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Dispelling Dispositive Motion Myths in Arbitration

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Many clients prefer arbitration to court litigation for commercial disputes, because arbitration offers advantages like confidentiality, rational disclosure, and subject matter expertise that courts oftentimes cannot provide.

Many of those same parties, however, also mistakenly believe that arbitration lacks one fundamental court benefit—a mechanism for disposing of unmeritorious claims before trial, and even those parties who know that dispositive motions can be made in arbitration oftentimes hold the view—again, mistakenly—that arbitrators never allow them, much less grant them. This article dispels both myths, and offers practical tips for persuading arbitrators to allow dispositive motions in arbitration in appropriate circumstances.

What Are Dispositive Motions?

Dispositive motions are applications that seek to adjudicate claims on the merits before a final hearing (trial) in the arbitration is held. Also called early determination, early disposition, or summary disposition, dispositive motions have no exact court equivalent, because they are something more than a motion to dismiss—which usually targets some technical pleading defect that can oftentimes be corrected—but something less than a summary judgment motion—which is typically not made until after discovery has been completed.

Dispositive motions are a hybrid of the two, because they address the substantive merits of a claim the way a summary judgment motion would, but generally do so well-before discovery is commenced or concluded.

Arbitration (Image: Adobe Stock)

Notably, while dispositive motions are often made by arbitration respondents (defendants) seeking to whittle down defective claims, arbitration claimants (plaintiffs) also frequently make dispositive motions to expedite their cases. Accordingly, while summary judgment motions—and certainly motions to dismiss—are typically defensive weapons in court litigation, dispositive motions are frequently offensive tools in arbitration that either party can deploy.

Dispositive Motion Standards and Procedural Requirements

While parties in court can typically engage in motion practice without getting prior approval, in arbitration, parties usually have to ask the arbitrators for permission to submit a dispositive

motion, and must generally show that the proposed motion would (a) efficiently narrow the case (thereby justifying the time and expense it will occasion), and (b) have a real prospect of succeeding.

For instance, Article 23 of the ICDR Rules (2021), and Rule R-34 of the AAA Commercial Rules (2022), both require parties seeking leave to make a dispositive motion to demonstrate that it will "narrow" the issues in the case, and will have a "reasonable possibility of succeeding," or will be "likely to succeed."

Similarly, Rule 18 of the JAMS Comprehensive Rules (2021) requires applicants to show that "the proposed motion is likely to succeed and [will] dispose of or narrow the issues in the case." Rule 12.6 of the CPR Administered Arbitration Rules (2019) provides more detailed guidance than those other rules, but equally requires a showing that the proposed motion would (a) "advance [the] efficient resolution of the overall dispute," and (b) have a "reasonable likelihood" of efficiently "resolving the overall dispute" (i.e., succeeding).

The rules of arbitral institutions outside the U.S. that expressly allow dispositive motions typically follow a similar substantive approach, but employ different terminology.

For instance, Article 22.1(viii) of the LCIA Rules (2020) allows applications to dispose of claims that are "manifestly without merit." Rule 47.1(a) of the SIAC Rules (2025) similarly allows applications to resolve "a claim or defense [that] is manifestly without legal merit," and Article 43.1(a) of the HKIAC Rules allows for the summary disposition of claims that "are manifestly without merit" as well.

The "manifestly without merit" standard, which was introduced by Rule 41(5) of the ICSID Rules in 2006, has been invoked over 50 times in investor-state arbitrations since its introduction, and has generally been interpreted to mean claims that are clearly and obviously flawed in some fundamental way, such that wasting time and resources on their merits would be unproductive.

Other institutional rules outside the U.S. have taken different paths to the same result. For instance, Article 39 of the 2023 Stockholm Centre (SCC) rules allows tribunals to summarily dispose of claims that are "manifestly unsustainable," as well as "any issue of fact or law material to the outcome of the case" that are "suitable to determination by way of summary procedure," but ultimately allows for the early disposition of claims "without necessarily taking every procedural step that might otherwise be adopted in the arbitration" if summary disposition would be "efficient and appropriate having regard to all the circumstances of the case."

Article 26 of the 2023 Saudi Centre (SCCA) rules incorporates a "manifestly without merit standard" in part, but also follows the SCC model, and allows for early adjudication of "[a]ny issue of fact or law material to the outcome of the case [that] is, for any other reasons, suitable for determination by way of early disposition."

The ICC Rules say nothing about the express right to make dispositive motions, but a 2021 guidance note from the ICC Court clarifies that tribunals have the inherent authority to entertain dispositive motions addressed to "manifestly unmeritorious claims or defences," or claims are that are "manifestly devoid of merit," provided the tribunal deems it appropriate, after "taking into consideration any circumstances it considers to be relevant, including the stage of the proceedings and the need to ensure time and cost efficiency."

Article 17.2 of the 2022 Dubai Centre (DIAC) rules similarly views the "determination[] of issues on a preliminary basis" as an inherent part of the tribunal's powers, as well as part of the tribunal's obligation to "ensure that the arbitration is conducted expeditiously, diligently, and in a cost-efficient manner."

In short, regardless of the route they take to get there, virtually all major institutional rules now either expressly allow for dispositive motions, or view them as within the scope of the tribunal's

inherent authority, provided the dispositive motion would help efficiently resolve the dispute.

