FOREWORD

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In recent years, the American Arbitration Association (AAA) has reaffirmed its commitment to efficiency in the arbitration process. Faster disposition at lower cost must continue to be the principal differentiator of arbitration as an alternative to litigation. As others (including the drafters of the recent amendments to the AAA Commercial Arbitration Rules) have noted, the importation of a litigation mindset has resulted in a slow but steady encroachment of litigation procedures into the arbitration process. (See Section P-1(b) of AAA Commercial Arbitration Rules, Preliminary Hearing Procedures). While there are many features of litigation practice that have increased the cost and duration of arbitration cases, broad discovery and motion practice are most often cited. This article will not address the full range of the problem; for that, see *Muscular Arbitration and Arbitrators Self-Management Can Make Arbitration Faster and More Economical* (Dispute Res. Jnl. Vol. 67, No. 4). Instead, this article will focus on deposition practice, a cause of unnecessary cost and delay in many cases.

To be sure, depositions are justified in some arbitrations. Commercial arbitration may involve very high stakes or high levels of factual complexity. In the exceptional case, a party may not be able to obtain access to information needed to present its claims or defenses without depositions. But where a decision has been made to allow depositions in an appropriate case, that decision should just be the first step in managing the process. When depositions are justified, there are techniques available to the arbitrator to maximize the value of deposition time and minimize deposition cost. With one exception, the techniques described below are not new and are already used by many experienced arbitrators. The exception, which at least I have not encountered, is the use of Fed. R. Civ. P. 30(b)(6) or “representative” depositions in arbitration. Federal Rule 30(b)(6) allows a party, by serving a notice containing a list of topics stated with “reasonable
particularity, to take the deposition of a corporate or other organizations
designee, who must then answer questions with information known or
“reasonably available” to the organization. The Rule 30(b)(6)
deposition can be a very efficient means to enable a party through a
single deposition to obtain a broad range of information from an
adverse party. For this reason, its use is increasingly popular in
federal litigation and in those state courts that have “representative”
deposition rules. If used in the right case, Rule 30(b)(6) depositions
can be one of the tools available to arbitrators to expedite the
exchange of discoverable information.

I. THE LITIGATION MINDSET

To many litigators, prosecuting or defending a complex
commercial case without depositions is a disconcerting proposition.
Litigators fear surprises at trial, and surprises are certainly more likely
if a witness is allowed to testify without being deposed. Yet, in most
arbitration cases, that is exactly what happens, and the examination
and cross-examination generally proceed smoothly and without any
astonishing new disclosures. Even in civil litigation, depositions are
grossly overused. For example, the use of depositions to impeach
actually plays a negligible role in most trials. Attempted
impeachments often fall flat because the questions are not identical,
the differences in the deposition and trial responses are subtle, or the
impeachment relates to a subject that is just not that important.
Countless hours are spent preparing for, and taking depositions, that
have little impact on the disposition of the case.

In arbitration, cross-examination of witnesses often occurs without
a prior deposition, but careful use of documents can minimize the risk
of surprise. The opposing party’s documents can be used as a cross-
examination roadmap much as the deposition would be used if one
were available. And in many instances, there is a distinct advantage to
the cross-examiner in confronting the witness with an effective line of
cross-examination for the first time at trial or the deposition hearing.
Indeed, many advocates have learned to love the “naked” cross-
examination that is so much more common in arbitration than in
litigation.

If depositions are available, however, there is an inclination to
leave no stone unturned. Once the deposition has started, the lawyers
and the witness are present, the stack of documents has been carefully
reviewed and marked, and the witness is unlikely to be available
again. Why not go through the entire stack or the entire outline just in case something useful is uncovered? In litigation, this mentality will often lead to inefficiency, and the judge is only likely to intercede when there is a dispute. In arbitration, there is a greater opportunity for the arbitrator to shape the process at the outset.

II. AAA RULES REGARDING DEPOSITIONS IN ARBITRATION

At the first mention of the word “deposition” in the preliminary hearing of a AAA arbitration, arbitrators will often advise the parties that there is no express authorization for depositions in the AAA Commercial Rules. Some arbitrators will go further and advise the parties that depositions are the exception and not the rule. These admonitions are an effective wake-up call for those advocates who come to the preliminary assuming that depositions will be part of the process.

