

RESTRUCTURING THE WORLD OF ARBITRATION

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ABSTRACT

The research paper titled “Restructuring the world of Arbitration” talks about two important aspects namely ADR and COVID-19. With the current outbreak of pandemic, each and every industry and sector has been gravely impacted. The paper talks about the general mechanism of ADR and the mechanism we have adopted or rather we can say “had to adopt” due to the coronavirus. The paper consists of reasons as to why there was a need of virtual platform. It talks about how virtual platform has made the system less tedious but at the same time complex. The paper talks about few provisions in law and rules which encourages virtual hearing and settlement of the matters in ADR. The paper further analyses the arbitration system in light of the loopholes intact with them. The paper includes the pros and cons of the virtual system of dispute resolution and puts forward both sides of the coin.

The paper includes suggestion in respect of what better measures can be taken for effective outcomes and improved management. It lays down ideas to adapt. The paper draws a conclusive statement after researching on the entire scenario of the pandemic. The entire research is genuine and information is taken from authentic sources. The paper is a complete study of dispute resolution and pandemic.

A. Research question

- i) Why is a virtual platform needed for arbitration needed?
- ii) What is the difference in situation seen in dispute resolution sector?
- iii) Analysis of the new arbitration system in light of the loopholes intact with them.
- iv) How can we approach in a better manner in this pandemic?

B. Research objective

The paper mainly aims to establish a comparative picture of alternative dispute resolution in respect of earlier process of ADR and the current process of ADR. The paper includes few case laws which are relevant at this point. The main objective of the research is to highlight

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the new methods that have emerged as a creative and faster means to settle disputes. The issues have also been addressed along with suggestive conclusion.

C. Chapterization

Chapter 1: Introduction

Chapter 2: The new arbitration

Chapter 3: Now and after

Chapter 4: Development of virtual system of arbitration

Chapter 5: Roadblocks for arbitration

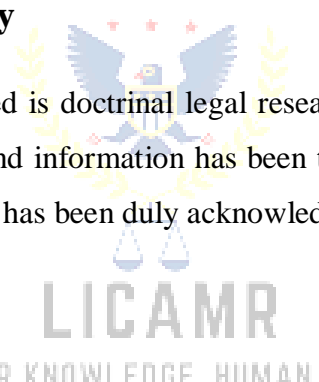
Chapter 6: Suggestive way forward

Chapter 7: Institutional framework for virtual hearings: extracted and summarized

Chapter 8: Conclusion

D. Research methodology

The research methodology adopted is doctrinal legal research method. Various e-books and web sources have been referred and information has been taken from authentic websites and journals. The referred information has been duly acknowledged and mentioned.



1. Introduction

In an age where social isolation became the new norm and the survival doctrine, its resonance and impact can be seen in virtually every area of life. At this juncture, the greatest obstacle that one has to face is being equipped to deal with the difficulties that the current situation has to bring. Since the release of COVID-19, the world has come to a standstill and has constantly been struggling to find a way to bring the situation back to normal. The basic purpose of the agreement may be assumed to provide the parties to the conflict with a timely and efficient settlement without the rigours of the law². As a result, the rules regulating arbitration have often been designed in such a manner as to preserve as much as possible the privacy of the parties as a priority. In addition, the majority of disputes which can be arbitrated are of a civil nature and therefore take into account³ the settled principle of civil

² Dr. P.C. Markanda, Naresh Markanda & Rajesh Markanda, 'Law Relating to Arbitration & Conciliation' 35 8th ed. 2013 LexisNexis.

³ ONGC Ltd. v. Oil Country Tubular Ltd., 2011 SCC OnLine Bom. 426.

law which balances the convenience of both parties. Hence, it shall be determined by mutual consensus of the parties before agreeing on the status of arbitration. In addition, the majority of disputes which can be arbitrated are of a civil nature and therefore take into account the settled principle of civil law which balances the convenience of both parties. It must, however, be determined by mutual consensus between the parties when agreeing on the status of arbitration.

