

Virtual Arbitration at a Glance

By Clara Flebus

On June 25, 2020, the Commercial and Federal Litigation Section co-sponsored with JAMS a live webinar featuring an interactive mock virtual arbitration of a commercial dispute. The Hon. Ariel E. Belen, arbitrator/mediator at JAMS and former Associate Justice of the Appellate Division, Second Department, led advocates and parties through a hypothetical virtual arbitration using an online platform (Zoom). Due to travel restrictions and social distancing imposed by the coronavirus pandemic, conducting arbitration by videoconference has emerged as an attractive solution to move forward with a pending arbitration, rather than submitting the case on the papers or postponing the hearing to a future date. In light of this recent trend, the one-hour webinar aimed at providing an opportunity to explore attorneys' most pressing questions and concerns regarding remote arbitration and offered first-hand exposure to the online hearing environment.



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1. Prehearing Conference Call via Zoom

As a first step, Hon. Belen, acting as arbitrator, conducted a pre-hearing videoconference through Zoom, a popular online platform that can be used for arbitrations and mediations of various sizes. The purpose of the conference was to hear from counsel for each side whether they were amenable to virtual arbitration. Hon. Belen informed the parties of his authority to order them to proceed with video-conferenced arbitration based on Rule 22(g) of the JAMS Comprehensive Arbitration Rules & Procedures, which states that "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." He noted that Rule 22(g) has been in effect since 2014 and was not created specifically as a result of the pandemic. Moreover, he indicated that the rule has been used in the past to introduce video deposition testimony, typically from third parties, in numerous hearings.

In the simulation, claimant's attorney was in favor of arbitrating the business dispute remotely. She expressed the view that in-person meetings are unlikely to resume soon, and when they will restart, the number of people allowed physically inside a conference room probably will be limited. Counsel was also concerned that in-person proceedings will require people to wear a face mask for the foreseeable future, rendering it impossible for the arbitrator to observe facial expressions of testifying witnesses. She concluded by noting that, in her opinion,

online videoconferencing technology has improved dramatically over the course of the past few months and is currently the safest and easiest way to participate in arbitration.

Respondent's attorney countered that remote technology does not provide a viable replacement for in-person proceedings. She raised several potential issues. According to counsel, confidentiality could not be assured; witnesses could be prompted by someone else in the room; assessing witness credibility would be limited by the inability to observe body language that is not captured by the webcam; and documents could not be presented to a witness while he or she is testifying at the hearing. Counsel opined that restrictions imposed during the pandemic are being lifted every day. Thus, she reasoned that the parties should wait a little longer until the arbitration could be conducted in person.

Hon. Belen addressed Respondent's concerns in turn. He explained that reputable ADR institutions make sure to use the latest and most advanced technology available to protect privacy and confidentiality of the proceedings, and parties are required to download the same program to their computer or tablet. With respect to an arbitrator's ability to assess credibility, he noted that so far videoconferencing has helped him focus on a witness's face better than when he presides over an arbitration in person because occasionally he may be distracted by other things occurring in the hearing room. In terms of presenting evidence to a witness, he indicated that best practice would be for counsel to agree on sharing an exhibit binder with Bates Stamp numbers and provide it to the witness. He also pointed out that Zoom offers the option of sharing a document on the screen, so that the arbitrator, opposing counsel, and witness are all able to see it.

2. Virtual Arbitration Order

As a second step, Hon. Belen decided that the case would move forward "virtually," although he indicated that it is preferable when both parties consent to it. He issued an "Order on Video-Conferenced Hearing," which

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laid out in great specificity technical aspects regarding the hearing as well as rules governing it. For instance, the order required that counsel and the arbitrator test their videoconferencing equipment to ensure that they can connect, and their video and audio systems work. According to the order, parties are responsible for testing the videoconferencing system with each of their own witnesses and any subpoenaed third-party witness. Importantly, the video conference must be of sufficient quality so as to allow for clear video and audio transmission of all participants.

As to confidentiality, the order provided that no person may attend, participate, or be allowed to listen in on the hearing without the prior consent of all parties and the arbitrator. To this end, each attendee of the virtual hearing must disclose all people physically in the room during each session. The arbitrator is permitted to ask a witness to orient his or her webcam to provide a 360-degree view of the remote location to confirm that no unauthorized individuals are present. Furthermore, the arbitrator must instruct each witness that recording the hearing is impermissible. Regarding witness testimony, the arbitrator may ask a witness to show the exhibits in front of him or her to verify that they do not bear any annotations. A witness may not look at any notes during examination.

Finally, the order stated that if the videoconferencing cannot proceed because of a technical failure, the arbitrator may reschedule the hearing or take any other appropriate steps necessary to ensure the fairness and integrity of the arbitration, including switching to a different modality.

3. Virtual Hearing

The third step addressed by the program was the actual online hearing. The hypothetical commercial dispute used arose out of a joint venture agreement between two entities to purchase and develop a parcel of property in Manhattan. Claimant alleged that respondent violated the agreement by failing to procure investors to fund the project and interfered with an existing investor after Claimant purportedly terminated the agreement with Respondent.

On the hearing date, each party met with counsel in a separate, private virtual “break-out” room. To protect security, participants received a link and a unique meeting ID for each Zoom session. Both sides had the opportunity to prepare and discuss the case while waiting for the proceeding to commence. A “moderator” from JAMS stepped into the virtual room to explain how to use Zoom functions on the screen and offered to troubleshoot technical issues.

Next, Hon. Belen admitted the participants to the hearing. At this point, the JAMS moderator disabled the Zoom recording function to maintain confidentiality. Hon. Belen noted that in a complex commercial case parties may consider hiring a court reporter to prepare a proper and reliable transcript.

After counsel for claimant and respondent delivered opening statements, the hearing proceeded with the direct and cross examination of the claimant’s witness. Hon. Belen pointed out that in a real proceeding, direct examination is presented primarily through a written declaration exchanged with the parties no later than two days before the witness is scheduled to appear. The purpose of the witness declaration is to save time during the hearing. Then, counsel calling the witness has up to one hour to expand upon the declaration through direct examination before turning the witness over for cross-examination.

During direct and cross-examination, the video switched back and forth between counsel and witness, depending on who was talking, as in a Perry Mason movie. It should be noted that Zoom gives participants the option to “pin” the video on a particular speaker, for example, the witness, if that is a preference. When the witness was asked to turn the exhibit binder to a specific Bates number and identify a document, the technical moderator assisted by posting that document on the screen through the “share screen” button available on Zoom. After the witness testimony concluded, the program attendees were left to imagine which side the arbitrator would choose as the winner.

The interactive mock virtual arbitration webinar was widely attended online and well received. The program provided a simple and concise demonstration of how arbitral proceedings may be conducted remotely, without a glitch, as an option to continue resolving business disputes expeditiously despite social and movement restrictions. The Section wishes to thank Chair-Elect Daniel K. Wiig and Matthew P. York of JAMS for organizing this enlightening and timely webinar, and the Hon. Belen for hosting it along with Niki Borofski of JAMS.

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