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April 9, 2008

Ms. Nancy Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

File No. SR-FINRA-2007-21
Proposal to Amend FINRA Customer Code Rules 12206 and 12504

Dear Ms. Morris:

The following are comments on certain of the proposed amendments to the above Rules in the Code of Arbitration Procedure for Customer Disputes of the Financial Industry Regulatory Authority (FINRA).

Rule 122504

The primary purpose of the proposed Rule change is to prohibit virtually all prehearing¹ dispositive motions including those that would otherwise terminate claims that are facially invalid.² This is factually unsupported and contrary to the purposes of alternative dispute resolution FINRA sponsors.

First, the ostensible rationales for the amendments are two-fold: (1) to eliminate “abusive” motion practice and (2) to preserve a public customer’s “right to a hearing.” Neither justifies the proposed Rule changes.

(1) FINRA cites no evidence to support its assertion that motion to dismiss filings have become “abusive” other than an informal survey indicating that from 2002 through 2006 dismissal motion filings rose from one in every 15 cases to one in every four. But given that the bulk of filings in the latter years of the survey undoubtedly arose from the collapse of the “tech bubble” in 2000 and 2001, it is unsurprising that as the decade wore on respondents would increasingly feel that such claims were time-barred and, consequently, would seek their dismissal to avoid a long, drawn-out prehearing process

¹ “Prehearing” meaning proceedings that precede the evidentiary hearing on the Statement of Claim that would otherwise be held absent granting a motion to dismiss.

² Both of the two “preserved” motions to dismiss in proposed Rule 12504(a)(6)(A)-(B) – previously released claims and the moving party “was not associated with the account(s), securit(ies), or conduct at issue –require factual showings extraneous to the Statement of Claim. For the former, an authenticated copy of the release/settlement agreement; for the latter, an affidavit/declaration establishing no material issue of fact that the moving party was “not associated with” the alleged wrongful conduct.

and several days of an evidentiary hearing. Moreover, the survey does not indicate what percentage of the motions were granted in whole or in part (the latter narrowing the issues remaining for hearing and, therefore, making it more likely that a voluntary settlement would ensue), or to what extent the panels considered the motion “frivolous.”

From respondents’ perspective, making a motion to dismiss is not a costless proposition; since their counsel are seldom on a contingent fee basis (in contrast to claimants’ counsel, who generally are), attorney’s fees will be incurred regardless of the result. As respondents’ counsel are hardly considered “profit centers,” the economic disincentives of meritless dismissal motions generally act as a self-generating brake on the filing of frivolous motions. To explicitly allow arbitrators to award fees and costs for truly frivolous motions would provide all the proper “discouragement” needed.

(2) It is generally accepted that litigants are entitled to “their day in court.” Every dispute resolution process recognizes, however, that not all complaints need a full-blown evidentiary trial when the claim is legally groundless or factually without merit. Indeed, it is ironic that while the overriding purpose of arbitration is the “speedy and relatively inexpensive means of dispute resolution,”³ FINRA’s proposal eliminates those procedures that in the court system are designed to remove fatally flawed complaints **before** they consume judicial resources and the parties’ time and money.⁴ The courts have uniformly held pretrial dismissal motions appropriate despite the lack of explicit promulgation of procedures for such motions and that the contention that customers would be improperly deprived of the “hearing” contemplated under the arbitration rules.⁵

Second, proposed Rule 12504(a) (7) requires that the granting of the prehearing motion be unanimous, in contradiction to the requirement in Rule 12414 that an award must be subscribed to by only a majority of the panel. FINRA has given no persuasive reason why unanimity should be required.

Third, under the proposed Rule a panel denying a motion to dismiss “must” award “reasonable costs and attorneys’ fees” to the successful party that opposed the motion that is deemed “frivolous.” The proposed Rule does not state, however, when and how that “frivolity” decision will be made or evidence of the “reasonable costs and attorneys’ fees” presented. If the Rule contemplates that, as SIFMA’s April 7, 2008 comment letter suggests at p. 6, the arbitrators will initiate and decide sanction issues *sua sponte* without briefing or argument from the parties, serious due process questions are raised inasmuch as it is generally recognized that parties are entitled to notice and an opportunity to be heard **before**

³ *Moncharsh v. Heily & Blasé*, 3 Cal.4th 1, 9, 10 Cal.Rptr.2d 183 (1992).

⁴ E.g., *Advanced Cardiovascular Systems, Inc. v. Scimed Life*, 988 F.2d 1157, 1160 (Fed. Cir. 1993) (purpose of motion to dismiss is to eliminate actions that are fatally flawed and spare litigants the burdens of unnecessary pretrial and trial activities); *Reutzel v. Spartan Chemical Co.*, 903 F.Supp. 1272, 1276 (N. D. Iowa 1995) (summary judgment procedure is integral part of Federal Rules of Civil Procedure’s design to secure just, speedy and inexpensive resolution of action).

