

Dispute Resolution in Pandemic Circumstances

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The peaceful resolution of disputes is among the most important earmarks of a regime attached to the rule of law. Even in countries in which, for one reason or another, courts do not work especially well, civil peace is of paramount importance. The absence of effective institutions for the administration of justice between and among private parties would spell a high degree of social disorder.

Even in the absence of a crisis such as we are experiencing, justice systems face a number of challenges in this day and age. Does a jurisdiction have a sufficient number of persons qualified to administer justice, and what are the consequences of a shortfall? In the same vein, is civil justice operating under formalities that generate delays disproportionate to the purposes they serve? Do the procedures that are in place sufficiently allow parties to adequately present their case and adequately rebut their adversary's? Is access to justice prohibitively expensive, most likely due less to court costs than to costs of representation by counsel? Are there safeguards in place to ensure the independence and impartiality of decisionmakers, and do they work? Is institutional bias or corruption a problem? Overall, does a justice system exhibit the qualities widely viewed as essential: procedural fairness, accuracy, and efficiency?

Long-distance Justice

These are concerns we have even in ordinary times, and irrespective of any exogenous factors may come into play. It is on top of these concerns that there have now emerged a whole new set of concerns traceable to the circumstances in which the prevalence of the Coronavirus has placed us. Some of these have never arisen before, at least not in the magnitude we are experiencing. How great a threat are they to the principles upon which our justice systems have

been built, and how can they be addressed most fairly and workably? How must we alter our modes of conduct in order to serve the purposes that our activities are meant to achieve, and to what extent are those changes technologically and humanly feasible?

In the discussion thus far, reference has been made, if only implicitly, to courts of law. However, civil disputes are obviously no longer resolved solely in national courts. They can be resolved amicably or through mediation or conciliation. But, especially in international transactions, arbitration has become an especially favored mode of dispute resolution.

The most important challenges for the administration of justice, whether judicial or arbitral, is obviously technological. As a result of the pandemic, the great majority of business and professional interactions are now taking place strictly online, and the administration of justice is no exception. This means big change. This is due largely to the fact that, particularly in litigation, but much less so in arbitration, we have traditionally operated on the assumption that the proceedings associated with the administration of justice take place in-person, with parties, counsel, witnesses, and court reporters all performing their roles in the presence of one another and, of course, in the presence of the adjudicator. This assumption must be jettisoned.

Virtual Proceedings

It is important to distinguish at the outset between phases of litigation or arbitration that are conducted “before” a judge or arbitrator and those that are not. In a great many circumstances, counsel traditionally perform their tasks and interact directly with opposing counsel without involvement of a court or tribunal. Pleadings, briefs and memorials are as easily submitted to the court or tribunal as well as opposing counsel as they have been up to now, i.e., remotely, via email or courier service. That is equally the case for pre-trial discovery and settlement negotiations.

Attention is therefore best focused on those moments in which proceedings ordinarily take place before a court or tribunal. Some proceedings before a court or tribunal, such as case management conferences, have also for a long while been performed at a distance, whether telephonically or online. Therefore, what remains to be considered are mostly hearings

themselves. These are the occasions when “change of venue” from a physical courtroom to a virtual courtroom stands to be most disruptive.

Even so, thanks to available platforms such as Zoom, there is no obvious reason why what transpires in a physical courtroom or hearing room cannot largely be replicated online. All that is required is that the judge or tribunal chair establish a meeting and invite all relevant parties to participate. These platforms appear to accommodate as many persons as are ever likely to participate in any given proceeding. As a result, an online hearing should unfold mostly as it would in person. Oral argument can obviously be performed online, as can examination and cross-examination of witnesses, transcription by a court reporter, or interpretation to and from a foreign language, with no one needing to be in the same room. To this extent, the situation is not unlike those university professors, such as myself, who conduct their classes online.

The Arbitration Scene

The use of video-conferenced hearings in arbitration was already well advanced when the pandemic struck. Online hearings have been a technological reality for some time. The International Center for the Settlement of Investment Disputes (ICSID), which administers the lion’s share of investor-State arbitrations, reports that it sees every year a steady uptick in the number of hearings online. In 2019, about 60 per cent of the 200 hearings and sessions organized by ICSID were held by video-conference. Indeed, “block-chain” arbitration, which is obviously 100% online, is a reality, if by no means yet a widely popular one.

