

INCREASING ACCESS TO INTERNATIONAL COMMERCIAL ARBITRATION WITH THE USE OF TECHNOLOGY

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ABSTRACT

The following paper discusses the various reasons and the role played by technological advancements and improvements in increasing access to international commercial arbitration. It further delves in detail with how technology plays a pivotal role in the four main stages of an arbitration proceeding, namely, communications, storage of documents, research tools and hearing logistics. While critically analysing the use of technology in international commercial arbitration, the challenges and concerns faced due to technological advancements have also been substantially discussed along with the future of arbitration with the introduction of the AI technologies in the arbitration process. The paper attempts to establish that with few modifications, information technology enables international commercial arbitration to become the most suitable form of dispute resolution.

International commercial arbitration is a globally preferred, private dispute resolution mechanism for cross border commercial disputes that allows the parties from different countries to submit their dispute to a neutral arbitrator or a panelⁱ. It is a flexible and an adaptable alternative dispute resolution method because it is one of the most secured, impartial forums for dispute resolution. It is due to the incorporation of arbitration clauses that the fear of bias in a foreign parties' home Court can be ameliorated as the contracting parties have the power to select a neutral arbitrator and ensure that the dispute resolution is done by a Tribunal comprising of individuals in whom the confidence is vestedⁱⁱ.

With the recent outbreak of the COVID-19 pandemic, unprecedented situations have been created which have impacted the businesses that indulge in cross border trading due to the restrictions imposed and have made it very difficult for the businesses to fulfil their contractual obligations. Moreover, the uncertainty regarding the resolution of disputes also acts as a barrier to cross border trade and investment. One such example is the decline in the World Merchandise Trade which has been estimated between 13 and 32% in 2020 by the World Trade Organizationⁱⁱⁱ. Therefore, availability of a contractual remedy or a defence against the contractual claim of the other party becomes one of the utmost necessary remedies that can deal with the fallout arising out of a contract tainted by COVID-19^{iv}. Henceforth, along with the cross border litigation, international commercial arbitration is also a very important part of dispute resolution mechanisms available to the businesses that face cross border dispute. However, in international commercial arbitration, unlike international litigation, the parties have the option to choose their arbitrator from a pool of experienced international arbitrators who are well-versed with the culture of international commerce^v. Moreover, since arbitration has a limited right to appeal arbitration awards, it typically provides a speedier form of resolution than litigation and eliminates the process that can delay finality of the adjudication. Additionally, as litigation is strictly controlled by statutory and procedural rules, it lacks flexibility, whereas, since the provisions in the arbitration agreement are set forth by the mutual agreement of the parties involved, it provides wider scope of flexibility to them. Consequently, the key characteristics that make international commercial arbitration a very preferred and accessible mechanism for dispute resolution are neutrality, efficiency, finality, expertise and enforceability. Therefore, International Commercial Arbitration is a robust resolution

mechanism, established to eliminate all the uncertainties regarding cross border dispute resolution and create an efficient framework that stimulates speedier settlement of disputes.

Though arbitrators, councils and institutions have already implemented the use of technology in few aspects of the international arbitration before the emergence of the COVID-19, however, until now, the introduction and growth in such technology in the international commercial arbitration was only happening at a very slow rate. With the disruption of cross-border trade due to COVID-19, there is an increased necessity for countries to have a good digital connectedness and this is only possible through rapid technological advancement, improvements and empowerment^{vi}. Over the last 15 years, changes in technology have directly impacted the process of international commercial arbitration and made it a more preferred mode of dispute resolution as compared to others such as litigation, mediation and negotiation. With innovation and advancements in technology, newer facilities have been introduced in the arbitration process in a variety of ways. However, the four main stages of an arbitration proceedings where technology becomes immensely useful are communications, storage of documents, research tools and hearing logistics^{vii}.

