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Impact of Covid-19 on Arbitration

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ABSTRACT

The present pandemic creates a necessity for businesses and corporations to contemplate thoroughly appropriate and alternative procedures for the economical, timely, amicable, and cost-effective resolution of disputes.

The focus should be gravitated towards maintaining a strong relationship and growing the business relationship, re-negotiating the contract, or looking for different routes to redress their conflicts, rather than demanding on stringent implementation of contractual terms. This has called for increasing need for Alternative dispute resolutions like mediation, conciliation and Arbitration as well as the combination of different dispute resolution processes. This paper focusses on the impressions and the effects left on by Covid on litigations and alternative dispute resolutions.

I. INTRODUCTION

The coronavirus pandemic symbolizes as an unparalleled, global impediment to all modes of dispute resolution, as well as international arbitration. The present pandemic that the entire world is engulfed in is basically prospected to quicken the technological innovations already existing in arbitration.

Further, the consequences of the coronavirus will inevitably cause a steep rise in international arbitrations, not only because of the possibility for unprecedented circumstances that have been born from the pandemic but also because, as some state court processes grind to a halt, and lose momentum, the international arbitrations can and will continue².

Travel ban has severely impacted the arbitral proceedings happening on international scale as there are needs of parties to the dispute being present along with their respective counsels during the hearing. Examining hardcopy details and arguments pertaining to the case, presenting witness evidence and one-on-one interactions of any kind are all hundred times more difficult now³.

¹ Author is a Lawyer in India.

² Reynolds, S., 2021. International Arbitration Experts Discuss The Impact Of COVID-19 On Arbitration In 2020 And Beyond. [online] Lexis Nexis. Available at: <<https://www.squirepattonboggs.com/-/media/files/insights/publications/2020/05/international-arbitration-experts-discuss-the-impact-of-covid-19-on-arbitration-in-2020-and-beyond/arb052620cm.pdf>> [Accessed 5 September 2021].

³ The Impact of COVID-19 on the Administration of Justice- Kun Fan (Herbert Smith Freehills China

The immense and widespread consumption of information technologies during trying times like these presents as a real advantage over traditional mode of procedural litigation.

Virtual conferences and hearings are already normal for procedural matters, and witnesses and parties to the contract commonly give evidence and arguments by telephone or video-link. Arbitral institutions have progressed and moved swiftly to limit hindrances: the ICC, for example, has digitized requests for arbitration, the LCIA has set up a virtual platform to file applications, parties governed by ICSID rules are encouraged to file submissions electronically and many arbitral bodies have now published guidance to online hearings⁴. The persistent issue remains that of technological glitches, time differences, the limitations of virtual cross examination, investigation etc. having said that though the flexibility that is offered by international arbitration makes it uniquely special and it is accustoms and adapts to the new normal⁵.

More broadly, the effect of coronavirus has surely led to a steep rise in international arbitrations throughout every business division inclusive also of insurance. There will be a call for ample number of claims invoked from state actions to deal with the pandemic, force majeure claims, MAC claims and supply chain disputes. Immense number of production and construction and manufacturing projects have been disturbed, delayed, or cancelled, and global transportation networks have been massively faced the repercussions. There has been a rough trough faced by the oil and commercial prices has weakened the power markets, which will cause disputes to arise, also involving over estimating expectations⁶.

Travel and tourism have basically collapsed, disabling the airline industry. The magnitude of the financial decline is visible and can be seen, but its impact is massive which has already caused ample number of cases and disputes piling up which has in turned caused create troubled situations and impacted negatively to the financial institutions. International arbitration, with its inherent flexibility, will have an important role in dealing with the fallout from coronavirus in the coming months and years⁷.

International Business and Economic Law (CIBEL) Centre of UNSW Law)/July 10, 2020 /1 Comment Academic Council, Institute for Transnational Arbitration (ITA) <http://arbitrationblog.kluwerarbitration.com/2020/07/10/the-impact-of-covid-19-on-the-administration-of-justice/>

⁴ Bhargava, A., Chaturvedi, A. and Diddi, S., 2021. Virtual arbitrations and the new normal. [online] Khaitan & Co LLP. Available at: <<https://www.khaitanco.com/sites/default/files/2020-12/Virtual-arbitrations-and-the-new-normal.pdf>> [Accessed 5 September 2021].

