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Three Tips for International Online Dispute Resolution in the Age of COVID-19



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The COVID-19 pandemic has made online dispute resolution (ODR) a mainstream feature of appropriate or alternative dispute resolution (ADR). Historically, ODR tended to be used for cases where the cost of in-person meetings or hearings was impractical, or by parties enthusiastic about the use of technology. Now, with the limited ability to travel and hold in-person meetings, ODR has become a necessity.

Parties reluctantly adopting ODR will find it has several benefits, such as being less expensive, greener, and more flexible and convenient for convening parties in disparate locales around the world. On the other hand, ODR results in the loss of in-person interaction that can be critical for building trust and rapport. In addition, some parties may have challenges using or accessing technology, and there is greater risk of unauthorized behaviors, such as attempts to record proceedings or include a third party without permission.

Although ODR can dramatically reduce the difficulty and cost of resolving international disputes, having a California-based neutral meet online with, say, Tokyo- and London-based parties comes with

its own tribulations. Where multiple time zones are involved, there may be only a few hours of traditional business time available.

As neutrals with experience mediating and arbitrating with parties located abroad, we have put together this list of three tips to keep in mind.

1. DO MORE ASYNCHRONOUSLY

Give serious consideration to whether an online meeting or hearing is really necessary, and if it is, how it might be made more time efficient. For example, getting the parties to agree to exchange mediation briefs with one another can help ensure that both sides are thinking about the same issues at an early stage. Holding premediation caucuses with each side can be particularly effective because it allows the mediator to master the factual and legal background in advance and identify information gaps that may need to be addressed prior to the main session.

A mediator may also stagger a mediation so that a first party joins online before the second. This can help to avoid the second party sitting around waiting for the mediator to complete an initial discussion with the first party. Of course, mediators should be cognizant that different parties may have different levels of sophistication and familiarity with the process, and should avoid the appearance of giving preference to one party as a result of staggered joining times.

In arbitration, *ex parte* discussions are generally not allowed, but it may still be possible to simplify or minimize hearings. For example, a live evidentiary hearing is not necessary in many cases, and discovery disputes and motions can often be heard solely on the documents—something to which parties based in civil law jurisdictions will be more accustomed. Another common time-saving device in international disputes is to submit all direct testimony in the form of witness statements and to reserve hearing time for cross-examination. Using a chess-clock system can also help the proceedings stay on track, especially given that countdown timers are more readily visible on a computer screen than in a hearing room.

2. CONSIDER PHYSICAL SETTINGS

Neutrals should discuss ODR environments with the parties in advance. This should not only include obvious points such as the prohibition on the presence of unauthorized parties or the recording of the meeting, but also the importance of having a

stable internet connection and a home or work environment free of distraction to the extent possible. In the case of mediation, consider in advance whether you wish to speak with the lawyer separately from his or her client. Lawyers and clients often Zoom in together from the same physical space, but this makes it difficult to speak with the lawyer about client control or other issues that would best be discussed separately.

Due to pandemic-related restrictions on movement, a party may be forced to participate in an ODR proceeding with a less than ideal background; therefore, the neutral should make an effort to help resolve this in advance or discuss accommodations. Neutrals should lead by example and ensure they have a stable online connection together with a nondistracting background. Virtual backgrounds can sometimes be distracting, especially when combined with movement.

3. BE SENSITIVE TO LOCAL CONDITIONS AND EXPECTATIONS

No one wants to start a meeting at 4 a.m. or 10 p.m., but that may be the unfortunate necessity of international ODR. Neutrals should be aware of the local times of all participants, and where meetings or hearings on multiple days cannot be held at a mutually convenient time, the time should rotate to avoid disadvantaging any particular party.

Consistent, high-quality internet service cannot be taken for granted in many countries. As a result, parties might experience difficulty accessing the meeting, or their connection might be compromised in ways that make it difficult for others to understand what they are saying. To the extent possible, conduct a test prior to a hearing and give parties the option of appearing by telephone or with their video turned off.

The neutral should also check with the parties in advance on their preferences and availability, being sensitive to local norms. We can think of examples, particularly in developing countries, where parties sometimes have unexpected flexibility to start early, or unusual requirements to end early, in order to avoid long commute times caused by infrastructure constraints. In addition, not all countries observe daylight savings time, and some switch to and from daylight savings time on different days. If the local time changes between when a meeting is set up and when it will occur, it is possible that a party (or the neutral) will show up an hour late.

Applications like Outlook and Google Calendar can help prevent this outcome by automating an otherwise error-prone process of calculating time differences.

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