A Neutral's Perspective on Using Remote Proceedings To Resolve Disputes During the Pandemic and Beyond

By Theo Cheng

There is no question that the pandemic has had a severe impact on access to justice through our court systems. In many parts of the country, courts remain closed or are operating at less than full capacity. The imposition of reasonable and necessary health and safety protocols has placed increasing pressure on courts to adopt technology and convert to remote (also known as virtual) proceedings. But adopting a technological infrastructure throughout a court system and mandating its use by the bar presents many challenges. There must be adequate training on remote platforms for judges, jurors, attorneys, clients, and witnesses; participants need to secure appropriate software and hardware (devices, cameras, microphones, speakers, headsets, etc.); and there need to be sufficient cybersecurity protocols in place.

With courts thus severely hampered by the impact of the pandemic, the need to resolve disputes more efficiently and quickly points to alternative methods of dispute resolution—like arbitration or mediation—as a potentially more viable option. Even without mandatory court-annexed mediation (or other alternative dispute resolution (ADR)) programs in place, parties can freely agree to have their disputes resolved in a different forum with, for example, the assistance of a trained arbitrator or mediator. Doing so can provide litigants with a more expeditious and cost-effective way to resolve their disputes. Indeed, under the circumstances we face today, ADR is increasingly shedding its "alternative" moniker and fast becoming the principal way to resolve disputes.

Practicing as an advocate in either mediation or arbitration already requires a different skill set than practicing in court or as a transactional lawyer. And converting to the remote world requires developing yet another set of skills because remote and in-person proceedings are not the same. Remote proceedings have undoubtedly become a very good substitute for the in-person experience, but they are not an exact replacement—nor are they meant to be. Counsel face challenges honing both their preparation and advocacy skills in the context of remote proceedings. As for a mediator, building rapport with the participants, establishing the requisite trust, and "reading the room" may also present some difficulties; for an arbitrator, assessing credibility and overseeing contested proceedings as the trier of fact present related, but different, concerns. This article will address just a few of these challenges and share some best practices that we all face in this new remote world.

Adopting and Using a Video Teleconferencing Platform

Preparing to participate in remote proceedings is a different affair altogether because of the need to adopt and use a technology platform as the forum in which to conduct the proceeding. Becoming familiar with video teleconferencing (VTC) platforms and how to integrate them into a trial practice are some of the key challenges for advocates more accustomed to in-person appearances.

Depending on the platform that is used, participants will encounter varying levels of cybersecurity and confidentiality, which may implicate both practical concerns and professional responsibility issues. Participants may also feel deflated from the lack of control they have over their online experience because someone else (the host) is usually manipulating and managing the platform. The inevitable technical glitches, bugs, and outages that accompany any software-driven platform dependent on the internet can also exacerbate this inability to maintain any semblance of control. Participants may further find it difficult to gauge credibility—or at least conclude that credibility evaluations must be accomplished differently in the online world—when the entire persona of a witness or other participant is restricted to a small video screen, which usually only displays the head and upper torso and generally lacks the ability to exhibit greater or broader body language.

While most of these concerns can be overcome through increased training, education, and continued practice and use of the chosen VTC platform, there are other concerns related to the psychological and neurological effects of communicating using VTC platforms.

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Known as "platform fatigue," they pertain to the distortions and delays inherent in video communications that confound the receipt of information and muddle well-accepted subtle social cues to which we are all familiar. These effects create gaps in the participants' perception of reality. Our brains then struggle to fill those gaps in ways that leave us feeling disturbed, uneasy, tired, isolated, anxious, and disconnected. Participants in remote proceedings may find it difficult to concentrate or have difficulty developing empathy, rapport, credibility, and trust, all of which are generally critical to successful remote proceedings. To combat platform fatigue, participants may decide to:

- refrain from multi-tasking while engaged in the proceeding;
- reduce on-screen stimuli from other sources, such as e-mail notifications and calendar reminders;
- build in regular and frequent breaks from the screen;
- stop the proceeding earlier than anticipated to prevent poor decision making by the participants; or
- switch to an entirely different medium, such as using the telephone.[1]

Perhaps the greatest challenge we all face is inertia—namely, the desire of advocates, clients, arbitrators, and mediators to continue handling matters in the way they are most comfortable doing them. To that end, it is important to become more facile and familiar with the features and limitations of VTC platforms, as well as the protocols that will make using those platforms both expeditious and cost-effective. For example:

- How will documents be handled?