ICSID reports that its video-conferencing platform does not require special hardware or software and that a computer with an internet connection and webcam is sufficient for effective and secure participation. Hearings with hundreds of participants have been held online. The available platforms are sufficiently sophisticated for the purpose. All participants have the ability to share audio and video, as well as content such as PowerPoint presentations. A virtual chat function allows participants to communicate individually strictly with one another or with the entire group. A virtual court stenographer provides a real-time transcript of the proceeding, visible to all participants on the video-conference. Particularly in arbitration, but also in litigation,

demonstratives, as they are called, are increasingly in use. It makes little difference whether they are exhibited by power-point online rather than in a hearing room.

Thus, arbitral chairs (and solo arbitrators) are readily acting as hosts, convening sessions online, by inviting participants in whatever manner the platform in use provides. It is not proving particularly difficult for participants to learn how to navigate the platform that an arbitrator selects, whatever shape individual learning curves may take. This process is well underway in a large number of arbitral proceedings, with no particular technical difficulties.

Although individual arbitrators are proving capable of launching and managing an online arbitration, nothing prevents the arbitral institutions, such as the American Arbitration Association or the International Chamber of Commerce International Court of Arbitration, under whose aegis the vast majority of arbitrations take place, from establishing an institution-wide system available to all tribunals proceeding under their auspices. This is happening in ICSID, which has its own online system, that it is making available also to arbitrations conducted under other institutional rules or the UNCITRAL Rules. There is an ICSID hearings team that works directly not only with the tribunal, but also with the parties, so that they perform their role with confidence. ICSID IT staff members are present throughout hearings to ensure they run smoothly. It is already apparent that all the other leading arbitral institutions are heading down the same path.

The Litigation Scene

Arbitral institutions appear to be significantly ahead of the courts. According to reports, at present, judges are scrambling individually to equip themselves with Zoom and like technologies, and it is not clear that courts are developing video-conference systems for use by all their individual judges in the fashion in which arbitral institutions are developing such systems for their tribunals. It would clearly be advisable for them to do so.

The Administrative Office of the US Courts recently made the following recommendations to all federal courts, urging them:

- to hold in-person court proceedings only when absolutely necessary, utilizing videoconferencing or audio-conferencing capabilities where practicable
- to conduct jury proceedings only in exceptional circumstances
- to limit the number of family members who attend proceedings
- to stagger scheduling of critical court proceedings to reduce the number of people in seating galleries, wells of courtrooms, conference rooms, and public waiting areas, and
- to limit staff at critical courtroom proceedings to fewer than 10 people, and ensure that they are at least six feet apart.¹

As can be seen from this inventory, it is by no means anticipated that all judicial proceedings will take place online. While in-person court proceedings are to take place “only when absolutely necessary,” they are evidently expected, at least to some extent, to continue. Only if they were to continue, would, for example, it be necessary to “stagger scheduling of critical court proceedings to reduce the number of people in seating galleries, wells of courtrooms, conference rooms, and public waiting areas” or “limit staff at critical courtroom proceedings to fewer than 10 people, and ensure that they are at least six feet apart.” State court systems are moving at different rhythms; some have no choice but to go online (or else suspend activity altogether, at least temporarily), since some state courthouses are closed due to the fact that persons found to be virus-infected had recently attended proceedings there. But there is progress. The American Bar Association very recently conducted an instructional webinar in which 500 judges participated.

Changes Nonetheless

The fact that courts and tribunals are equipped to carry on business reasonably well does not mean that nothing changes. One need only visualize how court and arbitral proceedings ordinarily unfold. Consider witness testimony. A witness may be examined remotely, but something is inevitably lost in the process. Clearly the opportunity for counsel and court or

¹ <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19> (last consulted March 22, 2020).

tribunal to observe a witness' demeanor is greatly reduced. Body-language remains unseen. Nor is there any way to know to what extent, if at all, a witness, in testifying is being coached by someone sitting next to him or her, but not visible on a screen, or is consulting documents that he or she would not be permitted to consult in a courtroom or hearing room.

There is much discussion of the impact of the pandemic on the conduct of jury trials. It is entirely possible for jurors to observe civil and criminal proceedings on line, once their home computers are equipped, or even to deliberate online, but the absence of physical proximity between jurors and witnesses, as well as among jurors while deliberating, cannot help but make a difference. Moreover, many of the ground rules governing the conduct of jury trials presuppose a degree of sequestration of jurors from others – though, ironically not much of a problem with the current prevalence of shelter-in-place orders.

