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Can a Commercial Arbitrator Demand a Virtual Hearing?

In light of social distancing required by COVID-19 and the uncertainty as to when it will be safe to congregate in person again, questions abound as arbitrators navigate the shift toward a new digital normal.

By **Neal Eiseman** | May 20, 2020



With rare exception, parties who agree to arbitrate their commercial disputes naturally assume the evidentiary hearings will be conducted in person. However, in light of the social distancing required by COVID-19 and the uncertainty as to when it will be safe for parties to congregate in the same room, the only two viable options are to adjourn the proceedings sine die until it's safe or to move forward and arbitrate virtually. That begs the controversial question: If one party insists on arbitrating online and the other resists, can the arbitrator require the recalcitrant party to participate in a virtual arbitration?

For example, let's assume a claimant files a demand for arbitration seeking monetary damages against a respondent who claims no money is due because the claimant failed to perform as promised. During the pre-hearing conference, the claimant asserts the parties elected to arbitrate (rather than litigate) so that if any disputes arose, they could take advantage of the speed and efficiency arbitration offers over litigation. The claimant also asserts that, unless the process moves forward within the same time parameters that were routinely followed in commercial arbitrations pre-pandemic, it will likely be out of business by the time it's safe to arbitrate in person. The respondent objects, stating its due process rights would be violated unless in-person hearings are conducted, claiming that presenting evidence and cross-examining witnesses online is not nearly as effective as in person.

The answer to the question depends upon a variety of factors. If the arbitration provision incorporates by reference the rules of an arbitration provider, as many agreements to arbitrate do, then what those rules say about how the hearing may be conducted may provide the answer. And, as it turns out, the rules of many well-known and widely used providers do address the issue.

Both the Commercial and Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association provide, "When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communications, telephonic conferences and means other than an in-person presentation." The JAMS Comprehensive Arbitration Rules and Procedures also states, "The hearing, or any portion thereof, may be conducted telephonically or videographically with the agreement of the parties or at the discretion of the arbitrator." Accordingly, for arbitrations governed by the AAA or JAMS rules, clearly, the arbitrator has the authority to direct the parties to arbitrate online.

The rules of other providers may not necessarily contain specific language addressing the issue, but, as written, they do not suggest a different result. According to the International Institute for Conflict Prevention & Resolution's Administered Arbitration Rules, "Testimony may be presented in written and/or oral form as the tribunal may determine is appropriate." And the International Chamber of Commerce rules provide that the "arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."

There are several factors an arbitrator may consider when confronted with the issue: Were any in-person evidentiary hearings previously held? Is it too early to determine whether the hearings should be moved online because the parties have not yet completed the activities set forth in the arbitrator's pre-hearing scheduling order? After considering who is making the request and who opposes it, and the reasons therefor, will any undue prejudice result by ruling one way versus the other? And, if so, after balancing the equities, what is the correct decision? What deference and weight should be given to the fact that the parties voluntarily selected an alternate dispute resolution process whose hallmarks are speed, efficiency and finality? Will denying the request, in effect, bring the arbitration to a halt? Is the arbitrator technically savvy enough to conduct the hearing online and, if not, will someone be present in real-time to address and resolve any technical issues that may arise? By analogy, how are the courts conducting their business at the time the arbitrator is asked to rule? Are they allowing online judicial proceedings and, if so, to what extent?

Perhaps the most important consideration is whether, by proceeding virtually, the arbitrator will be able to understand the testimony and exhibits, assess witnesses and decide the dispute fairly. Interestingly, one of the arguments often raised against having witnesses testify by video is that it hampers the arbitrator's ability to observe the witnesses up close to assess their credibility. Arguably, that argument

disappears on online platforms that allow for facial close-ups. (Ironically, if social distancing required witnesses to wear masks to protect themselves from contracting COVID-19, having everyone together in the same room turns out to be a less effective way to assess credibility.)

What's the upshot? Perhaps we'll soon be seeing arbitration provisions in parties' agreements that expressly allow or prohibit online evidentiary hearings. Undoubtedly, in the not too distant future, the first of many state and federal court decisions will weigh in—most likely following the filing of a quickly prepared order to show cause from the party who unsuccessfully opposed arbitrating online or by the losing party who raises the issue post-award when moving to vacate the award on procedural due process and related grounds.

Granted, it's hard to dispute the notion that there's nothing quite as good as physically being at an event, whether it's a concert, athletic competition or an arbitration proceeding. However, it's not much of a stretch to predict that—whether out of necessity or not—as more people become familiar and comfortable with the available online technology, virtual arbitrations are destined to proliferate, along with the belief that they are fair, viable alternatives to arbitrating in person.

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