  - Consider using a screen share or annotation feature for presenting documents to witnesses or other participants.

  - Consider having a second monitor to display documents for yourself.

- How will attorneys confer with their clients over the platform?

  - Perhaps use the platform's breakout rooms or private chat features, or, alternatively, hold offline private cell phone calls.

- How will attorneys confer with their co-counsel?

  - Because there is no ability to pass notes, perhaps use cell phone texting, e-mail messaging, or offline private cell phone calls.

- How will connectivity issues be handled when they (inevitably) arise?

  - Consider having a separate IT person on standby.

  - Conduct an inventory on available equipment (microphone, speaker, camera, laptop, tablet, etc.).

  - Hold a test session of the platform with all participants in advance.

Remote and In-Person Proceeding Protocols

At some point, it will be critical to hold a conference with at least the counsel and the neutral to go over the specific protocols that will be used, irrespective of whether the proceeding will be conducted remotely or in-person. These protocols will help guide the parties in understanding how best to utilize the chosen forum, while also putting into place appropriate health and safety measures.

For remote mediations, some topics to consider addressing at that conference include:

- *Decide which VTC platform to use*

- Consider whether the mediator or a third-party hosting service provider will roll out the platform to the participants and serve as the host.

- Consider whether the platform provides for screen sharing by multiple participants.

- Consider whether the platform meets the security, privacy, and confidentiality concerns of the participants.

- *Testing the platform*

  - Consider holding a test session with all the participants so that they are comfortable using the VTC platform, including sharing documents and navigating into and out of breakout rooms (as facilitated by the mediator or a third-party hosting service provider, if applicable).

- *Attendance at the session*

  - Consider allowing only previously disclosed participants to attend, "locking" the platform thereafter.

  - Perhaps require that no person who has not been disclosed to all other participants in advance will physically be in the same room as a previously disclosed participant (absent an inadvertent interruption, such as someone accidentally entering the physical room, and exempting children and pets).

- *Recording the session*

  - Consider generally prohibiting any recording of the session by or through any means (e.g., using a stream capture program on the computer, turning on the voice memo feature on your smartphone, etc.).

  - Consider recording the terms and conditions of any resolution (e.g., settlement agreement, memorandum of understanding, term sheet, etc.) in the presence of all participants.

- *Inadvertent seeing or hearing of confidential communications*

  - Consider requesting participants to immediately cease listening and viewing that communication and to let the affected individuals (or their counsel) know what has transpired.

- *Mediator entering breakout rooms*

  - Consider exchanging cell phone numbers so that the mediator can text counsel in advance.

- *Accidental disconnection from the platform*

  - Consider having affected participants immediately letting at least the mediator know via e-mail, text, or phone.[2]

For remote arbitrations, some topics to consider addressing at that conference include:

- *Deciding which VTC platform to use*

  - Consider the same issues as above with respect to remote mediations.

- *Attendance at the session*

  - Consider having the arbitrator and counsel ensure that the presence and participation of all attendees at the evidentiary hearing is reflected on the record at the beginning of (and, as necessary, during) each online session.

- *Testing the platform*

  - Consider setting a date by when everyone is assured that the participants have the video and/or audio capability necessary to proceed with the hearing.

  - Consider holding a test session with all the participants so that they are comfortable using the VTC platform, including sharing documents (as facilitated by a third-party hosting service provider, if applicable).

  - Perhaps have IT support readily available for when technical problems (inevitably) arise.

  - Decide on the protocols for when a connection fails (no video or audio) (e.g., exchange cell phone numbers in advance and call either the arbitrator or counsel if there is a disconnection, send e-mails, etc.).

- *Recording the hearing*

  - Designate by whom the recording (if any) will be made.

  - Determine where the recording will be saved/stored.

  - Ascertain who and how access to the recording will be provided.

  - Determine by when and how the recording will be deleted.

- *Witness examinations*

  - Consider whether the applicable law authorizes the arbitrator or the stenographer to administer oaths to witnesses by video or audioconferencing, and if not, obtain consent (or waiver) from the parties.

  - Decide who, if anyone, may be permitted to be in the same room as the testifying witness.

- Consider barring texting between counsel and witness during the examination and turning off any private chat functionality.

