

Managing Impact of Coronavirus Epidemic & Other Disruptions on Litigation Operations – Mediation & Arbitration Webinar

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Nest



The Rader Group



Litigation Disruptions

Thomas L. Jarvis



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Disruption of Judicial Operations

- History of systemic disruptions
 - War, including Sept 11, 2001 terrorist attacks
 - Natural disasters, e.g., Hurricane Katrina, Superstorm Sandy
 - Pandemics: 1918 Spanish H1N1 flu 675,000 USA deaths; 1957 Asian H2N2 flu 116,000 USA deaths; 1968 Hong Kong H3N2 flu 100,000 USA deaths, 2009 Swine flu 12,469 USA deaths
- Disruptions
 - Limited availability of essential personnel (judges, clerks, jurors, counsel)
 - Access to facilities (court houses, transportation, jails)
 - Access to vital records (judicial records, police records, civil discovery)
- Prioritization
 - Resolving uncertainty in governmental operations
 - Criminal matters (Speedy Justice Act)
 - Disruption-specific case loads

Judicial Continuity of Operations (COOP)

- Continuity of government: Eisenhower administration cold war planning
- Judicial COOP
 - Federal judiciary:
 - Escalating plans for disruption, disaster, catastrophe
 - Modified operations (now in force)
 - Protecting judiciary to enable essential operations
 - Relocation of central functions & leadership to secure locations
 - State judiciaries
 - “Best practices” planning guides
 - Patchwork of state-specific plans

U.S. Supreme Court

- March 12th Notice:
 - Building was closed to public, but open for official business
 - Case filing deadlines not generally extended under Rule 30.1
- March 19th Order:
 - 150-day extensions for writs of certiorari
 - Motions for extension due to COVID-19 will ordinarily be granted under Rule 30.4
- Oral arguments were postponed in March, but remain scheduled for April 20-22 and 27-29, 2020

U.S. Circuit Courts of Appeals

Circuit	Building Closed Except for Official Business	Limiting Certain Paper Filings	General Extensions of Certain Due Dates	COVID-19 Specific Extensions	Hearings Rescheduled	Canceling In Person Hearings	Telephone & Video Hearings
Federal	✓	✓				✓	✓
DC					✓	✓	✓
First			✓		✓		
Second	✓	✓	✓				✓
Third	✓	✓		✓			✓
Fourth	✓	✓			✓	✓	✓
Fifth	✓	✓					
Six					✓		
Seventh	✓	✓				✓	✓
Eighth		✓			✓	✓	✓
Ninth	✓	✓		✓			
Tenth	✓	✓			✓		
Eleventh							✓

U.S. District Courts: COVID-19 Actions

USDC	Closing Court Houses	Provisions re Witness Availability	Limiting Certain Paper Filings	General Extensions of Certain Due Dates	COVID-19 Specific Extensions	Hearings Rescheduled	Modifications re In-Person Hearings	Telephone & Video Hearings	ADR Provisions
Delaware	✓	✓	✓		✓	✓		✓	✓
NDCA	✓		✓			✓	✓	✓	✓
SDNY	✓			✓		✓	✓	✓	✓
New Jersey	✓	✓	✓	✓	✓	✓	✓	✓	✓
WDTX	✓				✓	✓		✓	
EDTX						✓		✓	
EDVA				✓		✓	✓	✓	

U.S. International Trade Commission 337 Cases

- Building closed to the public through at least April 24, 2020
- All ITC employees teleworking full time since March 17, 2020
- Paper filings prohibited; only e-filing on EDIS permitted
- [Notice](#): All in-person hearings postponed until at least May 12, 2020
- Scheduling will be re-evaluated on April 24, 2020
- ALJs may otherwise proceed with investigations

Evolving Litigant Interest

- Changes in motivations to litigate
- Changes in financial ability to litigate
- Difficulty in conducting discovery
 - Foreign travel restrictions
 - Health concerns
 - Facilities closed
- Changes in attorney availability
- Corporate interest in increasing certainty, reducing risk

Mediation Issues

Kent R. Stevens



Mediation for COVID-19 Circumstances

- Opportunity generated by circumstances
- Process-First Mediation for:
 - Efficient Audit/Diagnosis of changed circumstances and new prospects for settlement/resolution
 - Customize process for resolving impasse issues under circumstances
- The Absence of Face-To-Face Negotiation
 - Impact of Alternative Negotiation Media

Overview of Mediation

Key Features

- Voluntary
- Private, privileged, and confidential
- All participant statements inadmissible; participants maintain confidence ex parte discussions with mediator
- Neutral third-party facilitator promoting mutually acceptable agreement

