Dispositive Motions in Arbitration Proceedings

By Carl M. Sapers and David A. Hoffman

While limitations on discovery and the absence of pretrial motion practice help to make arbitration more economical and expeditious, the absence of dispositive motions is not always advantageous to the arbitration proceeding. If a dispute can be resolved by deciding a threshold issue, the authors maintain, the use of a motion to dismiss or for summary judgment can save the time an arbitrator might otherwise need to hear evidence, while saving parties the expense of lengthy proceedings. This article, originally prepared for the ADR committee of the American College of Construction Lawyers, proposes the addition of a provision to the AAA's arbitration rules allowing for use of dispositive motions to decide specific issues prior to issuing an award or to resolve the dispute by any reasonable means. The ACCL is an invitation-only group of leading construction lawyers with a broad range of industry representation. Meeting in November, a key AAA construction industry group did not recommend that the provision be accepted.

Arbitration is generally viewed as a flexible, economical and expeditious alternative to litigation.[1] Limitations on discovery and the absence of pretrial motion practice in arbitration are among the factors that help to make it more economical and expeditious.

The absence of dispositive motions in arbitration proceedings, however, is not always advantageous. Arbitration may be unnecessarily time-consuming and expensive, as compared with litigation, if the dispute can be resolved by the decision of a threshold issue but the arbitrator feels compelled to take evidence on the entire case before deciding that issue.[2] In such situations, the use of a motion to dismiss or a motion for summary judgment—a familiar part of litigation practice—can substantially shorten the proceedings.

A few examples will illustrate the point: (a) the claim is time-barred, either because of a time limitation for filing claims under the contract or the statute of limitations has run;[3] (b) the right to arbitrate has been waived;[4] (c) the claim is not arbitrable under the parties' contract;[5] (d) the damages sought are not recoverable under the parties' contract (e.g., delay damages in a construction case); (e) the claimant has failed to establish liability and no evidence need be taken on damages.[6] In each of these situations, a decision on the threshold issue could save the parties the expense of lengthy proceedings.

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Even if a threshold issue does not determine entirely the outcome of the case, a motion for summary judgment or partial summary judgment can sometimes narrow a dispute by eliminating factual or legal issues from the case.

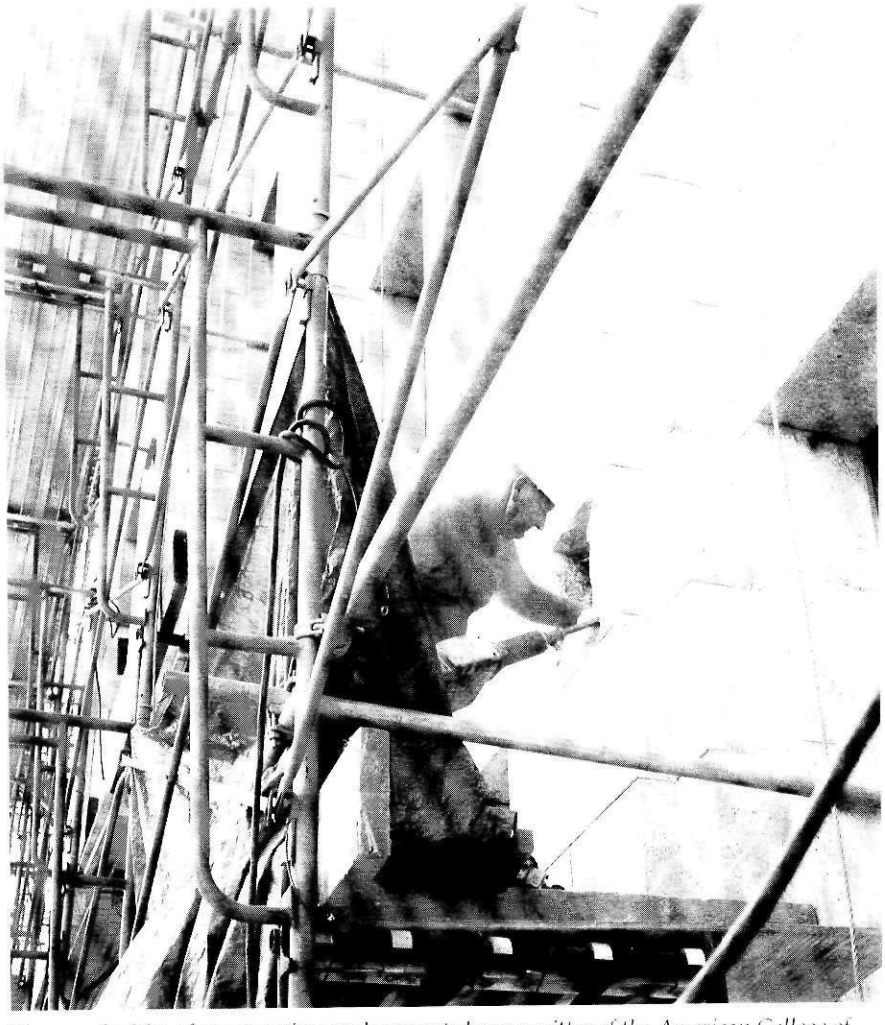
Under current practice, dispositive issues are sometimes decided by arbitrators as a means of streamlining the proceedings. For example, some arbitrators already decide the issue of arbitrability (where it can be separated from the merits) before hearing the balance of the case.[7] In other cases, as noted above, arbitrators will bifurcate consideration of a case to decide liability before taking evidence concerning damages.[8] Commentators have proposed bifurcation as particularly appropriate for complex cases.[9]

