

## GLOBAL VIRTUAL TRENDS IN INTERNATIONAL ARBITRATION

**Rohit Kumar Singla**

*Student : LLM Commercial Arbitration –Academic Year 2021-2022,*

*Manav Rachna University Sector – 43, Aravalli Hills, Delhi – Surajkund Road,*

*Faridabad – 121004, Haryana. Email : Rohits4@Gmail.Com*

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### Abstract

*During the past two years, the virtual methods for dispute resolution in international arbitration, due to pandemic crisis, have become one of the most favoured alternative dispute resolution mechanisms for international contracts and investments. With the increasing international trade & financial & technical collaborations, the global corporations have been devoting considerable time and money in selecting and drafting arbitration clauses to protect their financial involvements as well as confidentiality and proprietary nature of the Technology and Intellectual Property, they share with foreign partners, manufacturers, and distributors. Since the arbitration is usually an autonomous and consensual process, it is imperative to comprehend the latest trends of virtual means as their preferred dispute resolution modality that arouse corporate decisions and preferences when deliberating international arbitration.*

**Keywords:** *International Arbitration, Virtual Mode For Alternative Dispute Resolution Mechanism, Hypothesis, International Arbitration Institutions, The Arbitration And Conciliation Act, 1996*



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## INTRODUCTION

***“The measure of intelligence is the ability to change” - Albert Einstein.***

The current trends from the latest statistics data, is that global businesses turned to virtual means of arbitration to have their disputes resolved, perhaps because the court systems were unable to move forward with civil cases in light of the pandemic crisis and local laws requiring public gatherings to be restricted. The international arbitration community responded swiftly with alternative options for handling disputes through virtual methodology, and the arbitrators and practitioners diverted to the new environment quickly and effectively. As the businesses saw their disputes could be resolved through

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virtual means, saving time and money, they appear to have adopted virtual methods as their preferred dispute resolution modality.

### **SUB HEADINGS**

- Research Questions
- Hypothesis
- Hypothesis Adopted
- Research Methods
- Background of Concept
- Definition of Virtual Arbitration
- Advantages of Virtual Arbitration
- Challenges to Virtual Arbitration
- Leading International Arbitration Institutions in the World
- Status of Virtual Arbitration in India
- Section 18 of the Arbitration And Conciliation Act, 1996
- Case Laws
- Conclusion
- Bibliography

### **RESEARCH QUESTIONS**

- Before the pandemic in year 2020, have you ever attended a virtual hearing?
- What different technologies are required for successful virtual arbitration hearings?
- What is the attitude of parties to the dispute, arbitral institutions, tribunals, and counsels towards virtual hearings?
- How to deal with questioning witnesses/experts, requiring translation during the virtual hearings?
- What do you think, the future holds for virtual arbitrations?

### **HYPOTHESIS**

Virtual method of arbitration is designed to support companies who intend to resolve their arbitration disputes in fast & economical modes.

## **HYPOTHESIS ADOPTED**

- Simple Hypothesis: In this the Independent variable is Dispute for Arbitration and Dependent Variable is Virtual Methods of Dispute Resolution, to settle the dispute.
- Existential Hypothesis: It is need based depending upon the complexity of the dispute, time schedule and financial position of the party, intending to pursue the arbitration proceedings.

## **RESEARCH METHODS**

- Fundamental Research
- Doctrinal Research
- Descriptive Research
- Qualitative Research
- Case Laws

## **BACKGROUND OF CONCEPT**

- It was interesting to see how differently state courts on one hand and arbitral tribunals on the other hand reacted to the lockdowns imposed by the COVID-19 pandemic in large parts of the world in spring 2020. Whilst local courts were forced to temporarily suspend operations, numerous arbitral tribunals swiftly adapted to the new normal by shifting the proceedings into virtual space.
- With the onset of the Covid pandemic, arbitral friendly nations and institutions perceived the inevitability of the evolution of virtual hearings and accepted this challenge with utmost compassion. Choosing the right arbitral institution with facilities such as e-filing of documents, live help-desk features, panel of arbitrators, panel of experts on various subjects, protocols for online dispute resolution, cyber-security policies, etc. and timely case management conferences to determine procedure and choosing the right meeting platform are the cornerstone of a successful arbitral session.
- Necessity is the mother of invention and India needs to provide impetus for the creation of platforms like Cisco Webex, Zoom, etc. with end-to-end encryption under its Make in India and Digital India initiatives. Online meeting etiquette dictates that meeting time be decided keeping in mind the difference in time zones of the parties, giving proper notice, providing a list of participants who will be present in the meeting and sticking to the agenda of the meeting.

## **DEFINITION OF VIRTUAL ARBITRATION**

The virtual arbitration hearing is an alternative format of arbitral hearing in which one party, several parties or all participants use web conferencing software, such as Microsoft Teams and Zoom, to attend the hearing remotely. It provides an option to the participants, including the witnesses and the counsels, to deliver their testimony or make their arguments remotely but directly to the tribunal in real time when their physical presence is not practical for some reasons, such as difficulty of travel, health issues or some other considerations.