Types

- Facilitative
- Evaluative
- Transformative

Typical Procedure

- Preliminary teleconferences with outside counsel (ex parte) Mediation Statements submitted to Mediator Opening Session – introductions, brief ground rules trend away from Opening Presentations
- Joint sessions – Face-to-face negotiation
- Caucus – Parties separated; mediator shuffles

Typical Mediator Agenda

- Often tilting toward “Getting to Yes” principles (Win/Win)
 - Separate people from problem
 - Focus on interests, not positions
 - Generate options of mutual gains
 - Objective criteria/standards
 - BATNA – Best Alternative to Negotiated Agreement

Global Pound Conference Reports

- Considerable in-house appetite for ADR processes,
- **high valuation of efficiency** as key priority in choice of ADR process,
- in-house **expectation of greater collaboration** from outside counsel in dispute resolution,
- high interest in mixed-mode dispute resolution (e.g., combination of non-adjudicative ADR and adjudicative elements).

Key Characteristics of Guided Choice Mediation

- Commitment to mediate process issues first
- Confidential discussions with the Mediator/Facilitator and diagnosis
- Process design and option generation based on the diagnosis
- Information exchange per the agreed process*
- Anticipating and overcoming impasses

Source and Reference: Lack, J., and P. M. Lurie. "Guided Choice Dispute Resolution Processes: Reducing the Time and Expense to Settlement." *Transnational Dispute Management* (TDM) 11.6 (2014).

Neutral's Forensics

- Examples:
 - Single issue of fact or law
 - Personal animosity between key players
 - B-to-B prior relationships; expectancy for future relationship
 - Conflicting damages theories
 - Hidden inside/outside influences****

Some Contextual Variables re Negotiation/Mediation

(In general)

- Prior relationship of parties
- Prior relationship of counsel
- Social in-group identification
- Mutual disclosure
- Emotions re merits
- Expectation of future dealings
- Trust and rapport – prior and developed
- Opportunity for prior socializing

(Familiar in IP litigation)

- Competition between parties
- Product substitutability
- Design-around options
- Request for injunction
- Pronounced and trending negative
 - market share/price erosion

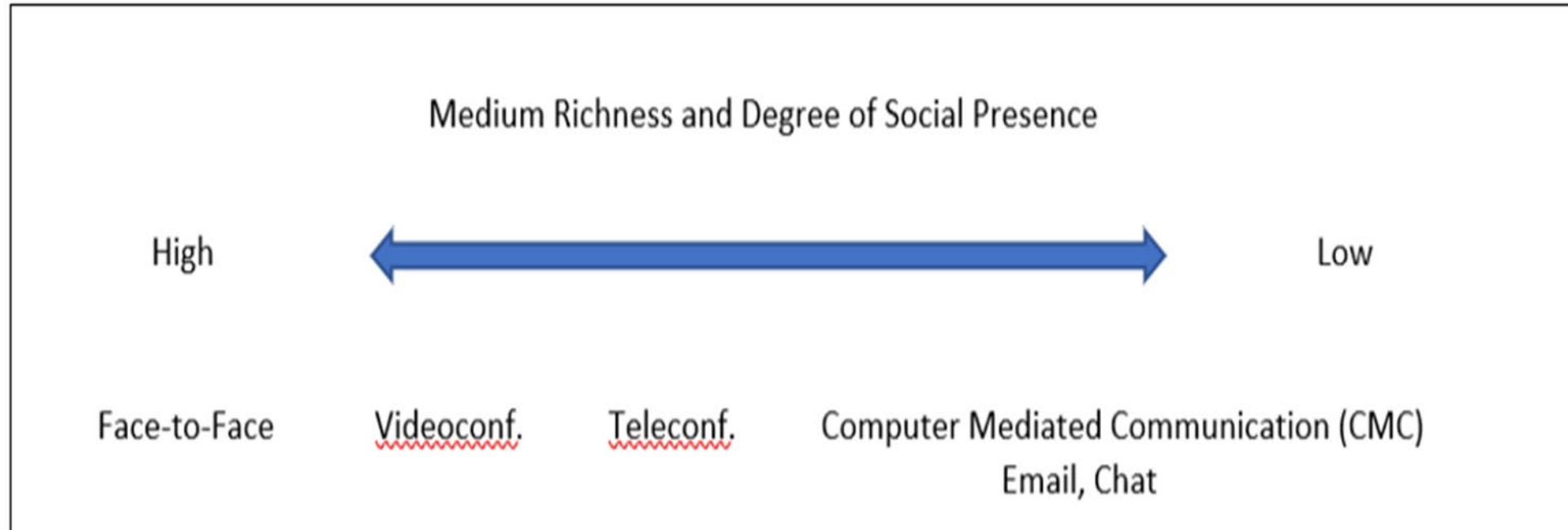
Good source on this point: Nadler, Janice, and Donna Shestowsky. "Negotiation, information technology, and the problem of the faceless other." *Negotiation theory and research* (2006): 145-172.