⁵ E.g., *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001); *Warren v. Tacher*, 114 F. Supp. 2d 600, 602-03 (W.D. Ky. 2000).

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sanctions are imposed for alleged litigation misconduct.⁶ SIFMA's *sua sponte* suggestion, while advanced to make sanction decisions less time-consuming and costly, is not appropriate.

Rule 12206

For the reasons noted above, unanimity in decisions on eligibility motions should not be required.

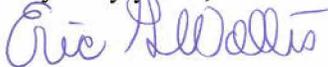
Conclusion

Reducing the time and expense of the arbitration process is, of course, a laudable goal. But in doing so one must not take steps that accomplish the opposite with little or no commensurate improvement in efficiency. FINRA's proposed Rule changes strip arbitrators of their ability to weed out those cases that truly do not deserve a hearing and, as a result, simply increase the time and expense to the parties and the arbitration administrators. As a leading commentator recently wrote:

Dispositive motions have the potential to play an important role in resolving disputes in arbitration more quickly and efficiently. They may benefit both parties by avoiding an unduly prolonged arbitration and they may assist the arbitrator in expeditiously resolving the dispute. [Ferris & Biddle, The Use of Dispositive Motions in Arbitration, 62 Disp. Res. Jnl. No. 3, p. 24 (August/November 2007) (Attachment 1).]

If FINRA believes in the ability of its arbitrators to decide cases on their merits as it has long proclaimed, then it should also trust them to decide when a case truly warrants the time and expense of a full merits hearing. The proposed Rules do not, and should not be approved in their current form.

Very truly yours,



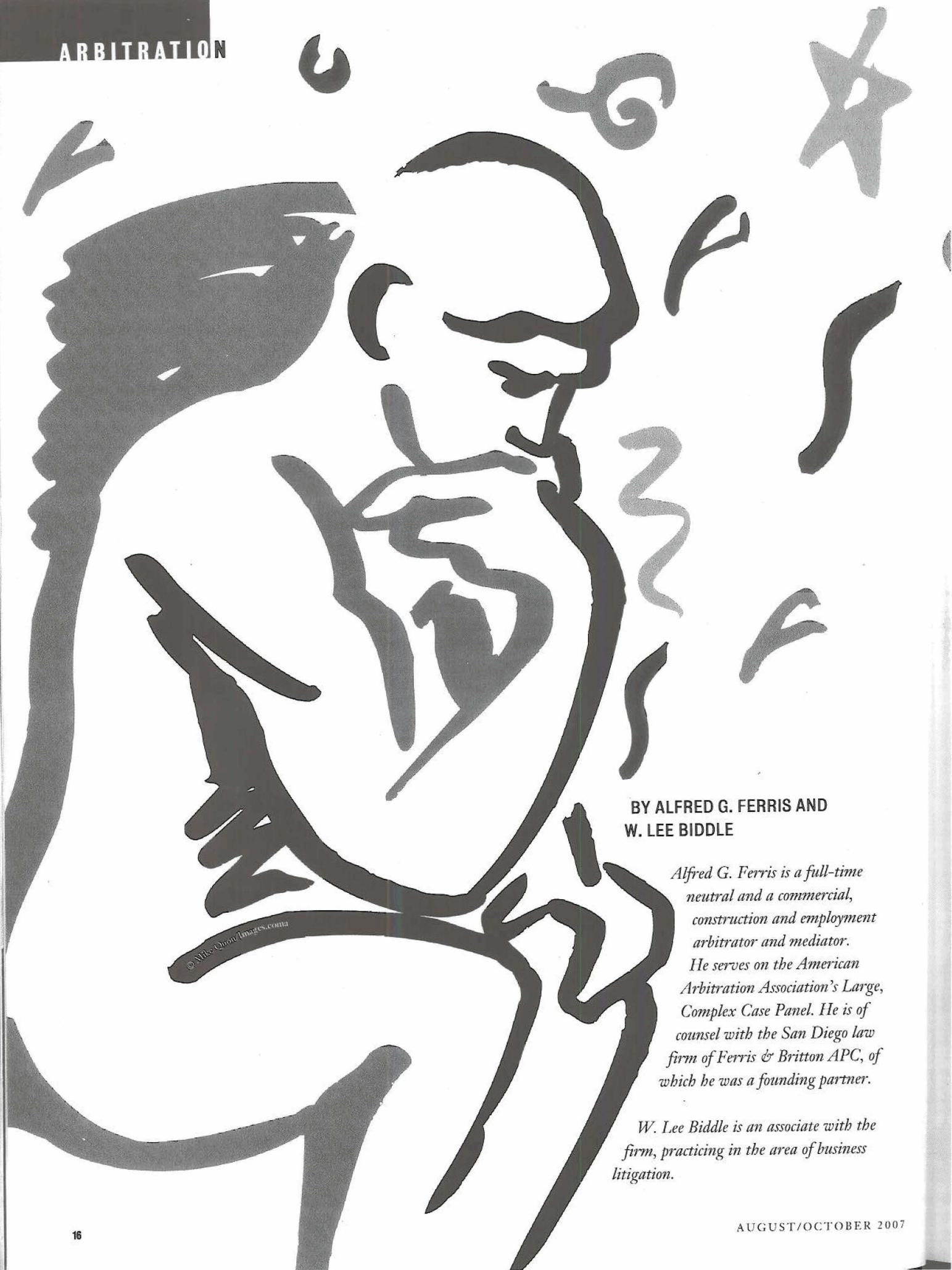
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⁶ E.g., *Simmerman v. Corino*, 27 F.3d 58, 62-64 (3rd Cir. 1994) (*sua sponte* imposition of sanctions inappropriate under Fed. R. Civ. Proc. 11); accord *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 784 n. 11 (9th Cir. 1983) (notice and opportunity to be heard required before imposition of sanctions under Fed. R. Civ. Proc. 37); see generally *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S. Ct. 2455 (1980).