One of the most important technical aspects that seems right for change in international commercial arbitration is the method of exchanging written submissions, correspondence and other documents between the arbitrating institutions, tribunals and the parties. Most of such communication exchange takes place via email communications. However, such exchange of communication and documents would still have the possibility to be intercepted or get forged since the document exchanges occur without any password protection or encryptions via email. Additionally, in cases where written submissions or documents compose of hefty files, disclosures or multiple files, they either split into batches or are sent over several emails to the recipients. This creates confusion for the parties and further complicates for them in tracing any specific document^{viii}. Consequently, the arbitrating institutions and practitioners have increasingly recognised the need for establishing various online platforms that make the exchange of such information more systematic, reliable and secure. One such example to illustrate the importance of developing private platforms for exchanging information in international arbitration has been recognised by the participants in the International Court of Arbitration of the International Chamber of Commerce (ICC) by creating and utilising the

'NetCase' website of ICC which was launched in 2005. The NetCase is not just an arbitrating procedure in itself but, it is one of the official services which is dedicated to facilitate commission and organization between parties and arbitrators under the Arbitral Rules of ICC. It not only grants security and confidentiality but also speed, accessibility, better sharing and efficient organising of documents and also acts as a private forum for discussions as well as allows cost saving. Few of the other advantages offered by this system include updating the information in real time basis, allowing the participants to exchange their opinions, views in a more secure environment rather than sending emails via unprotected forums and enhancing the immediate availability of documents^{ix}. One more such example where technology allowed data protection and avoided its breach is when the EU General Data Protection regulation (GDPR) implemented the data breach notification policy^x. The GDPR contained a very strict notification requirement in cases of data breach and this also applied to all Arbitral Data Custodians. It was required by the data controllers to notify the supervisory authority if a data breach is likely to occur and risk the rights and freedoms of the data subject within 72 hours of such a discovery of the breach. The data breach notification also informed about the cause and the nature of the breach and recommendations were also made regarding how the affected individuals can mitigate the risk of the breach. Henceforth, it can be stated that technological advancement has played a vital role in enabling ICC and GDPR to provide secure communication exchange facilities to its members.

It is pertinent to note that technology has incontestably impacted the nature of evidence collection in arbitration cases. With technological empowerment, witness conferencing has become more expedite and instead of dealing with each witness sequentially for presentation of evidence which is then followed by cross-examination and re-examination, the arbitrators can deal with witnesses testifying on similar issues in a group. However, this technique must be rightfully applied with appropriate safeguards which results in a speedier and cost effective collection of evidence. Moreover, technological advancement has not only increased the cost effectiveness by lowering the cost involved but also, by undertaking only partial assumption of the operating costs by the parties^{xi}. One such method is by online arbitration proceedings that allow cost reduction because the need for human intervention can be reduced in the process of dispute resolution. The cost of hiring human resource can also be avoided in instances where

automated computer systems are utilised for jobs such as calculating the settlement amount on the basis of the claims of the parties rather than hiring human personnel for that. This not only reduces the cost of arbitration process but also saves time and leaves no scope for any kinds of errors. It is apposite to note that in *Hanaro Shipping v. Cofftea Trading*^{xii}, the High Court of England and Wales while rejecting the argument that there was a procedural imbalance between one parties' witnesses giving evidence in person while the other parties witnesses giving evidence by video conference, the judge held that with increased technological advancements and better video quality facilities there is no risk of such an imbalance while providing evidence online.

One more way in which COVID-19 has impacted the international commercial arbitration process is that there has been a stark transition from physical hearings to virtual hearings as in pre-Covid scenario, 78% of users had never or rarely utilised virtual hearing rooms. However, technological upgradation in the arbitration process has also enhanced rapid processing of disputes as proceedings in State Court are very prolonged and take years to reach to a conclusion, whereas, arbitration proceedings comparatively take shorter time to reach to a decision and while working online, the instantaneous circulation of information allows the matter to be concluded all the more faster^{xiii}. Also, arbitration through online platforms allow the dispute to be settled remotely, without the requirement of the parties or the legal representatives to be present physically. The parties are merely expected to connect to the site of the chosen organization and transfer the necessary document and data messages through which the proceedings would be conducted. Moreover, it can also be pointed out that virtual hearings democratise arbitration by contributing in bridging the justice gap because there is no requirement of travel and accommodation costs in virtual hearings^{xiv}.

