Location of Depositions In Arbitrations: A Potential Conflict, Easily Avoided

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Binding arbitration is intended to be a more efficient means than litigation of resolving commercial disputes. Often, arbitration can save litigants time and money. There are areas, however, where arbitration can be more costly and less efficient than judicial litigation. One of those areas is the location of depositions. In federal court, the location of depositions is generally resolved by reference to well-settled law and practice. Thus, although disputes requiring a court's intervention do arise with respect to the location of depositions in federal litigation, such disputes may be less likely to occur in federal court proceedings than in arbitration, where there are often no rules controlling where depositions are to be conducted. Opportunistic parties and their counsel may take advantage of the lack of such rules in arbitration and seek to conduct depositions on terms disadvantageous to opposing parties, including demanding that depositions take place in inconvenient locales. Thus, costly, distracting, and unnecessary conflicts can arise over the location of depositions. These types of conflicts may be avoided, however, by addressing the issue of deposition location by agreement early in the arbitration process.

1. Federal Court Rules

In federal court, the general rule is that the party who serves a notice of deposition chooses the location and may set the location wherever she wishes. *See, e.g., Philadelphia Indem. Ins. Co. v. Federal Ins. Co.,* 215 F.R.D. 492, 495 (E.D. Pa., 2003) ("[u]sually, a party seeking discovery may set the place where the deposition will take place, subject to the power of the courts to grant a protective order designating a different location"). This is consistent with the general practice that a party wishing to depose a witness issues a notice of deposition instructing the deponent to appear at a particular time and location. *See, e.g.,* Fed. R. Civ. Pro. 30(b)(1) ("A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition."). This general rule is subject to a party's right to ask a court to grant a protective order designating a different location. 7 James Wm. Moore et al., Moore's Federal Practice ¶ 30.51 (2009). The party opposing the site of the deposition has the burden of proving that the specified location will cause undue burden or expense. *See Cobell v. Norton*, 213 F.R.D. 43, 47 (D.D.C. 2003). Undue burden or expense must be proved by affidavit. *Id.*

There are other general rules governing the location of parties' depositions in federal court proceedings. To illustrate, the plaintiff, having selected the forum, must appear for a deposition in the jurisdiction in which the plaintiff has instituted suit. *See, e.g., South Seas Catamaran, Inc. v. Motor Vessel Leeway*, 120 F.R.D. 17, 21 (D.N.J. 1988). In addition, the defendant's deposition generally must be held at his or her county of residence or principal place of business or employment. *Philadelphia Indem. Ins. Co.*, 215 F.R.D. at 495. Again, these rules are not hard and fast and are subject to relief from the court in certain instances, such as where the party to be deposed can establish by affidavit that it will suffer hardship or severe financial burden. *Cobell*, 213 F.R.D. at 47.

The critical point is that legal precedent applicable in federal court proceedings exists to guide parties, providing real hurdles that must be overcome if a party seeks to deviate from that precedent. This precedent provides incentives for parties to avoid needless conflict as parties that ignore this precedent risk raising the ire of the court by fighting over what the court might perceive as an unimportant issue. *See e.g., Avista Mgmt., Inc. v. Wausau*

Underwriters Ins. Co., No. 6:05-CV 1430, 2006 WL 1562246, at *1 (M.D. Fla. June 6, 2006) (court ordered parties to conduct one game of "rock, paper, scissors" to resolve dispute over location of deposition).

2. American Arbitration Association Rules

In contrast to parties litigating in federal court, parties to arbitration proceedings generally operate without the benefit of well-developed and specific procedural rules. Arbitration is a creature of contract. Few, if any, contractual arbitration provisions, however, dictate where depositions are to be conducted. A number of organizations promulgate rules to govern arbitration procedure, but these rules are considerably more general than state and federal rules of procedure. For example, the rules of the American Arbitration Association ("AAA") are silent with respect to who has the right to determine where depositions should take place. Instead, the AAA Rules grant arbitrators broad discretion to resolve procedural discovery issues, such as the location of depositions. *See*, AAA, Commercial Arbitration Rules & Mediation Procedures, Rules for Large, Complex Commercial Disputes, *available at* http://www.adr.org/sp.asp?id=22440#A5 (Rules eff. June 1, 2009) (describing how Rules provide "broad arbitrator authority to order and control discovery, including depositions").

The lack of rules governing the location of depositions, coupled with arbitrators' broad powers, makes conflict on this issue more likely. In addition, parties to arbitrations often exchange lists of intended deponents via correspondence rather than by using formal subpoenas or deposition notices. Accordingly, the location of depositions can be an overlooked detail when parties are noticing depositions. This situation affords creative counsel opportunities to argue that certain depositions should take place in locations that may be inconvenient to their opponents, without regard to the general rules that govern the locations of depositions in court. Aggressive opposing counsel might also try to shift travel costs onto their opponents, gambling that their opponents will not submit such a minor issue to the arbitrator(s). Thus, a party may be faced with two equally unpalatable choices: submit to its opponents' choice of venue for the deposition, incurring greater cost and inconvenience, or pay the cost of submitting the issue to the arbitrator(s) for resolution.

3. Early Planning Can Avoid Unwanted Conflict

For the client wishing to avoid needless cost and expense arising from disputes over procedural issues, potential conflict over the location of depositions can sometimes be avoided at the preliminary hearing stage of arbitration. A simple agreement that each party host the depositions that they intend to take is one straightforward possibility. Obviously, other agreements may be reached, the key being that the agreements are reciprocal. Indeed, even if an opponent balks at an attempt to reach an agreement on this issue, there may still be an opportunity to address the issue at a preliminary stage by asking the arbitrator(s) for an early resolution of the issue without costly briefing and correspondence. Of course, there are times when, for legitimate reasons, it may not be wise to seek an agreement with opposing counsel on the issue of the location of depositions. When, for example, your client has witnesses located in distant locales but your opponent does not, an agreement that appears reciprocal might actually place unequal burdens on the parties. However, planning ahead regarding such procedural issues can help both parties to a dispute maximize the value of arbitration by avoiding ancillary and expensive disputes that simply increase the cost.

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