It has been very correctly stated by Lord Chief Justice Hewart, “*Justice should not only be done but should manifestly and undoubtedly be seen to be done*”⁴, which today, in most situations, are massively undermined by holding those coercive terms⁵.”

2. The New Arbitration:

Many arbitration arrangements are also considered to have a fixed seat and place. However, when we continue to consider an international case such as the current situation in the middle of COVID-19, the preliminary question arises as to how the parties can honour the position of arbitration as agreed by the parties when they enter into an agreement. It is also a sad fact that numerous companies resort to arbitral tribunals which tend to appoint such arbitral tribunals or to pick arbitral tribunals which, by definition, come with luxurious venues which improve the credibility of the business in a dispute.⁶ In the current age of technical advancement, even then, it is also depressing to note that the existing legal structure of our country allows only the parties to enter into an arbitration agreement to send their pending or prospective disputes to arbitration via the exchange of e-mails, but the Act leaves a void by making no provision whatsoever for electronic arbitration or enabling them to do so.⁷ However, in the modern era of technological growth, it is also saddening to note that the present legal framework of our country allows only the parties to enter into an arbitration agreement and bring their pending or prospective disputes to arbitration through the exchange of e-mails⁸, the Act provides a loophole, however, by making no allowance whatsoever for conducting arbitral hearings

⁴ *R v. Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256.

⁵ *Dolphin Drilling Ltd. v. M/s. Oil and Natural Gas Corporation Ltd.*, (2010) 3 SCC 267.

⁶ *Id*

⁷ Shwetank Tripathi & Pallavi Verma, ‘The effect of invalidity of underlying contract on the Arbitration Clause: A Critique on the Doctrine of separability in Arbitration’ (August 29, 2020, 10:34PM) available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=22055.

⁸ The Arbitration and Conciliation Act, 1996, § 7, No. 26, Acts of Parliament, 1996 (India).

remotely or enabling them to do so by the online institution of arbitral proceedings⁹. With the advent of COVID-19, arbitral bodies around the world have taken the lead and paved the way for an electronic tribunal to deal with the cases presented before them, meaning that the disputes are not indefinitely postponed for too long. In this respect, it is important to take notice of the joint declaration issued by the International Federation of Commercial Arbitration Institutions and other leading arbitral institutions, such as the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre, the London International Arbitration Court, etc., on 16 April 2020.¹⁰ Most of the world's leading arbitral agencies, who were part of the Joint Declaration, unanimously decided to make virtual proceedings the standard for any conflicts pending with effective cyber protection controls, the parties were instructed to connect via e-mail and telephone and to cooperate with the time-frame and to make the awards accessible to them by issuing virtual copies¹¹.

These organisations have already paved the way for the introduction of fresh arbitration applications, as well as for the submission of emergency applications for the start of arbitral proceedings via e-mail¹², underlining the need for cooperation between the various inter-alia parties, the plaintiffs, the arbitrator, the arbitral body as the case may be, established techniques that could include simulated hearing facilities without the applicants moving to the venue, taking into consideration social distancing initiatives and enforcing travel restrictions.

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3. Now and After:

Many of the world's main arbitral organisations have been alert to the present scenario and, as a result, have revised their laws to address the extraordinary pandemic circumstance. But, closer to home, India's arbitral agencies, such as the Indian Arbitration Council, the Delhi

⁹ Atish Chakraborty, 'Online Arbitration Model: A Need of the Hour', 4 Cal. LT 14, 28 (2019).

¹⁰ 'Arbitral institutions COVID-19 joint statement' International Chambers of Commerce, (August 10, 2020 09:56AM) available at <https://iccwbo.org/publication/arbitral-institutions-joint-statement-in-the-wake-of-the-covid-19-outbreak/>.

¹¹ Janet Walker, 'Virtual Hearings: An Arbitrator's Perspective, Int-Arb Arbitrators' (August 01, 2020, 10:54 AM), <https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf>. (hereinafter "Janet Walker")

¹² *Id.*

International Arbitration Centre¹³ and the Mumbai International Arbitration Centre¹⁴, are yet to make any attempt to make arbitration a virtual reality.

