Can and Should Arbitrators Compel Parties to Participate in Remote Arbitration Hearings?

A Practical Guidance® Article by Theodore K. Cheng, Esq., ADR Office of Theo Cheng

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This article discusses the complex issue of whether and how an arbitrator can compel parties to participate in remote arbitration hearings amid the novel coronavirus (COVID-19) pandemic.

One adverse impact of the pandemic has been to create delays in the scheduling of in-person arbitration evidentiary hearings due to ongoing governmental regulations, travel restrictions, and concerns over personal health and safety. This delay undoubtedly compromises the promise of arbitration as an expeditious and cost-effective dispute resolution process. By agreement, some parties have arranged to proceed remotely using any one of the many available video teleconferencing ("VTC") platforms, such as Zoom, WebEx, or Microsoft Teams. Even if the arbitration agreement expressly prohibits holding a remote hearing, the parties could nonetheless agree otherwise and proceed remotely. Of course, if the parties conversely agree to proceed in-person, then the arbitrator should generally accede to their wishes, although proceeding remotely in the current environment would likely lead to a faster and less expensive process.

But what if there is a dispute between the parties as to whether to proceed remotely? When the parties' arbitration agreement specifically forbids remote hearings, it is a relatively easy matter for the arbitrator to:

- Refrain from proposing a remote hearing
- Deny applications to proceed remotely –or–
- Sustain objections when one party wishes to proceed remotely while the other does not.

See Code of Ethics for Arbitrators in Commercial Disputes (2004) (Code), Canon I.E. ("When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely."). But rarely do today's agreements explicitly address this issue.

Because the arbitrator is the decision-maker charged with resolving the parties' disputes, there are several things for parties and counsel to consider before deciding either to make an application to convert an in-person hearing to one conducted remotely or, conversely, to seek to postpone an in-person hearing until a future date when it is safe to do so. By its very nature, arbitration is a creature of contract. When there is a fundamental disagreement about how the proceeding should be conducted—particularly, the main event—the default arguably ought to be what the parties had originally intended when they entered into the agreement, namely, the normal in-person hearing.

But these are not normal times. It is difficult to imagine holding safe, let alone fulsome, in-person hearings when even vigorous disinfection, wearing masks, and social distancing do not necessarily guarantee personal health and safety. Moreover, the practicality of having witnesses testify

during an in-person hearing raises potentially problematic issues because mask-wearing can obfuscate a witness's appearance, demeanor, and reactions. With the realistic likelihood of scheduling in-person hearings being indefinitely postponed, parties, counsel, and arbitrators are all mindful of the adage that "justice delayed is justice denied." Indeed, in many circumstances, a delay in the proceeding invariably advantages one party at the expense of another.

When the prospect of an in-person hearing seems indefinitely delayed, an arbitrator operates under certain ethical duties that suggest an obligation to affirmatively propose that the parties undertake a remote hearing. Under the Code of Ethics for Arbitrators in Commercial Disputes, arbitrators:

- Have a responsibility to the arbitration process itself and must observe high standards of conduct so that the integrity and fairness of the process are preserved (see Code of Ethics for Arbitrators in Commercial Disputes (2004), Canon I.A.)
- Should conduct themselves in a way that is fair to all the parties and should not be swayed by outside pressure, public clamor, fear of criticism, or self-interest (see Code of Ethics for Arbitrators in Commercial Disputes (2004), Canon I.D.)
- Should conduct the proceeding to advance the fair and efficient resolution of the matters submitted for decision (see Code of Ethics for Arbitrators in Commercial Disputes (2004), Canon I.F.)
- Should afford all parties the right to be heard, allowing each party a fair opportunity to present its evidence and arguments (see Code of Ethics for Arbitrators in Commercial Disputes (2004), Canon IV.B)

Accordingly, there is a sound basis under the Code for the notion that arbitrators have an ethical obligation to affirmatively propose that the parties undertake a remote hearing, especially when the prospect of an in-person hearing seems indefinitely delayed.