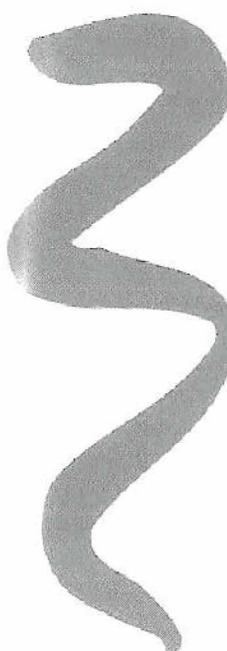
ATTACHMENT 1



**BY ALFRED G. FERRIS AND
W. LEE BIDDLE**

Alfred G. Ferris is a full-time neutral and a commercial, construction and employment arbitrator and mediator. He serves on the American Arbitration Association's Large, Complex Case Panel. He is of counsel with the San Diego law firm of Ferris & Britton APC, of which he was a founding partner.

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THE USE OF DISPOSITIVE MOTIONS IN ARBITRATION

Because a motion for summary disposition could be an efficient way to bring an arbitration proceeding to an end, arbitrators, parties and practitioners should learn when such a motion could be made and heard.



This article addresses a basic arbitration practice question—What role do dispositive motions have in arbitration? For purposes of this article, dispositive motions are motions that would be considered dispositive by a court, such as a motion for summary judgment, a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, and a motion to strike particular claims or defenses. In arbitration, these motions are considered under the general rubric of “summary dispositions” or “partial summary dispositions.”

Dispositive motions in litigation frequently provide the most efficient means of limiting the scope of the litigation or even ending it, saving the client's and the court's resources and reducing or eliminating the risk of an adverse judgment. The same considerations could apply in arbitration. The reason is that not every claim or defense brought in arbitration is sufficient to require a hearing on the merits. A claim made in arbitration could be just as ripe for disposition without a full evidentiary hearing as a claim brought in civil court. Thus, in some situations, it could be appropriate for a party to make, and the arbitrator to hear, a dispositive motion. Under these circumstances, hearing such a motion may facilitate the arbitrator's discharge of the duty that he or she "shall conduct the proceedings with a view to expediting the resolution of the dispute."¹

However, there is little reason to bring a dispositive motion in arbitration if resources saved by avoiding a hearing on the merits will have to be

5 states that "the arbitrators shall appoint a time and place for the hearing" and that "[t]he parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing." What was meant by a "hearing" and the method of presentation of "evidence" left a vast area for arbitral discretion, subject to limited judicial review.

The language in the UAA led some commentators to believe that dispositive motions were not permitted in arbitration.² But as a few courts had occasion to review the propriety of a dispositive motion while considering a petition to vacate an award, it became increasingly clear that arbitrators had such authority. It also became obvious that it might be appropriate for arbitration law to make a more explicit statement about the power of the arbitrator to manage this aspect of the arbitration process.

This issue was addressed in 2000, when the National Conference of Commissioners on Uni-

One of the most significant changes in the extensive revision of the Uniform Arbitration Act was the addition of a provision making it clear that arbitrators have broad power to manage arbitration proceedings and the specific power to summarily dispose of claims.

used before a court to defend an arbitral ruling granting the motion. So, this article first discusses the legal framework surrounding dispositive motions, including how courts view such motions and what the law and institutional arbitration rules say about them.

Next, the article discusses how the differences between civil courts and arbitration could have an impact on the decision to bring a dispositive motion and what kind of motion might be appropriate.

Statutory Authority

Two issues are central to a party contemplating a dispositive motion: First, whether the arbitrator has authority to grant such a motion and second, how a court would assess the motion on judicial review. Let's look at each in turn.

