

# VERDICTS & SETTLEMENTS

FRIDAY, JANUARY 8, 2021

## Virtual arbitration of business disputes: Looking back, moving forward

By Zee Claiborne

In the ADR setting where I practice, despite initial resistance to agreeing to hearings on Zoom, participants have adapted fairly quickly and expressed general satisfaction with the process. My experience includes four arbitrations so far, both domestic and international cases. The hearings have proceeded with very few technical difficulties. And, actually, there were some advantages over in-person hearings, the most significant being easy access to the hearings for witnesses unable to travel. For example, a witness in South America could not travel to the U.S. because of COVID-19-related restrictions but was able to access to the proceedings via Zoom. Counsel and the arbitrators had an unimpeded view of each witness as testimony proceeded. In order to ensure that there would be no coaching of a witness, virtual backgrounds were not allowed, and after being sworn in, each witness was asked under oath whether others were in the room. Court reporters could see and hear the proceedings clearly and had no significant problems creating an accurate transcript. As the pandemic has worn on, now is a good time to reflect on some of the issues, grievances, and solutions to two common areas of conflict in the post-pandemic (virtual) ADR world: scheduling and presentation of evidence.

### Scheduling

There has also been much discussion about whether, when one side objects to scheduling a hearing on Zoom, arbitrators can override those objections and order virtual hearings. If a party raises strenuous

objections, the panel first looks for guidance to the arbitration provision in the contract and then to the governing arbitration rules. Under the rules of most ADR providers, arbitrators are charged with case management, including determining the date, time and location of the hearings. Most ADR rules provide specific guidance on this issue. For example, under the JAMS Comprehensive Arbitration Rules and Procedures, Rule 22(g) states: "The hearing ... may be conducted telephonically or videographically with the agreement of the Parties or at the discretion of the Arbitrator."

Arbitrators are responsible for efficient case management. When ordering virtual hearings over objections, the panel should consider factors such as how long ago the demand for arbitration was filed, whether discovery is complete, whether a party will be harmed by further delay and whether ordering virtual hearings will disadvantage a party in some way. Arbitrators are charged with using their best judgment to make fair and unbiased decisions.

One thing to note is that, when creating a schedule, a virtual hearing may require more time than an in-person hearing. Each side should estimate the time needed for its presentation. Then counsel should work together to prepare a detailed schedule, including times for opening statements and the examination of each witness.

Once it is determined that a case will proceed virtually, the arbitrators will issue an order regarding hearings on the Zoom platform and hold a final status conference to discuss the details.

### Presentation of Witnesses and Written Evidence

Counsels should exchange an updated list of the witnesses scheduled to testify each day. Unforeseen circumstances may force changes in the schedule, so each side should let the other side know who will testify at least 24 hours in advance. That way, counsel can be prepared for cross-examination and will have time to negotiate regarding any other necessary changes to the witness schedules. The process for expert witnesses may be similar to that for percipient witnesses.

Because much of the evidence in business arbitrations consists of documents, it is wise to have at least one technical assistant at a virtual arbitration to present the documents on screen and to troubleshoot any problems that may arise. Plan to send all documents, except those to be used for impeachment, to the arbitrators on a thumb drive in advance of the first hearing day. The arbitrators may want to use a second screen for exhibits as the hearing progresses.

Careful preparation here will help ensure an efficient hearing. Sometimes, counsel will agree to split the hearing time 50/50 in order to be sure that the case will stay on schedule with no rambling cross-examinations or wasted time. In addition, the parties might agree to save hearing time by submitting the direct testimony of some or all of the witnesses in writing in advance of the hearing along with the documents related to that testimony. Then the witnesses can be cross-examined at the hearings. This process works particularly well with expert witnesses where the expert report is submitted as that witness' direct, with cross-examination reserved for the hearing. Written direct testimony is used successfully in many international

arbitrations and saves significant time.

The parties will no doubt want to protect their financial information and intellectual property. To protect the privacy of the hearings, it is a good idea to turn off the recording and chat features of Zoom. It is best practice to hire a court reporter to prepare a reliable transcript rather than recording the hearings. JAMS uses Zoom's HIPAA-compliant platform for all scheduled virtual proceedings, both arbitration and mediation.

### Conclusion

Last spring, counsel were often reluctant to plan virtual hearings. But the attitudes of many lawyers and their clients have changed over the last nine months. It is now common for parties to come to arbitration with a Zoom hearing agreement in hand. Because of the ease of attendance for witnesses, especially those based overseas, as well as the savings of time and travel costs, it is likely that virtual hearings will continue to be used for appropriate cases even after it is possible to work in person again. ■

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