These underlying ethical principles underscore the importance of maintaining the integrity and fairness of the process, advancing the fair and efficient resolution of the dispute, and affording parties a fair (but, notably, not necessarily perfect) opportunity to present evidence and arguments. They also operate as constraints on an arbitrator's authority and exercise of discretion in resolving a dispute over proceeding with a remote hearing.

Many arbitration agreements typically incorporate the use of a particular provider's arbitration rules, default to the Federal Arbitration Act (FAA) or applicable state arbitration statute, or leave the conduct of the arbitration proceeding to the sound discretion of the arbitrator. In each case, the arbitrator generally is afforded broad discretion to conduct the proceeding in a manner that advances the expeditious and cost-effective resolution of the dispute, while being consistent with its underlying premise of fairness and due process. See, e.g., AAA Commercial Arbitration Rule 32(c) (2013) ("When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must still afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination."); AAA Construction Industry Arbitration Rule 33(c) (2015) (same); CPR Non-Administered Arbitration Rule 12.1 (2018) ("The Tribunal shall determine the manner in which the parties shall present their cases."); JAMS Comprehensive Arbitration Rule 22(g) (2014) ("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.").

But exercising that discretion requires care on the part of the arbitrator to ensure that the party objecting to proceeding remotely and seeking a postponement to a day when an in-person hearing can be held has made an appropriate showing. Some factors for arbitrators, parties, and counsel to consider include:

- Timing considerations in the arbitration clause or case management orders
- The age of the proceeding
- The stage of the proceeding when the party makes the request or objection
- Whether it is premature to determine if the arbitrator should move the hearing online
- Whether the arbitrator previously held any in-person hearings
- The location and nature of a possible in-person hearing
- Whether the arbitrator can resolve a portion of the case through documentary submissions or a remote proceeding

- Whether the requesting party's reasons for postponement are reasonable and well-founded
- Whether the objecting party will suffer any undue prejudice by shifting to a remote hearing
- Whether there exist any continuing liability or time-sensitive matters, such as emergency health or safety issues
- The state of government regulations and associated travel restrictions, along with the family and health considerations of counsel, parties, and witnesses
- Whether there are legitimate concerns over the use of the VTC platform, such as:
    - Competency of the arbitrator, counsel, parties, or witnesses
    - Availability of appropriate equipment
    - Difficulty preparing or marshaling witnesses
    - Efficient handling of exhibits
    - Improper witness coaching
    - Preservation of confidentiality –and–
    - Platform security
- The technical support available to address real-time issues that may arise –and–
- Whether the arbitrator will be able to:
    - Understand the testimony and exhibits
    - Assess witnesses –and–
    - Decide the dispute fairly

See Nat'l Academy of Arbitrators, Formal Adv. Op. No. 26 (Apr. 1, 2020) (Adv. Op. 26); Neil Eiseman, Can a Commercial Arbitrator Demand a Virtual Hearing?, N.Y.L.J. (May 20, 2020); American Arbitration Association, "Considerations for Rescheduling Adjourned Cases" (2020).

In these extraordinary times, examples of reasons that likely would not establish sufficient good cause to prevent conversion to a remote hearing— absent extenuating circumstances—include:

- A mere desire or preference on the part of any participant to proceed in-person
- A lack of training on VTC platforms, particularly given numerous training opportunities offered for low or no cost
- An unfamiliarity, discomfort, disdain, or fear of technology
- The inability for any group of participants (e.g., counsel, parties, and/or witnesses) to be in the same physical location, either before or during the hearing

By contrast, some obvious examples that would likely qualify as establishing sufficient good cause include situations where a hearing participant:

- Tests positive for COVID-19
- Lives in the same household as someone who has tested positive for COVID-19
- Has been exposed to someone who has tested positive for COVID-19
- Must care for a family member who has tested positive for COVID-19
- Has closed the business due to governmental regulations
- Is unable to access the office where relevant case files are located
- Is in a location with unstable or unreliable telephone or internet service that the participant cannot otherwise remediate

