

## Strategies for Dispositive Motions in Arbitration

You find yourself defending a large commercial claim in arbitration. Should you seek a dispositive motion? And if so, how should your strategy differ than if you were in court? This article aims to help answer those questions by covering: 1) What authority do arbitrators have to grant dispositive motions; 2) How common are dispositive motions in arbitration; and 3) What considerations bear on dispositive motions in arbitration as opposed to court.

### AUTHORITY

In 2013, the AAA added R-33 to its Commercial Rules. R-33 grants explicit authority to an arbitrator or panel of arbitrators to grant dispositive motions:

[t]he arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party shows that the motion is likely to succeed and dispose of or narrow the issues in the case.

However, even before explicit rules like R-33 were adopted, courts around the country had concluded that arbitrators have implicit power to grant dispositive motions. *See, e.g., Sherrock Bros., Inc. v. DaimlerChrysler Motors Co., LLC*, 260 Fed. App'x 497, 499 (3d. Cir. 2008) (affirming summary adjudication issued on res judicata and collateral estoppel grounds); *Ozormoor v. T-Mobile USA Inc.*, 2010 WL 3272620, at \*4 (E.D. Mich. Aug. 19, 2010) (affirming summary adjudication issued on statute of limitation grounds); *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, 2009 WL 161086, at \*5 (S.D.N.Y. Jan. 21, 2009) (affirming summary adjudication issued on plain meaning of contract grounds); *LaPine v.*

*Kyocera Corp.*, 2008 WL 2168914, at \*10 (N.D. Cal. May 23, 2008) (affirming summary adjudication issued on waiver and estoppel grounds); *Hamilton v. Sirius Satellite Radio Inc.*, 375 F. Supp. 2d 269, 273, 277 (S.D.N.Y. 2005) (affirming summary adjudication issued on insufficient evidence grounds); *Warran v. Thacher*, 114 F. Supp. 2d 600, 602 (W.D. Ky. 2000) (affirming summary adjudication on failure to state a claim grounds); *Max Marx Color & Chem. Co. Emps.' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248, 255 (S.D.N.Y. 1999) (affirming summary adjudication issued on standing and preemption grounds); *Intercarbon Bermuda, Ltd. v. Caltex Trading and Transp. Corp.*, 146 F.R.D. 64, 74 (S.D.N.Y. 1993) (affirming summary adjudication issued without holding in-person evidentiary hearings on grounds that the arbitrator's decision was "reasonable" and "d[id] not amount to misconduct"); *Atreus Cmtys. Grp. of Ariz. v. Stardust Dev., Inc.*, 229 Ariz. 503, 508 (Ct. App. Ariz. May 1, 2012) (affirming summary adjudication even though the parties' arbitration agreement did not expressly allow for such authority); *Pegasus Constr. Corp. v. Turner Constr. Co.*, 84 Wash. App. 744, 750 (Ct. App. Wash. 1997) (affirming summary adjudication issued on failure to comply with contractual obligations grounds); *Goldman Sachs & Co. v. Patel QDS: 224SI164*, 222 N.Y.L.J. 35 (S. Ct., N.Y. Cty. 1999) (affirming summary adjudication issued on employment at will grounds).

Since the adoption of explicit rules granting arbitrators authority to grant dispositive motions, even more courts have affirmed the exercise of that power. Recently, for example, the Northern District of California affirmed a summary disposition, citing a long line of precedent in stating that "[t]he purpose of arbitration is to permit parties to agree to a more expedited and less costly means to resolve disputes than litigation in the courts. Summary judgment by an arbitrator is consistent with that purpose." *South City Motors, Inc. v. Auto. Indus. Pension Tr. Fund*, 2018

U.S. Dist. LEXIS 88452 (N.D. Cal. May 25, 2018); *see also, e.g., NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527, 547–48 (2d Cir. 2016) (affirming summary adjudication issued for failure to state a claim); *Weirton Med. Ctr. v. Comm. Health Sys.*, 2017 U.S. Dist. LEXIS 203725, at \*13–14 (N.D. W. Va. Dec. 12, 2017) (upholding a summary award even though the parties' arbitration agreement did not expressly allow for such authority); *McGee v. Armstrong*, 2017 U.S. Dist. LEXIS 129734, at \*10 (N.D. Ohio Aug. 15, 2017) (affirming a summary adjudication issued on all claims); *Balberdi v. FedEx Ground Package Sys.*, 209 F. Supp. 3d 1160, 1162, 1168 (D. Haw. 2016) (affirming a summary adjudication issued on statute of limitations grounds); *Kuznesoff v. Finish Line, Inc.*, 2015 U.S. Dist. LEXIS 71388, at \*4, \*11 (M.D. Pa. June 3, 2015) (affirming summary adjudication issued on statute of limitation and failure to state a claim grounds); *Tucker v. Ernst & Young LLP*, 159 So. 3d 1263, 1285 (Ala. 2014) (affirming summary adjudication issued on all claims).