There is nothing in the rules of the American Arbitration Association that prohibits the use of dispositive motions. In fact, AAA arbitration rules provide for a preliminary conference and/or hearing, in which procedural arrangements can be made.[10] These arrangements could include a decision to hear the case in stages, with certain threshold issues to be resolved before the case in chief is presented.[11]

The general tendency, however, is to reserve decision on threshold issues, such as arbitrability, until all the evidence has been heard.[12] The primary obstacle to the use of dispositive motions has been the concern that awards based on the outcome of such motions would be vulnerable to challenge under the Uniform Arbitration Act (UAA), Federal Arbitration Act (FAA), or the common law. Both the UAA and FAA provide that the failure to take evidence is a ground for overturning an arbitral award,[13] and this is likewise a familiar ground for vacating an award under the common law.[14]

Although the use of dispositive motions in arbitration is not unheard of, commentators have noted the reluctance of arbitrators to entertain such motions:

> It is unclear whether arbitrators have the power to grant dispositive motions, such as a motion for summary judgment. Unless the applicable decisional law clearly permits it,



The complexities of construction work prompted a committee of the American College of Construction Lawyers to suggest allowing use of dispositive motions.

> the arbitrator will most likely be reluctant to do it, for a traditional ground to vacate an award is an arbitrator's refusal "to *hear* evidence pertinent and material to the controversy." See, e.g., 9 U.S.C. § 10(c) (emphasis added). On the other hand, if in response to a summary judgment motion the responding party identifies no material evidence to present at a hearing, an experienced arbitrator may be ready and willing to grant the motion.[15]

In order to make it clear that arbitrators have the power to entertain and decide dispositive motions, we propose the addition of the following provision to the rules of the AAA.

> After hearing such evidence as is material to the issue and after argument by the parties, the arbitrator may decide specific issues in dispute between the parties prior to issuing an award resolving the entire controversy and may order the proceedings in any manner reasonably calculated to lead to a just and speedy resolution of the controversy.

The proposed rule is not entirely unprecedented. A recent proposal concerning banking arbitration rules included a similar provision.[16] To the best of our knowledge, however, no rule of the type we are proposing has yet been adopted by the AAA or any other organization providing arbitration services.

The proposed rule would permit procedures analogous to a motion to dismiss and a motion for summary judgment or partial summary judgment. In litigation, these procedures are established in the Federal Rules of Civil Procedure[17] and the cognate provisions of many states' rules of civil procedure.[18] Under the Federal Rules of Civil Procedure, a claim may be dismissed where, even if the facts as stated by the claimant are entirely true, the claimant is not entitled to relief as a matter of law.[19] A motion for summary judgment can be granted under the federal rules when there is "no genuine issue as to any material fact" comprising a necessary component of either the claim or defense.[20] Because these concepts and procedures are routine in litigation, there is a well-established body of decisional law and commentary concerning the standards for deciding motions to dismiss and for summary judgment.

The advantages of the proposed rule are especially clear in a large, complex arbitration which is likely to require many days of hearing. Dispositive motions would permit an award on the basis of a threshold issue such as the timeliness of the demand for arbitration, statute of limitations, or arbitrability. Dispositive motions would also permit an award based solely on a finding with respect to liability and could be used to streamline the case by eliminating issues and claims for which there is insufficient basis in law or in fact.

A delay claim by a contractor against the project owner is a paradigmatic application of the proposed rule. Assume a "no damage for delay" clause in the Owner/General Contractor agreement. Assume as well that applicable law upholds such a clause provided the delay was not caused by the owner's fraud, concealment or active interference with the contractor's performance. A delay claim typically involves extensive proof and may extend the arbitration proceeding for month after month of hearings. The owner, under the proposed rule, would seek to dispose of the claim against it by raising the contract clause. The contractor would oppose a disposition of his claim arguing that the owner had engaged in active interference.