The Arbitration & Conciliation Act of 1996 was amended in 2019, which led to the creation of the Arbitration Council of India with the intention of implementing legislation to promote arbitration in India¹⁵. However, until now, the Council has not been able to formulate a mechanism for the automated launch of proceedings, the conducting of trials remotely. If we now look at the arbitral hearings in arbitral tribunals in India, which are often constituted by the judge or by the parties, there are virtually no provisions for such courts in India for the execution of the arbitral proceedings. Consequently, these tribunals cannot be blamed for deriving their jurisdiction from the Arbitration & Conciliation Act of 1996.

Although the law on automatic trials remains vague, the courts have therefore tied their hands so that they cannot require the trial to be conducted remotely. In order to do that, that would mean that the court, by constituting such a tribunal, had moved beyond the reach of the statute and that such a decision by the court will thus be deemed to be poor in fact. It is time to enact changes to the Arbitration & Conciliation Act, 1996, to recognise the entities of virtual or digital arbitration proceeding, to set up internet hearings that establish an arbitral tribunal and, eventually, that set up a regulatory mechanism that will enable virtual or remote hearings of the arbitral proceedings and the award to take place in effect. The Indian Arbitration Council should use its powers to facilitate simulated hearings and enable arbitral agencies and arbitrators to conform to such arbitration procedure¹⁶. Finally, the Arbitral Institutions in India should amend their rules in such a way as to ease the obligation as to the status of arbitration and should take a pragmatic approach, recommending to the parties to carry out virtually all the existing proceedings, which will encourage the institutions to go a long way not only by keeping with the timetable, but also by speeding up the process, which is one of the main objectives of the arbitration and arbitration proceeding. These organisations should make provisions for emerging disputes with technological institutions and should formulate protocols for the effective management of those disputes.

¹³ Delhi International Arbitration Centre, available at <http://www.dacdelhi.org/>.

¹⁴ Mumbai International Arbitration Centre, available at <https://mcia.org.in/>.

¹⁵ The Arbitration and Conciliation Act, 1996, § 43D (1), No. 26, Acts of Parliament, 1996 (India).

¹⁶ Chakraborty Atish & Chakraborty Aurin, 'Rethinking the Practicalities of Arbitration in the Age of a Pandemic' (August 18, 2020 at 07:39PM) available at <https://ssrn.com/abstract=3628923> or <http://dx.doi.org/10.2139/ssrn.3628923>.

In the international system, an organisation such as the American Arbitration Association-International Centre for Dispute Resolution grants for Virtual Hearing by Video Conference, as well as for legal practise education manuals for arbitrators and parties¹⁷. The HKIAC also offers a venue for electronic trials through its robust digital hearing facilities.¹⁸

The International Chamber of Commerce also prefers to use a video sharing network that is used for virtual hearings and approved to ensure the greatest possible privacy. The Guidance Note also points out the 'Suggested Provisions for Cyber-Protocols and Procedural Orders for the Conduct of Virtual Proceedings' with the necessary protection¹⁹.

4. Development of Virtual System of Arbitration:

The 7th Asia Pacific ADR Meeting, held in Seoul , Korea, on 5-6 November 2018, was accompanied by a wide-ranging debate on the feasibility of using video conferences to perform arbitral hearings²⁰. At the beginning, the Conference addressed some of the main obstacles that could be met by such virtual hearings. Taking a careful note of the major problems that might occur in the process, the Seoul Protocol (hereinafter referred to as the 'Protocol') was devised by a group of experts and professionals who gathered and outlined best practices for the preparation, monitoring and efficiency of video conferencing for international arbitration, and also taking account of the challenges that could occur as a result of this process, a dual framework for dealing with hacking and secrecy concerns has been established and provisions have been designed to ensure that the due process of law is upheld as far as possible.²¹

The key issues that were identified are as follows-

- *Possible hacking and issues of privacy*

¹⁷ Covid19-flattening the curve, <https://go.adr.org/covid19-flattening-the-curve.html> (last visited May 10, 2020).