There is in fact no reference to “depositions” in the AAA Commercial Arbitration Rules. R-22 confers on the arbitrator the power to “manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party’s opportunity to fairly present its claims and defenses.” This broad reference to “information” in R-22 would seem to give the arbitrator the authority to allow depositions, without building in any presumption by making a specific reference to depositions in the rule. For cases with more than $500,000 at issue, Section L-3(f) of the Procedures for Large, Complex Commercial Disputes does provide for the possibility of depositions but only in exceptional cases:

In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

If this type of analysis is appropriate in cases where the Procedures for Large, Complex Commercial Disputes apply, it follows that the level of scrutiny should be at least as thorough in a case that is governed solely by the Commercial Arbitration Rules.
While there is little doubt that an arbitrator is authorized to allow depositions for *discovery purposes* in AAA arbitrations, there is some ambiguity in the rules regarding *admissibility* of deposition testimony. Obviously, depositions taken to *preserve testimony* would have no value if the testimony were inadmissible. As every arbitrator knows, conformity to the rules of evidence is not necessary under Rule 34(a), but less well known is the language in the same rule that requires that “all evidence shall be taken in the presence of the arbitrators . . . .” On its face, deposition testimony is “taken” outside the presence of the arbitrators. Nevertheless, it is at least arguable that the introduction of the transcript is the “taking” of evidence before the arbitrators. Moreover, if written witness statements are admissible under AAA Commercial Arbitration Rules, R-35(a), under appropriate circumstances and with appropriate safeguards for cross-examination, it would seem to follow that deposition testimony should be admitted in a case where the witness is unavailable and cannot be compelled to testify, or if used to impeach a witness that does appear live at the hearing.

**III. TECHNIQUES FOR ACTIVE EARLY DEPOSITION MANAGEMENT**

Managing the deposition process in larger and more complex arbitration matters requires the application of judgment and experience to the specific circumstances of the case. There is no one-size-fits-all approach. The following amounts to a sort of checklist, factors to consider and techniques to employ in the extraordinary case in which some depositions are warranted.

**A. Good Cause**

The requirement of good cause or justification that is expressly articulated in L-3(f) should be a part of the arbitrator’s thought process in every commercial case. If good cause is shown and depositions are permitted, the information obtained in making the threshold determination will be a source of useful information for the arbitrator in managing depositions. An arbitrator can ask for a showing of good cause orally at the preliminary conference, informally by letter, or in a more formal motion. If the arbitrator plans to discuss depositions at the preliminary conference, it is helpful to advise the parties in advance.
In any case, the showing should include the number of proposed depositions, the names and positions of the proposed deponents, and the reason that a deposition of each witness is justified. The reason given should be far more specific than a broad statement that the witness has relevant knowledge. What information is this witness likely to possess? How critical is that information to the disposition of the case? Will the same information be ascertainable from the documents or other sources? Is there overlap between the knowledge of the proposed witnesses? If answers to these questions are difficult to ascertain at an early stage in the case, should a showing of true “good cause” be deferred until documents are produced and reviewed?

The significance of the information obtainable from the specific proposed witnesses must then be evaluated against the backdrop of the size and complexity of the case. A showing of good cause would have to be extraordinarily compelling in a case with $100,000 at issue. Even many seven-figure cases are relatively straight-forward contractual disputes. Are the dispositive issues in the case truly factual in nature or is the case more likely to turn on a legal issue, such as interpretation of the contract at issue? If the dispute is truly a factual one, which party has greater access to relevant information? Are depositions the most efficient way to provide access to that information?

With answers to these questions, the arbitrator can make meaningful early decisions about the management of depositions in the case. In most cases in which some depositions are warranted, the decision will be that the parties may take limited number of depositions of limited duration.