## **WHAT ABOUT VACATUR?**

Advocates, parties and arbitrators often express concern that granting a dispositive motion will make the award more susceptible to vacatur. Under the FAA, one of the four bases on which an award can be vacated is:

where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced

9 U.S.C. § 10(a)(3). However, several considerations should alleviate that concern. First, as a general matter, federal and state courts confirm summary awards in the vast majority of cases, in

part due to the strong federal policy favoring arbitration. See Solomon Ebere, *Summary Adjudication in Arbitration Proceedings*, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (2011). “There is a presumption in the Federal Arbitration Act that arbitration awards will be confirmed.” *Id.* (“The authority of arbitrators to decide motions for summary disposition is generally challenged at the award enforcement stage, but in the vast majority of cases, without success.”).

Second, courts generally will not vacate an award solely based on the claim that there was no discovery or evidentiary hearing. For example, in *Louisiana D. Brown v. Peabody Coal Co.*, the Sixth Circuit noted that “[a]rbitrators are not bound by formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing.” 205 F.3d 1340, \*6 (6th Cir. 2000). Fundamental fairness requires “only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators.” *Id.* Courts interpret arbitration rules that discuss a hearing requirement as simply providing that any dispute or claim shall require a hearing, but not necessarily an evidentiary hearing. See *Goldman, Sachs & Co. v. Patel*, 1999 N.Y. Misc. LEXIS 681, 222 N.Y.L.J. 35, \*12 (N.Y. Sup. Ct. 1999). Thus, the failure to hold an evidentiary hearing, on an issue that could be decided as a matter of law based on the parties’ submissions, has been found not to be a basis to vacate the arbitration award. *Id.* Indeed, both before and after the promulgation of R-33, courts have confirmed awards based on summary adjudication even where discovery permitted or evidence admitted was limited. See *Samaan v. Gen. Dynamics Land Sys.*, 835 F.3d 593, 603–05 (6th Cir. 2016) (affirming summary adjudication issued without an evidentiary hearing); *Louisiana D. Brown 1992 Irrevocable Tr. v. Peabody Coal Co.*, 205 F.3d 1340 (6th Cir. 2000) (affirming

district court confirmation of a summary adjudication over objections that party was precluded from taking discovery prior to decision); *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (Cal. App. Ct. 1995) (affirming summary adjudication over objection that arbitrator had refused to hear evidence material to the controversy).

The few summary adjudications by arbitrators that have been vacated are those that were fundamentally unfair to the parties. *See, e.g., Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383 (4th Cir. 2000). In *United Mine Workers of America*, for instance, the Fourth Circuit held that a party was denied a fair arbitration hearing where the arbitrator refused to consider any of its evidence or arguments before issuing a decision. *Id.* at 389-90. In *Prudential Securities, Inc. v. Dalton*, a 1996 Oklahoma employment case, the court concluded that the arbitration panel was guilty of refusing to hear evidence and exceeding its powers when the panel issued a summary award after declining to hear evidence at a pre-hearing conference. 929 F. Supp. 1411, 1415 (N.D. Okla. 1996); *see also Sheldon v. Vermonty*, 269 F.3d 1202, 1206 n.4 (10th Cir. 2001) ("In *Dalton* . . . on the facts of the case, the court held that the plaintiff had stated a claim for relief and that the panel was therefore guilty of misconduct in failing to hold an evidentiary hearing."). Similarly, in *International Union, United Mine Workers of America v. Marrowbone Development Co.*, the Fourth Circuit affirmed vacatur where the arbitrator "issued his award without ever holding [a requested evidentiary] hearing or affording the Union the opportunity to present the evidence it had been prepared to offer at the abbreviated February hearing." 232 F.3d 383, 390 (4th Cir. 2000). Recently, in *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, the district court granted the Players Association's motion to vacate the arbitration award emphasizing the rights of the parties to have a full and fair opportunity to examine witnesses and presenting material evidence

