

## What The Coronavirus Means For Arbitration And Mediation

By **Jeff Benz** (March 4, 2020, 3:06 PM EST)

It is one thing to say that hearings in China might be affected by the coronavirus epidemic. It is another thing entirely to realize that the virus has spread to Europe and is in close proximity to the commercial centers — and commercial dispute resolution centers — of Geneva, Zurich, Milan, Paris and London.

Cases around the world are increasing dramatically daily. This is our reality in early 2020. Arbitration and mediation institutions must be prepared to deal with this reality.

Arbitrators, mediators, lawyers and parties may no longer be able to traverse the world as freely as before as a matter of national legal restriction. And they may wish to stay home as a matter of self-preservation.

The coronavirus will not stop disputes from arising and, in fact, may actually give rise to more disputes. Force majeure clauses are alive and well in commercial contracts, even if they were perhaps not expressly crafted for viruses, instead focusing on issues related to weather, terrorism and natural disasters.

Parties may be unable to perform in accordance with their contracts because of government restrictions on access to factories and places of work, or voluntarily adopted preventive measures. And, of course, consistent with the rest of human endeavor, there will be those who use the coronavirus to invoke the force majeure provisions of what they consider to be a bad agreement so they can make an exit with minimal consequences.

All of this will breed a new kind of dispute, one that centers on whether these contractual clauses have been satisfied, with arguments and disputes over reasonableness.

### Navigating a New Reality

How can institutions, arbitrators, mediators, lawyers and parties deal with this new reality so that the world of commercial dispute resolution keeps humming along and resolving disputes? There are a number of ways.

Arbitrators, when crafting their procedures, orders and directions for a case, should give more



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consideration to the need for, and benefits of, mechanisms to create efficiencies and minimize in-person or inter-party interactions. Arbitrators and counsel in arbitrations should review, revisit with the parties and revise procedural orders and directions on scheduling of the proceedings to find ways to accommodate this new changed reality.

Consider what kinds of hearings, if any, absolutely must be held in person.

## **Maximizing Technology to Keep Business Moving**

### ***Video Conferencing and Teleconferencing***

Arbitration and mediation institutions' rules do not generally describe in any detail what constitutes a hearing. This allows tremendous flexibility for the arbitrator(s) and the parties to agree on hearing formats that might not meet the traditional model of a U-shaped table in a conference room, with arbitrators sitting at the base and parties, witnesses and counsel sitting on the sides.

Hearings can be held by videoconference, or, if they must be conducted in person, in a format that limits the number of people in the room to only those who are absolutely necessary. Party representatives and others can access the video feed in another room or location.

Fact witnesses testifying live in a hearing room, with everyone in the room wearing surgical masks, could be part of our new reality. Arbitrators would have great difficulty evaluating the credibility of those witnesses, whose facial expressions would be shrouded.

Institutions, and lawyers, must review their videoconferencing capabilities. A robust system that allows for multiple split screens; the appearances of counsel, arbitrators, witnesses and parties simultaneously around the world; and the easy exchange of information are the basic requirements.

Mediation by telephone, using virtual conference rooms that can be made private with one party, or shared with all parties and their counsel at the touch of a button, is a format that works. I speak from having mediated nearly 100 cases in this format. Success rates are similar to or better than mediations conducted in person. In this format, it is important to develop some ground rules regarding time and the exchange of information at the outset, and then stick to them.

While parties might be deprived of having that village elder to speak with, they do get an efficient and often less expensive and quicker process than they would in person. This is not to say that in-person mediations do not have benefits over telephonic mediations. But in balancing personal safety with effectiveness, a telephonic mediation can yield excellent results.

Online filing systems and international access to electronic documents, available on demand, may be necessary.

Witness statements comprising direct testimony, long accepted in English and international practice (less so in American practice), should be used more often to keep live presentations to a minimum (even if live on video) and focus the parties, counsel and arbitrators on points of difference in testimony, not unnecessarily showcase points of agreement.

Do expert witnesses really need to be examined in person? Given that they are not fact witnesses, there is not much traditional fact witness credibility to judge in person. Video for experts can now become the

new standard.

While not optimal, it is possible and not very difficult to prepare witnesses by videoconference or in a larger room, separating people to avoid unnecessary risk of transmission. It might seem unfriendly, and unnatural, for lawyers to take steps to minimize interaction with, or keep a distance from, clients and witnesses, but this too may be part of our new reality (English barristers have been doing this already, but for institutional reasons, not concerns about personal health).

### ***Modify Travel Plans***

Minimizing parties' travel is a way to significantly reduce the risk of infection. Now that airplanes and hotels have become hotbeds for the spread of the virus, consideration should be given to keeping parties at home, if at all reasonable, no matter their roles in the hearing.

Arbitrators do not need to deliberate in person. While it is often better and more useful for them to do so, especially in complex cases, there is no reason why arbitrators cannot talk to each other in virtual conference rooms.

### ***Leverage Technology***

As arbitrators and mediators, and as counsel, we must ensure that we have sufficient home office technology to permit us to work remotely, such as high-speed internet and access to cloud storage, robust data security, a quiet area, a reliable telephone line (this means getting a landline or at least using VoIP) and a quality speakerphone.

Lawyers, arbitrators and mediators tend to socialize a lot. We get to know each other that way. While some of what we do is a solitary endeavor, much of it is interactive and social. For now, we are going to have be a bit more circumspect about our social activities because of the risk of transmission of the virus.

This does not mean we should not continue to try to see people in some appropriate format outside of our professional interactions, but it might mean we should do so in groups sensitive to its composition or smaller groups. It might also mean more webinars rather than live conferences (this is already the case in China, where most of the legal workforce is required to work remotely).

### ***Keep Calm and Carry On***

Of course, people should remain calm and carry on. There is no reason to be afraid of this virus given that the mortality rate thus far is comparable to that of the flu, but then again we should do our best to ensure that we do not contribute to the discomfort of others or to that mortality rate.

But perhaps the coronavirus will be the push we all need to get online dispute resolution figured out, fit for purpose and fully functioning. Perhaps arbitration will be forever changed. Perhaps we will learn from this shared worldwide historical experience so that when it passes we will not revert to our past practices.

Or maybe we will at least learn some small things we can implement, now that a crisis has forced us to, that will make our practices — in whatever our roles in the arbitration and mediation space — a little more efficient and expeditious from what they were before.

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