## **ADVANTAGES OF VIRTUAL ARBITRATION**

- 1. *Faster & convenient procedure:*** In online arbitration proceedings, face to face communication is not demanded and the parties are not required to be assembled at one place. They can take part in the proceedings at their own convenience and are also relieved from the long dates given in the arbitration process.
- 2. *Cost saving :*** It provides substantial savings when compared from conventional arbitration and those who cannot afford much or can't afford long distance travelling expenses can, with no worries, opt for online arbitration.
- 3. *Other advantages:***The parties to online arbitration also enjoy certain other benefits as it provides round the availability and accessibility and a more efficient dispute management. It has a flexible approach and affords greater party control with both Business To Business and Business To Customer disputes.

## **CHALLENGES TO VIRTUAL ARBITRATION**

Various challenges may be posed in virtual arbitrations but these can be dealt with effectively by the parties, Tribunal and the appellate courts. The fundamental principle of each solution is that every virtual arbitration will endorse mutual consent with party autonomy, to ensure equity.

### **a) *Complexities of internet services and web technology***

The key is to conduct training/orientation sessions for the parties, arbitrators, etc. to gauge the features of the meeting platform such as chat and breakout features and to familiarise themselves with trouble-shooting features of the meeting platform, which include internet connectivity issues, dropped calls, audio-video disruption, etc.

### **b) *Arbitrability problems of intricate disputes***

While simple contractual matters may easily be dealt with in virtual arbitrations, multi-party matters with multiple claims and voluminous evidence may render the process inaccessible.

**c) *Cybersecurity, privacy and data protection***

Various cybersecurity protocols such as ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020 Edition) can be referred to secure safety of the parties. A prior agreement on the participants allowed into the meeting, proper identification and verification of participants done before the commencement of the virtual hearing, etc. will ensure that there is no breach of trust amongst the parties involved.

**d) *Confidentiality***

Confidentiality, an implied aspect of arbitration, may be achieved by the arbitrator by binding all parties and participants involved to a confidentiality undertaking. Adopting a confidentiality clause or rules of a designated arbitration service provider that require specified confidentiality levels, can also have the same effect.

**e) *Witness examinations, admissibility and veracity of virtual evidence***

The Tribunal must not conduct the witnesses examination or allow adduction of evidence in the absence of parties, unless the parties have otherwise chosen to remain absent, despite proper notice. Despite the concerns surrounding virtual arbitrations, they work to eliminate visual, behavioural and verbal bias that is created in the mind of the Tribunal and put the spotlight solely on the testimony presented.

**f) *Witness coaching***

To ensure that the witness is not coached/prompted, a party may require its duly empowered legal representative to be present at the location of the witness, upon having sought the permission of the Tribunal.. Moreover, the witness may be asked to show his surroundings via camera to prove that there is no one else present with him. He should not be allowed to confer with his counsel, use virtual backgrounds or use electronic devices other than the computer during the hearing.

**g) *Challenge to proceedings***

If awards pronounced in virtual arbitrations are challenged under the garb of unfair treatment of parties or the public policy umbrella, the credibility of such arbitrations is thrown out the window. A work-around can be for parties to agree to not challenge the award or seek its annulment on the ground that the proceedings were not held in-person.

**h) *Costs***

All expenses incurred in connection with the arbitral proceedings are included in the definition of costs and as a general rule, the losing party bears such costs, unless there is an

agreement between the parties stating differently. Some protocols require the requesting party to bear costs for videoconferencing facilities, whereas some mandate equal cost sharing.

***i) Due process***

Due process holds the Government subservient to the law of the land and protects individuals from the excesses of State. Conscious use of technology like teleconferencing and videoconferencing should be encouraged as they can replace the formal physical settings and manifest into a more efficient and smoother arbitral process.

***j) Time Zones***

Other seemingly trivial obstacles such as different time zones might have extensive repercussions on the conduct of proceedings. Arbitrations often have parties present in multiple jurisdictions, and witnesses/experts might also be located in different geographical locations.

**LEADING INTERNATIONAL ARBITRATION INSTITUTIONS IN THE WORLD**

➤ Some of the leading international arbitration institutions of the world are :

1. London Maritime Arbitrators Association (**LMAA**)
2. American Arbitration Association and International Center for Dispute Resolution (**ICDR**)
3. International Chamber of Commerce International Court of Arbitration (**ICC**)
4. Chinese International Economic and Trade Arbitration Centre (**CIETAC**)
5. Singapore International Arbitration Centre (**SIAC**)
6. London Court of International Arbitration (**LCIA**)
7. Hong Kong International Arbitration Centre (**HKIAC**)
8. German Institution of Arbitration (**DIS**)
9. Dubai International **Arbitration** Centre (**DIAC**)
10. Stockholm Chamber of Commerce Arbitration Institute (**SCC**)
11. Swiss Chamber's Arbitration Institution (**SCAI**)
12. Vienna International Arbitral Centre (**VIAC**)
13. International Centre for Settlement of Investment Disputes (**ICSID**)

➤ Over 90% of international arbitration cases are handled thirteen organisations: LMAA, ICDR, ICC, CIETAC, SIAC, LCIA, HKIAC, DIS, DIAC, SCC, SCAI, VIAC, ICSID. They all offer arbitration services in English languages and most offer arbitration under different other nation state laws.