Generation of Options for Resolution

- Streamlined one-issue arbitration
 - Procedure/power in terms of reference/rules
 - Final offer; high-low; night baseball arbitration
- Expert “hot tubbing”
- Mini-trial (perhaps with corporate representatives as Judge-panelists)
- Agreed-upon exchange of information* /Expert neutral fact finder
- More traditional negotiation or mediation with specific participants identified and agenda

Absence of Face-to-Face Negotiation

Impact of alternative negotiation medium



Impact on Bargaining Style

Bargaining Styles Employed: Collaborating vs. Competing

Experimental conditions: Communication media

Dependent variables	Face to face (n = 42)	Video-conference (n = 32)	Telephone (n = 42)	Computer chat (n = 34)	χ^2 (3, N = 150)
% Collaborating ¹	76% _a	70% _{a,c}	49% _b	56% _{b,c}	7.64
% Competing	12% _a	47% _b	29% _b	44% _b	12.88**
% Collaboration correctly perceived ²	67% _a	32% _b	35%	42% _b	7.81*

Note: ¹Percent of negotiators who report that they attempted to collaborate. ²Percent of collaboration attempts that were correctly perceived by opponent. Proportions in the same row that do not share subscripts differ at $p < .05$ based on one-tail tests. Chi-square tests for the interdependence of media and bargaining style are significant at * $p < .05$, ** $p < .01$.

Purdy, J. M., Nye, P., & Balakrishnan, P. (2000). THE IMPACT OF COMMUNICATION MEDIA ON NEGOTIATION OUTCOMES. *International Journal of Conflict Management*, 11(2), 162-187.

Other Negotiation Factors Impacted by Medium Richness

- Time to Agreement
- Trust, Rapport, Mutual revelation
- Outcome Satisfaction
- Willingness to negotiate again (future dealings)
- Cultural differences, language differences
- Value/Profit Distribution Equality
- Joint Value/Profit – not so simple, context specific

Advantages of Arbitration in the COVID-19 Era

Judge Randall Rader



 The Rader Group

Primary Advantage: Tailor Your Own Proceeding

- **EXPEDITED TIME:** complete the entire proceeding in 30 days, 60 days?
- **WRITTEN SUBMISSIONS:** 20 or 30 pages for each party
- **VIDEOCONFERENCE:** all parties in same screen
- **ARBITRATORS:** one or three chosen by parties for expertise

Single Issue Clarification

- **COORDINATE WITH MEDIATION OR ADJUDICATION:** send single issue to arbitrator for binding or non-binding guidance (within 30 days)
- **TYPES OF ISSUES**
 - Claim construction
 - Resolve battles of experts
 - Meaning of contract or license provisions

Potential Emphasis on Valuation

- Business resolution more possible once proper valuation of assets
- Enable expert presentation of value issues
- Evaluate different arguments

Summary

- **CONFIDENTIAL**
- Fast and efficient (less expensive)
- Tailored to needs of parties or nature of proceeding

Expert Valuation Issues

Manish Das



OCEAN TOMO[®]
INVESTMENT GROUP

Expert Valuation Support

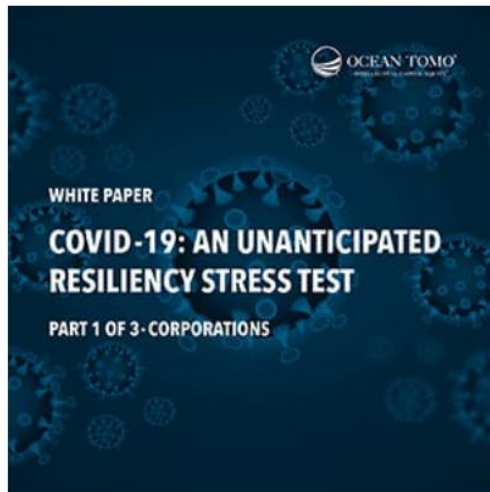
- Support for accelerated mediation and arbitration
 - ✓ Domain expert review of contracts
 - ✓ Valuation support across all balance sheet items
 - ✓ Due diligence, documentation, data management and warehousing support
 - ✓ Referential data enhancement support as required
 - ✓ Industry, peer benchmark and review
 - ✓ Experienced professionals who have supported clients through similar situations in the past (e.g., 2008 financial crisis)

