



## **2021 CLM Construction Conference**

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### **How to Arbitrate a Complex Construction Case Virtually – Practical Tips from the Trenches**

#### Summary

With civil jury trials delayed in jurisdictions across the country as a result of the COVID-19 Pandemic, virtual platforms for litigation and arbitration of construction cases are expected to become a standard course for time to case and those who are prepared to present a case virtually will be able to ensure that they obtain the best outcome in a case. Adding a further layer to the complexity of a virtual platform for an adjudication of a case in a complex construction case are the number of parties, large volume of documents, and technical issues and witnesses. There is much debate whether complex construction matters can effectively be litigated in a virtual fashion. Regardless of whether parties and counsel may not prefer the virtual option, it appears that virtual hearings and arbitrations are here to stay in at least some aspects. Astute construction companies, their insurers, attorneys, and consultants will best be served in investing in the necessary tools to build an alternative to the traditional hearing in a large conference room, at least for some cases. To do this, some changes in approach and awareness of the issues is necessary.

As more cases are presented through remote arbitration (as well as jury trials that we are starting to see proceed in some jurisdictions), practitioners should keep in mind several considerations to ensure the most effective representation of their clients. Of course, reams have been written about communication skills and styles, but there are four key considerations for a remote arbitration proceeding to consider: (1) understanding the audience; (2) getting the evidence to the arbitrator; (3) controlling the room; and (4) managing the technology.

#### **The Rise of Remote Dispute Resolution Options**

Many complex construction disputes have pre-selected arbitration (or similar processes such as judicial reference) as the forum of choice by arbitration provisions in construction contracts and Homeowner Association Covenants Codes & Restrictions. A well-crafted arbitration provision will provide guidance to the parties of the rules to apply, or the parties will often select a set of arbitration rules depending on the arbitrator's affiliation with a service provider. Most of the arbitration providers have well developed Arbitration Rules and Procedures. A careful review of these rules and procedures show that many have provided for remote witness testimony, and experience counsel have taken advantage of the expediency of use of videotaped testimony and

submission of deposition testimony in many complex construction cases. With the need in the last year to morph and pivot to accommodate the need for hearings to proceed, many of the arbitration providers some actively moved to create and implement specific rules and guidance for remote hearings.

For example, some of the

1. American Arbitration Association: [AAA-ICDR Virtual Hearings | ADR.org](#); see AAA Construction Arbitration Rules, Rules 32 and 33(c), and 39(d), allowing for video or other presentation of evidence.
2. JAMS: [Comprehensive Arbitration Rules and Procedures | JAMS Mediation, Arbitration, ADR Services \(jamsadr.com\)](#), see Rules 22(d) and (e), and see 22(g) which allows for a fully virtual hearing.
3. ADR Services Arbitration Rules: [ADR-ARBITRATION-RULES-FINAL-1-29-21.pdf \(adrservices.com\)](#), See Rule 33(d).
4. International Institute for Conflict Prevention & Resolution (CPR): [NEW: CPR's Annotated Model Procedural Order for Remote Video Arbitration Proceedings | CPR International Institute for Conflict Prevention & Resolution \(cpradr.org\)](#)
5. Others/State Laws: check your local rules as many courts have now implemented new (and constantly changing) procedures.

With COVID-19 shutdowns and stay-at-home orders, parties in the construction industry saw many impairments to proceeding with hearings and trials. The large volume of documents, oversized plans and drawings, and sheer number of parties and witnesses necessitated either a cessation of arbitration hearings or a move toward remote adaptations.

ADR has as its underpinning the creative use of options to resolve disputes – thus the term “Alternative.” During the last year, and continuing, many sectors sought to make some adaptations, including the construction legal industry. While some parties retreated to wait out to see how COVID-19 would proceed, many pressed forward and implemented remote proceedings.

### **What is Different About Remote Arbitrations**

As most are aware, in a traditional arbitration proceeding, the parties agree to be bound (if mandatory) to the arbitrator’s findings and a hearing will proceed in a more informal manner usually in a conference room. The rules of evidence are relaxed, if enforced at all. In addition, many arbitrations have used deposition transcripts or declarations in lieu of testimony, and for limited witnesses, have allowed for videoconference/videotaped testimony.

In a fully remote arbitration proceeding, the key issues and challenges include use of exhibits, witness credibility, and the ability to “read the room.” In addition, practical issues and

considerations include technology availability and support, witness comfort levels and distractions, and confidentiality concerns.

In the virtual arbitration proceedings to date, we have seen some ingenious use of technology as well as some trying to find workarounds to their advantage. One key issue of concern is “who is ‘in the room’” and how to address this in a remote hearing. Some rules address the concern of confidentiality and how to limit the audience to a remote hearing including the use of passwords and requiring attendees to have cameras on. Another difference is that the parties have some opportunity to involve the home office, vested stakeholders, and support teams who otherwise would only get a post-mortem on the hearing and results.