**B. Deposition Limits**

Deposition limits will commonly take the form of a limit on the number and duration of depositions. For example, an arbitrator might order in a complex case that each side may take three depositions of its choice of no more than three hours each. However, an equally effective (and perhaps fairer) approach might be to allow 9 aggregate hours of deposition time per side. Time limits are relatively easy to track and enforce as court reporters can give a deposition run-time at any time during the deposition. Limiting the total number of hours may be fairer in those cases where a small number of witnesses have relevant information on one side and a larger number on the other.
Whether there are limits on the number and time, or just on the aggregate deposition time per side, limits do work. When forced to focus on the more relevant issues and documents, litigators can break out of the litigation mindset. A deposition that might take a full 8-hour day can remarkably be completed in 2 or 3 hours if limits are in place. In most state or federal court depositions, useful deposition testimony comprises a small fraction of the total. This is because litigators are accustomed to using all of the time allotted. A deposition will expand to fill the time vacuum if the rules and the tribunal permit.

In addition, the parties can always ask for more time or more depositions if they need it. In most cases, they will not do so, either because the deposition was taken more efficiently because of the limits in place or because the parties agreed on a modest extension of the limits to avoid the cost of a further request to the arbitrator and the possible need to reconvene the deposition. Because limits can always be modified as more information is shared, it is generally preferable to impose fairly restrictive limits at the outset.

C. Ordering and Staging

In an especially complex and/or high-value case, the parties may insist that some limited number of depositions or deposition hours is insufficient. A party might argue that it is impossible at an early stage of the case to set meaningful limits because some basic discovery is needed to understand the nature and extent of the information, or that arbitrary time limits on depositions will deprive that party of the opportunity to present its case.

In these or similar circumstances, ordering or staging depositions is a useful tool. As a guiding principle, depose the more knowledgeable witnesses first. In litigation, a party might consider a deposition strategy of starting with the lower level witnesses or those with only isolated pieces of relevant information, picking up some important pieces of information along the way, and then using the knowledge obtained in the earlier depositions to cross-examine the most critical and most knowledgeable witnesses. This approach has no place in arbitration, and it is usually inefficient, and ineffective even in litigation. If the most knowledgeable persons are depose first, the depositions of some of the secondary players will probably fall by the wayside.
If multiple depositions are justified, the deposition process can be “staged.” This may involve a first wave of depositions of those most knowledgeable, using limits on the number or duration, and then a “second look” at how much additional deposition testimony would be justified in the second wave. For example, the arbitrator might order three depositions per side of three hours each. Depending upon the justification shown for the second wave, the arbitrator might then allow two more depositions of two hours each. In a corporate setting with multiple departments involved (e.g., management, sales, accounting), the arbitrator could order that the most knowledgeable person from each department be deposed first, and then reevaluate the need for more after the first round.

While useful, these techniques are not without potential problems. First, there are cases in which it is difficult for the parties and the arbitrator to formulate an educated deposition plan before some basic information is exchanged. In such a case, deposition management decisions can be deferred until after documents are produced. Even then, however, a party may not have access to enough information without questioning at least one adverse witness to obtain the kind of basic information often obtained through mandatory disclosures or interrogatories in the litigation setting. For example, a party may not know who possesses relevant information, what kind of information they possess, where those witnesses are located, how a corporate party is structured, how the knowledgeable witnesses fit into the corporate structure, how documents and ESI are maintained and produced, what corporate policies and procedures apply to the dispute, and how a corporation prepares its financial information. A deposition may be the most efficient way to obtain this information.

Another potential shortcoming of deposition limits, ordering and staging is that the parties may have radically different numbers of knowledgeable witnesses. A small wholly-owned proprietorship may have a single witness with most of the relevant information while a large public company could have dozens. In some cases, the information needed to prosecute or defend a claim may be almost entirely in the hands of one party or the other. In these kinds of cases, blind application of a reciprocal approach to deposition limits would be unfair. One technique that is expressly authorized in larger cases is the allocation of costs under L-3(f). Another tool for those cases where the number of witnesses or access to information is disproportionate is the Rule 30(b)(6) deposition.
D. Representative Depositions

Most litigators are very familiar with Fed. R. Civ. P. 30(b)(6) or one of its state law counterparts. The rule allows a party to serve a notice on an adverse party with a list of topics that must be stated with “reasonable particularity.” When a party receives such a notice, it has the duty to designate one or more deponents to provide information “known or reasonably available” to the organization about the topics identified. If the witness does not have personal knowledge, the organization must educate the witness so that he or she can testify fully and knowledgeably about the topics identified. The witness may use documents, present or former employees, or other sources of information to prepare. The result is that the questioner can cover a great deal of ground in a single deposition.