The Federal Arbitration Act (FAA), which was enacted in 1925, is silent on the issue of dispositive motions, as it is on all issues of arbitration management. So is the 1955 Uniform Arbitration Act (UAA), which was enacted in 49 states. The UAA seemed to require the arbitrator to determine all claims in an evidentiary hearing. Article

form State Laws released the Revised Uniform Arbitration Act (RUAA).³ One of the most significant changes in this extensive revision was the addition of a provision making it clear that an arbitrator has broad powers to manage the arbitration proceedings and the specific power to summarily dispose of claims. RUAA § 15 reads in relevant part:

(a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding....

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

- (1) if all interested parties agree; or
- (2) upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.

Subsection 2(b) calls for minimum due process by requiring "notice" and a "reasonable opportunity" to be heard.

At this point in time, the RUAA has been en-

acted (in some states with modifications) in 12 states. Some version of the 1955 UAA still governs in 37 states.

One of these states, California, now has a unique arbitration statute. Although originally based on the 1955 UAA, it has been altered over the years by a legislature that has taken an active role in managing the arbitration process.⁴ The California Arbitration Act (CAA) governs arbitrations that take place in the state where the parties have not otherwise agreed to the applicable arbitration rules.

Because California is such an influential jurisdiction, it is worth looking at the provisions of the CAA. Not surprisingly, since it was founded on the UAA, it is silent on the issue of dispositive motions, neither authorizing nor forbidding them.

However, several newer sections addressing the management of the arbitration hearing could be perceived by imaginative counsel as supporting an argument limiting the arbitrator's ability to dispose of claims short of full hearing on the merits.⁵ But this is only a potential argument. As discussed below, California case law makes clear that arbitrators have broad discretion in managing the arbitration process and that this includes the authority to grant a dispositive motion in appropriate cases.⁶

Nevertheless, the small uncertainty caused by the silence of the CAA on the issue has led some commentators to recommend that the California legislature adopt RUAA § 15, since it closely tracks California judicial decisions on the powers of arbitrators.⁷ To date, however, this has not been done, leaving at least the potential for an argument that the CAA does not permit dispositive motions.

Institutional Arbitration Rules

Since almost all commercial arbitration agreements contractually mandate the use of arbitration rules crafted by institutional providers, such as the American Arbitration Association (AAA) and others, it is appropriate to look specifically at such rules.

American Arbitration Association Rules. In 1996, Michael Hoellering, then general counsel at the AAA, the largest not-for-profit arbitration provider in the United States, wrote in an article about dispositive motions that, although the AAA rules did not then address the arbitrator's authority to hear and decide dispositive motions, the rules did not prohibit them and "in actual practice," arbitrators have been exercising this authority.⁸

Since that time the AAA has amended its arbitration rules and some specifically address dispositive motions. For example, the current AAA

employment arbitration rules, which came into effect on July 1, 2006, make it clear that the arbitrator does have authority to hear and grant dispositive motions. Rule 27 places the onus on the arbitrator to determine if filing such a motion is appropriate in the first place. Thus, it does not seem to allow a party the unilateral right to file such a motion. Rather, permission of the arbitrator seems to be required. Rule 27 provides: "The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."

The AAA's Construction Industry Arbitration Rules also address the issue of dispositive motions. Rule 31(b) expressly directs the arbitrator to hear motions that "dispose of all or part of a claim." Unlike the employment rules, this rule seems to allow such motions to be brought at the discretion of any party. It provides:

The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute ... and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case. The arbitrator shall entertain motions, including motions that dispose of all or part of a claim, or that may expedite the proceedings....

Somewhat surprisingly, the AAA Commercial Arbitration Rules are silent on the issue of dispositive motions. However, one could argue that they are implicitly authorized by Rules 30 and 31, which obligate arbitrators to "conduct the proceedings with a view to expediting the resolution of the dispute" and give arbitrators the authority to focus the presentation of evidence on issues that, in the discretion of the arbitrator, may readily decide the case. Rule 31 provides, in relevant part:

The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.... The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

Rule 20(b) of the commercial rules also supports the arbitrator's authority to hear and rule on dispositive motions because it encourages the parties to raise any potentially dispositive issues early in the proceeding. This rule provides: "During the preliminary hearing, the parties and the arbitrator should discuss the future conduct

of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.”

Like the commercial rules, the AAA/ICDR (International Centre for Dispute Resolution) International Rules do not address dispositive motions directly. Rather Article 16 seems to authorize them indirectly, giving the arbitrators broad authority to manage the arbitration. For example, subsection (1) provides that “the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.” Subsection (2) says that “[t]he tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute.” Subsection (3) further provides that the tribunal may in its discretion “direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.”