### **Distinctive Issues in Remote Construction Cases**

In complex construction cases, some key and unique considerations must involve the use of exhibits and demonstrative evidence to ensure that they are effective. The technology and planning are key. In addition, in most construction cases, the expert testimony can make or break the case; however, many expert witnesses may be experts on their topic of delay/scheduling issues, costs, and constructability, but are not experts on the use of technology. What is worse than an expert looking at her second computer screen the entire time being examined over a Zoom arbitration?

Cross-examination issues are also distinctive in a remote hearing. One of the critical aspects in an arbitration is being able to “read” the witness’ body language. There is an inherent difficulty examining a witness over the computer. Where does the witness look? What about the examining attorney – if you look down at notes or on another screen for typing which is normal when in-person, when on camera only, it can send the wrong message to the arbitration tribunal.

Similarly, credibility issues need to be considered and prepared for specifically. Extra training of a witness of where to look when answering questions is critical.

Finally, “Zoom Fatigue” in a remote construction hearing is something to consider and plan for. Not just for the arbitrator but for all involved. This is distinctive in large part often due to the detailed and technical nature of these kinds of cases.

### **Discovery Issues and Use of Remote Technology**

Some considerations for a remote construction arbitration are necessary at the outset of the case, and that includes careful thought and planning on the presentation of evidence that will be needed, the issues in the case, the exhibits to be used, and the witnesses.

Parties should carefully consider that witnesses may be deposed remotely, and preparation is key. Even if depositions are not allowed witnesses should be prepared and practice testifying in front of a computer.

Exhibits are one of the biggest issues. You need to determine how to present them for ease of reference for the arbitrators. Careful preparation of Stipulations and Scheduling Orders is important and issues of how depositions will proceed, what the parties will do in regard to exchange or presentation of deposition exhibits, what platform will be used, whether parties will have the option at the hearing to use deposition transcripts or video-recorded depositions, how to address technology glitches. In a remote arbitration hearing, discovery and depositions may be more critical than an in-person hearing and should be planned for accordingly.

### **Pros and Cons of Remote Hearings**

Despite the concerns over credibility and technology issues, there are ways to use a Remote Hearing to your benefit. First, the decision-makers and key stakeholders will have expanded access to the hearing process. The substantial reduction in costs for travel and associated meals, hotel, and time away from the office is substantial, particularly if the hearing otherwise would be across the country. In complex construction cases, witnesses and experts may be all over and the ease of access and limited disruption for a few hours of testimony cannot be overstated.

However, for a remote hearing, extra work will likely be required for witness preparation and presentation of evidence, and particularly the exhibits. For the large construction documents, your expert cannot simply pull up a sheet of the plans and flip to find the answer in response to a question; rather, the specific exhibit must be pulled and shown on the screen and the witness must then be able to manipulate it. Even if this can be accomplished, the amount of time required due to the technology and cumbersomeness is substantial. The issue of technology hiccups is not something to be disregarded as the more parties and individuals involved, the more complicated a drop of audio or poor connection becomes. Along this line, the use of a stenographer/court reporter can be problematic, for example, there often are times the court reporter may miss a word and stop the witness and flow to ensure a complete record is obtained and resulting in disruption and confusion.

While there may well be considerable cost savings in a remote hearing for a construction matter, there are other costs that in-person hearings do not include. First, the length of time required to present evidence remotely is simply just longer. Even with the best preparation, it takes longer to put up an exhibit and to ensure the parties have access. In addition, due to the pressure of being "on screen," additional preparation of your case is an absolute must. What might be acceptable in person can come across very poorly on the screen. In addition, you may need expanded technology support including a video technician and IT help on standby. Finally, the loss of personalized engagement and the process and Zoom fatigue are real costs in a remote setting that cannot be treated lightly. Instead, careful planning of breaks and other ways to engage the arbitrator and witnesses must be done.

Most litigators rely on their keen communication skills to present persuasive arguments to the trier of fact. But with a remote hearing, all of this changes – the lawyers, clients, and claim professionals are not in the same room, the neutrals' reactions and body language are opaque at

best across a screen, and witnesses and technology may impair the smooth and clear presentation of evidence. Indeed, technical glitches can throw off the most seasoned attorney or expert witness. Complex construction cases – with construction drawings, technical specifications, and detailed complex systems – are difficult enough to present to a jury or arbitration in person; however, for a Zoom arbitration, counsel will need to approach the presentation of evidence from a different angle. This panel will discuss ideas and tactics on how to best do this from the claim professional, expert, and attorney perspectives.

### **Overcoming the Issues of Remote Hearings**

Some of the other issues in a remote hearing that should be considered and planned for include controlling client expectations, working to address cost considerations and alternative arrangements, extensive and specialized witness preparation and engagement (including test runs on the computer) and determination of where and how the witness will testify, and importantly, determination of the right neutral for the case. As noted above, in a construction case that is document intensive, exhibits must be prepared for well in advance and a plan in place on how to present the exhibits. A war room of hard copies of documents and extra computer screens is highly recommended. Finally, consider the use of a secondary platform for confidential communication between team members on your side.

Virtual arbitrations for complex construction cases present unique challenges that need to be evaluated and prepared for well in advance of the hearing. Counsel, Parties, and their Insurance Partners can take these issues into consideration for an effective use of ADR.