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Alternative Dispute Resolution

Prehearing Motions: Toward More Efficient Arbitration

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While arbitration may serve a number of goals, its main purpose is to provide a speedy and efficient means of dispute resolution. Whether prehearing motions, in particular motions for summary disposition, advance that purpose without sacrificing the integrity, reliability and fairness of the process has been the subject of debate among alternative dispute resolution practitioners. On one hand, prehearing motions can be used to resolve non-meritorious claims without the need for costly discovery or a full evidentiary hearing. Even if a motion does not dispose of the dispute entirely, by ruling on specific claims or issues prehearing, arbitrators can narrow the focus of the dispute, likewise promoting efficiency. On the other hand, prehearing motions used for tactical purposes add cost and inefficiency to the process.

This article examines the use of prehearing motions in arbitration. It will address the authority of arbitrators to grant substantive relief prior to an evidentiary hearing. It also will explain why the arbitration process would benefit from more frequent use of summary disposition.

ARBITRATORS' AUTHORITY

Arbitration, of course, is a creature of contract; the arbitrator's authority is as broad or limited as set forth in the contract. Therefore, the starting (and in some cases ending) point for determining whether an arbitrator is authorized to grant prehearing substantive relief (as distinguished from rulings on procedural issues such as discovery) is the arbitration clause. While it is unlikely that the arbitration clause will include a specific provision regarding motions or the arbitrator's authority to grant prehearing relief, it is not uncommon for the arbitration clause to adopt a particular set of rules or procedures. Such rules may or may not include specific provisions regarding the adjudication of issues prior to an evidentiary hearing. In the absence of a contractual provision adopting a specific set of rules, one must look to applicable statutes or case law regarding the scope of arbitrator authority. As discussed in more detail below, most arbitration rules and statutes either expressly permit summary disposition or are silent in that regard. And courts have nearly universally held that, in the absence of an express prohibition, arbitrators have broad discretion to award prehearing relief, so long as the process is fundamentally fair.

The Uniform Arbitration Act, drafted in 1955, does not contain an express provision regarding summary disposition. When the Uniform Law Commission drafted the Revised Uniform Arbitration Act in 2000, however, it added a new section, expressly permitting an arbitrator to decide a claim or issue by summary disposition if the parties agree or if the parties are provided notice and a reasonable opportunity to respond. To date, 18 states have adopted the RUAA.

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Section 15 of the RUAA is modeled on Rule 18 of the JAMS Comprehensive Arbitration Rules and Procedures, which likewise permits summary adjudication so long as opposing parties have reasonable notice and are permitted to respond. The Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association (as amended in 2013) also permit summary disposition, albeit "only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."

Even in the absence of a specific rule or statute, however, courts have recognized that arbitrators generally have wide latitude to grant any relief they see fit. The decision in *Sherrock Brothers v. DaimlerChrysler Motors*, 465 F. Supp. 2d 384 (M.D. Pa. 2006), aff'd 260 Fed. Appx. 497 (3rd Cir. 2008), is instructive. After an administrative board dismissed the plaintiff's claim, he sought review of the decision in the Commonwealth Court and then before the Pennsylvania Supreme Court. The courts affirmed the board's ruling. In the meantime, the plaintiff separately commenced an arbitration asserting the same claims. The defendant moved for summary judgment on the basis of res judicata, collateral estoppel and waiver. After the panel granted the motion to dismiss, the plaintiff filed a petition in federal court seeking to vacate the ruling on the grounds that the arbitrators exceeded their powers and were guilty of misconduct. Specifically, the plaintiff argued that the applicable AAA rules (before the 2013 amendment) did not provide for summary disposition and, to the contrary, implied that an evidentiary hearing was required. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the ruling and reinforced the broad authority afforded arbitrators to grant any relief reasonably fitting and necessary:

"Granting summary judgment surely falls within this standard, and fundamental fairness is not implicated by an arbitration panel's decision to forgo an evidentiary hearing because of its conclusion that there were no genuine issues of material fact in dispute. An evidentiary hearing will not be required just to find out whether real issues surface in a case."

