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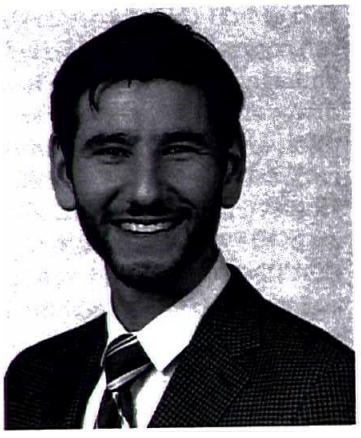
Arbitration and COVID-19

By Dan Grodinsky and Neil Hazan



Dan Grodinsky

Neil Hazan

We are living in "unprecedented times," as we have heard from half of the emails sent over the last several months. The ongoing COVID-19 pandemic has seen its impact on all aspects of society, and the judicial system is no exception. Courthouses are closed or operating at significantly reduced capacity, procedural deadlines are suspended or extended, and depositions have been rescheduled. The focus of many businesses is on survival, rather than on driving forward their commercial disputes, whether it is a fresh issue or a dispute that existed prior to the pandemic.

One expects that there will be a rush of COVID-19-related litigation once there is a return to a new normal. This may include anything from "force majeure"-style claims where contracts have been terminated, claims for delayed performance of contracts for the delivery of goods or services, trickle-down effects from supply chain issues, disagreements over newly negotiated payment terms and pending insolvencies, and disputes regarding how risks or unexpected costs are dealt with. This is in addition to the normal roster of new commercial disputes that were put on the backburner in favor of other priorities.

As the courts slowly reopen, it is a good opportunity to reconsider how businesses and their decision-makers can best deal with commercial disputes, as this is yet another new area in which the pandemic should give rise to new and creative thinking. For a number of reasons, arbitration, instead of litigation before the courts, may be better suited for resolving a new or lingering dispute in the current climate and new challenges.

There are a number of advantages to arbitration that are well known. Parties will have a higher degree of autonomy and control over a dispute beyond which they can expect before a court. Parties also can better ensure that they maintain confidentiality over a dispute and the underlying commercial information that would otherwise be subject to filing before a public court hearing. Parties often see cost advantages by way of opting for a tailor-made dispute process that could be both quicker and often cheaper. Litigants from different jurisdictions can also agree on a neutral panel, thereby avoiding the fear of a "home-court advantage" for one party over the other. A dispute can also be submitted to specialized arbitrators with industry specific knowledge, instead of trusting whichever judge is assigned the case.

In addition to these advantages, the COVID-19 pandemic has given rise to a number of other benefits to proceeding with arbitration, which are becoming apparent because of the COVID-19 pandemic. In a number of jurisdictions, courts have been forced to close or to significantly limit access to hearings. From mid-March onwards, a tremendous number of trials and hearings have therefore been postponed or canceled, or have seen the allocated hearing time reduced well below what is realistic. Users of these systems have been asking questions as to when they will ever see the inside of a courtroom, or alternatively, that their ability to be heard within a fair hearing has been unacceptably reduced. As all these postponed hearings now have to be rescheduled into a judicial system running at less than full capacity, it is very likely that we will see significant delays for cases

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Daniel Grodinsky is a partner at the Canadian law firm of Borden Ladner Gervais. His practice is focused on commercial and securities litigation and arbitration, intellectual property, and regulatory investigations. His expertise includes contract disputes, shareholder disputes, and the protection and enforcement of intellectual property rights. Mr. Grodinsky appears regularly before Canada's Federal Court of Appeal and Federal Court, and Québec's Court of Appeal and Superior Court, as well as before arbitration tribunals.

Neil Hazan is a partner at the Canadian law firm of Borden Ladner Gervais. His practice is focused on cross-border mergers and acquisitions, corporate finance and joint ventures. He also assists businesses with their expansion into Canada and advises on local and international agency and distribution agreements. Mr. Hazan regularly advises strategic and private equity buyers in diverse industries on Canadian and international platform and bolt-on acquisitions.

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which have already been filed, let alone finding hearing times for new cases. There is also a potential for a second wave of the COVID-19 virus causing further uncontrollable court delays. If that is the case, the initial shutdown could easily lead to a slowdown for even longer, meaning months if not years into the future. Finally, the sheer weight of these cases requires not just hearing time, but the judge's attention in deliberation. It is possible parties see further delays waiting for judgments to be rendered.

Transitioning a dispute from the courts into an arbitration should allow many businesses to avoid these delays to some extent and to ensure that a lingering dispute does not become that much more expensive due to the passage of time, or that key evidence and testimony are not lost. The ability to skip the line of litigants before the courts and to agree on arbitrators with availability and the expertise to quickly drive progress in a dispute is therefore a significant advantage in the current climate. Moreover, if there are fears of the opponent's solvency, the quicker one gets to an enforceable award, the better are the chances of recovering.

While major jurisdictions have slowly moved toward authorizing virtual hearings for certain matters, often with an urgent component, arbitral institutions and arbitrators appointed ad hoc are already making use of hearings by videoconference or by phone. They are also more familiar with more streamlined and efficient practices for managing the evidence filed by the parties. This includes regularly employed practices such as using shared data rooms, providing dedicated iPads populated with the parties' evidence and pleadings. Arbitration has also been at the forefront of some pleading techniques made available by flexibility in regard to technology. This includes e-briefs that are more dynamic, comparisons for the purpose of contractual analysis, and demonstrative aids. This often avoids some of the inefficiencies seen by the courts as they try to adapt their local procedural rules with the realities of moving online or to a virtual space, let alone to any reluctance on the part of certain judges to embrace the advantages of technology.

Another benefit lies in an often-discussed fear on the part of non-U.S. parties to subjecting disputes to American courts. The reasons cited often include unpredictable damage awards, a desire to avoid an extensive and costly discovery process, and a need for more foreseeable partition of costs. When it comes to disputes with an international aspect, these benefits should remain the same. However, parties should also consider the unpredictability of the state of the law regarding how risks related to COVID-19 are going to be apportioned. By opting for an international arbitration, bounded by reference to an appropriate governing law, and appointing experienced arbitrators, parties may be able to better predict how a dispute may be decided and therefore to reduce any variability resulting from any unexpected outlier precedents rendered by local courts.

Arbitration should also allow parties to agree amongst themselves as to what the range of cost consequences will be for a dispute, thereby adding a degree of predictability and autonomy, which may not otherwise exist.

So as we move into a new world characterized by revelation of the frailty of how the judicial system responds to panic, it is useful to consider whether there are other methods by which a dispute can be resolved quickly, easily, and hopefully, more successfully, by way of a move to arbitration. Therefore, it may be the right time to consider whether to include an arbitration clause in a new or renegotiated contract, to verify if a potential dispute is subject to an exitings arbitration clause, or for a dispute where litigation is anticipated, whether it is possible to agree between the parties to transition the dispute to arbitration.