'S POWER TO AWARD ON DISPOSITIVE MOTION

- *TIG Ins. Co. v. Global Int'l Reinsurance Co.*, 640 F.Supp.2d 519, 523 (1999) (“[A]rbitrators...have great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings, and thus may proceed with only a summary hearing and with restricted inquiry into factual issues.”)
- See also *Max Mark Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F.Supp.2d 248, 252 n.23 (1999) (“The law only requires that the parties be given **an** opportunity to present their evidence, not that they be given every opportunity.”) (emphasis in the original)

### 3. LEGAL AUTHORITY FOR ARBITRATOR'S POWER TO AWARD ON DISPOSITIVE MOTION

- *Brooks v. BDO Seidman, LLP*, No. 09-107884, 2011 N.Y. Misc. LEXIS 834 (N.Y.Sup.Ct. Feb. 22, 2011) (Confirming arbitration award that rendered summary judgment; rejecting argument that rendering summary judgment on the merits constituted arbitrator misconduct)
- *Schlessinger v. Rosenfeld* , 40 Cal.App.4th 1096 (1995) (Under State Act and AAA Rules, arbitrator has implicit authority to award based on motion for summary adjudication).

## 4. PRELIMINARY SHOWING OF LIKELY SUCCESS OF DISPOSITIVE MOTION

- “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.” (AAA Commercial Rule R-33)
- “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.” (AAA Construction Rule R-34)
- “At the pre-hearing conference, the desirability of the Tribunal’s ruling [by motion for partial summary judgment] before the hearings commence can be considered.” (CPR Commentary, Administered Rule 9)

## 4. PRELIMINARY SHOWING OF LIKELY SUCCESS OF DISPOSITIVE MOTION

- “The Arbitrator may permit any party to file a Motion for Summary Disposition of a particular claim or issue...at the request of one party...” (JAMS Comprehensive Rule 18)
- Does the arbitrator have the same discretion under each Rule?
- How to determine if the motion likely to succeed?
- How to determine if the motion will dispose of or narrow an issue or claim?

## 5. SCREENING FOR DISPOSITIVE MOTIONS

- Discuss potential motions with parties at first preliminary hearing (See e.g. AAA Commercial Rules P.2(2)(vi))
- Identify key issues as soon as possible
- Disallow “reflexive” motions
- Should arbitrator require a written submittal demonstrating likelihood of success? (See, e.g., AAA Commercial Rule R-33) Or should the preliminary showing be made orally at a preliminary hearing?

## 5. SCREENING FOR DISPOSITIVE MOTIONS

- Should the arbitrator give the non-moving party an opportunity to oppose the preliminary showing?
- Should the arbitrator require a showing that the motion will be efficient and cost effective? (See, e.g., AAA Commercial Rule L-3(a)).
- Assume a demand asserts alternative causes of action based on the same operative facts. Would a motion to dismiss one of the alternative causes of action, if granted, make the arbitration more efficient and cost effective?



## 6. HEARING DISPOSITIVE MOTIONS

- Should the arbitrator have the motion submitted on the papers only or also allow oral argument?
- Should the arbitrator impose page limits on briefs, declarations and exhibits?
- Should the arbitrator schedule an evidentiary hearing if requested by the non-moving party?
- And if the arbitrator does so, should the arbitration be bifurcated?

## 7. RULING ON DISPOSITIVE MOTIONS

- Guidance provided from Guide to Best Practices in Commercial Arbitration, 3d Edition, The College of Commercial Arbitrators (2014):
- “To avoid the risk of having an award vacated for refusing to hear evidence, arbitrators should grant dispositive motions only when a party opposing the motion has had a reasonable opportunity to gather and present evidence on the pertinent issues and the arbitrators are confident that on the undisputed facts, the movant is clearly entitled to an award in its favor.”

## 7. RULING ON DISPOSITIVE MOTIONS

- “The fear that an award might be vacated on the grounds that the arbitrator failed to consider material evidence must be balanced with the goals of efficient and cost-effective arbitrations.”
- If the motion is granted but does not resolve the entire case, should the arbitrator issue an interim award?
- If so, what form of award should be issued?
- If so, how should issues such as interest and attorneys’ fees be handled?

## 8. DISPOSITIVE MOTIONS IN INTERNATIONAL ARBITRATION

- The traditional expectation among international arbitral practitioners is that an arbitral claim will go through a full hearing process before being resolved on the merits.
- The more modern view is reflected in the IBA Rules on the Taking of Evidence in International Arbitration: “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.” IBA Rules, Article 2.3.
- Objection to and preliminary review of claims that are “manifestly without legal merit.” (ICSID Additional Facility Rules, Article 41 (5))

## 8. DISPOSITIVE MOTIONS IN INTERNATIONAL ARBITRATION

- Bifurcating the proceedings or rendering one or more partial awards on key issues and identifying issues that can be decided solely on the basis of documents (ICC Rules Appendix IV(a) & (c)).
- “The tribunal may decide preliminary issues ...and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case.” (ICDR Rules 20.3).
- As a practical matter, although dispositive motion practice is not explicitly provided for in ICDR Rules and ICC Rules, it is accepted practice, particularly in matters with common law parties, counsel and neutrals.

## 8. DISPOSITIVE MOTIONS IN INTERNATIONAL ARBITRATION: ENFORCEABILITY

- Dispositive motion practice raises enforceability concerns under the NY Convention. See Art. V (1) (b) (procedural unfairness); Art. VI (1)(d) (procedure not in accordance with parties' agreement or Art. V (2)(b) (contrary to public policy).
- However, there do not appear to be any NY Convention cases rejecting dispositive motion practice.

# QUESTIONS

QUESTIONS?