

Coronavirus May Hasten Arbitration Technology Boom

By **Caroline Simson**

Law360 (March 20, 2020, 9:33 PM EDT) -- As the world grapples with the effects of the coronavirus pandemic, some in the arbitration community have begun questioning whether lawyers' increased reliance on technology like videoconferencing during the crisis could help kickstart a more permanent movement.

The emergence of COVID-19 has turned the lives of many people upside down, a fate that arbitration lawyers haven't escaped. While many hearings in arbitrations and related court proceedings have been postponed, there's no telling how long the crisis will continue, and it's unlikely these proceedings will stay on hold for more than a few weeks.

As a result, even lawyers who were previously resistant to technological advances available in the legal industry will be forced over the next few weeks and months to conduct much of their business by phone or videoconference, and to exchange documents electronically rather than by hand.

It's a change that many saw coming, but certainly not this rapidly. And while it's possible that lawyers will revert to their old ways once the crisis abates, the pandemic has prompted a number of questions about the way arbitration practitioners work: Could COVID-19 hasten an increasing reliance on technology? Are lawyers beginning to ask whether it's really necessary to conduct in-person hearings in all or most instances?

"The way we conduct international arbitration proceedings has been on the cusp of a fundamental transformation for a while," said Lisa Houssiere, a principal in McKool Smith PC's Houston office who specializes in U.S. and international litigation and arbitration. "Perhaps more than any other area, we are at an inflection point."

She noted that criticism of international arbitration has been increasing because of rising costs and the lengthy time it can take for a proceeding to run its course. Logistically, it's also become more difficult to ensure that all parties involved in an arbitration — particularly when there are parties in different countries who may speak different languages — can be present at one time in the same room.

"Given the potential for worldwide crises and the modern realities [of international arbitration], I think this trend is here to stay," Houssiere said.

And the impact could go even beyond conducting video hearings in lieu of in-person hearings and making filings and document exchanges electronically.

"Maybe this will be the impetus we need to figure out online dispute resolution," said Jeff Benz, an arbitrator and mediator at JAMS. "No one knows what it means. There's no common definition. Maybe this will incentivize us to figure out what this is."

To some extent, this increased reliance on technology was a movement that was already in motion, at least to a degree, said Reed Smith LLP partner James P. "JP" Duffy IV.

He noted that many in the arbitration community had begun to question whether in-person hearings and meetings were absolutely necessary not only from an efficiency and cost perspective, but also from a movement aimed at limiting one's carbon footprint.

International arbitrator Lucy Greenwood has been spearheading an initiative called the Campaign for Greener Arbitrations for months, urging practitioners to question the need to fly "at all times" and consider letting witnesses give evidence through videoconferencing, for instance.

Many arbitral institutions, too, had already been preparing for an increasing reliance on technology — something Houssiere noted could give international arbitration, which is already seen as superior to litigation in many instances, even more of a boost as courts around the country are shuttered during the crisis.

Kimberly Taylor, JAMS senior vice president and chief legal and operating officer, told Law360 that JAMS and other alternative dispute resolution providers have for many years been developing and promoting the use of remote technology. JAMS has an online dispute resolution system called Endispute ODR, a video application that it says offers parties a "practical and timely alternative to a traditional in-person mediation session."

And many lawyers were already experimenting with technology like videoconferencing during other large-scale crises, such as hurricanes and other natural disasters, or for low-value disputes.

It's not just about moving hearings online, either. The International Chamber of Commerce's International Court of Arbitration has "strongly advise[d]" its users to conduct all communications with the ICC via email, including new requests for arbitration, and other institutions have followed suit.

Directives like that might seem obvious to outsiders, but arbitration lawyers have long been accustomed to doing such things in person, or by using couriers.

"For those who are not used to doing it, this will introduce a new dimension," said Hafez Virjee, president of the Paris-based international arbitral institution Delos Dispute Resolution. "Generally speaking, there's going to be a change of practice in that respect. There's going to be a lot more comfort [with] doing things online."

There has also been a push among arbitral institutions to offer webinars in lieu of in-person events. The Hong Kong International Arbitration Centre announced Wednesday that it was offering several weeks of webinars on topics ranging from drafting arbitration clauses to Korean investor-state arbitration case updates, while the Stockholm Chamber of Commerce launched an online seminar menu on topics like arbitration and climate change.

Still, it's unlikely that arbitration lawyers will completely abandon their instinct to want to conduct hearings in person, especially when it comes to larger "bet-the-company" or otherwise strategically

critical disputes. For many lawyers, there's good reason to stick to in-person hearings on the merits in these types of disputes.

"I would feel disadvantaged trying to conduct a full hearing on the merits remotely," Duffy said. "Oftentimes, the hearing on the merits is the first time you get to interact with the tribunal in person ... and for someone like me, that ability to interact in person is important."

Before a hearing on the merits, the parties will have filed briefs with the tribunal laying out their respective positions in the case. But given how easily something within such a brief can be misinterpreted or found by an arbitrator to be confusing, being able to argue in person is crucially important to ensuring that the arbitrators understand the point a lawyer is trying to make, Duffy said.

"As counsel, I want the ability to interact in person with the tribunal face to face, so that I can see how they're interpreting what I'm saying and I can respond in real time to questions their faces are telling me they have," he said. "Conversely, if I'm sitting as an arbitrator, I want to be able to stop and ask questions right away, which all becomes very challenging if not done in person."

And Duffy's not alone. Both Taylor and Virjee acknowledged that many practitioners are understandably uncomfortable not being in the same room as the other party, or parties, to an arbitration, and the tribunal when it comes to these larger types of disputes.

Hearings are all about having the option to plead one's case and to present it in a manner that addresses the status of the pleadings at that point, and being able to examine the other side's witnesses and offer up your witnesses for examination.

"Part of it is also being able to read where everybody's at in their view of the case, and you get that from the questions that are asked, but also from the body language, from the facial expressions, and so on," Virjee said. "When you're doing a video conference, you can't see everyone at the same time. You can't take in the room in the same way. ... There's a level of texture that you get from that interaction that is near impossible to replicate through technology."

But Taylor said that while lawyers may tend to stick with what they know and avoid unfamiliar platforms, she expects the changing work habits during the pandemic to fuel the adoption of technology in certain situations long term.

"I think as people are forced to do this to operate as normally as possible, they will get more comfortable with it," she said. "I think it's going to increase. I think people will be more open to the possibility of using technology to move their dispute resolution processes along."

--Editing by Aaron Pelc.