



Professional Perspective

Remote Hearings and Depositions in Commercial Arbitration

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Commercial arbitrators using remote technology can make good on the promise of a fair, quick, and efficient resolution of the parties' claims and defenses. Yet many parties continue to insist on in-person, face-to-face hearings, and many arbitrators continue to grant adjournments upon the request of one or both parties.

There is no question, however, that arbitrators have the authority to order remote hearings over the objection of one or all of the parties absent contrary language in the parties' agreement. As a general matter, arbitrators have broad discretion over procedural matters, including when and how they conduct hearings. Provider rules memorialize this broad discretion, including the ability to order remote hearings.

Rule 22(g) of the JAMS Comprehensive Arbitration Rules & Procedures explicitly contemplates that, at the arbitrator's discretion, the entirety of the hearing can be held remotely. That rule provides that a hearing or portion of it "may be conducted telephonically or videographically with the agreement of the Parties or at the discretion of the Arbitrator."

Likewise, Rule 32(c) of the American Arbitration Association's (AAA) Commercial Arbitration Rules gives arbitrators discretion to hear remote testimony when "deemed appropriate," and the International Institute for Conflict Prevention & Resolution's (CPR) 2019 rules for administered arbitrations, among other things, authorize the arbitrator "to determine the manner in which the parties shall present their cases." In arbitrations under these rules, whether to proceed remotely is a matter of arbitrator discretion, and unlike under [Rule 43 of the Federal Rules of Civil Procedure](#), there is no predicate requirement of "compelling circumstances" or "good cause" before a witness can testify by remote means.

The authors recognize there is a school of thought among some arbitrators that if both parties object to a remote hearing, then this joint wish must, rather than should, be granted. This view seems inconsistent with arbitrator authority and rules that make the decision of whether to proceed with a remote hearing a matter of arbitrator discretion. This is particularly true under the JAMS rules, which, again, specify that a hearing can be held entirely or partially remotely either by party agreement or at the discretion of the arbitrator. These rules clearly do not provide a presumptive right to a face-to-face hearing.

Given the current Covid-19 pandemic and its likely lasting impact on travel and the ability to gather together for in-person hearings, among other things, an arbitrator's decision to exercise its discretion to order a remote hearing over the objection of one or both of the parties cannot be viewed as controversial. Rather, it is consistent with the role arbitrators have always played. As explained in guidance from the International Court of Arbitration, waiting for the pandemic to subside to have a face-to-face hearing may be inconsistent with holding a hearing within a reasonable time and could result in unwarranted or prejudicial delay. Requiring a remote hearing over the objection of one or both parties may therefore be necessary to fulfil the arbitrator's duty to provide an expeditious and cost-effective proceeding.

Arbitrators can also order the parties to conduct remote depositions. An arbitrators' broad discretion over procedural matters extends to discovery, which is typically limited in arbitration. See, e.g., *Guyden v. Aetna, Inc.*, [544 F.3d 376](#), 386 (2d Cir. 2008). The AAA and CPR commercial rules leave it up to the arbitrator to decide whether any depositions are allowed, while JAMS provides a presumptive right to one deposition per party, with more allowed at the arbitrator's discretion. See generally JAMS Rule 17(c); AAA Rule 22; CPR Rule 11.

These rules do not prohibit arbitrators from requiring that such depositions take place within a specified time period and proceed by video. If the parties object to such a ruling and decline to take depositions remotely, there is no prejudice. If the desired deposition is that of a party representative, the party representative can always provide testimony at the hearing itself. If the desired deposition is that of a nonparty, such depositions (at least in most circuits) are not authorized by Federal Arbitration Act (FAA) section 7 in any event. See, e.g., *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, [939 F.3d 1145](#), 1159-60 (11th Cir. 2019).

Practitioners objecting to remote hearings cite, among other things, perceived concerns about technology, effective cross-examination, and the ability to determine witness credibility. Their point is often, either explicitly or implicitly, that due process will be adversely impacted by a remote hearing. In arbitration, due process concerns boil down to the question of

whether the parties have been afforded a “fundamentally fair hearing.” See, e.g., *Doral Fin. Corp. v. Garcia-Velez*, [725 F.3d 27](#), 32 (1st Cir. 2013)

This term of art is implicit in FAA section 10(a)(3), which permits vacatur in cases “where the arbitrators were guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy.” In other words, a hearing is only fundamentally unfair when an arbitrator denies a party an “adequate opportunity to present its evidence and argument” and the party is prejudiced as a result. See *Tempo Shain Corp. v. Bertek, Inc.*, [120 F.3d 16](#), 20 (2d Cir. 1997).

Although we can think of some outlier situations—such as where one party does not have access to sufficient bandwidth or where a court refuses to compel the remote appearance of an essential nonparty witness—in the vast majority of cases, there is little reason to think that a remote hearing, simply by virtue of being remote, will deny any party an opportunity to be heard. To test this contention, we conducted a review of all state and federal cases on Westlaw. We did not find a single pre-Covid-19 case where an arbitration award was vacated as a result of the receipt of testimony from a witness by telephone, video, pre-recorded deposition testimony, or other remote means.