¹⁸ Online Dispute Resolution: Now and the Future, <https://www.hkiac.org/events/online-dispute-resolution-now-and-future> (last visited Aug, 12, 2020).

¹⁹ICCA-IBA Joint Task Force on Data Protection in International Arbitration Proceedings, https://www.arbitration-icca.org/projects/ICCA-IBA_TaskForce.html (last visited May 12, 2020).

²⁰The Seoul Protocol on Videoconferencing and the Coronavirus (COVID-19) Pandemic, <https://www.jdsupra.com/legalnews/the-seoul-protocol-on-videoconferencing-89404/> (last visited May 10, 2020).

²¹ Jiyeon Hong, *Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing*, (May 12, 2020, 9:40pm), <http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/>. (hereinafter “Hong”)

It has also been observed that data security vulnerabilities appear to occur in such virtual hearings of international arbitral proceedings. For example, in the 2015 Philippines-China territorial dispute, hackers allegedly targeted the Philippines Department of Justice, a law firm representing the Philippines, and the website of the Permanent Court of Arbitration. Articles 2.1(c) and 2.2 of the Protocol explicitly discussed the risk of a violation of security and proposed that the connexion to a video conference be properly secured. They have made it their duty to the parties to do their best and to ensure the welfare of the video conferencing participants²².

- *Ensuring the due process of law might be a problem*

Article 2.1(c) of the Protocol guarantees that the parties have an equal opportunity to discuss their case during the questioning of the claimant, as it specifies that the video conferencing site is situated in a neutral position granting the parties involved a fair, equitable and appropriate right of access. In particular, Article 4.1 of the Protocol ensures that the proceedings are open by requiring all related records to be clearly defined and published. Article 3.1 of the Protocol fixes the issue of jurors being abused by off-screen individuals, as it requires all parties to the video conferencing to be involved in the hearing and to be remembered at the start of the videoconferencing session.²³

- *Witness Tutoring*

A main aspect that needs attention is that of a witness tutoring, which could be carried out in the form of a manual that may have been prepared prior to the trial or with instructions from a third party during the testimony. These features may be present or situated in a hearing room where the camera will not be focused. However, it is much easier to track the true character of a witness during an in-person hearing²⁴, while in virtual trials it is important to ensure that the plaintiffs are not engaged in actions that may damage the integrity of their testimony.²⁵

5. Roadblocks for Arbitration:

²² *Id.*

²³ Hong, *supra* note 20.

²⁴ Janet Walker, *supra* note 10.

²⁵ Vivek Joshi & Rohan Gulati, 'Steering Virtual Arbitration Hearings in the Right Direction', NLUJ Law Review Blog (Aug. 25, 2020, 10:10AM), <http://www.nlujlawreview.in/steering-virtual-arbitration-hearings-in-the-right-direction/>.

- i) **Logistical Blocks:** There is a primary need to recognise such technical problems, including but not limited to the shortage of connectivity that might not be available to the parties. This can give rise to the primary issue of accuracy in both audio and video during virtual hearings. In addition, in the event that the problem of bandwidth is raised prior to the hearing, the parties may encounter snags with respect to the network or domain to which they are related for a virtual hearing. The number of institutions offering services similar to those of Maxwell Chambers or Arbitration Place Virtual continues to be relatively small in terms of e-hearing facilities. Consequently, not all participating in the arbitration process would actually have access to such sites that allow for virtual hearings.
- ii) **Confidentiality vis-à-vis virtual hearing:** Any stakeholders may have questions about the protection of documents exchanged via virtual platforms. In other words, in the context of the proceedings, there may be a variety of papers which need to be exchanged or sent to the legal counsel, which are often posted electronically. Any stakeholders may have questions about the protection of documents exchanged via virtual platforms. In other words, in the context of the proceedings, there may be a variety of papers which need to be exchanged or sent to the legal counsel, which are often posted electronically.
- iii) **Credibility of witness testimony:** It is necessary to discuss the question of the reliability of the testimony of witnesses in the process of the arbitral proceedings. Due to the absence of a witness at an in-person hearing, the court can find it difficult to determine and interpret the vocabulary of the voice, the facial expression and the sound of the witnesses' reaction²⁶. The above plays an invaluable role in the discernment of the integrity of the witness and the claims made afterwards. It is generally easier to recognise those causes during an in-person hearing, but in the e-hearing phase the aforementioned downside can have a conflicting impact on the case as a whole. Another critical factor that deserves consideration is that of witness tutoring, which can be performed in the form of reading from a document that may have been written prior to the trial or taking directions by a third party during the testimony. These factors may be present or situated within the hearing room, where the camera is not centred or unable to identify. It is also

