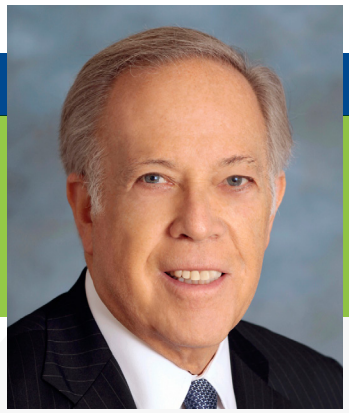

ABTL Report
Dispositive Motions in Arbitration

By Hon. James P. Kleinberg (Ret.) JAMS

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Eliminating unworthy cases or claims from an overworked and understaffed court is a goal no one can dispute. But winning a dispositive motion – in any forum – is difficult. For example, statistical analyses of federal courts in three large districts (Eastern District Pennsylvania, Northern District Georgia, Central District California) show that summary judgments are granted less than 10% of the time. (See Eisenberg and Lanvers "Summary Judgment Rates Over Time…" Cornell Law Faculty Publications Paper 108 (2008)) A 2009 study of class actions in California Superior Courts showed 3.9% of such cases were disposed of by summary judgment for the defendant. (DataPoints AOC Office of Court Research (November 2009)). As discussed below, winning such motions is even more problematical in arbitrations, but excellent lawyering in the right case can make it happen.

Some context is necessary. When commercial arbitration started in the United States early in the 20th Century it was a natural venue for business disputes. Buyers and sellers in the same field – such as the garment industry in New York – typically had ongoing relationships worth preserving. It made little sense to present such claims to a neutral who knew nothing of the business at issue, and neither side wanted to spend the time and money in a court proceeding. Hence, labor, securities, and other highly specialized enterprises – such as baseball – were the predominant users of arbitration. For many years there were known hallmarks of commercial arbitration: no pre-hearing discovery or motions, a prompt hearing before an experienced neutral, and a relatively quick (30 days, for example) decision that was, with very limited exceptions, final.

But commercial arbitration has changed. First, the subject matter is not limited as in the past. All types of disputes are heard, from patent licensing to construction defect to class actions. The courts have played a prominent role in this expansion. See, e.g., recent decisions of the Supreme Court, such as *AT&T v. Concepcion*, 131 S.Ct. 1740 (2011). Second, arbitration has become – at least in some commentators' minds – the "new litigation."

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In the words of Professor Thomas J. Stipanowich, arbitration has become " 'judicialized,', formal, costly, time-consuming, and subject to hardball advocacy." (Thomas J. Stipanowich, *Arbitration: The "New Litigation"* University of Illinois Law Review 1,8 (2010))

This trend is not surprising. Business litigators, having been trained in the techniques of discovery and motion practice, are not comfortable stepping outside their usual, and frankly lucrative, comfort zone. A recent article observed:

"Most of the cost involved in a typical business lawsuit is incurred in pretrial discovery. Although discovery has long been expensive, costs exploded with the introduction—and now near-ubiquity—of electronic data, including emails and databases. In larger cases, the cost of document discovery can easily reach into the millions of dollars per lawsuit. Perhaps more important, because the court rules place little restraint on the tendency of lawyers to search through as much data as possible in the hope of finding something useful, the process is not only expensive but inefficient. One survey of large lawsuits found that for every 1,000 pages of documentation produced in discovery, only one page became an exhibit at trial." Creighton Magid, New Discovery Rules to Rein in Litigation Expenses, Corporate Counsel (2014)

Dispositive motions – demurrer or motion to dismiss – that turn on the language of the claim or defenses would seem to be more straightforward. For example, if a claim is barred by a statute of limitations, the case could be over quickly. But claims, responses, and defenses in arbitration do not necessarily follow the traditional, detailed pleading format. It may be difficult to discern what statute of limitations applies, for example. Of course discovery is the foundation of summary judgment motions. And, at least in theory, there is nothing inconsistent with granting summary judgment motions in arbitration as it is obviously an expeditious method of resolving disputes.

A recent flurry of articles and press releases suggest arbitration institutions such as JAMS and AAA are more open to the idea of dispositive motions, and there is greater receptivity to the concept in international proceedings. See, e.g., Solomon Ebere, Associate at Derains & Gharavi, Summary Adjudication in Arbitration Proceedings (2014), Rule 18, JAMS Comprehensive Arbitration Rules, Article 16.3, AAA International Arbitration, Rule 12504, FINRA Code of Arbitration Procedure. But this suggestion of openness to dispositive motions can be viewed too broadly. For example, FINRA states: "FINRA recognizes that, in some limited circumstances, dispositive motions may be warranted, FINRA is concerned, however, that dispositive motions often result in delay of the hearing on the merits. FINRA reminds parties that filing dispositive motions in bad faith may result in sanctions imposed by the panel."