In *Jiangsu Shagang Group Co Ltd v. Loki Owning Company Ltd*^{xv}, it was observed by the Court that the Tribunal had not assessed the credibility of one of the key witnesses appropriately. The Tribunal failed to take into consideration that the witness did not speak in English and the evidence was given by him by an unreliable video link which has led the Tribunal to its conclusion as to the witness' credibility. Therefore, this case highlights that in arbitration proceedings where video conferencing technologies are utilised, there should be a minimum quality threshold for the infrastructure deployed. Also, proper guidelines and

regulations must be followed while conducting the arbitration process through video conferencing such as the limited guidance found in the Seoul Protocol which require cross-border connections to be safeguarded in order to prevent unlawful interception. They have also applied limits to the number of observers present during the videoconference to only necessary individuals and requires the Tribunal to verify the identity of the individuals present. It also prohibits any recording of the videoconference without the permission of the Tribunal. Additionally, the International Bar Association Rules, 2020 provide that it is the responsibility of an arbitral tribunal to consult with the parties and establish a protocol before the remote hearing which address factors such as the technology to be used, the starting and ending timings of the meeting, the way in which the documents are to be placed before a witness or the arbitral tribunal and measures that ensure that the witness giving oral testimony is not improperly influenced or distracted.

The arbitrating panels play a vital role in the application of technology during the arbitration process. It is the duty of the panels to ensure that both the parties must have equal access to the technical aid in question, whenever confronted with the request to use technical aid. The panels must also be aware about the necessary powers that they pursue to regulate the use of the technical aid and it must be ensured that it is aware of the scope of that power. Proper guidelines must be laid for the arbitrating panels to look into if at all, they face any issues with regards to the application of technology in arbitration process^{xvi}. Additionally, the advent of new technologies have also triggered new and substantive causes of action that can be raised where technology is the core of the disputes. There can be a diverse situations where the issue of the use of technology may arise such as a situation may arise where technical aid may have been used by one of the parties without requesting the panel's permission and subsequently the same has been objected by the other party. The second situation may occur when the permission to use a technical aid is requested by one party, however, the other party objects to it. The panel may also face a complicated third situation when the panel on its own decides to use a technical aid and fourthly when the arbitration rules that promulgate and administrate the process of arbitration itself include technical aid. It is important to state that at times even if the institutional rules lack the necessity and specificity on whether parties can expressly be allowed to conduct a virtual hearing or not, the institutional rules and curial laws however, do provide

the Tribunals/panels with wide powers regarding the conduct of hearings and therefore it can be implicitly argued that virtual hearings can be accommodated under the same^{xvii}. For example, as per Section 34 of the English Arbitration Act, 1996 the Tribunal have the powers to decide all procedural and evidential matters which also include the way in which the proceedings are to be held. Henceforth, technological innovations also form a very crucial aspect for arbitral institutions in order to maintain their key role as effective platforms for international arbitration.