CPR Institute Rules. The CPR Institute’s Rules for Non-Administered Arbitration are, at best, ambiguous on the issue of dispositive motions. But the commentary to Rule 9 suggests that arbitrators have authority to decide pure legal issues prior to the hearing on issues that involve undisputed issues of fact. The commentary states: “Some controversies hinge on one or two key issues of law which in litigation may be decided by motion for partial summary judgment. At the pre-hearing conference, the desirability of the Tribunal’s ruling on such issues before the hearings commence can be considered.” This is the only statement in the rules that could be germane to dispositive motions.

JAMS Rules. The JAMS Comprehensive Arbitration Rules clearly say that arbitrators have authority to rule on summary adjudication motions. Rule 18(a) of these rules provides: “The Arbitrator shall decide 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.”

JAMS’s International Rules are like the ICDR international rules quoted above. They do not

directly authorize dispositive motions. But Rule 20.1 does so indirectly by giving arbitrators authority to “conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a reasonable opportunity to present its case.” This rule

also provides that the tribunal, “exercising its discretion, will conduct the proceedings with a view to expediting the resolution of the dispute.” Similar to the ICDR international rules, Rule 20.3 of the JAMS international rules authorizes arbitrators to “direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.”

Standard of Judicial Review

Statutory and case law in most jurisdictions make clear that arbitration decisions can be challenged only on very narrow grounds. The grounds on which an award may be challenged are contained in Article 10 of the FAA or in similar state arbitration laws. Two grounds are potentially relevant to the subject of dispositive motions. One is that the arbitrator refused to hear material evidence, prejudicing the rights of the parties. The other is that the arbitrator

exceeded his powers.⁹

It is widely recognized that arbitral awards are entitled to great deference and that parties who have agreed to arbitrate are not entitled to a second bite of the apple in court. For example, in *Moncharsh v. Heily & Blase*, the California Supreme Court made it clear that a reviewing court is “not free to review the merits of the controversy, the arbitrators’ reasoning, or the sufficiency of the evidence on which the award is based.”¹⁰ Indeed, a reviewing court cannot “examine the arbitration award for errors of fact or law” and “an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review.”¹¹ Other courts have noted that the “standard of review of arbitral awards is among the narrowest known to law.”¹²

Judicial Review

This raises the issue of how courts have reviewed arbitral awards that make a summary dis-

The cases make clear that in the appropriate circumstances an arbitrator does not need to hear live testimony in the context of a full evidentiary hearing and that the parties do not have an automatic right to cross-examine witnesses.

position of the case. The fact is that case law dealing with dispositive motions is not extensive. What the case law teaches is that courts have not been receptive to arguments that granting a dispositive motion, by itself, constitutes an arbitrator error that would warrant a judicial decision to vacate an arbitration award for refusing to hear material evidence or exceeding arbitral powers.

These cases also show that, when the rules adopted by the parties fail to expressly provide for dispositive motions, the argument could be made that the arbitrator exceeded his or her powers in granting such a motion. Although this is an argument based largely on an unwarranted assumption, the lack of clarity in the rules may lead arbitrators to hesitate to hear and grant such motions. It could also lead parties to hesitate to bring them, even where warranted by the lack of any disputed material issue of fact. Fortunately, as rules are being altered or amended, the clear trend is to add language making explicit the arbitrator's power to hear dispositive motions.

The cases make clear that in the appropriate circumstances an arbitrator does not need to hear live testimony in a full evidentiary hearing and that the parties do not have an automatic right to cross-examine witnesses. What matters is that the arbitrator gives each side an opportunity to address the relevant issues before ruling on a dispositive motion.

The 10th Circuit has said that "a fundamentally fair [arbitration] hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers."¹³ Evidence that is relevant and material need not be presented live. It could be offered through a declaration, affidavit or deposition transcript.

The leading case addressing the issues involved in dispositive motions is *Schlessinger v. Rosenfeld, Meyer & Susman*, decided in 1995 by the California Court of Appeal.¹⁴ In *Schlessinger* the court found that the arbitrator acted properly in rendering a final award without any hearings "on the merits," although dispositive motions were not specifically authorized by the parties' arbitration agreement, the AAA Commercial Arbitration Rules, or the CAA.

The *Schlessinger* arbitration was brought by a departing law partner who challenged a partnership agreement provision that limited his payout if he competed with the former firm. The arbitrator apparently viewed this claim as presenting a straightforward question of law: Was this contact clause lawful? The arbitrator entered a final award for the respondent law firm after deciding two summary adjudication motions. First, he

ruled that the anti-competition clause was lawful, if reasonably limited in time, scope and location; second, he concluded that the specific limit on the partner's payout was reasonable.

Prior to ruling on the summary adjudication motions, extensive document discovery and depositions took place because the parties' agreement provided that California Code of Civil Procedure § 1283.05 applied. This section authorizes depositions and discovery regarding the subject matter of the arbitration. It also gives the parties the same rights, remedies and procedures, and the same duties, liabilities and obligations in arbitration that they would have if the case were pending in court.

