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A Neutral Approach to Dispositive Motions in Arbitration

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Most arbitrations are entirely unique, each one a never-to-be-repeated permutation of the parties' various situations, the terms of their agreement to arbitrate, and the nature of the disputes. Despite the many variables, arbitrators have been known to harbor—and in some instances, to openly proclaim—a general disinclination to entertain dispositive motions.

They shouldn't. Instead, the cardinal duty of neutrality should lead all arbitrators to impartially evaluate the utility of each proposed dispositive motion on a case-by-case basis. In appropriate cases, the dispositive motion can promote an efficient and cost-effective resolution, which is usually a key motivation for parties to choose arbitration in the first place.

To be sure, not every dispute in arbitration is a good candidate for summary adjudication. It's important to surface at the earliest stages of a proceeding whether any party anticipates the possibility of a dispositive motion. When one or both parties have such a motion in mind, the arbitrator first must consult the parties' agreement, in addition to any governing rules. Arbitration clauses commonly address whether and under what circumstances dispositive-motion practice is permitted, and it is not uncommon to see explicit preservation of the right to file such motions. Furthermore, the rules of most administering institutions anticipate and provide standards for when to permit a dispositive motion. The standard arbitration rules of JAMS and the American Arbitration Association give arbitrators discretion to permit dispositive motions when the requesting party has shown "the proposed motion is likely to succeed and dispose of or narrow the issues in the case." JAMS Comprehensive Arb. R. 18; AAA Commercial Arb. R-34.

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The scope of information exchange in the proceeding is an important consideration that impacts the fairness of dispositive-motion practice. If, in the spirit of arbitration, the parties are limiting the amount of "discovery" requests being made in advance of a hearing, it may not be fair to expect a party to marshal the evidence necessary to properly respond to a dispositive motion, particularly if that evidence, to the extent it exists, is in the possession of the moving party. Rules of civil procedure generally do not allow motions for summary judgment to be filed without the benefit of discovery (cf. Fed. R. Civ. P. 56(b), Tex. R. Civ. P. 166a(g)). Likewise, dispositive motions may not be appropriate in arbitration if the non-moving party has not had a fair opportunity to gather the information necessary to respond.

Timing is another important factor. To the extent there is an efficiency justification for a dispositive motion, the benefits can be lost if the arbitrator does not have adequate time to decide the motion and render a timely ruling so that resources and efforts are not wasted unnecessarily in the event of a successful motion. Even though a dispositive motion may be meritorious, if the briefing schedule does not culminate sufficiently in advance of a final hearing, the parties still may be subject to the expense of preparing for the hearing, the arbitrator's hearing fees, and other costs that may not be saved if canceled on short notice. Thus, any proceeding that contemplates the possibility of a dispositive motion should include in the scheduling order a procedural roadmap to allow for timely briefing and resolution of the motion. Some proceedings have very short procedural timelines or short hearings of a day or less, circumstances that may lead to the conclusion that there is no way to save time or costs through a dispositive motion.

In the absence of an agreement of the parties, it is a useful screening process for the scheduling order to require a two- to three-page letter seeking advance leave to file a dispositive motion. This letter should specifically address any applicable criteria for permitting the motion, such as why the requesting party will prevail on the merits, and how to further proceedings will be streamlined as a result. The non-movant should have an opportunity to respond, and such an exchange of short letters is usually adequate to assess whether continuing with full briefing is worth the effort.

Once a dispositive motion has been authorized, unless the parties have agreed to import the standard of specified rules of procedure, there often is no rule-based guidance for a standard to decide such a motion. By default, an arbitrator is likely to apply a familiar standard such as Federal Civil Rule 56, but in best practice, a movant will articulate a proposed standard, giving the non-movant an opportunity to note any disagreement. If the schedule permits, the arbitrator may wish to receive the parties' briefing before deciding whether to hear an oral argument on the motion. If the arbitrator perceives a substantial chance that the motion will resolve the entire dispute, it is prudent to set a hearing so that the non-moving party has a final opportunity to be heard before the case is resolved based on the motion. At some point, the arbitrator also should invite the parties' views of whether they want to receive a reasoned disposition of the motion regardless of the outcome.

Just like disputes litigated in courts, there are disputes in arbitration that can be resolved completely, or in significant part, as a matter of law and without the need for a factual hearing. When there is a substantial likelihood of resolution on such a basis, and when the procedural circumstances otherwise make it feasible and fair, arbitrators can and should be open to dispositive motions. For an arbitrator to declare otherwise (or even to privately think it) is a breach of impartiality, which is an essential component of an arbitrator's neutrality. Therefore no arbitrator should prejudge in the abstract that dispositive motions are not appropriate in arbitration. Instead, a neutral arbitrator must evaluate each dispute based on its own circumstances and the arguments made by the parties. When justified, arbitrators should be willing to consider and even to grant dispositive motions when that will best implement the agreement of the parties and efficiently resolve a dispute.

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