- Consider providing witnesses with a complete set of the parties' joint set of exhibits, along with a copy of the index.

- Alternatively, just use the screen sharing function on the platform.

For in-person proceedings, some questions to consider addressing at that conference include:

- What are the most up-to-date governmental health and safety regulations and measures that apply to the venue in which the mediation session or evidentiary hearing is taking place?
- Are there any associated travel, quarantine restrictions, or COVID-19 testing requirements that need to be accommodated?
- Does there exist any reason to adopt more stringent measures than are required under prevailing governmental health and safety regulations? (e.g., individual or family health concerns, personal preferences, etc).
- How many participants are anticipated to be in attendance at any one time?
- Is that number likely to change over the course of the session or hearing?
- Can the number of participants be regulated so as to minimize the number of people who are in the same room at the same time? (e.g., can some attendees—like the witnesses—participate via video teleconferencing (VTC)?)
- Does the proposed room provide for sufficient square footage and adequate ventilation (HVAC system, filters, windows, etc.) to accommodate the number of expected participants?
- Should portable high-efficiency particulate air (HEPA) fan/filtration systems be brought in to help enhance air cleaning?
- Are there windows in the building/room that can be opened? If so, should window fans be placed in them?
- Does the layout of the building that houses the proposed room afford sufficient passageways to practice social distancing?
- Does the building that houses the proposed room provide other rooms for testifying witnesses and others in which to wait/consult with counsel, or for the tribunal to meet and confer?
- How long will the session or hearing last each day? How often should breaks be scheduled?
- Where will the participants be seated? How will they be interacting (or not interacting) with each other in the room?
- Should participants be required to maintain social distancing requirements and hand-washing in compliance with recommendations of applicable health authorities?
- Will participants be required to use personal protective equipment (PPE), such as wearing masks? Will the obstruction to facial expressions, demeanor, and reactions be of material concern?
- Alternatively (or in addition), will portable clear plastic dividers (or some other kind of barrier) at (each/the) table, around participants, and/or around the mediator or arbitrator (or, in the case of a panel, around each arbitrator) be erected, or at least around a testifying witness (if that individual will be speaking without donning a mask)?
- Should there be daily or periodic COVID-19 testing of all the participants in the proceeding?
- Would it be feasible to have some of the participants in a separate room? (e.g., witnesses who are only needed for short amounts of time could appear via VTC)
- Will there be any hard copy documents used with testifying witnesses? If so, how will they be handled safely?
- Alternatively, should monitors be set up so that documents can be shown electronically, thereby avoiding any use of hard copies?
- How and under what conditions should participants inform the arbitrator/tribunal or mediator of a possible close contact with someone who has tested positive for COVID-19? What next steps should participants undertake upon being so informed?
- What disinfection protocols will be used during and/or after each session or hearing day?
- Should there be use of VTC platforms to accommodate individuals who may need to participate remotely (which is no different than when an accommodation is made for an individual witness to appear to testify for a limited time)?

The outcome of the conference could then be memorialized in a protocol document or an agreement of the parties (for mediations) or a procedural order (for arbitrations) that can be shared not only with counsel, but with their clients, client representatives, and any other participants.[3] The above considerations also underscore counsel's underlying responsibility to inform and pre-

pare their clients for the remote or in-person experience.[4] For example, for remote proceedings, it would likely be helpful to advise the client on such topics as appropriate dress, appearance, and the ambient environment that will be captured by the webcam, akin almost to preparing for a television interview. Additionally, coaching participants on taking their time due to difficulties with transmission and receipt on VTC platforms would also be helpful, as those platforms do not always allow for cross talk amongst participants. For in-person proceedings, being in a closed environment for any extended duration involves gauging the participants' comfort level with the health and safety measures that have been adopted and ensuring that they will adhere to them.

Assessing Credibility Over Video Teleconferencing Platforms

As noted above, at first blush, there is generally some difficulty assessing credibility without being able to fully read a participant's body language. But the alternative is to face indefinite delays or severely hampered in-person proceedings due to the implementation of appropriate health and safety protocols, which likely include wearing face masks and maintaining social distancing. Among other factors, such as the adequacy of the ventilation system, the number of anticipated participants in the proceeding will largely dictate the size of the room that is needed. The need for social distancing, in particular, will typically place participants very far away from each other—certainly further than if they had appeared on video—thereby exacerbating any obfuscation that may be created by the wearing of masks.