Under the proposed rule, the arbitrator could order that evidence on the active interference contention be heard first. Having received such evidence, he would then respond to the motion

by the owner to dispose of the delay claim on the contract grounds. The controversy might, as a result, be disposed of in three days rather than 20, if the owner's position is sustained. But even if it is rejected by the arbitrator, the owner has cause after three days to reassess its exposure and the likelihood of settlement is enhanced once the basic legal question has been resolved.

To be sure, not every arbitration would benefit from the use of dispositive motions. Indeed, in some cases, such motions could have the opposite of the desired effect—i.e., making arbitration more like litigation, including the expense and delay caused by motion practice.[21] Thus, in any arbitration, the parties and arbitrator would have to weigh the risk that a potentially dispositive motion might not, in fact, be dispositive. In most cases, however, the issue would have to be decided in any event, and therefore no loss of efficiency would result from deciding it at the outset.

While the governing statutes permit a court to overturn an arbitration award when the arbitrator refuses to entertain *proffered* evidence, there are two reasons why the proposed rule should prevent courts from exercising that power in the circumstances.

First, whatever rights the parties may have under applicable statutes or the common law can be waived by agreement.[22] Accordingly, if the parties agree to arbitrate their dispute under rules which include the one proposed here, they have in effect waived any claim that a decision based on the outcome of a dispositive motion should be overturned because the arbitrator did not hear all the evidence in the case.[23]

Second, the applicable provisions of the UAA and FAA involve the vacating of awards where the arbitrator failed to hear evidence "material" to the controversy. That same standard is embraced by the proposed rule. The cases applying these provisions of the UAA and FAA to overturn arbitral decisions have generally involved proceedings in which the arbitrators refused to hear evidence which was central to the issues in controversy,[24] or they refused to hear any evidence at all.[25] Conversely, the cases in which the courts have refused to overturn arbitral awards for failure to hear evidence have generally involved decisions in which the proffered evidence was either duplicative, offered untimely, or simply not material to the issues under consideration.[26] It does not appear that these statutes or the common law have been used to overturn any arbitral award based on the arbitrator's decision of a threshold dispositive issue (such as arbitrability), which obviated the need for taking further evidence. Moreover, an arbitrator can make it clear, in any award or decision based on a dispositive motion, that it was found unnecessary to hear or consider other evidence because it would not have been material to the outcome of the case.

Finally, it might be argued that the use of prehearing dispositive motions will increase the likelihood that a disappointed party will seek judicial review. It is, however, well established that an arbitrator's decision of an issue of law is no more susceptible to judicial second-guessing than an arbitrator's decision with respect to an issue of fact.[27] Thus, although courts have the power to determine whether a dispute is arbitrable (i.e., whether the parties have a binding contract requiring submission of the dispute to arbitration), an arbitrator's decision with respect to other issues of law that may dispose of the case is not subject to similar review.[28]

Many arbitration cases can benefit from the application of the rule proposed here because narrowing the issues in controversy will generally reduce the amount of time and expense involved in an arbitration. The proposed rule would give arbitrators additional flexibility and permit them to design a decisionmaking process to suit the individual case.[29] ■

The *Journal* always welcomes comments on its articles. Readers who wish to share their thoughts with the editors on the above article, which raises some interesting questions, are encouraged to do so.

ENDNOTES

[1] See T. Oehmke, *Construction Arbitration* § 3:1 at 39 (1988) ("Perhaps the most frequently mentioned advantages of arbitration are economy, justice, privacy, and speed.").

[2] See J. Butler, *Arbitration in Banking* 45 (1988) ("The concern here is that a [party] should not be dragged through an entire arbitration proceeding on a completely meritless claim which could have been dismissed on a pretrial motion in a court case.").

[3] See Annotation, *Statute of Limitations as Bar to Arbitration Under Agreement*, 94 A.L.R. 3d 533 (1979); see, for example, *River Brand Rice Mills, Inc. v. Latrobe Brewing Co.*, 110 N.E. 2d 545 (N.Y. 1953).

[4] See Hoellering, "Arbitrability of Disputes," 41 *Business Lawyer* 125, 139–40 (Nov. 1985); Annotation, *Waiver of Arbitration Provision in Contract*, 161 A.L.R. 1426 (1946).

[5] See generally, O. Fairweather, *Practice and Procedure in Labor Arbitration* 97–132 (2d ed. 1983).