IP Valuations

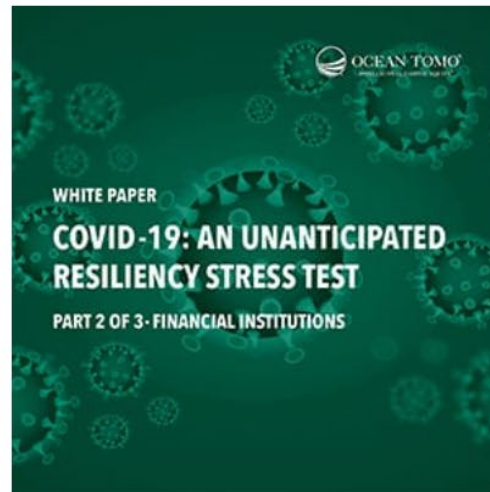
- Support for accelerated mediation and arbitration
 - ✓ Valuation expertise across assets, industries and borders
 - ✓ Business valuation, intangible assets, collateral, financial instruments and portfolios
 - ✓ Fair market value (FMV), orderly liquidation value
 - ✓ Time-sensitive and limited-access valuation services
 - ✓ Technology assessments, forecasting analytics
 - ✓ End-to-end review and documentation support of assumptions and methodologies

Ocean Tomo Risk & Resiliency Center

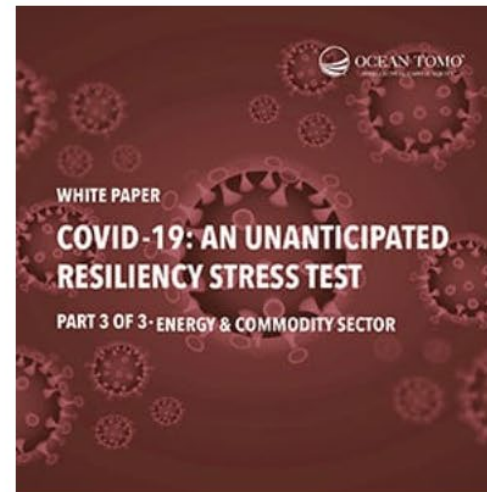
Along with reviewing the looming challenges and risks during this period of uncertainty, we will highlight how organizations can proactively manage their impact, with responsive practices to strengthen business resiliency.



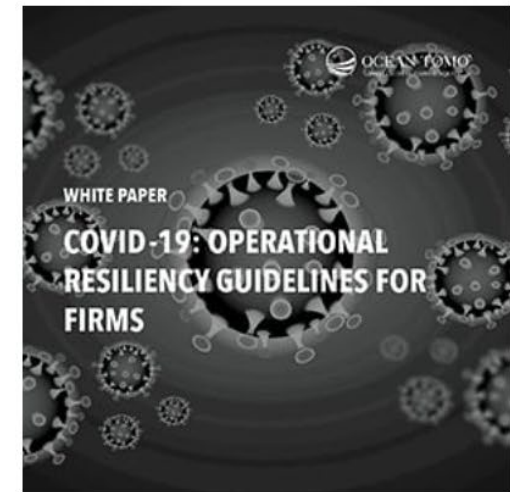
COVID-19: An Unanticipated Resiliency Stress Test – Corporations (Part 1 of 3)



COVID-19: An Unanticipated Resiliency Stress Test – Financial Institutions (Part 2 of 3)



COVID-19: An Unanticipated Resiliency Stress Test - Energy & Commodity Sector (Part 3 of 3)



COVID-19: Operational Resiliency Guidelines for Firms

<https://www.oceantomo.com/white-papers/risk-and-resiliency/>

Hi-Tech Litigant Issues

Chip Lutton



Hi-Tech Industry IP Issues

- Globalization of R&D, engineering, manufacturing, and markets
 - Economies of scale
 - Localization of products
 - National markets: regulation, distribution channels, pricing, customer support
- International challenges of identifying infringers & infringing products
 - Private investigators
 - Reverse engineering
 - Preparation of patent infringement claim charts
- Patent litigation objectives
 - Exclude competitors
 - License competitors & collect royalties

Merits of Mediation & Arbitration

- Flexibility: who, when, where, how to resolve disputes
- Cost
 - Patent litigation fees & costs are large, but small in proportion to sales revenues
 - Stalled sales and lower revenues favor ADR
- Speed to resolution—resolve uncertainty
- Business disruptions can refocus attention to next-generation products
- Changed commercial motivations may enable “business solution”
- But
 - Windfall jury damages/awards less likely
 - Worries about encouraging nuisance claims

