

A Lawyer's Perspective: Guarantees of a Fair Trial and Online Dispute Resolution*

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A. Introduction

This article addresses a topic where several of the fundamental values of our society intersect. These values include the right to a fair trial, access to the law and to the courts, and, in particular, the right to obtain a decision within a reasonable time, as an essential corollary of effective protection, in good time, against threats to or breaches of personal rights. Taking a political perspective, another of these values is the fulfilment of the jurisdictional function incumbent on the state. These are all values that are rooted in the Portuguese Constitution. Indeed, it is curious to note that the principles somehow under strain in the current pandemic - the guarantee of a fair trial and, at the same time, the guarantee of a decision within a reasonable time - are enshrined in precisely the same constitutional provision: para. 4 of Article 20 of the Constitution of the Portuguese Republic.

Historically, the guarantee of a fair trial and the guarantee of a decision within a reasonable time are regarded as two sides of the same coin, insofar

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as both are essential principles underpinning not only the rule of law, but also protection of citizens' rights.

The issue raised by the pandemic in the handling of civil proceedings is that the guarantee of a decision within a reasonable time may not be compatible with the guarantee of a fair trial, and vice versa.

As we shall see, this question will often be more theoretical than real and can be exploited by parties to take a position that best suits their interests in a specific dispute, in particular, their interest in delaying a decision, or even, their interest in raising procedural issues that may later provide grounds for appeals or other proceedings to annul decisions, depending on the type of proceedings in question.

However, it would be flagrantly unfair to treat as equal, in all instances, efforts to defend the guarantees of a fair trial with an interest in delaying proceedings. Reality has shown that there are cases where the new conditions under which proceedings are conducted raise additional issues for one party, which are not raised for the other. We shall look below at some of these questions.

B. The Status Quo prior to the COVID-19 Pandemic

As our starting point, one shall have to acknowledge that online dispute resolution has been a reality in our professional lives for more than ten years. People who litigated in the last century and in the early years of this century will certainly remember the ritual of filing proceedings at the court registry, delivering applications at the central offices, with one copy to be stamped and another to be added to the proceedings reform.

Today, most procedural acts in state courts take place online, on digital platforms such as Citius or Sitaf. This is the case in both civil and administrative proceedings, not just for most acts of the parties, but also for those of the court, including the rendering of decisions and judgments.

The same is true for the witnesses examination, parties and even experts. Examination by video conference has been a frequent procedure for a long time, using a variety of computer-based communication systems. This has led some to point to an erosion in the principle of immediacy in the production of evidence and, related to this, the impact that the production of evidence by videoconference can have on the formation of the judge's free conviction, on the grounds that certain elements used to assess the reliability and relevance of oral evidence – most obviously, body language – can be prejudiced by the fact that the witness, deponent or expert is not present in the courtroom.

Likewise, experience has also shown that cross-examination by the party not presenting the witness or deponent may in some way be undermined, forcing a slower pace of questioning to avoid missteps that might undermine the production of evidence.

As part of the wider digitisation of the justice system, even in physical hearings, parties were already making growing use of audiovisual media, in their opening presentations and closing arguments, and also, albeit in more limited cases, during the production of evidence phase. This does not amount to conducting procedural acts online, but it does represent the use of electronic tools that contribute to inevitable changes in habits and customs as regards procedural rituals.

The above considerations demonstrate that online dispute resolution had already been adopted, to a large extent, by Portuguese courts prior to the COVID-19 pandemic.

In arbitration, in addition to certain procedural acts taking place by email or using secure document management systems, it was already a widespread practice for witnesses, parties or experts to be questioned by videoconference and for electronic tools to be used to present each party's case. The main difference here was perhaps the fact that preliminary pre-trial hearings were also frequently organised by videoconference or conference call, avoiding the need for parties to travel to attend the arbitral tribunal in person, which undoubtedly represented a significant saving of time and money for the parties.

So any analysis we make today of this matter must take as its starting point a situation in which the use of electronic tools was already commonly accepted for conducting proceedings remotely, seeking a fair balance between:

- the necessary solemnity and formality of administering justice and of procedural acts; and
- criteria of efficiency, which make justice swifter and, at the same time, minimise the inconvenience of participants in proceedings having to travel to attend in person.

C. The Challenges of Online Dispute Resolution

The question that the COVID-19 pandemic now raises is whether remote proceedings can be taken to an extreme.

The initial response of Portugal's legislator to the pandemic was to suspend deadlines for procedural acts and to allow certain acts to take

place remotely. However, it is not our purpose here to analyse or assess the virtues of the temporary and exceptional procedural rules applied in the Portuguese legal system, their definition and application.

Instead, this article seeks to assess the impact that the use of online dispute resolution tools may have on the guarantees of a fair trial, taking into consideration that, irrespective of the rules each country may have adopted (the arrangements have varied greatly), we are moving towards a paradigm shift in how procedural acts take place: what formerly required people to be physically present is now being processed by virtual means. The prime example of this phenomenon is online trial hearings.