By contrast, using a VTC platform allows participants to focus in on the speaker in a manner that is likely closer and larger than if the proceeding were held in-person. Arbitrators and mediators, whose work requires them to constantly make credibility assessments, will have a greater opportunity to see the participants' faces and discern even subtle changes in expression. In addition, advocates, too, will be able to see more clearly whether testimony or other information that is being imparted during the proceeding is having an impact on the tribunal or mediator.

Benefits of Remote Proceedings

Over a year into the pandemic, counsel, parties, and neutrals have now firmly recognized the benefits of conducting remote mediations and arbitrations.[5] In particular, proceeding remotely has permitted many additional participants to attend who might otherwise have been precluded due to time or cost considerations. For example, a party's ultimate decision-maker often would not attend mediations due to that individual's busy calendars. But having them present at mediations is not only often required under certain court-annexed programs, but also desirable from the perspective of securing a durable and ratifiable resolution. Another mediation participant who typically participates only by telephone (or sometimes is available only by telephone) is the insurance carrier's adjuster. With the convenience of VTC platforms, those individuals now have an easier and better opportunity to attend and participate in mediation sessions.

Most promising about the advent of remote proceedings is the resulting broadening of opportunities for junior members of a litigation team—many of whom are younger, women, and/or people of color—to have the ability to attend and participate. Junior attorneys have oftentimes been unable to do so due to the additional costs that would be imposed upon both the firm and the client. But now, especially without the associated travel and lodging costs, they are able to continue being active on the matter by attending and participating in the proceeding, so long as the firm is willing (if necessary) to write off the time. In turn, doing so opens the door to both additional on-the-job training and increased opportunities for younger and diverse attorneys to participate in both mediation and arbitration proceedings, which is invaluable to their professional development and will ultimately inure to the firm.

Perhaps the most obvious benefit is that scheduling has become significantly easier because of the ability to avoid logistical issues related to coordinating travel and lodging schedules. Indeed, an increasing number of disputants are considering mediation even before commencing a formal proceeding in court or in the arbitral forum. This is especially true of intellectual property matters, which are notoriously expensive to litigate. It is even more true for matters with small amounts in controversy, which make little economic sense to file in court or submit to arbitration.[6]

As for arbitration proceedings, parties are increasingly considering entering into post-dispute submission agreements, under which they agree to have their dispute handled in the arbitral forum. Specifically, parties can agree to submit only a specific dispute to arbitration, and they can do so at the time the dispute arises, while the parties are engaged in negotiations over a resolution, or even if the dispute is already being actively litigated in court (i.e., because there was no pre-existing arbitration agreement). Although submission agreements can be challenging to consummate—because what one party perceives as the benefits of arbitrating the dispute, the other will likely view as disadvantages—the backlog in the courts have incentivized parties to enter into them.

Absent an agreement of the parties to proceed only in person, the pandemic has also created increased pressure on parties to convert to remote proceedings in order to fulfill the promise of arbitration as cost-effective and expeditious. Remote evidentiary hearings also open up the field of potential arbitrators because parties and counsel are no longer limited geographically in the selection process. The issue of whether arbitrators can compel a party to attend a remote proceeding, on the one hand, or an in-person proceeding, on the other, over its objection is beyond the scope of this article. But suffice it to say that all participants should strive to create a complete record of their views on the matter before the arbitrator or tribunal rules on an application or objection to converting an in-person hearing to a remote hearing, or vice versa.[7]

In any case, there has been a steady increase, particularly during this pandemic, in having intellectual property matters handled in arbitration, which is likely attributable to three factors: (1) a preference for having disputes resolved by those who understand intellectual property law and/or technology; (2) the need for preliminary or emergent relief; and (3) the need to maintain confidentiality.

First, arbitration is seen as having a number of significant advantages over litigation, and one of these advantages is that the parties and their counsel have the ability to choose their own decision-maker (and, in some cases, more than one decision-maker). That decision-maker can be someone who is an acknowledged expert in the subject matter of the dispute, the industry or background business norms in which the dispute arises, or the legal framework governing the dispute itself. Having such a decision-maker in place should, at least in theory, allow the proceeding to be conducted more quickly and efficiently than having it heard and decided by a randomly assigned and (most likely) generalist judge, who has no special expertise, knowledge, or insight into the dispute, the relevant industry, or the business context.[8] For example, an arbitrator with technical expertise related to the patent-in-suit will not only need to be less educated about the basic art or field by the parties and counsel, but also can perhaps better appreciate the technology. Likewise, a decision-maker with background or experience in trademark law would more likely be able to appreciate the intricacies and nuances of the applicable decisional law, as well as understand the business concerns underlying the parties' negotiations and expectations over their trademark licensing arrangements.