With the aid of depositions and discovery, both sides obtained written evidence, which they submitted along with their motions. The arbitrator conducted motion hearings by telephone. However, there was no in-person hearing with live witness testimony.

Schlessinger challenged the final ruling, citing Civil Procedure Code § 1286.2(a)(5), which provides that an arbitration award must be vacated if the rights of a party were substantially prejudiced by the arbitrator's "refusal ... to hear evidence material to the controversy." Schlessinger contended that the arbitrator did not "hear" any evidence because he disposed of the principle issues by way of summary adjudication motions instead of receiving live testimony and other evidence in a formal hearing on the merits. Schlessinger further argued that the lack of a hearing on the merits prevented him from exercising his fundamental right to cross-examine witnesses.

The court ruled that the absence of explicit authorization of dispositive motions in California law or the chosen arbitration rules did not mean the arbitrator lacked power to dispose of a claim without an evidentiary hearing on the merits. The court said that the nature of the arbitration process and the arbitrator's inherent power to determine the issues material to a controversy empowered the arbitrator to rule by dispositive motion:

We decline to read section 1286.2(e) as requiring that an arbitrator always resolve disputes through the oral presentation of evidence or the taking of live testimony. To do otherwise would lead to anomalous results. The purpose of arbitration, as reflected in the [California Arbitration] Act, is to provide a "speedy and relatively inexpensive means of dispute resolution." Having chosen arbitration over civil litigation, a party should "reap the advantages that flow from the use of that nontechnical, summary procedure."

The court went on to explain the philosophy behind dispositive motions:

Schlessinger's position would require full-blown trials even where, as here, one of the parties believes that no material facts are in dispute. In a case where a legal issue or defense could possibly be resolved on undisputed facts, the purpose of the arbitration process would be defeated by precluding a summary judgment or summary adjudication motion and instead requiring a lengthy trial.

The holding in *Schlessinger* is echoed in several cases outside California.¹⁵ These courts have also upheld dispositive decisions by arbitrators. Yet, as noted by some commentators, they have expressed the view that such motions are appropriate only

trator took steps to ensure that the due process rights of the parties were protected through adequate notice and an opportunity to address the dispositive issues.

Types of Dispositive Motions

Dispositive motions in civil actions may have different names in different courts and in different states. Generally, they fall into two broad categories.

The first type include motions that attack the pleadings, for example a motion to dismiss, to strike a claim or defense, or for a judgment on the pleadings. These motions generally do not require counsel to discover and analyze evidence because they focus on what the pleadings say to determine if the elements of a valid claim have been stated.

The court said that the nature of the arbitration process and the arbitrator's inherent power to determine the issues material to a controversy empowered the arbitrator to rule by dispositive motion.

when the opposing party is given a full opportunity to address the issues relevant to the motion.¹⁶

Only one case has been found in which a court vacated an award granting a dispositive motion. In *Prudential Securities v. Dalton*, a federal district court in Oklahoma vacated the award granting a motion to dismiss because the panel, prior to granting the motion, did not hear a broker's motion to compel the production of documents he contended were necessary to prove the claim. The court felt that the broker was not given the opportunity to present "factual evidence at a hearing relative to the factual issues presented by his claim."¹⁷

It is not clear that the *Prudential* case stands for anything other than as a caution to arbitrators to be sure, when considering a dispositive motion, that the responding party has the maximum opportunity to provide the arbitrator with both legal points and authorities and relevant facts, either by affidavit, declaration under penalty of perjury, or signed deposition transcript.

Also, since *Prudential* dealt with a motion to dismiss for failure to state a claim rather than a summary judgment motion, the panel should have assumed for purposes of the motion that all allegations of the claim were true. It is not clear if the panel did so.

The case law suggests that courts will not disturb an award that grants a dispositive motion without a hearing on the merits where the arbi-

The second type of dispositive motion seeks a summary adjudication of the dispute. These motions cannot be made unless there is undisputed evidence showing that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.¹⁸

Each type of motion will be discussed in the context of arbitration:

Motions Attacking the Pleadings. These motions are common in civil court, particularly in "code pleading" states such as California. There, a pleading is ripe for attack if it fails to identify facts supporting each element of each cause of action.¹⁹

However, motions attacking the pleadings would seem to have limited utility in arbitration proceedings. The primary reason is that the pleading requirements in arbitration are extremely relaxed.²⁰ For example, to start an employment arbitration under the AAA rules, the claimant need only file "a brief statement of the nature of the dispute"; the amount in controversy, if any; the remedy sought; and the requested hearing location.²¹ Compare this to the notice pleading requirements for actions in federal court, which require "a short and plain statement of the claim showing that the pleader is entitled to relief."²²

However, this does not mean that an arbitrator should not agree to hear and decide a motion on a pleading in an appropriate case. How should an arbitrator go about deciding such a motion?