In litigation, counsel may approach the bench to address the judge beyond hearing by others. Similarly, in arbitration, members of the tribunal, faced with a difficult objection by counsel, will retire from the hearing to the tribunal's breakout room, or simply the corridor, to exchange views and reach a ruling. Ways must be developed by which this can take place without hearing by others in the "room". It is common, again in arbitration, for fact witnesses to be sequestered while other fact witnesses testify, so as to disable witnesses from molding or tailoring their testimony in accordance with what another witness may have said. Now, the witness will need to be removed from the room technologically.

Similarly, counsel ordinarily take signals from the way in which adjudicators physically react to their oral advocacy or examination of witnesses, whether by grimaces or raised eyebrows, or hopefully a benign countenance. There can essentially be no movement on the part of those who are speaking. Changes in advocacy styles may well result. Put more simply, we are accustomed to experiencing litigation and arbitration as theater. Much of the cast will be present at all times during online hearings, but not all visible to one another, with the element of drama necessarily subsiding. With the move to online adjudication, the atmosphere will have undergone a profound, if subtle, change, in these and so many other ways, the implications of which will only be fully understood with the passage of time.

Deadlines

One of the first things courts and tribunals do, once assembled, is establish a calendar for the proceedings. Arbitral tribunals, more so than courts, are likely to produce early on a calendar reflecting the entire length of the proceedings, from beginning to end, procedural step by procedural step. Deadlines abound, not only in the calendar, but over time. Uncalendar motions will be made, in the wake of which all parties will be given a fixed deadline by which to state a position.

Some proceedings will have been well underway by the time the dislocation and disruption occasioned by the pandemic have occurred. The proceedings will have to be conducted differently midstream. Short-term delays are inevitable. But for all the reasons stated above, courts and tribunals have it largely within their means to adapt usual litigation and arbitration activities to the demands of the technologies that will now govern. We have no choice but to believe that courts and tribunals will exercise the good judgment and common sense we ascribe to them in making the necessary rulings on requests for relaxing the ground rules and, in doing so, striking a sound balance between efficiency and fairness.

It is also a watchword of both litigation and arbitration that the parties to a dispute must enjoy “equality of arms,” i.e., an equal opportunity to make their case and refute their opponent’s. As courts and tribunals make whatever adjustments they do to the calendar, they need to be correspondingly sensitive to due process in all its manifestations.

Conclusion

It is useful in conclusion to put what has been said in a somewhat larger perspective.

First, how does the magnitude of the “upheaval” – to use a somewhat hyperbolic term – in the administration of justice compare to the upheaval to be experienced in other fields of endeavor. Some fields of endeavor may be adapted to the technologies at our disposal more readily than others and, conversely, technologies may be adapted to some fields more readily than others.

It may work to the advantage of litigation and arbitration that both entail well-established staged forms of activity, marked by a more or less recurring set of discrete steps. No litigation or arbitration is “routine,” but these activities do tend to be “routinized.” No less important, dispute resolution is largely a matter of words, oral or written. A sphere of activity in which words loom so large lends itself well to the technology to which we are all turning for the conduct of business and professional activity under present circumstances.

Second, some activities were already set on a novel technological path long before the pandemic occurred. Such is the case of arbitration and, unfortunately, much less so in the case of litigation. Already years ago, the arbitration community was on a quest to make fuller use of available technologies. A law journal dedicated to that very purpose – *The Journal of Technology in International Arbitration* – was established some time ago and is prospering. The motivation for technological innovation in arbitration, much like the motivation for “expedited” or “fast-track” proceedings, was largely one of economy in time and cost, to which concerns over consumer arbitration have contributed. Thus, adaptation to a pandemic was not required in order for this transformation to take place. In other words, greater and better use of technology was already identified as distinctly in arbitration’s best interests and, according to some, inevitable. If that is the case, the present pandemic is only hastening arbitration’s progress, albeit somewhat precipitously, down a path it was destined to travel anyway.

Reform in civil procedure reform has always moved at a distinctly slower pace than reform in arbitral procedure. Arbitral institutions operate in a highly competitive market, revising their rules every several years, if only to borrow innovations that other arbitral institutions will have recently introduced. For the most part no such competition prevails in civil litigation at the national level, and the intervals between procedural reforms are decades – many decades – rather than years. For these and other reasons, modernization in civil litigation has not kept pace with modernization in arbitration. But the functionality of national court systems depends on closing that gap. The present crisis makes that only more apparent and can be a catalyst for change.