²⁶ Vries, Berend, 'Online Dispute Resolution: Challenges for Contemporary Justice' Information & Communications Technology Law, 15 (2006) available at <https://www.researchgate.net/publication/263247362> Online Dispute Resolution Challenges for Contemporary Justice.

important to ensure that the witnesses are not engaged in actions which may weaken the legitimacy of their testimony.²⁷

- iv) **Adjusting official working hours:** The majority of international commercial arbitrations can have parties / arbitrators / case lawyers in various parts of the world. In the ordinary course of the trials, they will fly to the site of the arbitral trial, but at such extraordinary periods, as at the moment when fly limits have been placed, the aforesaid becomes invalid. Therefore, though in various areas of the world, another problem that can arise is that of worldwide time zones and daily working hours²⁸. For example, a trial scheduled to begin at 1 p.m. in Singapore would mean that, in the event that the arbitrator is based in London, he will have to be ready at 6 a.m. as per London timings. There is also still a significant issue about the scheduling of timings.

6. Suggestive Way Forward:

A heavy focus is placed on the Seoul Protocol on Video Conferencing in International Arbitration (hereinafter referred to as the Protocol) in order to resolve the pitfalls that may exist during virtual hearings.

The primary goal behind the Protocol was originally established in 2018, which was to create functionality that would support the international arbitration community as a whole. As a result, the Protocol obtained a go-ahead in the wake of 2020 and was eventually implemented in Seoul. Recently, on 20 March 2020, the Protocol was adopted by COVID-19 to allow international arbitration.²⁹

The Extracted and outlined the related aspects of the Protocol with a view to resolving disadvantages are as follows:

- a) **Witness Examination Generally (Article 1):** The article provides for an exhaustive process to be followed during the review of the claimant, along with a provision that the place of residence authorise a substantial portion of the interior of the room to be revealed

²⁷ Dev Sareen, 'Online Dispute Resolution- Application and Challenges', International Journal of Law Management & Humanities, Iss 5 Vol 1, 2581-5369 available at <https://www.ijlmh.com/wp-content/uploads/2019/03/Online-Dispute-Resolution-Application-and-Challenges.pdf>.

²⁸ Id.

²⁹ Bob Frisch & Cary Greene, 'What It Takes to Run a Great Virtual Meeting' Harvard Business Review, (Sept. 05, 2020 at 08:38 PM) available at <https://hbr.org/2020/03/what-it-takes-to-run-a-great-virtual-meeting>.

at a suitable distance from the claimant. In addition, the claimant shall be seated at a vacant desk and the expression shall be plainly visible.

- b) **Video Conferencing Venue (Article 2):** This guarantees that all practical preparations are made prior to the start of the video conference and that all technical support is given during the meeting in order to prevent any complications, etc.
- c) **Technical Requirements (Article 5):** The Protocol is highly sensitive to propagation rates and the devices to be used to ensure that the virtual hearing is smooth. Further, detailed technical specifications are set out in the Annex attached to the Protocol concerning video, audio, image, networks, bandwidth and bridging criteria, as well as the degree to which they are in themselves exhaustive.

