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Maximizing online platforms for success in arbitrations

By Jeffrey Benz

The new normal has arrived and will dominate how we as arbitrators and arbitration professionals participate in and conduct hearings. Disputes will not disappear simply because of the worldwide COVID-19 pandemic. With the same certainty as births, deaths and taxes, disputes will continue to arise. The pandemic has caused deadlines to be missed and hearings to be delayed. Home confinement and limited in-person social interaction are wearing on people's psyches. We are living in the new normal, but we owe it to our clients to ensure that their disputes continue to get resolved.

Only two options exist for hearings in this changed world. The first option is for hearings to be postponed to a date when both in person hearings and airplane travel are deemed to be safe again. There is very little ability to predict this successfully at this point with the moving dates being discussed at the government level. Parties and the arbitrator could consider dates deemed to be so late that any virus impact would presumably have to be behind us, but good luck determining when that will be. And back-ending all arbitration hearings to the fall of 2020 is both inefficient and will likely result in hearings being postponed later because of current commitments to other hearings in the fall of 2020.

The second option is to attempt to go forward with evidentiary hearings on the dates that have been scheduled but to conduct them by video conference or online. This raises perhaps new logistical issues, but it probably does not raise procedural or legal bases for challenge of an award. This option may actually be extremely efficient if done well because travel costs will be non-existent.

Ensuring you can achieve the single measure of success of arbitration, obtaining a final binding award, requires consideration of the best way

to conduct arbitration hearings by video and telephone. But let's start with the fact that providing evidence by video, or even telephone, is not new or novel: witnesses have been testifying by video and telephone at hearings for decades; documents have been presented electronically for nearly as long; and in-person interactions in arbitrations have been limited at some level for at least procedural matters, including procedural matters that implicate evidentiary issues, for nearly as long as that.

My goal is to share some basic strategies for arbitrators and parties to set the table for a successful arbitration in an increasingly virtual world.

Choose the Appropriate Platform

There is a lot of online-interaction platforms available for low cost, such as Zoom and BlueJeans. If you are an arbitrator, make sure to choose a platform with which you are comfortable. I suggest doing a test run or two before the day of the hearing. If you are a party to a dispute, make sure you can access the platform and that it has all the features you need. Review its functionality to ensure that you know how to use its features. The platform should permit the parties, their counsel and the arbitrator(s) to view each other onscreen simultaneously, in addition to any documents, provide the ability to have breakout rooms for the parties and the arbitrator(s) in case side discussions must occur, permit polling or chatting among the arbitrator(s) and the parties on each side and altogether separate from the live video and audio feed (for example, in case you need to make a comment about a witness or their presentation to counsel outside the witness' hearing and off the record).

Review the Procedural Order

Most likely, the parties did not set out to participate in an online hearing, and the procedural order for

their case probably does not contemplate that. The procedural order will need to be revised to reflect that in-person hearings will not be held for the foreseeable future.

Set a Hearing Timetable

Because the evidentiary hearing will take place virtually, it may require a schedule, as people will be joining and leaving the platform at different times. Create a calendar to minimize disruptions. Of course, it is each party's responsibility to ensure that their respective witnesses appear on time.

Ensure Everyone Has Sufficient Internet Bandwidth

Do not wait until the start of the hearing to test internet connectivity. Arrange a preliminary event — perhaps a final case-readiness conference shortly before the evidentiary hearing — where everyone can connect to and use the platform. Counsel should also ensure that all of their witnesses and party representatives have strong internet connections and that they will have used or practiced on the platform at least once before appearing in the hearing.

Confidentiality

Typical confidentiality orders that apply to arbitration hearings can easily be adapted to online evidentiary hearings. One of the most significant new items to ensure this is covered by a confidentiality order is that the dial in, or access credentials, or link for the hearing, are to be maintained strictly confidential.

Get Contact Information in Advance

All contact information for the parties and their counsel should be provided to the arbitrator before the hearing. This information can be used in the event of a technical emergency or issue. It might be advisable to set up a group chat for the arbitrator and counsel before the hearing so that logistics and other issues can be

discussed informally and any technical issues can be addressed then.

The Video Setting

Appearing on video is a lot different from appearing live and in person. The video camera will be focused on a small area, but it may reveal some things that someone may not want to share or emphasize. Some key things to keep in mind are: dress code; the lighting and space of the room (including making sure there are appropriate backdrops); and camera angles.

Conclusion

We all, parties, counsel, and arbitrators, need to embrace the new format for hearings so that the lifeblood of our industry, resolving disputes, can continue in an efficient and timely way. Hearings cannot be put off indefinitely or set for the hope of a COVID-19 free final quarter of 2020, with everyone's hearings fighting for attention and commitment in the final ninety days of the year blended with the holiday season. And there is no good reason we as a profession cannot adapt and thrive in this new environment. ■

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