Converting Litigations into ADR

- Building ADR alternative into every litigation plan
- Recognizing when the opportunity or time is right
- Socializing ADR option within the organization
- Overcoming reluctance to be the “first mover” on ADR discussion
- Proposing ADR: between principals or between outside counsel?
- Negotiating ADR objectives with adversaries—setting boundaries
- Selecting the mediator or arbitrator
- Trial counsel vs. arbitration counsel
- NDAs

Mediation and Arbitration Opportunities for Biotech/Pharma Disputes Caused by Coronavirus and COVID-19

Colin G. Sandercock



Biotech/Pharma Disputes Relating to COVID-19

- Most biotech/pharma disputes created by the COVID-19 pandemic will not involve patents; rather, most disputes will involve general business disruption caused by the non-performance of contractual obligations
- Preserving/accessing capital at a reasonable cost is especially critical for biotechs, which depend on meeting projected timelines to satisfy investors
- Problems can arise for pharma and biotech companies because such companies:
 - depend heavily on networks of suppliers and vendors, many of whom also are being disrupted by the pandemic; and
 - are susceptible to disruption of general day-to-day R&D resulting from (i) employee absences, and (ii) “shelter-in-place,” “social distancing,” and other government orders that reduce the numbers of employees in labs and on-site
- Disruptions can delay timelines and impair capital access at reasonable cost

Potential Types of Biotech/Pharma Disputes

Reasonable prospects for ADR

- Failures to fully or partially perform contractual obligations
 - ***Applicability of force majeure clauses in existing agreements***
- Applicability of coverage under insurance contracts
- Payment of rents and mortgages if premises are unavailable or have limited availability because of a state/local government order
- Disruption and delays in clinical trials
 - Obligation to continue payments to institutions under CTAs when a trial is suspended
- Employment litigation

Unlikely prospects for ADR

- Activist investor litigation
- Shareholder suits relating to corporate action/inaction due to COVID-19 (including securities filings)

Applicability and Operation of Force Majeure Clauses

- Generally describe events beyond the reasonable control of one or both parties that can excuse performance of a contractual obligation
 - Generally list natural events such as acts of God, floods, fires, earthquakes, hurricanes, etc., and human events such as acts of war, civil strife, riots, labor strikes, gov't order, etc.
 - Key to applicability may be, e.g., whether performance is hindered by the COVID-19 pandemic or a governmental order
- Language typically varies significantly from contract to contract
- Enforcement varies country to country, and from state to state in the US
 - Force majeure not typically implied under US law or English law, but generally incorporated into the civil codes of civil law jurisdictions
- General requirements:
 - Event was not reasonably foreseeable, and party's non-performance could not have been avoided through reasonable advance efforts
 - Performance must be impossible, not just merely more burdensome

Potential Disputes Relating to Force Majeure Clauses

- Was the parties' contractual definition of force majeure satisfied?
 - Does the general or specific language of the force majeure clause apply to the cause of the delay in performance?
 - Is the delay in performance due to COVID-19 or to a gov't order relating to COVID-19?
- Did the COVID-19 pandemic actually cause a force majeure event?
 - Was performance impossible or merely more difficult?
 - Was the event reasonably foreseeable and avoidable through reasonable measures?
- Did the non-performing party resume performing as soon as reasonably possible?
- What are the damages if force majeure does not apply?
- If force majeure is unavailable, can another doctrine excuse performance?
 - Common law "impossibility" or "frustration" doctrine may excuse performance when an unexpected event (not the fault of either party) fundamentally alters the nature of the rights/obligations such that it would be unfair to hold the parties to their obligations

Discussion

Video Conference Tools for Remote Proceedings

- Procedural agreements
 - Identification of persons present
 - Court reporters authorized to administer oath?
 - Recorded?
- Capability: audio or video
- Availability / compatibility
- Controlled by a neutral
- Quality of connection: audio & video clarity
- Who controls camera vs. recipient focus on any speaker
- Security
- Private discussions

Agreements for Remote Presentations

- Consider format that serves both litigants' & neutral's interests
- Protective orders
- Fixed dates & times with adequate notice to prepare
- Format of presentations, time, disruptions
- Advanced exchange of witness lists & exhibits
- Neutral's examination of witnesses
- Hot tubbing expert witnesses

Keys to Success

- Active involvement of key personnel—fully present & attentive
 - Counsel
 - Witness availability
 - Decision makers
- Training
 - Speakers identifying their names
 - Cues for speaking in turn, not over talking
 - Self-awareness; guarding against distracting or inappropriate behavior
 - Rehearsals with video conference tool
- High-quality video conference is money well spent