It will not be wrong to state that with the increasing technical advancement there is also a possibility that a time may come where Artificial Intelligence (AI) is used in assisting in the process of arbitration. AI technologies can be utilised in analyzing of an arbitration clause, suggestions on how to improve that and directly drafting an arbitration clause. The AI systems can also help with the amount of possible compensation to be awarded, the duration of the arbitral proceedings and with the assessment of the reasonable prediction of the outcome of the case^{xviii}. Another aspect where AI can prove to be helpful in arbitration is in the procedure for selection of arbitrators as the process of selection of arbitrators requires no legal analysis, and only qualifications are needed, therefore AI can speed up the process and prevent the possible objections of parties against appointed arbitrators. Such technological advancement can also contribute towards impartiality and independence of the arbitrators. Moreover, AI technologies can also assist the human arbitrators while researching and summarising the relevant law, analysing the party statements and arranging conferences in arbitrating process. One such recent development in this regard is the launch of E-Arbitration services by the Hong Kong's electronic business related arbitration and mediation platform where the platform intends to provide functions such as text translation, real time translation on chat style sentences, transcription of the recording of online hearings and user authentication for access security^{xix}. The development and incorporation of such technologies in arbitration proceedings will definitely have a positive impact on both foreseeability of the arbitration process and the legal certainty.

However, the most common concerns related to the use of information technology in arbitration can also not be completely excluded such as the existence of threat of security breaches in electronic communication because the authenticity of a message cannot be fully trusted as

faking identities is relatively easier on the Internet. Additionally, as per the Report by the ICC Section on IT on Special IT Requirements in International Arbitration, other reasons why usage of information technology is not uncomplicated in international arbitration are the adversarial nature of arbitration, the difficulty of adopting a uniform approach specially when both the sides already have their own IT habits, the huge expenses involved in maintaining and using the necessary IT infrastructure, the inadequacy of the legal environment related to the use of information technology and the lack of skill or willingness to use IT solutions as professionals are accustomed to their working habits and are afraid of changing and adapting themselves to the newly technologically advanced processes of arbitration as they have a fear that it may result in decreasing their productivity^{xx}. Also, there are no specific guidelines, neither in the USA law nor in the most commonly employed arbitral rules, that is, the ICC Report that an arbitration panel can take into consideration for deciding certain issues related to the usage of technology in the arbitration process. Moreover, technology is unreliable and may also breakdown at the most inconvenient time. Therefore, there is an acute need for establishment of proper institutions that administer continuous innovations and developments which fix these technical glitches and promote the use of technology in international commercial arbitration. Nonetheless, it becomes imperative for the countries to take initiatives to educate the professionals and other stakeholders with the basic technical know-how of the technologically advanced arbitration process so that it helps them in accepting it. The arbitrating panels must also have the inherent power in order to regulate the use of any technical aid that is required in the process of arbitration. No technical aid shall be allowed if there exists an unreasonable security risk and appropriate privacy protocols cannot be implemented. The use of technology shall be prohibited if such an usage of the technical aid deprives the other party of the minimal procedural fairness and equal treatment^{xxi}. However, in situations where the advantages of using technical aid in arbitrating proceedings outweigh the disadvantages associated with it then such a use shall be allowed with imposing such restrictions and conditions as the arbitral panel seems necessary and reasonable. Proper procedural protocols, institutional rules that address issues of cybersecurity, privacy and confidentiality in arbitration process must be established and implemented.

Technological advancement has encouraged international commercial arbitration to become one of the most effective forms of online dispute resolution. It can be concluded that the appropriate use of technology in the arbitrating process shall be significantly encouraged because it increases the speed of an arbitration, improves its efficiency and is also cost effective. Large amounts of documentary evidence can be analysed with easier and more effective software, video technology is one of the great alternatives to traditional in person hearings where the procedures are over costly or at times even impossible to implement, communications between party can be ensured through more reliable, secure and fast means of communication, online filing proves to be more safe authoritative and convenient repositories for keeping a perfect record of all documentations involved in an arbitration. Therefore, a substantial number of inefficiencies within the process of arbitration can be reduced through a dispute resolution service in a more cost effective way due to the increased use of technology in international commercial arbitration. The new path of development of AI technologies specifically for arbitration will also add to the efficiency and effectiveness of international commercial arbitration and make it more accessible and preferred mode of dispute resolution in the coming future.

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ENDNOTES

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