necessary to a fair ruling. *See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449, 470-71 (S.D.N.Y. 2015), rev'd 820 F.3d 527 (2016) ("[A]lthough not required to hear all the evidence proffered by a party, an arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and argument. ... A fundamentally fair hearing requires that the parties be permitted to present evidence and cross-examine adverse witnesses."). However, on appeal, the Second Circuit reversed Judge Berman upon finding that "the Commissioner properly exercised his broad discretion to resolve an intramural controversy between the League and a player." *Nat'l Football League Mgmt. Council*, 820 F.3d at 532. In *Attia v. Audionamix Inc.*, the court vacated an arbitration award stating that "[a] fundamentally fair hearing requires that the parties be permitted to present evidence and cross-examine adverse witnesses." *Attia v. Audionamix Inc.*, No. 14 Civ. 706(RMB), 2015 WL 5580501 (S.D.N.Y. Sept. 21, 2015).

In order to help insulate any award based on a dispositive motion from the risk of vacatur, the following procedural safeguards may be useful:

- Apply the same Rule 12 or Rule 56 standards that would apply in court;
- Ensure the opposing party receives all relevant discovery in advance of a hearing on the motion; and
- Agree to a reasoned award, in which the arbitrator(s) can explain why a full evidentiary hearing was not necessary. *See Edna Sussman & Solomon Ebere, Reflections on the Use of Dispositive Motions in Arbitration*, 4 N.Y. Disp. Resol. Law., 28, 30 (2011).

## FREQUENCY

If you are like us, you have heard litigators complain that arbitrators never grant summary judgment. *See, e.g.,* Michael D. Young, *Arbitrators Less Prone to Grant Dispositive Motions Than Courts*, JUDICIAL ARBITRATION & MEDIATION SERVICES (June 26, 2009), *available at* <http://www.jamsadr.com/arbitrators-less-prone-to-grant-dispositive-motions-than-courts-06-26-2009/> ("[A]rbitrators are generally much more reluctant than courts to grant dispositive motions—whether they are motions to dismiss a complaint or arbitration demand, or motions for summary judgment.").

Because arbitration is confidential, it is difficult to make an exact comparison of the frequency of dispositive motion grants in arbitration as opposed to court. (And, by the way, a study of federal courts found that less than 5% of civil cases are terminated by summary judgment. *See* Memorandum from Joe Cecil & George Cort to Judge Michael Baylson (April 13, 2008), *available at* <https://www.uscourts.gov/sites/default/files/sujulrs2.pdf>.) But, surveys of arbitrators suggest that they are very open to considering dispositive motions.

For example:

- A 2014 study of 134 commercial arbitrators found less than 1% of these arbitrators refuse to rule on motions for summary judgment. In fact, about 70% of these arbitrators say they “readily” rule on dispositive motions. Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practice and Perspectives of Experienced Commercial Arbitrators*, 25 *Am. Rev. Int'l Arb.* 394, 449 (2014).

- A 2015 study of construction arbitrators found 63% “freely entertain” summary judgment nearly half of the time or more often. Dean B. Thomson & Jesse R. Orman, *Inside the Black Box: The Preferences, Practices, and Rule Interpretations of Construction Arbitrators*, 12 J. Am. Coll. Construction Law. 37, 63 (2018).

In other words, there is no reason to assume that just because you are in arbitration, you cannot pursue a well-supported dispositive motion.

## STRATEGY

When do dispositive motions make the most sense in arbitration? They are most practical where the grounds are the same type of threshold or purely legal defenses that succeed in dispositive motions in federal court: standing; lack of jurisdiction; statute of limitations or repose; res judicata or collateral estoppel; failure to state a claim<sup>1</sup>; release; a previous waiver of the claim. *See* College of Commercial Arbitrators Protocols for Expeditious, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS & ARBITRATION PROVIDER INSTITUTIONS (Thomas J. Stipanowich *et al.*, eds., 2010) (“[T]here are purely legal issues, such as statute of limitations, interpretation of a contract, or identifying the required elements of a cause of action, which arbitrators can and should undertake to decide early in a case, particularly when a decision in favor of the movants could substantially reduce transaction time and cost for both sides.” (citing International Centre for Dispute Resolution (ICDR) Guidelines for Arbitrators Concerning Exchanges of Information, *available at*

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<sup>1</sup> However, it bears emphasis that the normal arbitral statement and claim is not the same as a court pleading, and therefore it is not a proper target for dispositive motions. AAA rules merely require “a statement setting forth the nature of the claim including the relief sought and the amount involved” and do not impose pleading standards as federal and state procedural rules.



