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Maximizing online platforms for success in arbitrations (part 2)

By Jeffrey Benz

This is the second part of my article on maximizing online platforms for success in arbitrations in the new normal of the COVID-19 world. There are specific ways to adapt arbitration to the online environment that will not detract from the in-person hearing experience and that might, with a little planning and practice, actually enhance the hearing experience. My aim is to hopefully provide some useful suggestions.

Consider Using Witness Statements

Providing witness statements in place of the direct testimony of fact and expert witnesses is a common practice in English courts and in international commercial arbitration. This reduces the amount of time needed to present a witness. A benefit of this approach is that the witness' direct examination is completely scripted to exactly what he or she would have said if questioned live and in person, so that the arbitrator need only read that statement. The opposing party is able to cross-examine the witness on that statement, having been fully prepared for what a direct examination would have provided. Failure to make available for cross-examination a witness who has submitted a witness statement will result in that witness' statement being excluded. The downsides of

this approach are that the witness cannot testify in his or her own words and emotions, at least for direct (which for most arbitrators is not as persuasive a tool as counsel seem to think it is), and that the parties must invest time and expense in crafting a proper witness statement in advance. Overall, I believe that the benefits of witness statements far outweigh their detriments.

Access to Documents/ Use of Technology

For an online hearing to be effective, having access to documents and evidence is paramount.

All witnesses must have in front of them the documents on which they are to be examined, which requires that they have the documents in advance. And the witnesses must have access to technology that permits them to receive and read those documents. Usually, the free version of Adobe Acrobat will suffice. The documents must be organized and indexed and paginated for easy and quick retrieval, but the documents should be clean and unmarked without any highlights or notes aside from what was contained in the original documents. The ability to share documents onscreen on the online software package is important so that everyone is reviewing the same document at the same time during testimony, much as you would when viewing an overhead projector or a presentation monitor

or screen in a traditional in-person hearing.

The arbitrator(s) and counsel should have a backup computer on hand to use to refer to documents separate from those being shown on screen if they want to check something, and so that they can have a backup machine in the event their main machine fails.

Taking and Enforcing Breaks

The schedule should include regular breaks. Given that everyone in a virtual hearing is somewhere else, the arbitrator has to ensure that the parties return at the correct time, and the parties have to commit to doing so, and be shamed if they do not do so habitually, or hearing time will be lost. Similarly, the need to enforce time may call for a strict time clock or chess clock format run by the arbitrator and ensuring the parties have equal time to present their respective cases.

Time Differences

In international arbitrations, and increasingly in domestic cases, it is common for witnesses to be spread around the world and to testifying via video or telephone. In our new online environment, even in domestic arbitrations, participants may be in various parts of the country. Obviously, the hearing has to proceed based on a reference time zone, but the participants should be mindful of where everyone is when calling witnesses, taking

breaks, and determining start and end times.

Recording

The virtual hearing platform you choose may permit the hearing to be recorded. The arbitrator should have command of this functionality, as chair of the online meeting, and not permit any one party or a third party to carry this out. A good practice is to require parties to agree in advance to not attempt any recording of the proceedings and to admonish witnesses when they testify that they may not do so. The recording of the hearing might obviate the need for a transcript (and thus a court reporter), or it may allow the transcript to be created later from the recording. In any event, the arbitrator must ensure that counsel and witnesses speak clearly and one at a time to have a clean recording.

Excluding Witnesses

Using an online platform permits the arbitrator to place witnesses into virtual rooms if they are to be excluded from hearing testimony prior to giving theirs or if they arrive early. The arbitrator should be familiar with how to accomplish this and use it as appropriate.

Multi-tasking

While hearing participants can get away with multi-tasking during in person hearings, on an online hearing such activity can be easily seen and detected, particularly given the camera

angles and close up nature of the video in these proceedings. The participants should be directed to devote their full time and attention to the proceedings when there is no break, and advised that multi-tasking is prohibited except where counsel is working on matters related to the proceedings.

Troubleshooting

Do not forget to have someone on hand or on standby to assist in troubleshooting any issues. At JAMS, we have internal resources who have become expert at this who are prepared to assist with online hearings as necessary, particularly on Zoom.

Costs of Online Hearings

The costs of online hearings, to the extent there are any, should be borne equally by the parties, unless there is some specific element peculiar to one party's case or witness that would

incur special additional costs. The online hearing costs, like other costs in the proceedings, can, where the parties' agreement, applicable law, or the institution's rules permit, may be awarded to the prevailing party later in the case.

Adapt!

Be prepared to adapt as the hearing develops. Sometimes plans do not make for the best course of action. Sometimes you may have to revert to telephonic aspects to the hearing if Internet or platform issues arise. The key to success with the online hearing is to have an open mind and be prepared and flexible to try something new as necessary to accomplish providing the parties with substantial justice before their chosen arbitrator(s).

Conclusion

Births, deaths, taxes and disputes continue to move ahead

in our new, hopefully temporarily interrupted, COVID-19 world, albeit with perhaps altered speeds or significance. There is no reason that resolving disputes must stop or be put on hold. Technology that is already a basic part of our lives can be adapted to assist us.

Online arbitration is currently the only viable option for resolving disputes in this new world of social distancing, self-isolation and quarantines. To succeed, arbitrators and counsel must be attuned to the unique elements that differentiate virtual hearings from in-person hearings. Insurmountable challenges are not present, only peculiarities that can be easily addressed. Online arbitration can be user-friendly and successful with a little bit of preparation and foresight.

Maybe adapting our practices to the current circumstances will yield enduring techniques

that will allow us to offer our clients a more efficient and effective dispute resolution process and experience in the future after the current emergency dissipates. ■

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