

## **INTERNATIONAL ARBITRATION IN THE TIMES OF COVID-19 AND THE WAY FORWARD**

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### **ABSTRACT**

This article talks about the changes in the way Arbitration Proceedings are conducted in the light of the global pandemic. It talks about Virtual Hearings and the challenges it poses. It also progresses into explaining the guidelines issued by various Arbitral Institutions to ease the process of conducting hearings online. It then goes on to talk about how the situation might pan in the future, the use of artificial technologies to conduct proceedings, etc.

The coronavirus outbreak is an unprecedented global health crisis with no certainty whatsoever. The World Health Organisation has officially declared it as a global pandemic. In the span of just three weeks it evolved from being a crisis only in central china to a challenge the entire world is facing. It has now affected over 1,93,92,179 people across the world resulting in 7,18,326 deaths and the number keeps increasing. There is no proven medicine for the disease yet, health officials have stated that it would take over a year to develop a vaccine. Therefore, it is safe to say that the virus is going to stay with us for an extended period.

The pandemic has adversely affected every business sector and left the dispute resolution system completely handicapped. Arbitration has not been immune from these effects. Arbitration proceedings across the world have been delayed. The outbreak has initially disrupted proceedings in China, South Korea, Singapore and later in the U.S, Europe, Asia and rest of the world. It has been a challenge for tribunals to conduct hearings without witnesses from China. International Institutions facilitating arbitration have been taking precautionary measures in their offices and are advising parties to refrain from hearings in person. Therefore, undoubtedly, proceedings are going to be conducted online. Arbitral institutions like the ICC, LCIA, SCIA, ICDR and ICSID have been operating only virtually and parties are requested to

transmit all communications through email. This has to be a turning point for International Arbitration as online dispute resolution is being brought into the picture.

## **VIRTUAL ARBITRATION**

The pandemic has led to arbitrators convening fully virtual hearings. Parallely, arbitration institutions have started introducing procedural features and promulgating various guidelines for conducting hearings during the pandemic in a hassle-free manner. They are making significant efforts to support parties participating in virtual hearings. The ICDR is offering tools to support virtual hearings including an online hearing platform to ensure privacy, security and ease of use.

The virus will also call for a change in the way evidence is created, gathered and transmitted. There will be more reliance on digital documents and signatures rather than paper documents and contracts which used to be couriered earlier. Tribunals will also prefer digital memorials and document submissions.

Most of the steps in arbitration proceedings like requesting for arbitration, selecting and confirming arbitrators, case related conferences, deliberations between arbitrators can be conducted virtually without any hassle. While other steps like stages of hearing evidence, witness examinations and final hearings could pose a challenge to be conducted virtually. Some of the main drawbacks of virtual hearings could be confidentiality, technical challenges, witness coaching, examining witnesses virtually, enforceability of awards issued virtually, etc.

Confidentiality is an implied requirement in most arbitration proceedings and a breach of the same could result in setting aside the award. Unlike in person hearings, there are more people involved in remote hearings for instance technical staff or assistants who help arbitrators. Therefore, ensuring confidentiality of information disclosed in virtual hearings becomes a major challenge. The primary tool for any online hearing is technology. Arbitrators, participants, witnesses could face issues relating to lack of technological facilities, unstable low speed internet, etc. One of the main reasons virtual hearings were not used for arbitration proceedings earlier is because of its technical difficulties. Virtually examining witnesses could also be another major problem. Usually in proceedings when witness' testimony is not reliable, the counsel cross examining the witness relies on the body language and gestures of the

witness, to do the same on a virtual platform could be a challenge. There could also be a possibility of witness coaching, where in the witness is coached by his counsel through other means while he is being examined via video conference. Due to these reasons the tribunal will also face difficulty in determining the credibility of the witnesses.

A middle ground to this dilemma could be using hearing centres. Due to the pandemic situation long travel is however not resorted to by most people. A hearing centre in local regions with necessary infrastructure and technical support could be used, provided the social distancing norms are complied with.