[6] See, for example, *Scranton Federation of Teachers, Local 1147 v. Scranton School District*, 444 A. 2d 1144 (Pa. 1982) (affirming arbitration award in which no evidence was taken by the arbitrator on damages after he determined that there was no liability).

[7] See F. Elkouri & E. Elkouri, *How Arbitration Works* 218–22 (1985); O. Fairweather, *Practice and Procedure in Labor Arbitration* 132 (2d ed. 1983); T. Bornstein & A. Gosline, *Labor and Employment Arbitration*, § 1.03[1][g], at 1–41 (1991); see, for example, *In re Moloney Electric Co.*, 50 LA 927 (Lehoczyky, 1967).

[8] See T. Bornstein & A. Gosline, *Labor and Employment Arbitration*, § 1.03[1][g], at 1–42–43; see, for example, *Scranton Federation of Teachers*, 444 A. 2d 1144 (Pa. 1982); *Reed & Martin, Inc. v. Westinghouse Electric Corp.*, 439 F. 2d 1268 (2d Cir. 1971) (preliminary ruling concerning availability of delay damages); *cf. Island Creek Coal Sales v. City of Gainesville*, 729 F. 2d 1046, 1049 (6th Cir. 1984) (interim award that "finally and definitively disposes of a separate independent claim may be confirmed 'notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration'") (citations omitted); *Eurolines Shipping Co. v. Metal Transport Corp.*, 491 F. Supp. 590, 592 (S.D.N.Y. 1980) (same); *Sperry International Trade, Inc. v. Government of Israel*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982) (same).

[9] See Lloyd, "How to Manage Complex International Arbitrations," 45 *Arb. J.* (September, 1990) 30, 33; Hoeniger, "Tools to Tailor AAA Arbitration for Large, Complex Matters," 44 *Arb. J.* (March, 1989) 15, 21.

[10] See, for example, *Construction Industry Arbitration Rules*, § 10; *Commercial Arbitration Rules*, § 10.

[11] See Hoellering, "Is a New Practice

Emerging from the Experience of the American Arbitration Association?" (AAA General Counsel's Annual Report, 1985); see, for example, *Reed & Martin, Inc., supra* note 9.

[12] See Fuller, "Collective Bargaining and the Arbitrator," 1963 *Wis. L. Rev.* 3, 13–16 (1963); T. Bornstein & A. Gosline, *Labor and Employment Arbitration*, § 1.03[1][g], at 1-41 (1991); O. Fairweather, *Practice and Procedure in Labor Arbitration* 132 (2d ed. 1983); see, for example, *Scranton Federation of Teachers, Local 1147 v. Scranton School District*, 444 A. 2d 1144 (Pa. 1982) (noting general disapproval of bifurcation of issues in arbitration).

[13] Section 12(a) of the UAA provides as follows:

> Upon application of a party, the court shall vacate an award where: . . . (4) The arbitrators refused to . . . hear evidence material to the controversy . . . .

Section 10(a) of the FAA, 9 U.S.C. §1 *et seq.*, provides that:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . (3) Where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy.

Reversal is apparently mandatory under the UAA and permitted under the FAA. Over forty states have statutory provisions similar to those quoted above from the UAA and FAA.

[14] See, for example, *McLaurin v. McLauchlin*, 215 F. 345 (4th Cir. 1914) (common law rule requiring arbitrators to give the parties an opportunity to present their evidence "appears to be the settled rule of law everywhere").

[15] Heilbron, "The Arbitration Clause, The Preliminary Conference, and The Big Case," 45 *Arb. J.* (June 1990) 38, 43.

[16] See J. Butler Jr., *supra* note 2, at 57 ("In any arbitration proceeding subject to these provisions, the arbitrator is specifically empowered to decide (by documents only, or with a hearing, at the arbitrator's sole discretion) pre-hearing motions which are substantially similar to pre-hearing motions to dismiss and motions for summary adjudication.")

[17] Rules 12(b) and 56, respectively.

[18] See, for example, Mass. R. Civ. P. 12(b), 56.

[19] Fed. R. Civ. P. 12(b)(6) provides for dismissal of claims where the plaintiff has failed "to state a claim upon which relief may be granted." See generally *Conley v. Gibson*, 355 U.S. 41 (1957).

[20] Fed. R. Civ. 56(c) provides as follows:

> [Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

The U.S. Supreme Court has recently made it easier to obtain summary judgment under a line of cases culminating in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Celotex* the Court held that, upon motion, the nonmoving party has the burden of showing (by affidavits or otherwise) that it can establish the existence of the elements essential to its case. 477 U.S. at 322–23.

