

DIGITALIZATION OF INTERNATIONAL ARBITRATION FOR CONTITNOUS ADMINISTRATION OF JUSTICE

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ABSTRACT:

Embracing new technology and adopting it as a genuine alternative to the court proceedings and in the arbitration is the need of the present situation of pandemic and is the best opportunity for introducing new changes in the resolution of disputes. Online dispute resolution can be the best remedy for the administration of dispute resolution. However, there are few technical and procedural issues relating to online arbitration. This paper aims at presenting the changes in regulations made by different international institutions in the way of propagating online/virtual arbitration and this paper also addresses the technical issues involve in virtual arbitration and suggest certain remedies for such technical and procedural issues..

KEYWORDS: *Online dispute resolution, technology, virtual dispute resolution, arbitration, pandemic, international, technology, data privacy, security.*

INTRODUCTION:

“JUSTICE DELAYED IS JUSTICE DENIED”. COVID 19 being the global disruption has effected all the areas such as industries, banking, employment, hospitality and also the judicial system and its legal practices. Due to the present pandemic situation the administration of justice by the courts has become difficult. This situation has put a halt on administration of justice for litigants. And if the parties are involved with international arbitration it is further more difficult for them to resolve their litigation as parties are from two different countries. The COVID-19 pandemic is exerting greater pressure for the arbitration community to find innovative ways for more use of online dispute resolution (“ODR”) or virtual hearings. Many leading arbitration institutions have provided guidelines and tools to facilitate virtual hearings. International arbitration involves parties and arbitrators from different countries and continents involving high cost for the hearing which has to be borne by parties ultimately. And if there is any pandemic like COVID-19, the litigating parties and arbitrator cannot participate or conduct arbitration due to social distancing and restrictions on international travelling leading to further negative effect on the relationship of litigants. However International arbitration rules provide the flexibility to conduct arbitration in any manner convenient to the parties i.e. either physical or virtual. China is at the frontlines of the use of technology in court services. It has digitalised case-handling within its court system using cyberspace and technologies like block chain and cloud computing. Many legal cases are now being decided by internet courts that do not require citizens to appear in court.

CONTENT:

This pandemic has accelerated the pace of digitalisation of arbitration process. However many arbitration institution have recommended the digitalisation pre pandemic such as **ACICA (AUSTRALIAN CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION) draft procedural order for use of online dispute resolution technologies** was finalised in 2016 but arbitration community has not shown much interest in it. **SEOUL PROTOCOL ON VIDEO CONFERENCE IN INTERBATIONAL ARBITRATION** was introduced in 2018 for discussion on virtual arbitration but was not paid any attention by international arbitration communities. If these prospective recommendations which were made by the arbitration institutions would have been recognised by the different nations it would have provided proper remedies and established regulations for conducting timely dispute resolution during current COVID situation.

However Online Dispute Resolution can take place either entirely or partly as per agreement between the parties. There are few minor disadvantages of online dispute resolution such as inadequate technology to participate, less personal form, language difficulties these issues can be resolved by the parties mutually. But the major concerns which need the attention are discussed further in this paper.

MAJOR TECHNICAL AND PROCEDURAL ISSUES IN THE WAY OF ONLINE ARBITRATION:

There are two major hurdles in the way for proper implementation of online arbitration

I) Mutual consent II) Confidentiality**MUTUAL CONSENT FOR VIRTUAL HEARING IS A CONCERN:**

The important question which arises is consent of both the parties for proceeding with the virtual arbitration. The parties may argue that offline arbitration gives better scope for presenting the dispute and examination of parties-witnesses. However the following guidelines provide

The **NATIONAL ACADEMY OF ARBITRATION (NAA)** issued the guidelines, in case a party is in opposition to virtual hearing the arbitrator can still issue order for virtual hearing even without the mutual consent. However many parties are of opinion that the virtual arbitration will violate the confidentiality of the proceedings due to the technological issues also.

The **ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic** allows the tribunals, in appropriate circumstances, to adopt different approaches as they exercise their authority to establish procedures suitable to the particular circumstances of each arbitration and fulfil their duty to conduct the arbitration in an expeditious and cost-effective manner". International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation allowed a party to request the arbitral tribunal to participate in the hearing by means of videoconferencing (article 30(6)). Article 25(2) of the ICC Rules of Arbitration 2017 also does not preclude a hearing taking place "in person" by virtual means if the circumstances so warrant.

In the case of **Capic v Ford Motor Company of Australia Limited (Adjournment) [2020] FCA 486**, the Australia Federal Court denied the Respondent's application for adjournment of the trial and decided that the trial would proceed as scheduled in the virtual mode. As Public institutions such as the Court must do all they can to facilitate the continuation of the economy and essential services of government, including the administration of justice".

CONFIDENTIALITY: AN IMPORTANT ISSUE RELATING TO VIRTUAL ARBITRATION

The recent virtual hearing of **NATIONAL BANK OF KAZAKISTHAN V BANK OF NEWYORK MELLOR AND ORS** conducted by high court of England went live on YouTube enabling the parties and others follow the hearing. This did not cause violation of courts procedure or rights of parties. But in case of arbitration, confidentiality is an important aspect and live streaming on public platform will affect the right of confidentiality of litigants. However the parties can form an agreement which includes private virtual hearing with mutual consent of parties in litigation.

TECHNOLOGICAL ISSUE EFFECTING CONFIDENTIALITY OF VIRTUAL PROCEEDINGS: UNAUTHORISED RECORDING OF PROCEEDING

The unauthorised recording of the virtual hearing is a very important aspect which may increase the risk of violating the confidentiality feature of arbitration. If this aspect is not addressed properly then the arbitration output may lead to loss of interest of the community in arbitration. This technical issue can be addressed by the arbitrator by providing the instructions regarding the virtual hearing and providing parties with logistical steps to participate in the hearing.

The remedy for unauthorised recording is that the virtual hearing is protected with a password and with a restriction that the password shall not be shared with any other individual and if shared then such participant be held liable to compensate the other part and arbitrator.

DATA PROTECTION AND CYBERSECURITY:

Another issue related to confidentiality is cyber security and cyber threat. However ICCA-NYC Bar-CPR Protocol on Cyber security in International Arbitration provides guidelines on how to increase the security. The blue print to achieve Data Protection in International Arbitration has been developed by the ICCA to help arbitration professionals better understand the data protection and privacy. And if the parties follow the data security norms strictly there can no threat to the online security. Although there is cutting edge security, still internet can be venerable when it comes to the security of data transmission without the knowledge of other party. Here comes the trust aspect between the parties. If parties remain trustworthy to each other settlements can be easier.

CONCLUSION:

ONLINE DISPUTE RESOLUTION is the process of incorporating technology along with arbitration. It is not supplementing the traditional method of arbitration but complementing it. Online dispute resolution allows parties to resolve their claims from their offices or residence. Any peoples are of opinion that regardless of what advantages ODR provides face to face resolution is irreplaceable but these can be solved by usage of advanced technology. In response to the COVID 19 crisis Australian courts have already included online mode to court proceedings. Increasing demand for online judicial process will force the ongoing offline judicial system to incorporate the online mode. The shift from offline to online resolution is inevitable and the shortcoming will in no time be addressed and new technology shall resolve all the concerns relating to online dispute resolution.