Furthermore, concerns or drawbacks related to the confidentiality of information can be resolved by the ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration 2020 (hereinafter referred to as the Cyber Security Protocol). The Cybersecurity Protocol has been developed with special regard to the requirements of international commercial arbitration.

The aim of the Cyber Security Protocol is twofold: (i) to include adequate security mechanisms for arbitration and (ii) to increase awareness of security standards in international arbitration. The Cyber Security Protocol is thus, in itself, an all-important and formal protocol.

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7. Institutional Framework for virtual hearings: Extracted & Summarized:

1. Model Law

- **UNCITRAL Arbitration Rules, 2013**³⁰
 - “Article 28 (Hearings): Arbitral Tribunal may examine witnesses by way of video conferencing.”

2. Institutional Arbitration Bodies (International)

- **Singapore International Arbitration Centre (SIAC)**³¹
 - “(Schedule 1 – Emergency Arbitrator)”

³⁰ UNCITRAL Arbitration Rules, 2013, available at <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>.

³¹ SIAC available at <https://www.siac.org.sg/>.

- “Rule 7: The Emergency Arbitrator may utilize the video conferencing facility for hearing the disputing parties as an alternative to an in-person hearing.”
- “Rule 8: Power of Emergency Arbitrator to order or award any interim relief via video conferencing.”
- **London Court of International Arbitration (LCIA)**
 - “Article 14.1 (Conduct of proceedings): Allows the parties and the Arbitral Tribunal to conduct the proceedings via video conferencing.”
 - “Article 19.2 (Oral Hearings): Allows video conferencing as a mode of oral hearing.”³²
- **International Chamber of Commerce (ICC)**
 - “Article 24(4) (Case Management Conference and Procedural Timetable): Case Management Conference may be conducted by video conferencing.”³³
 - “Appendix IV (Case Management Techniques): Encourages the use of video conference (for procedural or other hearings) where attendance in-person is not essential.”
 - “Appendix V, Article 4(2) (Emergency Arbitrator Rules): Emergency Arbitrator may conduct hearing through video conference.”
 - “Appendix VI, Article 3(5) (Place of the Emergency Arbitrator Proceedings): In case of expedited procedures, the Arbitral Tribunal may conduct hearings via video conference.”

3. Institutional Arbitration Bodies (Domestic)

- **Indian Institute of Arbitration & Mediation (IIAM)**
 - “Article 28 (Hearings): Arbitral Tribunal may examine witnesses by way of video conferencing.”
- **Indian Arbitration Forum (IAF)**
 - “Article 8 (Case Management Conference): Case Management Conference may be conducted by video conferencing.”
 - “Article 28 (Examination of witnesses via video conferencing): In exceptional circumstances, video conferencing of witnesses may be allowed.”³⁴

³² LCIA available at <http://www.lcia-india.org/>.

³³ ICC, available at <https://iccwbo.org/>.

8. Conclusion:

It is also reasonable to assume that the time is right for our nation to undertake a major reform of the arbitral system of our government. To this end, the newly formed Indian Arbitration Council can play a significant role by introducing an amendment in two parts.

Firstly, a substantive amendment must be made to the Arbitration and Mediation Act of 1996, which explicitly accepts the automatic operation of arbitral hearings which allows for electronic lawsuits which essentially assures that the arbitral processes are not unduly postponed and thus adheres to the schedule which thereby preserves the purpose of a prompt settlement of conflicts.

Secondly, the Council will take steps to ensure that all arbitral organisations improve a case management system, which includes not only virtual courts but also virtual trials and electronic awards, while bearing in mind the various precautions provided by the Seoul Protocol.

If these reforms can be made, it will not only go a long way to cope successfully with the current pandemic situation, but will also help to harmonise the arbitral system of our country with established and much sought-after global norms, rendering India a global arbitration centre in the near future a possibility.

³⁴ Indian Arbitration Forum, available at <https://www.indianarbitrationforum.com/>.