



Necessity is the mother of invention – virtual proceedings in the time of pandemic

COVID – 19 lockdown and social distancing rules and recommendations have made traditional legal proceedings all but impossible. Rather than postpone court hearings, arbitrations and mediations, video streaming platforms have been pressed into service. Gard lawyers, Louis Shepherd and Fredrik Falck-Knutsen review the practices in various jurisdictions and comment concerning their own experiences with the technology.

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Gard has seen numerous disputes arise as a result of the COVID-19 pandemic, which has had a major impact on vessel and port operations. Vessels are experiencing quarantine delays, force majeure claims and difficulties with supplies and crew. Many people in the shipping industry are also now working from home due to COVID-19, but disputes still need to be resolved while adhering to social distancing rules. Some disputes are urgent in nature, such as when a vessel has been arrested or an injunction is being sought. In other cases, the parties may have been working for a long time towards a hearing on fixed dates, so that an adjournment might set back the case by months or years. Even in these difficult conditions, Gard's experience has been that court hearings, arbitrations and settlement meetings, such as mediations, have continued to take place effectively, but with the parties communicating remotely through video conferencing.

Court

Many courts have developed procedures to allow hearings to go ahead in a safe way under local social distancing guidelines. In some places, court rooms can still be used if the number of representatives is limited, but many hearings must now be held remotely. On 19 March, the Lord Chief Justice of England and Wales [announced](#) that “the default position now, in all jurisdictions, must be that hearings should be conducted with one, more than one or all participants attending remotely” and he urged civil and family judges to use video streaming technology instead of defaulting to postponement of proceedings.

Mr. Justice Teare oversees the Commercial and Admiralty Courts. In denying a request to postpone a Commercial Court trial rather than use video conferencing he stated: “It is the duty of all the parties to seek to co-operate to ensure that a remote hearing is possible”.

Guidance on how to conduct remote hearings is provided in a [Remote Hearings Protocol](#). According to the protocol “available methods for remote hearings include (non-exhaustively) BT conference call, Skype for Business, court video link, BT MeetMe, Zoom and ordinary telephone calls. But any communication method available to the participants can be considered if appropriate”.

Recognising the importance of ensuring that open justice principles are protected, the Protocol also provides that remote hearings should, so far as possible, still be public hearings. The recently enacted UK Coronavirus Act 2020 allows for the live streaming of Court hearings. This has already been put into effect. In the aforementioned Commercial Court trial, Mr Justice Teare ordered that the proceedings be live-streamed via YouTube.

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Courts in other countries have moved to video streaming rather than postponing a scheduled trial even in complex cases. For example, in a class action suit against Ford Motor Company, pending in the Australian Federal Court, Judge Perram denied

Judge Perram noted the present COVID-19 restrictions as well as the need for the Courts to “facilitate the continuation of the economy and essential services of government, including the administration of justice”. He concluded that the “combination of those two considerations would suggest a mode of trial conducted over virtual platforms from participants’ homes”.

Arbitration

Most arbitration awards are made on the basis of papers alone, without an oral hearing, so many arbitrations will not be affected by COVID-19. When a hearing is necessary, as arbitration is a consensual process, there should be no problem for the parties to attend remotely, as long as the practicalities can be dealt with to ensure it is a fair process. In 2018, the Seoul Protocol on Video Conferencing in International Arbitration was published, which contains a sensible list of points that can be considered by the parties when agreeing and setting up a virtual arbitration hearing. [Seoul Protocol](#)

Although arbitration hearings have taken place remotely in whole or in part for several years now, they have not been as common as one might expect. There is currently still some concern about taking part in remote hearings, part of this may be due to anxiety about how well the technology works, and also that it may not be the most advantageous way to present their case. Over time, users will likely become used to the mechanics of such hearings, and if all parties and witnesses are joining the hearing in the same way, there is no advantage or disadvantage to any party. Virtual hearing etiquette is also developing, which in time will make it easier for all users.

Mediation

Mediation or facilitated settlement negotiation is a consensual process and has been open to remote meetings. Gard participated in our first online/video mediation (rettsmekling in Norwegian), regarding a P&I claim before the Norwegian courts. Due to the COVID - 19 situation, there are very few physical court hearings and mediations in Norway for the time being and the courts have thus arranged for mediations and hearings to be held by video so that cases can continue to be heard and mediated. The Norwegian Supreme Court just conducted a full [appeal hearing by video](#) conference.

In our case the parties and the judge were sitting in separate locations around Norway, including North of Norway, Oslo and Arendal. From a technical point of view, the mediation went very well. The opening and closing meetings were held in a common virtual room. The parties then had their separate virtual rooms where they could communicate privately, and the mediator kept shuttling back and forth between these “rooms” as he would have done in a physical mediation. It was a positive experience – communication through the platform was good, both internally and with the opponents. A strength of mediation has been focusing the parties’ attention by bringing everyone together in one place. We were worried that holding the mediation virtually would lose that focus but we were wrong. The mediation was successful, and all involved acted in good faith toward the common goal of settling the case.

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The use of video conferencing technology for some types of legal proceedings was a trend before the pandemic. Necessity has pushed us years ahead of the trend. We are confident that as more practitioners use the available streaming technology and become comfortable with it, virtual proceedings will become accepted as a tool to efficiently handle many disputes.

Clearly some litigation is not suited to virtual proceedings in the absence of an emergency. For example, criminal trials are not suited because the accused has a right to confront the accusers as well as a right to trial by jury. Complex civil cases may also be ill suited. As Judge Perram put it in his decision in *Capic v. Ford Motor Company* :

Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. But these are not ordinary circumstances and we have entered a period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try.

During this time of global pandemic, we all must try our best to see that cases are handled fairly and expeditiously. Preparation is essential – set out positions clearly and succinctly. Invest in and practice with the streaming technology before the hearing. Communicate and cooperate with the tribunal and other participants early to work out any of the technological hurdles.

Virtual proceedings in a pandemic offer a way (sometimes the only way), to progress litigation and settle disputes. Most practitioners say that virtual proceedings take more time than traditional litigation or mediation. Familiarity with the technology and potential advances or tailoring of current applications may improve the efficiency. It is too early to say whether lawyers will disappear from the airports, but virtual proceedings can definitely contribute in reducing travel. With sustainability high on the agenda, this will be something for many companies to consider.