As demonstrated by *Sherrock Brothers*, fundamental fairness is the key to determining whether an award granting prehearing relief will be affirmed. While there is no bright-line test for fundamental fairness, courts have focused generally on whether the parties were afforded the opportunity to be heard. In *Sheldon v. Vermonty*, 269 F.3d 1202 (10th Cir. 2001), the Tenth Circuit affirmed an arbitration panel's dismissal of the plaintiff's claims on the pleadings, reasoning that the plaintiff was provided the opportunity to fully brief and argue the motion to dismiss. Holding that fundamental fairness requires only that the panel consider relevant and material evidence, the court explained that, if the plaintiff's claims were facially deficient, the panel had the authority to dismiss those claims without permitting discovery or holding an evidentiary hearing.

Arbitrators, of course, do not have carte blanche to dismiss claims in all cases. *Prudential Securities v. Dalton*, 929 F. Supp. 1411 (N.D. Okla. 1996), illustrates the limitations on such decisions. There, the court vacated an arbitration panel's dismissal of the plaintiff's claim, holding that the plaintiff's statement of claim was not deficient on its face because he would be entitled to some relief if the allegations were taken as true. The court emphasized that by refusing to hear the plaintiff's motion to compel discovery, the panel denied him the opportunity to present relevant and material evidence.

The takeaway from these cases and others is that courts will consider factors such as the scope of the evidence and argument presented to the arbitrators and the basis for their ruling. If the parties are afforded the opportunity to submit briefs, including documentary evidence, and to present oral argument, an award granting prehearing relief is much more likely to be affirmed. Awards granting dismissal at the pleading stage will be more closely scrutinized, and the basis for dismissal is critical. Rulings dismissing claims that are facially invalid—where additional factual evidence does not matter because the claims are time barred or subject to res judicata/collateral estoppel—are likely to be upheld, even in the absence of discovery.

Parties and their counsel also need to be aware that the failure to specifically object to prehearing relief on procedural grounds can serve as a waiver of the argument that the arbitrators did not have authority to grant such relief. A party that files a cross-motion for summary disposition, for example, cannot argue that the arbitrators lacked authority to grant summary relief. In fact, even agreeing to an arbitration schedule that includes a date for the filing of motions for summary disposition may act as a waiver. In *Campbell v. American Family Life Assurance Co. of Columbus*, 613 F. Supp. 2d 1114, 1120 (D. Minn. 2009), the court held that the plaintiffs failed to preserve an objection to a motion for summary judgment, which was specifically included in a scheduling order.

MORE FREQUENT PREHEARING RELIEF

Notwithstanding the wide latitude courts have afforded arbitrators to grant prehearing relief, arbitrators historically have been reluctant to grant such relief. Some have suggested that arbitrators feel compelled to give parties their full day in court and that allowing a full hearing diminishes the likelihood that the award can be successfully challenged.

Regardless of why arbitrators have been reluctant to grant substantive prehearing relief, the effect of that tendency is clear. Arbitration takes longer and is more expensive. The most common complaint among ADR practitioners is that arbitration has become too much like litigation and, in some cases, is even more expensive and drags on longer than litigation. Granting prehearing relief more frequently would undoubtedly make arbitration less expensive and more efficient.

Arbitrators should be willing to consider prehearing relief where the facts are undisputed or irrelevant. Even if only certain claims or issues can be resolved by motion, narrowing the scope of the dispute will reduce cost and may lead to settlement. The key, however, is for arbitrators to distinguish when prehearing relief is warranted and when motions are filed only for tactical purposes. Arbitrators should be prepared to summarily reject the latter and be willing to impose sanctions against parties who file frivolous motions. In the end, if arbitrators exercise sound judgment and afford the parties an opportunity to be heard, courts will uphold decisions granting prehearing relief, and the principal goal of arbitration—speed and efficiency—will be advanced. •