To the contrary, courts have rejected challenges to awards based on the receipt of testimony by telephone and video, including where the parties raised issues relating to perceived impediments to cross-examination and the assessment of witness credibility. Here are a few examples:

- *Nuyen v. Hong Thai Ly*, [74 F. Supp. 3d 474](#), 482 (D.D.C. 2014), finding that the inability to observe the demeanor of witness—the respondent in the arbitration, who appeared at the hearing by telephone—did not deny petitioner the right to confront the witness or result in prejudice.
- *Trademark Remodeling, Inc. v. Rhines*, No. PWG-11-1733 (D. Md. Aug. 6, 2012), indicating that the plaintiff “failed to” explain “in any detail why it was unable to ‘adequately and fully cross examine the witness’ by telephone.”
- *Lunsford v. RBC Dain Rauscher, Inc.*, [590 F. Supp. 2d 1153](#), 1156-57 (D. Minn. 2008), explaining that “the arbitration agreement gave the Panel the ultimate authority to determine the location of the evidentiary hearing and plaintiffs were not prejudiced by testifying telephonically.”
- *Gedatus v. RBC Dain Rauscher, Inc.*, No. 07-1750 (D. Minn. Jan.23, 2008), finding that “Petitioner has not presented the Court any authority supporting his position that he was entitled to ... live testimony at his arbitration hearing.”

Awards have also withstood scrutiny when videotaped depositions were admitted. In *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc.*, for example, a panel's decision not to compel attendance of an elderly party and to instead admit a videotaped deposition was not a basis to vacate where prejudice had not been shown. [953 A.2d 726](#), 734 (Del. Ch. 2008). None of these cases addressed situations in which the entire hearing was remote, but there is no reasoned distinction to be made. Absent compelling circumstances, remote hearings are not fundamentally unfair and do not prejudice the parties.

Arbitrators may also be “guilty of misconduct” under section 10(a)(3) when “refusing to postpone the hearing, upon sufficient cause shown ...” But since the “expeditious resolution of disputes requires that arbitrators be provided with broad discretion and great deference in their determinations of procedural adjournment requests” vacatur will be denied “as long as there is at least a barely colorable justification for the arbitrators’ decision not to grant an adjournment ...” *Bisnoff v. King*, [154 F. Supp. 2d 630](#), 637 (S.D.N.Y. 2001).

When a preference for a non-remote hearing is the predicate for the adjournment request, denial of the request, depending on the facts and circumstances, is well within an arbitrator's discretion. The request boils down to an objection to proceeding remotely. But the arbitrator's belief that a remote platform will provide the parties a fair hearing makes postponement unnecessary, particularly where taking a wait-and-see approach during the pandemic and other circumstances can lead to protracted and unnecessary delay. Further, arbitrators are entitled to take their own schedules into consideration when ruling on requests for adjournment. Not unsurprisingly, the forgoing analysis is not altered by the fact that both parties request an adjournment. See *CM S. E. Texas Houston, LLC v. CareMinders Home Care, Inc.*, [662 F. App'x 701](#), 704 (11th Cir. 2016).

The feasibility and fairness of remotely held hearings should be clear for the further reason that holding remote hearings is not exactly a cutting-edge move by an arbitrator. First, arbitrators can look to years of court experience with remote testimony under Rule 43 as a guide. The Advisory Committee might not have been enthusiastic about remote testimony, but in practice there is often no material difference between remote and live testimony, and remote testimony can save time and money. As one court put it 20 years ago, "I am mystified as to why anyone would think that forcing a person to travel across the continent is reasonable when his testimony can be secured by means which are a) equivalent to his presence in court and b) preferable to reading his deposition into evidence. To prefer live testimony over testimony by contemporaneous video transmission is to prefer irrationally one means of securing the witness's testimony which is exactly equal to the other." *F.T.C. v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000).

Second, of necessity, the pandemic has led to greater use of remote technology to receive testimony and evidence. Federal and state courts alike have been holding remote hearings and trials. And it has worked. As one court explains, "one of the enduring lessons of the ongoing Covid-19 pandemic is that we can accomplish far more remotely than we had assumed previously." *Petersen Energia Inversora S.A.U. v. Argentine Republic & YPF S.A.*, No. 15 Civ. 2739 (LAP) (S.D.N.Y. June 5, 2020).

The reality is that remote proceedings are here to stay. Courts around the country are dealing with case backlogs and experimenting with new ways to maximize capacity. Even before the pandemic some courts recognized that using remote technology provides greater access to the courthouse and can increase efficiency. This is captured in a recent letter from judicial leaders to the Massachusetts bar, which emphasized that remote proceedings "enable attorneys to reduce the time (and therefore the cost) devoted to litigation, spare self-represented litigants from the need to miss work or find child or elder care, and allow civil disputes to be resolved equally thoughtfully but more efficiently."

Arbitrators have the authority to use remote technology to move arbitrations forward safely, expeditiously, and efficiently during the pandemic and beyond.