⁵ Ibid 2

⁶ Impact Of Covid-19 On Arbitration Proceedings In India- Mirza Aslam Beg and Chandni Arora <https://www.mondaq.com/india/operational-impacts-and-strategy/911554/impact-of-covid-19-on-arbitration-proceedings-in-india>

⁷ International Arbitration Report <https://www.squirepattonboggs.com/-/media/files/insights/publications/2020/05/international-arbitration-experts-discuss-the-impact-of-covid-19-on-arbitration-in-2020-and->

II. SERIOUS IMPLICATIONS OF COVID ON ARBITRATION

(A) Increasing Demand for Amicable Methods of Dispute Resolution

The current pandemic calls for an urgent need for commercial organisations, businesses and their legal representatives to contemplate thoroughly, properly and look for alternative and fruitful options for the economical, judicious and profitable resolution of disputes. They have to now channelise their resources in focusing on reconstructing, advancing their business relationship, re-doing of the contract, or finding lucrative and impactful processes to come to an amicable solution to their dispute, as opposed to dwelling on stringent implementation of their contractual terms. This will cause an increase in the demand for alternative dispute resolutions like mediation, conciliation and other amicable methods of dispute resolution, as well as the combination of different dispute resolution processes.⁸

(B) Digitalization of Arbitration

The COVID-19 pandemic has severely impacted and exerted immense pressure on arbitral institutions to look for advanced ways to integrate better use of technology, by engaging more into online dispute resolution (“ODR”) or virtual conferences. Many prominent arbitration institutions have stipulated intricate guidelines and management to administer virtual hearings like ICC and SIAC. There are more and more alliances between varied institutions to come up with concrete solutions. There has been massive development in the sector of International Arbitration Center Alliance (“IACA”), and the Joint Statement on Arbitration and COVID-19 (“Joint Statement”) which was issued by thirteen arbitration institutions.

When we opt for online hearing or online trial there are many pitfalls that need to be considered. Often times the virtual evidentiary hearing has its fair share of technical glitches and issues that arise from it, which needs strong consideration and vigilance.⁹

(C) Access to Justice and the Due Process Issue

With the devastating effect that the covid has had on the Judiciary system parties to the dispute have inclined towards online means of redressals. With the emergence of the online redressal mechanism, there is possibility of technical issues when hearing is done online such as limited availability of internet connection and other technological tools. Usually before the pandemic all the institutions carried out hearings on face to face and later on the basis of the concrete grounds presented by the parties and procedural fairness a concrete solution was reached by

beyond/arb052620cm.pdf

⁸ IDIB 6

⁹ IDIB 2

the deciding authority. Having said that with the pandemic tightly clenching the world in its fist there is no possibility of having face to face hearings for a quite some time. The time taken for things to get back to normal cannot be fathomed and simply delaying the procedure in hope that things will be the same soon is not considered prudent. There will be a humongous lag in the delivery of justice and will shake the very basis of the legal system. Arbitrators need to be more vigilant, and d balance the parties' right to present one's case and arbitrators' overriding duty to conduct the arbitration in an efficient and profitable manner.

Many arbitration institutional rules and practice guidance have gradually recognized the need of virtual conferences and hearings. Example in the year 2017 Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation ("ICAC") came up with the guidelines¹⁰ that the party to the dispute has the right 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 exclude a hearing held in place "in person" by virtual hearings if the situation and circumstances so permits, as suggested by the ICC.

In the infamous case of **Capic v Ford Motor Company of Australia Limited (Adjournment) [2020] FCA 486**¹¹, the Australia Federal Court rejected the Respondent's plea for adjournment of the proceedings and came to the decision that the trial would proceed in form of virtual mode. The Judge acknowledged that many parts of a virtual hearing were difficult and unwanted but strongly assumed that those impediments were not challenging and did not make the trial would be unfair or unjust. The "public organizations such as the Court must do every possible thing they can to enable the maintenance of the economy and essential services of government, including the administration of justice", the judge also said that a virtual hearing shall proceed as the adjournment of cases would simply delay the cases even the gravity of issues shows that the hearing must proceed and such delay would really act in the best interest of the general public. The decision came in as a ray of good hop to the arbitrators if and they decide to proceed with virtual hearings despite the parties' objections.

III. CONFIDENTIALITY AND PRIVACY

It is of paramount essence that the parties to the dispute have the sense of security and

¹⁰ INTERNATIONAL ARBITRATION LAW AND RULES IN RUSSIA-Surgey Yuryev <https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/russia>

¹¹ [2020] FCA 486 15 June 2020 <https://www.judicialcollege.vic.edu.au/sites/default/files/2020-04/JCV%20Case%20Summary%20-%20Capic%20v%20Ford%20Motor%20Company%20of%20Australia%20Ltd%20%28Adjournment%29%20%5B2020%5D%20FCA%20486.pdf>

confidentiality of the content, information disclosed in the remote hearing and remote trials. Referring to the “ICODR’s Free Guide to Video Arbitrations (“IOCDR Guide”) stipulates intricate guidelines and rule to keep the events of the trial in utmost confidence and also have written confidentiality clauses and no objection certificate. Parties including the arbitrators have to sign written promise that no recordings video or audio, nor any kind of screenshots of the hearing will be disclosed outside the four walls of the room. Hence any kind of hearing and secure video conferencing is done in a with safe videoconferencing platforms having the end-to-end encryption.