When a trial court decides a motion on the pleadings, it assumes the facts stated in the pleading are true and then determines if the facts alleged state a valid claim.²³ An arbitrator who hears a dispositive motion attacking a pleading should do the same: assume the facts stated in the challenged pleading are true. If the arbitrator ruled in favor of the moving party without doing so, the award would be vulnerable to being overturned on the ground that the author of the challenged pleading did not have an opportunity to present relevant evidence. This is apparently what happened in the *Prudential* case. The court stated in that case:

Before an arbitration panel should be able to dismiss a claim for failure to state a claim upon which relief can be granted, the claim should be facially deficient. Such is not the case here for if the allegations of the claimant's complaint are taken to be true, he would be entitled to some form of relief.... Thus, to assure fundamental fairness, claimant is entitled to offer evidence relevant to his claim.²⁴

It is clear from this statement that the court assumed an arbitrator could grant a motion on the pleadings, provided that in deciding the issue the arbitrator assumed the facts pled to be true and found that they were insufficient to state a valid claim or defense.

We also need to consider one more factor. Civil courts typically allow plaintiffs leave to amend a deficient complaint at least once.²⁵ Thus, if a defendant moved to dismiss a complaint for failure to state a claim, the court probably would dismiss without prejudice and grant leave to replead with greater particularity.

An arbitrator should follow this practice. The arbitrator should not conclude an arbitration by granting a motion on a pleading without leave to amend except when the pleading in question has a flaw that cannot be remedied. An example of a non-remediable flaw is a pleading clearly filed beyond the applicable statute of limitations or one with an obvious jurisdictional defect.

Even then, to avoid a possible later attack on the award, it might be advisable for both the party attacking a pleading and the arbitrator to allow the author of the pleading in question to produce extrinsic evidence by declaration or deposition that might be relevant to the issues raised by the motion.

Motions for Summary Adjudication. As previously noted, motions for summary adjudication (also known as summary judgment) are appropriate only when no disputed material fact is at issue and the only question is one of law.

Summary judgment motions filed in court usually must comply with the applicable rules of civil procedure.²⁶ That is not the case in arbitration because arbitrators are not bound by court rules of procedure or evidence unless the parties so agree.²⁷

As the institutional arbitration rules quoted above show, arbitrators are generally required to manage the proceedings with a view to efficiently resolving the case. Where the arbitration rules expressly or implicitly allow for dispositive motions, that would include hearing a motion for summary disposition. To reduce the risk of later challenge, it might be prudent for the arbitrator to encourage both parties to expressly buy into the procedural approach that the arbitrator intends to take to the dispositive motion, including notice and other procedural requirements.

Although arbitration is more flexible than litigation and not as formal, the procedures used must be fair. In other words they must satisfy arbitral due process. In the case of a dispositive summary judgment motion, this means that the party opposing the motion must have an opportunity to present, not only legal arguments, but relevant evidence to establish that there are material issues of fact in dispute, despite the moving party's claims to the contrary.²⁸ How and in what form that evidence is presented and received appears to be within the arbitrator's discretion.

Discovery and Dispositive Motions

A key issue the arbitrator will have to decide is how much and what type of discovery to allow before hearing a summary adjudication motion. Absent an agreement by the parties, discovery in arbitration is usually quite limited compared to civil litigation. Arbitrators normally have discretion to determine how much discovery will be allowed, since most arbitral rules do not prescribe a specific type or amount. A party opposing a summary adjudication motion is likely to believe that extensive discovery is needed in order to develop supporting evidence.

The case law does not provide much guidance on how much discovery should be allowed. However, denying all discovery on an issue relevant to the judgment may be viewed as fundamentally unfair.

In the *Schlessinger* case, the arbitrator allowed extensive discovery by agreement of the parties. Thus, the reviewing court easily found that Schlessinger, who challenged the summary judgment procedure, had an adequate opportunity to gather and present evidence.

If there is no agreement among the parties on discovery relating to a summary adjudication

motion, should the arbitrator condition hearing the motion on the moving party agreeing to an appropriate amount of discovery? How much discovery is appropriate? Should the arbitrator allow the same amount of discovery that a court would have allowed if the action had been brought there? Should the arbitrator limit discovery to the issues he or she considers material to the motion? These are questions of judgment. The answers will depend on the nature of the case, the specific issues raised by the motion, and the costs associated with the motion and discovery. They also will depend on the arbitrator's view of his or her inherent power to manage the proceedings, including how much discovery is permitted by the rules or the parties' agreement.

Conclusion

Dispositive motions have the potential to play an important role in resolving disputes in arbitration more quickly and efficiently. They may ben-

efit both parties by avoiding an unduly prolonged arbitration and they may assist the arbitrator in expeditiously resolving the dispute.