Second, as many intellectual property law practitioners know, preliminary relief—in the form of a TRO or injunction—can often be the main event and lead to settlement. Under the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*), which will likely govern most intellectual property-related disputes, courts have routinely held that arbitrators possess the power to issue nonmonetary remedies, and, in particular, to issue preliminary remedies before a hearing on the merits.[9] Currently, all major arbitration providers have included emergency arbitrator provisions in their default rules (although each expressly allows for the parties to opt out of these provisions through their arbitration agreements). These rules provide for fast assignment to a decision-maker and generally a faster decision at less cost.

Third, a related hallmark of an arbitration proceeding is its privacy and confidentiality.[10] Confidentiality has long been desired in intellectual property disputes, and the extended duration of matters in court due to the pandemic can exacerbate the likelihood that both the existence of the proceeding and its details will become more known in the public arena by having it open on the docket longer. If confidentiality is indeed a concern, the parties should agree to maintain that confidentiality throughout their dispute resolution proceeding. Critically, however, absent such an agreement, as would be the case in conventional court litigation, the parties would be theoretically free to disclose any aspect of the proceeding, ranging from publicly speaking about the case to the media to actually revealing information or documents obtained during the proceeding itself. Non-party witnesses who participate at any point in the arbitration process should also be bound by a separately applicable agreement between those witnesses and the parties to the arbitration (e.g., a non-disclosure agreement, a cooperation agreement) lest they also be left free to publicly discuss anything they may have learned or experienced, or to which they were exposed, as a result of their participation in the arbitration proceeding.[11]

Like so many other things, the art of lawyering has significantly changed with the onset of the pandemic. After several months, for the most part, the bench, bar, and other dispute resolution professionals have accepted remote proceedings as a natural consequence of the current circumstances. In particular, advocates need to adapt to the age of remote proceedings by preparing for them differently, counseling clients about new topics, and serving in their role in a manner that does not necessarily mirror the way they are accustomed to handling in-person proceedings. Even after the pandemic has subsided, remote proceedings will not suddenly disappear; to the contrary, they will be a mainstay of dispute resolution practice for quite some time and are likely here to stay. Indeed, we will likely see the emergence of different kinds of hybrid proceedings where some portions of the mediation session or evidentiary hearing will be conducted remotely.

The resiliency and flexibility of the legal profession, and among dispute resolution professionals in particular, has been some of the shining lights during these difficult and challenging times. We continue to have much to learn and experiences to share.