The CIArb Guidance that says on Remote Dispute Resolution Proceedings (“CIArb Guidance Note”) call for the circulation of full names and roles of all participants to a remote proceeding as well as their allocated virtual hearing and breakout rooms between parties and neutrals in advance and strict adherence to it.¹²

IV. CYBERSECURITY AND DATA PROTECTION

This is pertaining to the confidentiality and the cybersecurity which is very crucial in arbitration as the entire process of arbitration is based on trustworthiness and honesty of the dispute resolutions. When an arbitration hearing or the conference is virtually conducted or has online hearing, it is very essential for arbitrators to talk to parties and ask parties for permission in order to implement a cyber-protocol to follow any relevant guidelines of any applicable data privacy regulations (such as the European Union General Data Protection Regulation).

The ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020 edition) stipulates rules and regulations for adherence of advanced standard of information security during the course an international arbitration. The ICCA-IBA Roadmap to Data Protection in International Arbitration (public consultation draft) has been developed by the ICCA-IBA Task Force on Data Protection in International Arbitration to help arbitration professionals better comprehend the data protection and privacy commitments to which they may be subject in relation to international arbitration proceedings¹³. The ICC includes recommended clauses to enhance cyber-protocols and procedural orders dealing with the organization during the course of virtual hearings (Annex II). Also, the African Arbitration Academy Protocol on Virtual Hearing in Africa also offers minimum cybersecurity standards (Annex I) and tribunal-issued cyber protocol.

¹² IDIB 2

¹³ IDIB 5

V. PRACTICAL AND TECHNICAL ISSUES

There are many underlying issues associated with the Virtual hearing or virtual trials out of which the practical and technical issues stand out. The ICC guides through the process of virtual hearing by coming up with guidelines regarding the quality of virtual hearing by ensuring the platform of the virtual hearing is set to maximum security settings and also that it is licensed. There is a detailed guidelines mentioned by the Seoul Protocol on video Conferencing International Arbitration (“Seoul Protocol”) which has within its ambit the guidelines with respect to technology and logistics to ensure that there is both quality and efficient hearing. The HKIAC also provides for certain guidelines that needs to abide by the arbitrators and the parties. The guidelines is based on the HKIAC’s real experiences at the HKIAC. These guidelines help shape the solutions that come out of a virtual Arbitration hearing and ensures that the participating parties have an efficient, speedy and an amicable hearing. The ICODR also took cognizance of the technical issues and said that the in situations that one party gets disconnected from the session the trial shall be paused until the party is able to join in again this guarantees fairness, impartiality and neutrality. It has also suggested on multiple occasions to have a plan b incase of such sound glitches like usage of telephone.

VI. DIGITALIZED ARBITRAL AWARD

These arbitral institutions have enthusiastically retorted to the devastating impacts resulting from the Covid-19 pandemic by adopting and adapting to new procedures to allow improved remote administration of cases and by executing secure online hearings, conferences and information sharing platforms. To our surprise from various surveys held it is also deduced that the arbitral awards are turning into an electronic award and signatures and driving efficiency through technology and digitalization.¹⁴

VII. THE NEW NORMAL

The Covid -19 has called for some series tweaking of how things worked previously in the legal institutions. Therefore, thew current way in which the judgement is being made seems to the new normal or the lockdown ways of working. Hence all the knowledge inculcated during the year and a half will be put into use and will be in practice in continuing to hold wholly virtual/ online fundamental hearings. This pandemic has however taught us to be more flexible

¹⁴ ‘International Arbitration and the COVID-19 Revolution’ (Part 1 of 2)- Maxi Scherer (WilmerHale & Queen Mary University of London), Niuscha Bassiri (Hanotiau & van den Berg), and Mohamed S. Abdel Wahab (Zulficar & Partners)<http://arbitrationblog.kluwerarbitration.com/2020/10/08/international-arbitration-and-the-covid-19-revolution-part-1-of-2/>

and adaptable to respond swiftly and efficiently to sudden, immediate, and often changing, situations.

Online hearings are the only plausible solution to being flexible and adaptable given the present situation. A combination of virtual and physical attendance will be fruitful and help in a large extent to mitigate the limitations of travelling across states or borders and also considering the local or national lockdowns. They will also empower those engaged in hearings (such as the parties and their counsel, the Tribunal and any witnesses or translators that might be involved) to fully participate. Some participants have the liberty to meet a particular location multiple times, with appropriate social distancing, and following relevant guidelines while others have the option to attend it virtually. These hybrid hearings offer the right to make changes to its schedule at a very short notice, enabling those involved to plan for many of changed situations but also ensure at the same time that the procedure remains fair, offering each party the opportunity to put their case.

VIII. CONCLUSIONS

Though the pandemic has had some disastrous effect on lives of people and also how the world used to previously function, there has been a very steady shift to newer and more efficient ways in which the institutions have handled the repercussions of the pandemic. Even the dispute resolution institute have taken a massive leap of faith by adopting as well as adapting to the new technological and innovative ways decision making.

Though during trying times like the one in which we are right now has shown to have done more harm than good, the only way to move forward is by thinking out of the box and shift shift in mind-set towards different ways of delivering the product of arbitration effectively and efficiently has been exciting to see and experience
