Remote Arbitration: Embrace it or Avoid it?

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Strategic and practical considerations when choosing remote arbitration.

When thinking about a legal proceeding, one typically pictures a formal in-person event. However, in the aftermath of the Covid-19 Pandemic, certain virtual technologies have been integrated into various legal proceedings, including arbitration. Businesses of all types, especially those who conduct business across state lines, may consider remote arbitration as a dispute resolution avenue.

Below, you will find certain topics worth keeping in mind when deciding whether to include a remote arbitration provision in your next contract or agreement.

Key Takeaways

- Consider how remote arbitration can affect the execution of your case, including the presentation of your case, the tone of the proceeding, how it may affect the perception of witness credibility, and whether it may support third party witness participation.
- Consider how you will introduce exhibits and what technological rules you may want for your remote arbitration.
- Consider the practical aspect of remote arbitration, such as possible cost-savings, access to technology, scheduling based on time zones, and selecting an arbitration platform.

A. How will remote arbitration affect the execution of your case?

Items to consider when deciding whether remote arbitration is right for you are:

1. **Case Presentation.** Conducting arbitration remotely can affect how you present your case to the arbitrator. For example, the camera frame in video conferencing platforms may make it difficult to see non-verbal cues while a witness is testifying. Additionally, remote arbitration may be advantageous in contentious disputes by minimizing the amount of interaction the parties have.
2. **Arbitration Tone.** Unlike in a courtroom where the tone of the entire proceeding is formal, in an arbitration (whether it is remote or in-person), the Rules of Evidence are not strictly adhered to, which may lead to a more informal tone. This informal tone can be especially prevalent in remote arbitration where parties can participate from their homes. Consider how this informality may affect the presentation of your case.
3. **Witness Credibility.** Another consideration is how remote arbitration may affect the assessment of witness credibility. A witness's ability to convey his or her testimony effectively often depends on his or her ability to develop a rapport with the factfinder, which is usually more effective in person. By the same token, a witness who is

combative (and loses credibility because of it) might become less so when appearing on camera versus being cross-examined in person. If you know who the witnesses are going to be and can make an assessment as to how they are likely to perform under in person versus remote proceedings, that factor may be of great importance. A witness may also appear on camera at an inadequate camera angle or poor lighting, rendering it difficult to assess the witness's demeanor and body language. Be sure that each of your witnesses while on camera appears (and preferably is) engaged during the proceeding and dresses appropriately.

4. **Third-Party Witnesses.** Third-party witnesses are another consideration for remote arbitration proceedings. If your case would benefit from a third-party witness that is not local, it may be beneficial to hold the arbitration remotely so that it is more convenient, and therefore likely, that the third-party will voluntarily testify.

B. What are some practical considerations for remote arbitration?

Beyond the strategic considerations discussed above, there are certain practical considerations to keep in mind as well:

1. **Handling Exhibits Remotely.** Be sure to consider how you will introduce exhibits during a remote arbitration. Complex or large exhibits may be cumbersome to present to witnesses. While it is possible to introduce large exhibits during a remote session, it may take some additional thought and preparation to introduce the exhibits effectively and efficiently. Some things to keep in mind are: (a) how the exhibit will be remotely shared with the arbitrator, the adverse party, and the testifying witness; (b) will the witness have the ability to control the document while testifying; and (c) whether providing copies of exhibits (either in hard-copy or electronically) in advance would avoid unnecessary delays. There are many companies who now provide bespoke exhibit management software that can streamline the use of exhibits remotely if the amount in controversy in the arbitration warrants the cost of the service.
2. **Outline the Rules of the Remote Arbitration.** You should also consider what unique "technology" rules may benefit your remote proceeding. Key considerations include:
   - Is there a sequestration order for witnesses prior to their testimony or during breaks? If so, make sure your remote platform allows for secure, private virtual waiting rooms and the ability to admit participants as directed and on-demand.
   - Will virtual breakout rooms be available for private conversations?
   - Will virtual backgrounds be required or prohibited?
   - What is the protocol for marking and introducing exhibits
   - Should certain participants be required to keep their cameras turned on or off for the entire arbitration proceeding?
   - What steps do you need to take to ensure that witnesses are not being coached by counsel, or others, of camera during their testimony?
3. **Travel Cost Savings.** At a traditional in-person arbitration, the parties (including their counsel), the arbitrator(s), any third-party witnesses (including experts), and on occasion a court reporter, would meet at a physical location. The associated costs of an in-person arbitration can be substantial for the parties and may include expenses for travel and lodging. Remote hearings can significantly reduce these costs by eliminating the need to reserve a physical room, travel and provide lodging. Keeping hard costs in check can be especially important when considering the overall amount in controversy.
4. **Access to Technology.** In a remote arbitration, reliance on technology is important. If one party has drastically different technological resources or is disadvantaged due to unreliable internet services, the quality of the process could be affected.

5. **Time Zones.** Consider which time zones the parties are in. If the parties are in different time zones, think about what time during the day would be feasible to schedule a remote proceeding. Time blocks may be something you want to insert directly into the contract.
6. **Platform.** Unless it is dictated by the arbitrator, parties will need to decide on an arbitration platform. It is critical to select the right platform for your arbitration to ensure a smooth proceeding.

Ultimately, a holistic analysis of the case/the business relationship between the parties should be completed before deciding whether remote arbitration is appropriate. For more information on remote arbitrations, please contact Scott Magee and Paige Zacharakis.

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