Another issue that might arise is when one party does not agree to proceed with virtual hearings. There might be a situation where the claimant requests for a virtual hearing and the respondent does not intend to proceed. Most modern international arbitration rules state that if one of the parties requests for a hearing, the tribunal shall provide that party with a hearing.<sup>i</sup> Moreover tribunals are usually vested with the power to determine procedure as they consider appropriate, as to where and when it shall be conducted, virtual or in person etc. Electing not to participate in virtual hearing in the hope of challenging an award has never been proved to be a good strategy especially when the parties are given a genuine opportunity to participate

## **GUIDELINES BY INTERNATIONAL ARBITRATION INSTITUTIONS**

Arbitration Institutions, in response to the pandemic situation have altered their operations. New procedural features have been introduced along with guidelines and resources to support arbitral proceedings in these trying times. Earlier this year a group of arbitral institutions<sup>ii</sup> have issued a joint statement seeking to ensure stability during the COVID-19 times and assured that *“pending cases will continue and parties may have their cases heard without undue delay”*

A general practice for commencement of arbitration proceedings is where parties submit a hard copy requesting for arbitration, as this is not possible in the pandemic situation many institutions have mandated electronic submission for arbitration requests. ICSID has made electronic submissions of requests its default procedure. ICC and ICDR have expressly directed electronic-only submissions for requesting arbitration. LCIA requires all new requests to be filed through its online system or sent through email. For submissions other than requests for commencement, there is a clear trend in favour of online filing. ICC, in its recent

Guidance Note states that tribunals should make use of the electronic medium for submissions to the full extent possible. Arbitral institutions have also addressed the issue of time extensions. DIS has promised to take into account the pandemic situation while considering requests for time extension.<sup>iii</sup> SIAC has also pledged to show sympathy towards delays caused to proceedings due to COVID outbreak.<sup>iv</sup>

Many arbitral institutions have been encouraging and providing guidelines to support parties participating in virtual hearings. ICC is encouraging parties to avoid delays by using audio or video conferences. Its guidance note also provides for technical support and assistance to arbitral tribunals. Earlier this year ICDR informed its users that no physical hearings would be conducted and encouraged them to use its turn key virtual hearing platforms. ICSID also encourages its users to discuss detailed options for online hearings with ICSID Secretariat, it also issued a guide to online hearings which outlines tools offered to participants of online hearings including use of a video conferencing platform and the services of a virtual court stenographer.

HKIAC offers services for electronic transmission of evidence, it has issued guidelines for virtual hearings which assist participants through every step of the hearing and ensure cyber security and confidentiality.

Some institutions have addressed the treatments of arbitral awards in the pandemic situation. DIS and ICC provide that if parties agree, awards will be notified only in the electronic form. Similarly SIAC and LCIA will also provide notifications of awards to parties online and transmission of hard copies will only be done after the pandemic settles.

## **THE WAY FORWARD**

In the past few years, the International Arbitration community has begun discussing the potential of introducing artificial intelligence in resolving matters. Stakeholders in arbitration have been on the lookout for deploying new technologies to increase efficiency (i.e low costs, high speed) and the quality of proceedings. The COVID-19 pandemic will only accelerate the trend towards using latest technologies for arbitration proceedings.

One of the artificial intelligence tools currently used is predictive coding. Predictive coding is a form of supervised machine learning tool that takes human review-based data input about document relevance and applies it to a larger document population. With predictive coding, relevant or responsive documents are identified by an algorithm. Predictive coding is said to be more efficient than a manual search-terms based review as the legal team only has to review documents identified by the algorithm as relevant or not. Arbitration practitioners have criticised the process of responsive documents being searched through an algorithm as it is done without human involvement. Concerns have been raised as to who would be responsible if the algorithm makes a mistake. However, it ultimately depends on the parties to the dispute whether or not this tool shall be used.

## **CONCLUSION**

The pandemic situation has been very challenging but on the brighter side due the constraints imposed there has been rapid adoption of digital methods of conducting arbitration. However virtual hearings and tools of artificial intelligence come with their own set of difficulties. But as the world continues to evolve in the wake of COVID-19, so must the way hearings be conducted. The need of the hour is to look beyond these problems and come up with solutions to tackle them, as sticking to conventional methods of arbitration could stall the arbitration proceedings indefinitely.

## **ENDNOTES**

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<sup>i</sup> UNCITRAL Model Law, Article 24

<sup>ii</sup> DIS, ICC, AAA, ICDR, ICSID, KCAB, LCIA, CAM, HKIAC, SCC, SIAC, VIAC, SCAI.

<sup>iii</sup> DIS Arbitration Rules, Art. 4.9, (2018)

<sup>iv</sup> SIAC Rules, Art. 2.6, (2016)