[21] See Butler, *supra* note 2, at 45, 51, 57, 61.

[22] See Annotation, Refusal of Arbitrators to Receive Evidence, or To Permit Briefs or Arguments, on Particular Issues as Grounds for Relief from Award, 75 *A.L.R.* 3d 132, 139; see, e.g., *Brown's Executors v. Farmandis*, 27 Wash. 232 (1902) (parties may waive right to present testimony to the arbitrators); *Bennett v. Bennett*, 25 Conn. 66 (1856) (same).

[23] See Butler, *supra* note 2, at 45 ("If the parties wish to do so, . . . they can provide for such pre-hearing challenges [as motions to dismiss or for summary judgment].")

[24] See, for example, *Katz v. Veegi*, 187 N.Y.S. 2d (511) (1959) (reversing arbitral award where arbitrators refused petitioner's request that they hear the testimony of the only eyewitness to the transaction other than the parties); In *re Rexburg Investment Company*, 211 P. 552 (Id. 1922) (reversing award of arbitrators who refused to permit claimant to present evidence of fair market value of labor and materials, which was the central issue in construction dispute); *Smaligo v. Fireman's Fund Insurance Company*, 247 A. 2d 557 (Pa. 1968) (reversing award where arbitrator refused to hear testimony from the decedent's physician concerning her employability, which was "relevant and of great import in the determination of loss of future earnings"). See *Matzen Construction, Inc. v. Leander Anderson Corporation*, 565 A. 2d 1320 (Vt. 1989) (in order to establish arbitrator's failure "to consider material evidence, plaintiff must prove both materiality and substantial prejudice resulting . . . the exclusion of evidence will not be grounds to vacate unless critical evidence is omitted") (citations omitted). But compare *McLaurin v. McLauchlin*, 215 F. 345 (4th Cir. 1914) (reversing arbitration award in dispute over sale of timber where arbitrators refused to hear evidence concerning lumber wasted or lost due to purchaser's improper methods of processing timber; it is not essential that "the arbitrators would have regarded the excluded proof as important and persuasive, or as wholly without probative value").

[25] *Brown's Executors v. Farmandis*, 27 Wash. 232 (1902) (reversing arbitral award where arbitrators had declined to hear any evidence but instead based their decision upon the parties' statement of claim and *ex parte* meetings with each of the parties, and noting that the parties had not waived their right to present evidence); In *re Rosenberg*, 41 N.W.S. 2d 14 (1943) (setting aside $2,500 award in personal injury matter involving assault where no evidence of any kind had been offered to justify the award; "arbitrators are not empowered to make any award they please and without restrictions whatsoever"); *Halstead v. Seaman*, 82 N.Y. 27 (1880) (arbitrators refused to hear any evidence).

[26] See, for example, *Newman v. Labeaume*, 9 Mo. 30 (1845) (arbitrators were justified, in dispute over partnership accounting, in refusing to hear evidence concerning a particular business transaction where the appellants failed to show the materiality of the rejected testimony); *Atlas Floor Covering v. Crescent Housing & Garden, Inc.*, 333 P. 2d 194 (Cal. 1958) (arbitrators were justified, in construction dispute, in refusing to hear evidence concerning contractor's performance on unrelated jobs and evidence concerning profit earned by another contractor on jobs similar to the one in question); In *re CompuDyne Corporation*, 255 F. Supp. 1001 (E.D. Pa. 1966) (finding no error in arbitrator's refusal, in contract dispute involving cost accounting, to hear evidence concerning the cost accounting methods used by the parties in other contracts).

[27] See *Domke on Commercial Arbitration* § 34.00 *et seq* (G. Wilner, ed. 1990); 6 *C.J.S. Arbitration* § 162 (1975) 427–29; see, for example, In *re CompuDyne Corporation*, 255 F. Supp. 1004, 1008 (E.D. Pa. 1966) ("the award of an arbitrator will not be set aside for a mere error of law").

[28] See *City of Meridian v. Algernon Blair*, Inc., 721 F. 2d 525, 528 (5th Cir. 1983) (once issue of arbitrability is determined, "the court may not delve further into the dispute"), citing *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960) ("the courts . . . have no business weighing the merits of the grievance").

[29] See generally Houck, "Complex Commercial Arbitration: Designing a Process to Suit the Case," 43 *Arb. J.* (September, 1988) 3; Hoeniger, "Tools to Tailor AAA Arbitration for Large, Complex Matters," 44 *Arb. J.* (March , 1989) 15; Poppleton, "The Arbitrator's Role in Expediting the Large and Complex Commercial Case," 36 *Arb. J.* (December, 1981) 6.