White and Williams LLP

The Show Must Go On: Navigating Arbitration in the Wake of the COVID-19 Outbreak

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The recent COVID-19 outbreak has altered life for all of us, in ways both big and small. Unprecedented restrictions relating to the pandemic have forced individuals across the globe to change the ways in which they live and work. Perhaps not surprisingly, these restrictions have also changed the way we resolve disputes. Just as virtual conferencing has become the "new normal" for family gatherings and social events, it has also become the "new normal" for everything from mediation, to oral argument, to full-blown hearings.

To be sure, there are a number of advantages to conducting adversarial proceedings virtually. First and foremost, it results in substantial cost savings for the parties involved. In-person proceedings typically require significant travel expenses, including airline tickets, hotel reservations, and food and beverage stipends. The use of a virtual forum essentially eliminates these expenses, cutting costs dramatically for attorneys, clients, judges, and arbitrators alike.

Virtual conferencing also affords the opportunity for increased participation from party representatives living across the country, or even across the world. While demanding work schedules often make it impossible for multiple party representatives to attend a deposition, or even a hearing, in person, virtual proceedings require much less of a time commitment. Because these virtual proceedings require participants to spend less time away from other work-related obligations, party representatives are able to attend proceedings that they may otherwise have had to miss.

Perhaps most importantly, virtual conferencing ensures that cases continue to progress, allowing parties to achieve quick, efficient resolutions. This is consistent with the stated goal of the Federal Arbitration Act: to secure fair and expeditious resolutions of underlying controversies. *See* 9 U.S.C. §§ 1-6. Such efficiency gains are particularly important during the unprecedented times in which we find ourselves, where in-person depositions, hearings, and settlement conferences have become risky and challenging.

Despite the many advantages, there are also a number of disadvantages to conducting proceedings virtually. For many of us, the prospect of participating in virtual gatherings — both professional and personal — is daunting. Some of us have never used this type of technology, and may be uncomfortable navigating these new and uncharted waters. Attorneys, clients and arbitrators who have only ever participated in in-person depositions and hearings may find it difficult to ascertain an opponent's credibility from the other side of a webcam. Some witnesses may not even have a webcam, or a computer equipped with a camera or microphone. There is also potential for connectivity issues, as home Wi-Fi networks can be spotty and unpredictable. Worse still, there is potential for software and equipment malfunctions, or confusion transferring between hearing/deposition rooms and break rooms, which could result in accidental disclosure of privileged information.

Even if the parties have all of the appropriate equipment, and the technology is functioning as intended, there is still a risk that participants will overlook certain questions, or neglect to follow up on certain answers, due to the distractions that may exist in home offices. It is also more challenging for clients and counsel to interact during a virtual proceeding, since they can't easily pass notes back and forth.

Attorneys trying cases in non-arbitration settings also face obstacles associated with virtual examinations. In a jury trial, for example, attorneys often alter their lines of questioning based upon the reaction of a witness. Attorneys rely upon their ability to read the expressions of both witnesses and jurors alike when deciding whether to shorten or lengthen examinations, to shift the focus of the questioning, or to hone in on a particular point. Conducting direct and cross-examinations over a virtual platform can make it more challenging for attorneys to observe witnesses' facial expressions and recognize changes in tones of voice. Without these signifiers, an attorney may continue a line of questioning that he or she would otherwise have altered or abandoned.

Virtual proceedings may also hinder the development of the personal relationships that tend to grow naturally among attorneys, party representatives, and judges/arbitrators throughout the course of a dispute, and immediately following a final hearing. Moreover, virtual proceedings may be disfavored by arbitrators, who value the in-person contact that comes with the traditional hearing process, and may not be amenable to sitting at a computer screen for days at a time.

More importantly, though, are the constitutional concerns associated with virtual arbitrations. Indeed, it is well-settled that parties have a constitutional right to confrontation under the Due Process Clause. *See, e.g. Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (observing that, in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses). In a civil proceeding — such as an arbitration hearing — due process requires that the procedure adopted comport with fundamental principles of fairness and decency. *See, e.g. People v. Bona*, 15 Cal. App. 5th 511, 521 (2017). For someone who is uncomfortable with, or has no experience, participating in a deposition or hearing virtually, proceeding in such a way may not feel as effective as doing such things "in person."

Caught in the crosswinds of these competing interests, parties are finding themselves increasingly at odds over how to move forward in resolving their disputes. Many are left wondering who exactly is able to decide whether a matter must proceed virtually, or whether it must be set aside until in-person gatherings are deemed to be safe again. While parties in litigation have little choice, and must defer to presiding judges, things are a bit less clear in the arbitration context. Unlike judges, who exercise complete control over the cases in their dockets, the scope of an arbitrator's authority depends upon the arbitration clause in the contract(s) at issue, and any submissions from the parties.