The practical challenges faced over the past two years have included:

- The dynamics of cross-examination, as already referred to;
- The showing of documents to witnesses and arbitrators, where there is no longer the possibility of observing the witness, unless more complex multi-screen systems are used;
- The workings of simultaneous translation;
- Opening statements or closing arguments without, once more, the possibility of observing the facial expressions of the person taking the floor;
- The difficulties of ensuring that a witness is not being prompted by other persons present in the same room, or using a chat tool, for example;
- The possibility that the legal representatives of one party may be present in the same room as the tribunal, but not those of the other party;
- In international arbitration, the fact that arbitrators, legal teams and witnesses may be in different time zones;
- The possibility of one of the parties disconnecting from the session halfway through, perhaps when things are going less well, leaving the tribunal uncertain as to whether there has been a technical problem and so suggesting that it should not proceed with the taking of evidence (a phenomenon that has been called “rage-quitting”); and
- Last but not least, managing the different sensibilities of the parties with regard to the pandemic. By way of example, at this stage, there are individuals clearly less willing than others to attend a hearing in person with eight, nine or ten people in the same room, over several hours, even if everyone complies with respiratory etiquette. This raises the question of how to deal with the different attitudes of the parties in relation to this matter, bearing in mind that scientific research has pointed to an increased risk of infection when several people meet

indoors for several hours on end, irrespective of whether they wear masks.

As regards in-person procedural acts, the same issues may arise in relation to on-site inspections. This might be viewed as a matter of only slight importance in proceedings in Portugal's state courts, which rarely use this procedure to obtain evidence, but in arbitration (in particular, in the construction sector) inspections of this type are a common feature of proceedings. What should be done? Should the tribunal avoid an inspection that one of the parties, or the tribunal itself, deems necessary, and, instead of visiting the site in person, arrange for a guided tour by video?

The answers to these questions will necessarily have to take into consideration not only the rival claims referred to above of (i) the guarantee of a fair trial and (ii) the guarantee of a decision within a reasonable time, but other values too. Taken to extremes, there may be a conflict between the guarantee of a fair trial (allegedly based on maintaining the paradigm of procedural ritual as it existed prior to March 2020) and each individual's right to his or her physical integrity.

It is not my view that we should approach this issue on the basis of personal preconceptions on this matter, however firmly held, but rather accept that, either on the basis of scientific evidence or because of the exponential increase in the severity of the disease linked to comorbidities, or else due to the way the pandemic has affected people personally close to us, certain persons may have a greater sensitivity in what regards attending in-person procedural acts.

As we have seen, there are different values rooted in the Constitution which are absolutely fundamental to guiding the courts (both state courts and arbitral tribunals) in the task of deciding how far to make use of online tools in administering justice. There is nothing in Portuguese law to say that hearings must necessarily be held in person. The principle of orality in relation to certain acts and the principle of immediacy do not mean that the parties and the court have to meet in the same place to carry out procedural acts. The rule that raises the most questions would apparently be Article 34, para. 1 of the Voluntary Arbitration Law, from which it follows, *a contrario sensu*, that the parties may agree that hearings must be held for the production of evidence. However, even in those cases, the same rule does not provide that these hearings must be held in person.¹

1 A different solution would apply if the parties had expressly indicated in the arbitration agreement that hearings were to be held in person.

The underlying procedural principles suggest that, failing a specific provision in law, the court should decide in conjunction with the parties on how to proceed, consulting them prior to taking a position, in strict application of the principle of cooperation between participants in proceedings. Whenever possible, in the absence of express legal provision, arrangements should be reached through agreement, avoiding any decisions based on the court's preconceptions concerning the pandemic and in the understanding that, in addition to an interest in administering justice within a reasonable time, there may be other reasons for conducting proceedings by videoconference.

D. Conclusions

As we have seen, there can be tension between the rival claims of the guarantees of a fair trial and the guarantees of a decision within a reasonable time. This second group of guarantees points to relative criteria of efficiency in the administration of justice, whilst the first points to an absolute criteria of defence of the parties' rights.

Nonetheless, as has been demonstrated, there is a series of other values that weigh on the decision the court must take in relation to the use of online tools in administering justice. In the first place, how far does the use of these tools make it possible to uphold or safeguard the principles of a fair trial? Here too, it is important to reject preconceived ideas that suggest that in-person proceedings offer better guarantees than virtual proceedings, and experience has shown that, in many cases, the use of online platforms is not just more efficient, but also results in no harm to the guarantees offered to each of the parties.

As in any exercise involving tension between different values rooted in the Constitution, the court must decide on the basis of judgments of proportionality, adequacy and necessity, taking into consideration, in the circumstances of the current pandemic, the position of the parties and the extent to which that position can be accommodated, the latest science evidence, levels of COVID-19 infections at the time and the safety arrangements that can be made for in-person procedural interactions.

As always, it is by weighing up the different interests that the right solution for each case should be found.