While a party responding to a Rule 30(b)(6) notice may identify multiple witnesses to respond to the topics listed, it is usually motivated to produce a limited number of its most knowledgeable witnesses, and to educate them on those matters as to which they may not be knowledgeable. Thus, a wide range of relevant information can be gathered quickly and efficiently, and without the objections and carefully worded lawyer’s responses that make interrogatories so inefficient.

There are potential pitfalls here too, such as overbroad and/or excessively detailed Rule 30(b)(6) notices, so an arbitrator should offer guidance regarding the scope of such depositions at the outset. But if used correctly, one notice and a half day of deposition can at least educate the parties on the basic facts and location of information on both sides, and may even obviate the need for further depositions altogether. Even if more depositions are necessary, a single Rule 30(b)(6) deposition can be used as the first deposition “stage,” putting the parties on equal footing for the limited depositions that follow.

In the typical breach of contract case, the Claimant might serve a Rule 30(b)(6) notice with the following:

Produce a person knowledgeable about the following topics:

1. The contract at issue between Claimant and Respondent and Respondent’s performance thereunder;

2. Identification and location of persons knowledgeable about the contract at issue and Respondent’s performance thereunder;
3. Identification and location of documents and ESI relating to the contract at issue and Respondent’s performance thereunder;

4. Ownership and corporate structure of the Respondent, including reporting responsibilities relating to the persons identified in response to Topic No. 1 above;

5. Information regarding Respondent’s financial condition during the relevant period; and

6. Corporate policies and procedures relating to [the subject matter of the dispute].

There is, of course, no express authorization for Rule 30(b)(6) depositions in the AAA Commercial Arbitration Rules but there is no reason that the arbitrator’s initial scheduling order could not authorize the parties to take advantage of the device. It is not uncommon for parties to agree to use Federal Rule 26 as a guide for exchange of expert reports and related information. They could similarly agree to use the procedure of Rule 30(b)(6) in discovery. Rule 30(b)(6) and the case law thereunder comes with its own complexities and risks of abuse but it has the potential to facilitate a broad exchange of basic information as efficiently as possible—a kind of hybrid interrogatory/deposition with the best features of both.

IV. EXPERTS

Expert depositions can usually be avoided in arbitration. If the parties adopt Rule 26 as a guide for the preparation of expert reports, the reports should contain all of the information needed for the hearing—a complete statement of the opinions and the basis and reasons for them; the facts or data considered in forming the opinions; exhibits that will be used to summarize or support the opinions; the witness’s qualification, as well as relevant publications and prior testimony; and the compensation to be paid to the expert. In litigation, where expert depositions are common, they are often counter-productive, opening the door to new opinions or new bases for existing opinions that were not included in the expert report. When that happens, the expert deposition may lead to supplemental reports and supplemental responsive or rebuttal reports, as well as motions in limine or objections at trial that seek to confine the expert to the scope of her report. All of this is wasteful and costly.
If the parties seem concerned about relying solely on the expert reports, the arbitrator may offer some comfort by advising the parties at the outset that any opinions or bases not included in the expert report will not be permitted at the hearing. Moreover, the arbitrator can admit the expert report as the direct testimony of the expert and allow only cross-examination and redirect at the hearing. An admonition that direct expert testimony will be limited to opinions and bases articulated in the expert report, or that the expert report will actually be used as the direct testimony, serves two salutary purposes as it relates to efficiency of the arbitration proceeding: 1) it forces the parties to be complete and inclusive in preparing the expert report; and 2) it may help persuade the parties that expert depositions are not essential. Finally, if expert depositions are permitted, time limits should be considered. Time limits will force the parties to forego the often tedious and wasteful questioning of experts about background and qualifications.

V. CONCLUSION

The best way to reduce the cost and delays attendant to depositions in arbitration is to avoid them altogether, and in most cases the ability of the parties to present their cases will not be significantly impaired. In the exceptional case, however, where depositions are justified, using time limits, staging, and even authorizing Rule 30(b)(6) depositions can make the process considerably more efficient.