It is well-established that arbitration is "a creature of contract," and that an arbitrator's authority is derived from the arbitration clause in the parties' agreement. *See Part-Time Faculty Ass'n v. Columbia College Chicago*, No. 17-cv-513, 2017 U.S. Dist. LEXIS 185806, at *25 (N.D. Ill. Nov. 9, 2017) (*citing AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000)); *Interchem Asia 2000 PTE Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 340, 353 (S.D.N.Y. 2005) (*citing Local 1199, Hosp. & Health Care Employees Union v. Brooks Drug Co.*, 956 F.2d 22, 25 (2d Cir. 1992)). Courts have generally held that, unless the contract between the parties says otherwise, arbitrators have broad authority to decide procedural issues. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685-86 (U.S. 2010) (indicating that

"procedural questions which grow out of the dispute and bear on its final disposition are presumptively…for an arbitrator to decide") (citations omitted); *Catamaran Corp. v. Towncrest Pharm*., 864 F.3d 966 (8th Cir. 2017) ("[m]any questions that arise in the arbitration context are procedural and subsidiary questions that courts presume an arbitrator may decide").

This broad authority generally includes the right to decide whether to hold an evidentiary hearing at all, or to resolve outstanding issues on summary judgment. *See, e.g. Sherrock Bros., Inc. v. DaimlerChrysler Motors Co*., 260 Fed. Appx. 497, (3d Cir. 2008) (finding that an arbitrator is empowered to grant any relief reasonably fitting and necessary to a final determination of the matter submitted to him, and that granting summary judgment surely falls within this standard…"); *See also Weirton Med. Ctr., Inc. v. Cmty. Health Sys*., No. 5:15CV132, 2017 U.S. Dist. LEXIS 203725 (N.D. W. Va. Dec. 12, 2017) (holding that an "arbitrator's procedural determination that summary disposition was appropriate has a reasonable basis in the parties' agreements[,]" such that "arbitrator did not exceed his powers in disposing of the arbitration on summary disposition").

In the reinsurance context, courts have applied this same logic when determining the authority of arbitration panels to issue summary judgment without a hearing. In *Global Int'l. Reinsur. Co. v. TIG Insur*. Co., 640 F.Supp.2d 519 (S.D.N.Y. Jan. 20, 2009), for example, a U.S. District Court in the Southern District of New York confirmed an arbitration award granting partial summary judgment in favor of a ceding company. The reinsurer had sought to vacate the award, arguing it had been denied a fundamentally fair hearing because the arbitrator had refused to hear evidence, disregarded the summary judgment standard, and resolved material factual disputes without proper discovery or an evidentiary hearing, in violation of Section 10(a)(3) of the Federal Arbitration Act.

The district court confirmed the award, noting: (1) that the settlement agreement at issue gave the arbitrator the authority to resolve "any dispute" arising from or relating to the settlement agreement and other agreements; (2) that arbitrators have "great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings;" and (3) that a court has very narrow authority to vacate arbitration awards, even if it disagrees with the merits of the arbitrator's decision, so long as there is a "barely colorable justification for the outcome reached." The court thus found that the arbitrator had acted within the scope of the authority delegated by the very broad provision and within the scope of his broad authority to manage the arbitration process.

Similarly, in *Lancer Ins. Co. v. Tolling Mfrs. Ins. Co*., 1990 U.S. Dist. LEXIS 10880, *6 (S.D.N.Y. Aug. 20, 1990), the U.S. District Court in the Southern District of New York again refused to vacate an arbitration award granting summary judgment. In *Lancer*, the party seeking to vacate the award argued that the panel's failure to hold an oral hearing constituted sufficient grounds for vacatur. The court disagreed, explaining that "[u]nless the parties have committed themselves by contract for oral hearings in the conduct of the arbitration, such procedural matters are committed to the discretion of the arbitrators." Thus, because the summary judgment ruling did not have the effect of denying the parties a fundamentally fair hearing, the arbitration award was be upheld.

Although a court has yet to address the issue directly, if arbitrators have the authority to decide whether or not an evidentiary hearing should be held at all, it seems likely that a panel will also have the authority to decide whether a hearing should be conducted virtually. Of course, the devil is often in the details, and where a virtual hearing does not

sufficiently allow a party to "put on their case" there is potential for a successful motion to vacate.

The COVID-19 pandemic has presented challenges (both personal and professional) to parties, counsel and arbitrators. While the world will recover from the pandemic and things will eventually go back to the way they used to be, it seems likely that the use of "virtual" conferencing is here to stay. And though these "virtual" proceedings may be a departure from how things have typically been done in the arbitration world, the use of video-teleconferencing has at the very least allowed for "the show to go on" while we all adjust to this "new normal."

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As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.