<http://www.adr.org/si.asp?id=5288> (last visited Mar. 1, 2013))). Conversely, motions based on disputed factual, evidentiary or credibility determinations are rarely likely to be summarily granted and should be avoided. Even partial summary judgment may make sense, especially if it knocks out a claim that either increases the likelihood of settlement, or eliminates a claim that would save significant time and energy at the hearing (for example, one that involves third parties, or separate witnesses and documents).

However, it rarely makes sense to bring a dispositive motion just to educate the arbitrator(s). Unlike court, where you may be assigned a judge with hundreds of other cases on her docket, your arbitrator has time to focus on your case. Therefore, it is not economical to spend the time and money to bring a motion just to ensure the arbitrator understands the facts of the case in advance of your pre-hearing briefing or the hearing itself.

Other key points to keep in mind are:

- **Timing.** Identify any dispositive motions you want to bring before the preliminary hearing. That is your first chance to discuss the trajectory of the case with the arbitrator(s), and you need to let them know that you have an important and dispositive issue to raise. The arbitrator can then build time for that motion into the schedule for the case. Usually the schedule will provide for 1) a short letter in which you attempt to persuade the arbitrator that a dispositive motion will increase the cost-effective resolution of the case, and 2) if the arbitrator grants permission, the motion itself.
- **Waiver.** If you are objecting to the arbitrator's authority to hear all or part of the dispute, you should "forcefully object" early and include that objection with every filing and at the start of the hearing, so that it is not waived. *See First Options of Chicago, Inc. v.*

*Kaplan*, 514 U.S. 938 (1995); *OMG, L.P. v. Heritage Auctions, Inc.*, 612 F. App'x 207 (5th Cir. May 8, 2015).

- **Fairness.** Ensure your opponent has sufficient opportunity to take discovery and gather facts necessary to respond to the dispositive motion.
- **Transcription.** Consider having any key hearings transcribed, if those hearings will cover issues like opposing counsel's decision not to take further discovery, the arbitrator's conclusion that the discovery would not be relevant, or the merits of the dispositive motion itself. The cost of a court reporter is small compared to the benefit of having a record showing the arbitrator's consideration of relevant issues in any petition to vacate.
- **Efficiency.** Remember that Rule R-33 requires you to persuade the arbitrator "that the motion is likely to succeed and dispose of or narrow the issues in the case." In showing that the motion is likely to succeed, most counsel rely on court standards for granting Rule 12 or Rule 56 motions. Unlike typical Rule 12 or Rule 56 motions practice, R-33 imposes a preliminary requirement for the arbitrator to assess likelihood of success and propensity to narrow or dispose of issues in the case even before permitting the party to make the motion. *See* R-33. Thus, unlike court rules, in which parties may move for summary judgment at any time, arbitration rules such as R-33 may allow the arbitrator to refuse a motion to be made at all. Stephen R. Stern and Sloan Zarkin, *Commercial Arbitration Rules*, AMERICAN BAR ASSOCIATION GPSOLO REPORT, Vol. 4, No. 1, August 2014. In addition to showing that judgment should be granted as a matter of law or there is no genuine dispute of material fact, it may be beneficial to frame your arguments in

terms of Rule L-3, which requires arbitrators to “take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution” of the case. Explain to your arbitrator why hearing the dispositive motion early will be cheaper, faster, or otherwise more cost-effective than delaying adjudication until after the evidentiary hearing.

- **Authority.** Cite some of the caselaw in this article, to give the arbitrator comfort that he or she has authority to grant a dispositive motion and will not be vacated on that basis.
- **Cost-shifting.** To avoid unsupported or dilatory dispositive motions that are improperly filed to delay a case or impose unnecessary costs on the opposing party, the parties may seek an order allowing interim fee shifting if the motion is ultimately found to lack any merit or good faith basis to conclude it meets the requirements. And finally, if you have an experience where an arbitrator refuses to consider a dispositive motion that is well-supported, make sure to let the AAA know at the conclusion of your matter. The AAA cannot help educate its arbitrators unless it has the information!

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