

Theme 2 : Managing Complexity, and the “complexification” of disputes

Justice Nallini Pathmanathan

Judge Fabienne Schaller

Co-chairs

I. Introduction

Understand “complexification”: what it is; what causes it; how to address it

a. Factors contributing to the complexification of disputes

- number of documents produced, volume and content (there is a limit to the adjudicator’s capacity to process complex and voluminous information)
- number of witnesses and parties involved
- languages and translation issues
- length of the trial, length of the reading (caselaw, document), length of the writing (briefs, judgements).
- values at stake (compensation, damages, obligations, interest...)

b. Mains aspects of complexity

- Technical complexity: evidence is increasingly technical and judges need to rely more and more on expert witnesses or be progressively specialized.
- Evidential complexity: the volume of documentary and oral evidence judges cope with is increasing because the development of technologies makes data cheaper, easier to generate, obtain and communicate.
- Legal complexity: the evolution of the law and caselaw, the increasing impact of international conventions and regulations, but also the multiplication of legal and or procedural issues (preliminary ruling, choice of law, choice of forum, statute of limitations etc.) requires the judge to be more and more knowledgeable. Legal complexity may even be increased by new technology and artificial intelligence tools.

c. The consequences and problems raised by the complexification of disputes

- At the level of the individual adjudicator/court/judge: There are physical limits to the judges’ ability to process complex and voluminous information. Time for reading and getting ready for the hearing keep getting longer. It generates stress and ever increasing responsibility.

- At a broader level : The complexity problem has an impact on justice systems:
 - It requires human resources adapted to technical, legal and evidentiary complexity (more judges, more clerks, specialized assistants)
 - It may generate uncertainty and unpredictability
 - It questions the legitimacy of the judicial system / other ways of resolving disputes
 - It limits judicial time for other cases (a judge will have less time for other cases, which hinders access to justice to other litigants)
 - It has a financial cost for the parties and for the courts

II. How to manage and address the increasing complexity of disputes? Roundtable

The increasing complexity of disputes raises a number of issues to which the participants of this session may provide answers from their legal system and experience.

1. Case management issues

- Enhanced management techniques and the use of technology raises the following issue : is "robust" case management the only solution to "downside" disputes, with the risk of giving rise to due process concerns?
- In some cases, the cost of investigating, documenting, and particularizing a claim may end up exceeding the amount at stake or awarded to the plaintiff. Even more so for complex disputes. How can courts combine the right of access to a fair tribunal (art. 6 ECHR) with such issues?

2. Evidence issues

- How to deal with evidence in complex litigations? What is the power of the judge to deal with evidence issues (discovery, disclosure, testimonies, warrants for search and seizure)?
- How can the judge cope with limits such as NDAs, trade secrets, technology
- How admissible are new sources of evidence (video, facial recognition, digital evidence, crypto-evidence)
- Expert witnesses : do judges relying on an expert's report in a very technical dispute still have a real power to appreciate all of the elements addressed by the expert? In other words, what room for discretion does a judicial expert's report have, when an extremely technical subject, outside the field of knowledge of the judge, significantly impacts the case outcome?

- How to find the balance between truth seeking, efficiency and conflicting interests - how can the judge manage the issue of discovery

3. What solutions ?

- Mediation / conciliation / dispute boards : a pre-requisite before going to courts? Would it limit the number of disputes or just postpone it?
- Financing litigation : the development of third-party funding - isn't it a factor for increasing complexity?
- Class actions : a way to deal with the number of litigants - but is it a good way to deal with complex commercial litigation?
- Other mechanisms? Artificial intelligence as a tool for judicial decisions?

III. CONCLUSION