The question therefore becomes, do tribunals actually allow dispositive motions? As the following section discusses, tribunals certainly do in appropriate circumstances when the application is properly presented.

The Historic Reluctance to Allow Dispositive Motions is Disappearing

The lingering notion in some circles that arbitration does not allow for dispositive motions comes from a time when arbitral rules were silent on the subject. Now that most arbitral rules expressly allow for dispositive motions, and now that institutions have affirmatively said they are permitted even when the rules might be silent, is it fair to say that arbitrators nevertheless refuse to allow them?

As recently as a decade ago, that criticism—particularly in the international context—might have been fair, because many arbitrators believed that dispositive motion awards could be successfully challenged in court at the enforcement stage under Sections 10(a)(3)-(4) of the Federal Arbitration Act, or under Article V.1(b) of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (colloquially called the New York Convention). Specifically, arbitrators were concerned that aggrieved parties could claim that a dispositive motion prevented them from presenting their full case.

Putting aside the fact that there are examples going back to the 1990s of courts (at least in the U.S.) enforcing awards granting dispositive motions – including awards subject to the New York Convention—many arbitrators now realize that the fear of judicial challenge does not justify reluctance in appropriate circumstances, for a host of reasons:

- Courts have long enforced partial and interim awards, and there are examples of courts enforcing dispositive motion awards under the New York Convention that go back decades;
- Courts around the globe are more attuned now to their enforcement obligations under the New York Convention than they ever have been, and are generally demonstrating a pro-enforcement posture, particularly when the underlying process is one to which parties agreed by accepting arbitral rules that allow the process (such as dispositive motions or emergency arbitration);
- A nascent consensus is also developing that dispositive motions are not just permitted, but may also fall within the arbitrator's duty to efficiently and economically resolve disputes in appropriate circumstances, and that refusing to entertain a dispositive motion solely because of enforcement fears may contravene arbitrators' efficiency and economy mandates in certain situations.

Consequently, there are few good enforcement reasons left in most jurisdictions—and certainly the U.S.—for arbitrators to refuse to consider dispositive motions in appropriate circumstances. The question therefore becomes how you convince arbitrators that your case is one that presents those circumstances.

Practical Tips for Obtaining Leave to Make a Dispositive Motion

The first – and arguably most important – thing to do if you anticipate making a dispositive motion is to select an arbitrator that will be open to entertaining one. Arbitrator interviews conducted within the boundaries of Article 8 of the IBA Guidelines on Party Representation in International Arbitration, or the Chartered Institute Guidelines on Interviews for Prospective Arbitrators, are not only commonplace, but permit questions about general views on broad topics like dispositive motions, so parties should ask about that subject if it will be important.

Selecting an arbitrator that has longer experience with dispositive motions can also be valuable, which might mean choosing an arbitrator from a jurisdiction like the U.S., which has greater

acceptance of dispositive motions, or arbitrators that have routinely encountered dispositive motions during their tenures as arbitrators, as they may not share the resistance that was once commonplace.

It can be equally important to select an arbitrator that has both the time and inclination to deal with a dispositive motion, as they can be time-intensive, keeping in mind that good arbitrators will clearly state during an interview those timeframes during which the arbitrator cannot devote substantial time to a matter.

In short, horses for courses as the English say, and you should factor prospective arbitrators' views on dispositive motions into the selection process if a dispositive motion will be important.

Second, choose which issues to present on a dispositive motion wisely. In a commercial arbitration, a dispositive issue of contract interpretation that does not require extensive extrinsic evidence—such as the meaning of a clearly drafted indemnity clause—could be a good candidate, whereas disputed issues of unsettled law which—even if decided your way—might only resolve one element of a claim in which every element will be contested would generally be a poor contender.

Third, always keep costs and procedural efficiency in mind, and do not ask to make a dispositive motion for purely tactical reasons. It is generally obvious (and irritating) to arbitrators when a party asks to make a weak dispositive motion for tactical reasons (such as highlighting a non-dispositive defect in the opponent's case, or seeking to 'out-resource' a smaller party), and doing so can have negative cost and credibility consequences.

Fourth, focus the request on the relevant standards—efficiency and likelihood of success. Too often, parties fail to adequately address those guiding principles, and waste time on tangential matters that have no real bearing on what they are asking for—leave to make a dispositive motion.

There is simply no substitute for a concise, substantive explanation as to why the proposed dispositive motion would meaningfully and efficiently narrow the case (which provides a wonderful advocacy opportunity), and why it is likely to succeed—which has significant value, even if the arbitrator ultimately declines to allow the application.

Lastly, acknowledge and address the time and attention a dispositive motion will necessitate. Far too often, parties seeking leave to make dispositive motions underplay the time and cost burdens it will impose on both the parties and the arbitrators. Directly acknowledging those issues, and explaining why the benefits and overall efficiency gains will outweigh the burdens not only adds credibility, but increases the chances of succeeding.

Ultimately, it comes down to showing the arbitrators that a dispositive motion is worth the time and effort, and that allowing the dispositive motion will advance the case's resolution.

Conclusion

Dispositive motions are a critical tool for restoring the efficiency promises that arbitration once offered, and when presented properly to receptive arbitrators in appropriate circumstances, dispositive motions have every chance of succeeding.

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