The relaxed procedural rules of arbitration proceedings allow the parties and the arbitrator to be more flexible in designing the procedures that will apply to dispositive motions. Whatever procedures are adopted, the party opposing the motion must be given adequate notice and a meaningful opportunity to respond.²⁸ Moreover, in the case of a summary adjudication motion, the arbitrator must give serious consideration to whether fairness requires granting the parties the opportunity to conduct discovery. If so, the arbitrator would then have to determine how much discovery would be reasonable. If the arbitrator believes that discovery could significantly raise the cost of the motion above what it might cost to proceed to a hearing on the merits, the arbitrator has sufficient discretion to deny the dispositive motion. ■

ENDNOTES

¹ AAA Commercial Arbitration Rules, Rule R. 30.

² See *Schlessinger v. Rosenfeld, Meyer & Susman* 40 Cal. App. 4th 1096, 1108 (1995), citing comments in a law review article and in the Rutter *California Practice Guide* stating that motion practice might not be available in arbitration. The *Schlessinger* court rejected this authority and determined that such motions were permitted.

³ The RUA can be viewed at www.nccusl.org (search for Uniform Arbitration Act).

⁴ See generally, Prof. Roger Alford, "Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law," 4 *Pepp. Dispute Resol. L.J.* 1 (2003).

⁵ See Cal. Code Civil Proc. § 1282.2.

⁶ *Schlessinger*, *supra* n. 2.

⁷ See Alford, *supra* n. 4.

⁸ Michael Hoellering, "Dispositive Motions in Arbitration," 1(1) *ADR Currents* 1, 8 (Summer 1996).

⁹ See FAA § 10(3) and (4) allowing an award to be vacated "where the arbitrators were guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy" and "where the arbitrators exceeded their powers." See also § 1286.2(a)(3) and (5) of the Calif. Code of Civil Procedure, allowing an award to be vacated if "the rights of the party were substantially prejudiced by misconduct of a neutral arbitrator" or there was a "refusal of the arbitrators to hear evidence material to the controversy" The common law "manifest disre-

gard of the law" doctrine also could be asserted, since it is in some ways similar to the argument that the arbitrator exceeded his powers.

¹⁰ *Moncharsh v. Heily & Blase* 3 Cal.4th 1, 11 (1992).

¹¹ *Id.* at 33.

¹² *Brown v. Coleman Co.*, 220 F.3d 1180, 1182 (10th Cir. 2000).

¹³ *Bowles Fin. Group v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994).

¹⁴ *Supra* n. 2.

¹⁵ See *Intercarbon Bermuda, Ltd. v. Caltex Trading & Transp. Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993) (confirming a summary adjudication by an arbitrator based on documentary evidence but expressing reservations about deciding arbitration cases without an evidentiary hearing); *Stifler v. Seymour Weiner*, 488 A.2d 192 (Md. Ct. App. 1985) (dispositive motion is appropriate on issue of statute of limitations); *Pegasus Constr. Corp. v. Turner Constr. Co.*, 84 Wash. App. 744, 929 P.2d 1200 (1997) (hearing of all evidence regarding merits of a claim is unnecessary where a decision can be made on basis of motion to dismiss).

¹⁶ Timothy J. Heinz, "Revised Uniform Arbitration Act, An Overview," 56 (2) *Disp. Resol. J.* 28 (July 2001).

¹⁷ 929 F. Supp. 1411, 1418 (N.D. Okla. 1996).

¹⁸ F.R.C.P. 56. See also Calif. Code Civil Proc. § 437(c): "Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there

is no defense to the action or proceeding."

¹⁹ Calif. Code Civ. Proc. § 425.10 states that complaints must include "a statement of the facts constituting the cause of action."

²⁰ However, under most institutional arbitration rules, the arbitrator has extensive power to require the parties to provide more detailed claims and defenses.

²¹ AAA Employment Arbitration Rules, R. 4.

²² F.R.C.P. 10.

²³ See Calif. Code Civ. Proc. § 430.10(e), noting the grounds for demurring to a claim are that "the pleading does not state facts sufficient to constitute a cause of action."

²⁴ *Prudential Securities*, *supra* n. 17, at 1417-18.

²⁵ "It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action." *Goodman v. Kennedy* 18 Cal. 3d 335, 349 (1976).

²⁶ See, e.g., Calif. Code Civil Proc. § 437(c), requiring 75 days' notice for such hearings, and Calif. Ct. R. 3.1350, describing the format of the papers for summary judgment or adjudication motions.

²⁷ See *Schlessinger*, *supra* n. 2, at 1108: "For instance, as stated, Code of Civil Procedure section 437c, the summary adjudication statute, did not apply to the arbitration here."

²⁸ *Bowles Fin. Group*, *supra* n. 13, at 1013.