The well-respected *Guide to Best Practices in Commercial Arbitration* published by the College of Commercial Arbitrators in 2014 provides this sobering advice (in bold-faced type):

"To avoid the risk of having an award vacated for refusing to hear evidence, arbitrators should grant dispositive motions only when the 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."

Hovering over the summary judgment motion is the language of CCP 1286.2:

(a) Subject to Section 1286.4 (which requires a timely and noticed petition or response to request that an award be vacated, or that the court give appropriate notice before vacating the award) the court shall vacate the award if the court determines any of the following:

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(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

Obviously the interplay between discovery limits in arbitration and the criteria for summary judgment makes obtaining such a ruling problematical. Further, under the JAMS rules the arbitrator has the authority to require the moving party to make an abbreviated showing as to the motion's merits before allowing the actual motion to be filed.

Finally, on the negative side, another law professor has authored an article that asserts summary judgment is unconstitutional. The theory is the Seventh Amendment is based on the common law, and since English common law had no procedure in 1791 akin to summary judgment, that procedure and the right to trial by jury cannot co-exist. The author goes on to posit that the courts would be better off without summary judgment because parties would settle and judges would not be faced with reviewing the extensive briefing that accompany such motions. See, Suja A.Thomas, *Why Summary Judgment is Unconstitutional* 93 Virginia Law Review 139 (2007)

How, then, might a party successfully persuade an arbitrator to grant a summary judgment motion?

First, do not succumb to the notion that the motion is brought to "educate the arbitrator." Or, worse, using the motion as a discovery tool. There are better ways to accomplish those goals, including requesting leave to conduct focused discovery, and briefing key issues in advance of the hearing.

Second, explore with the arbitrator or panel how the motion should be presented. For example, should the submission be akin to what you'd do in court, e.g., declarations, separate statements? The arbitrator may advise that to defeat a dispositive motion it's enough to present material facts in dispute at the time of hearing – which would seem to undercut the preemptive notion of the motion to begin with.

Then, pretend you are back in law school and consider the "elements" of the cause of action you are attacking. The CACI instructions are helpful for this purpose. Remember that the pleadings (claims and responses in arbitration) control. Carefully consider what evidence supports or undermines each element. Resist the temptation to overload the motion with dozens – or hundreds of undisputed material facts ("UMF"). Understand that if a single designated UMF is in dispute, the motion will likely fail. (For a helpful article on improving chances for success with such motions, see

Judge Beth Freeman's article, *Increasing the Likelihood of Success on Summary Judgment Motions* ABTL Report, Vol. 15, No.3 (2006))

Before the motion is filed, you may well be required to first ask permission of the arbitrator to do so. JAMS' Rule 18 provides:

"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."

The point of this exercise is to – again – try to adhere to the fundamental principles of arbitration, namely, a prompt, thorough, and final decision that ends the dispute. Since the form of the request to the Arbitrator is not specified, it is best to ask. For myself, a two-page summary on court paper that succinctly states, preferably in bullet-point fashion, (a) here's what the motion's effect will be (e,g., a portion or all of the claims eliminated), and (b) here are the pieces of evidence in support. Indeed, to retired judges now sitting in arbitrators this threshold is a device most would have desired when on the bench.

To assist the arbitrator, highlight portions of depositions or documents. A foot-tall set of materials may suggest that the issues are more complicated than the motion suggests. And, the more complicated the fact pattern, the less likely the motion will be granted. Again, the moving party should explore with the arbitrator the form to be followed. It is likely that a former judge now sitting as an arbitrator will feel comfortable with the submission of declarations and separate statements.

The brief should be concise, and rhetoric, adjectives, adverbs, and general "arm waving" should be avoided. Footnotes, string cites, and recitations of black-letter law are not helpful.

Be prepared for the opposition to ask the arbitrator to allow discovery on key issues raised by the motion. Depending on the case history, the arbitrator may well allow more discovery to foreclose some later appeal on that ground.

In summary, the arbitrator has two compelling thoughts in mind: making the right decision, and making a record that avoids the possibility of the award being overturned. When all is said and done, the motion preparation, additional discovery, hearing on the motion – if permitted – may suggest the motion is not worth the cost.

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