Endnotes

1. *See, e.g.*, *Why Zoom Is Terrible*, N.Y. Times (Apr. 29, 2020), available at https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html; Liz Fosslien and Mollie West Duffy, *How to Combat Zoom Fatigue*, Harvard Bus. Rev. (Apr. 29 2020), available at https://hbr.org/2020/04/how-to-combat-zoom-fatigue.
2. In April 2020, the Mediation Office for the U.S. District Court for the Southern District of New York issued "Zoom Mediations Best Practices Guide," which addresses other practical considerations for using the Zoom platform to conduct mediations. Those considerations range from selecting the appropriate equipment, choosing the location from which to participate, and engaging in pre-mediation testing of the hardware to setting-up the session, the various controls existent within the Zoom platform, and tips on looking your best on camera. The guide also includes a helpful bibliography of sources for further review.
3. Both the American Arbitration Association and the CPR Institute have promulgated model arbitral procedural orders relating to remote evidentiary hearings. *See* AAA Order and Procedures for a Virtual Hearing via Videoconference, available at https://www.adr.org/sites/default/files/document_repository/AAA270_AAA-ICDR_Model_Order_and_Procedures_for_a_Virtual_Hearing_via_Videoconference.pdf; CPR Annotated Model Procedural Order for Remote Video Arbitration Proceedings, available at https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings.
4. An attorney's duty of competence includes competence in relevant technology. New York Rules of Professional Responsibility Rule 1.1(a) mandates that "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment 8 to the Rule provides, in part, that "[t]o maintain the requisite knowledge and skill, a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."
5. For more on the benefits of remote mediations, *see* Theodore K. Cheng, V*irtual Mediation: Key Issues and Considerations*, Practical Law (June 2020), available at https://theocheng.com/documents/Virtual-Mediation-Key-Issues-and-Considerations-(2020.06.15).pdf.
6. On December 27, 2020, the Copyright Alternative in Small-Claims Enforcement Act of 2019 was enacted. Also known as the CASE Act of 2019, it creates a new statutory scheme under which a new Copyright Claims Board will decide small copyright claims. Participation is voluntary, with a 60-day opt-out procedure for defendants that allows the parties to have the dispute heard in court. If the parties go forward before the Copyright Claims Board, they forego the right to be heard before a court and the right to a jury trial. Damages are also capped at $30,000 in any one proceeding. The text of the act is available at https://www.congress.gov/bill/116th-congress/house-bill/2426/text. Essentially, the CASE Act creates another form of a small claims arbitration process.
7. For more on this subject, *see* Theodore K. Cheng, *Can and Should Arbitrators Compel Parties to Participate in Remote Arbitration Hearings?*, Lexis Practical Guidance Practice Note (Aug. 2020), available at https://theocheng.com/wp-content/uploads/2020/09/Can-and-Should-Arbitrators-Compel-Parties-to-Participate-in-Remote-Arbitration-Hearings.pdf.
8. For more on this subject, *see* Theodore K. Cheng, *Providing for Neutrals with Industry, Legal, and Business Expertise*, FBA The Resolver, at 5 (Spring 2019), available at https://theocheng.com/wp-content/uploads/2019/04/Providing-for-Neutrals-with-Industry-Legal-and-Business-Expertise-Resolver-Spring-2019.pdf.
9. *See, e.g.*, *CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. P'ship*, No. 12 Civ. 8087 (CM), 2012 U.S. Dist. LEXIS 176158, at *13-15 (S.D.N.Y. Dec. 10, 2012) (confirming and enforcing arbitrator's interim award that provided for pre-judgment security and a so-called Mareva-style injunction preventing respondent from transferring any assets, wherever located, up to the amount of $10 million until that security is posted); *On Time Staffing, LLC v. Nat'l Union Fire Ins. Co.*, 784 F. Supp. 2d 450, 455 (S.D.N.Y. 2011) ("Prior to the rendering of its final decision, the Panel, in the absence of language in the arbitration agreement expressly to the contrary, possesses the inherent authority to preserve the integrity of the arbitration process to which the parties have agreed by, if warranted, requiring the posting of pre-hearing security."); *see also British Ins. Co. of Cayman v. Water St. Ins. Co.*, 93 F. Supp. 2d 506, 516 (S.D.N.Y. 2000) ("Courts in this Circuit have firmly established the principle that arbitrators operating pursuant to [the FAA] have the authority to order interim relief in order to prevent their final award from becoming meaningless.").
10. For more on this subject, *see* Theodore K. Cheng, *Maintaining Confidentiality in Arbitration*, FBA The Resolver (Spring 2018), at 5, available at https://theocheng.com/wp-content/uploads/2019/04/Maintaining-Confidentiality-in-Arbitration-The-Resolver.pdf.
11. To the extent that the parties do not already have an agreement addressing confidentiality, it is a best practice to engage opposing counsel early on in the process to discuss this issue and raise it at the preliminary hearing with the arbitrator or panel. It has become common practice for parties in arbitration proceedings, much like they would in conventional court litigation, to seek to enter into stipulated protective orders governing the confidentiality of the proceeding and/or the designation and use of materials produced by parties (and non-parties) to which access may be circumscribed. As in court, these stipulations are generally presented to the arbitrator or panel for approval, or, alternatively, the parties may engage in motion practice before the arbitrator or panel on that issue. *See generally* Theodore K. Cheng, *Conducting a Preliminary Hearing in U.S. Arbitration: The Arbitrator's Perspective,* Lexis Practice Advisor Practice Note (July 2020), available at https://theocheng.com/documents/Conducting-a-Preliminary-Hearing-in-U.S.-Arbitration-The-Arbitrator%E2%80%99s-Perspective.pdf.