Presently, there is little authority concerning the propriety of an arbitrator ordering parties to conduct a remote hearing. One notable exception is Formal Advisory Opinion No. 26 (April 1, 2020) issued by the National Academy of Arbitrators (the Academy), the organization of labor and employment arbitrators in the U.S. and Canada. See Adv. Op. 26. Based on the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, the Academy concluded that, in the absence of a collective bargaining agreement or an ad hoc agreement prohibiting video hearings, an arbitrator may—in exceptional circumstances—order a remote hearing, in whole or in part, without mutual consent and over the objection of a party. See Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (2007). The substance of this opinion, including the Academy's guidance on factors arbitrators, parties, and counsel should consider in terms of remote proceedings, is highly instructive for all participants regardless of whether the dispute arises in the labor-management context.

However, in its opinion, the Academy urged arbitrators to first obtain the parties' agreement to proceed remotely before determining that a video hearing is necessary to provide a fair and effective proceeding. Indeed, nothing in the opinion "imposes an affirmative obligation to order a video hearing absent the agreement of the parties."

Keep in mind that, under the FAA, parties may move to vacate an arbitration award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown." See 9 U.S.C. § 10(a)(3). State arbitration statutes often have similar provisions or afford vacatur under the general catch-all of arbitrator misconduct. See, e.g., N.Y. CPLR 7511 ("The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by . . . (i) corruption, fraud or misconduct in procuring the award; or . . . (iii) an arbitrator, or agency or person making the award exceeded his power . . . ."). Thus, to guard against vacatur of the final award, all arbitration participants should strive to create a complete record of all views on the matter before the arbitrator rules on an application or objection to converting an in-person hearing to a remote hearing.

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Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property (IP), technology, entertainment, and employment disputes. He has conducted over 500 arbitrations and mediations, including business disputes, breach of contract and negligence actions, trade secret theft, employment discrimination claims, wage-and-hour disputes, and IP infringement contentions. Mr. Cheng has been appointed to the rosters of the American Arbitration Association (AAA), the CPR Institute, FINRA, Resolute Systems, the American Intellectual Property Law Association's List of Arbitrators and Mediators, and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. He serves on the AAA's Council, and he is also the President of the Justice Marie L. Garibaldi American Inn of Court for ADR, the Immediate Past Chair of the New York State Bar Association (NYSBA) Dispute Resolution Section, and the Treasurer of the Copyright Society of the U.S.A. He has also been inducted into the National Academy of Distinguished Neutrals. Mr. Cheng received the 2020 James B. Boskey ADR Practitioner of the Year Award from the New Jersey State Bar Association Dispute Resolution Section, and the *National Law Journal* named him a 2017 ADR Champion.

Mr. Cheng has over 20 years of experience as an IP and general commercial litigator with a focus on trademarks, copyrights, patents, and trade secrets. He has handled a broad array of business disputes and counseled high net-worth individuals and small to middle-market business entities in industries as varied as high-tech, telecommunications, entertainment, consumer products, fashion, food and hospitality, retail, and financial services. In 2007, the National Asian Pacific American Bar Association named him one of the Best Lawyers Under 40.

Mr. Cheng received his A.B. *cum laude* in Chemistry and Physics from Harvard University and his J.D. from New York University School of Law, where he served as the editor-in-chief of the Moot Court Board. He was a senior litigator at several prominent national law firms, including Paul, Weiss, Rifkind, Wharton & Garrison LLP, Proskauer Rose LLP, and Loeb & Loeb LLP. He was also a marketing consultant in the brokerage operations of MetLife Insurance Company, where he held Chartered Life Underwriter and Chartered Financial Consultant designations and a Series 7 General Securities Representative registration. Mr. Cheng began his legal career serving as a law clerk to the Honorable Julio M. Fuentes of the U.S. Court of Appeals for the Third Circuit and the Honorable Ronald L. Buckwalter of the U.S. District Court for the Eastern District of Pennsylvania.

Mr. Cheng frequently writes and speaks on a wide variety of ADR issues. He has a regular column called *Resolution Alley* in the *NYSBA Entertainment, Arts and Sports Law Journal*, which addresses the use of ADR in those industries. More information is available at www.theocheng.com, and he can be reached at theo@theocheng.com.