- ICC reported 946 new arbitration cases in 2020, HKIAC reported in its case statistics that its arbitration caseload totaled 318 new cases in 2020, CIETAC also saw growth in its caseload in 2020, a total of 3615 ongoing cases were registered AAA's International Center for Dispute Resolution (ICDR) also saw roughly 50% increase in aviation related claims in 2020, because most of these arbitral institutions updated their Rules of Arbitration to allow for more flexibility with virtual hearings and addressed the parties and tribunals on the conduct expected in arbitration.

### **STATUS OF VIRTUAL ARBITRATION IN INDIA**

- India's emergence as one of the top five economies in the world made it one of the most preferred destinations for foreign investment in recent years. Further India is seen as one of the most attractive manufacturing hub over the world. As more and more international businesses attempt entering vast potential of Indian market, to avoid cumbersome legal proceedings, inclusion of arbitration clause are adopted in the contracts. This growth in arbitration should've resulted in increased arbitration practice in India. However seat for arbitration is likely to be preferred outside India over Indian seat due to inferior standards compared to arbitration seats at international institutes such as Singapore, Hong Kong, Geneva, etc.
- Recently, the Delhi High Court issued a guidance note for conducting arbitration proceedings by video conferencing and directed the Delhi International Arbitration Centre to adopt these guidelines with effect from 8<sup>th</sup> June 2020. The guidelines provide for: E-filing of cases; conducting hearings and examination of witness through a video conferencing platform such as Cisco Webex; and arbitral awards and orders to be digitally signed and circulated through e-mail among the parties. The guidelines also provide for the parties to submit written submissions, with copies of relevant documents and judgments, and video clips of their oral arguments. These steps have been incorporated to make virtual hearings through video-conferencing more efficient, and dispense with hearings through video-conferencing in cases where the parties are satisfied with the written submissions and video clips. In case the arbitral tribunal have further queries, they may direct for virtual hearings or request the parties to submit additional notes. This way of recording the arguments through

written submissions and video clips will also rule out the possibility of the parties objecting to the proceedings at the time of challenging the arbitral award before the Courts and give the Courts a complete record of the proceedings. The guidelines also provide for taking consent of the parties before recording evidence through videoconferencing, getting the parties and arbitrators sign a confidentiality undertaking, and a fast track arbitration procedure.

- Further, the Indian Council of Arbitration (ICA), another leading arbitral institution in the country, has started taking consent from its parties and arbitral tribunal to conduct the on-going arbitration proceedings through use of information technology and video conferencing; and has also issued a notice for accepting fresh filings of arbitration cases through electronic means. These are indeed very welcoming steps; and we are of the view that other Indian arbitration institutions may also issue guidelines for virtual arbitral hearings to cope with the changing times.
- Indian Arbitration Forum (IAF) have also suggested for Arbitration Agreements to conduct virtual hearings through videoconferencing / arbitral tribunal's first procedural order Virtual hearings can be used at all stages of arbitral proceedings. In case the parties decide to conduct virtual hearings, they may enter into an agreement that shall incorporate the requisite standards addressed in this IAF Protocol. In case the parties decide to let the arbitral tribunal adopt the modalities of conduct of virtual hearings, the arbitral tribunal's first procedural order may lay down guidelines considering the suggestions addressed in this IAF Protocol. In either case, the parties shall expressly agree in writing not to challenge or oppose the enforcement of the arbitral award on the ground that the arbitral proceedings were not held in person and were held through virtual hearings. If any party is opposed to the conduct of hearings virtually, then ordinarily, the arbitral tribunal shall not conduct the proceedings through virtual hearings.

### **SECTION 18 OF THE ARBITRATION AND CONCILIATION ACT, 1996**

The Arbitration and Conciliation Act, 1996 or the 1985 UNCITRAL Model Law on International Commercial Arbitration on which it is based, have no overt references to virtual arbitrations. Section 18 of the Act only talks about the treatment of parties with equality and the provision of adequate opportunity to present their case, in line with the principles of natural justice. The juristic principle of audi alteram partem is enshrined under Section 18



and the principle constitutes a fundamental policy of Indian law. Thus, it only needs to be ensured that:

- (i) There is availability of proper internet and infrastructure for all the parties involved that provides them a sufficient opportunity to argue their case.
- (ii) No party is heard in the absence of the other as it would constitute a violation of fundamental principles of natural justice.
- (iii) Real-time transcripts or video records of the proceedings, will also be available to the differently abled.
- (iv) Interpreters will be used, whether in a staggered manner or simultaneously. Section 19(2) gives the parties autonomy to choose the procedure to be followed in the proceedings, which could be virtual or physical hearings. If a procedure is not agreed to, Section 19(3) mandates the Tribunal to conduct proceedings in the manner it considers “appropriate”, ex aequo et bono, after giving due reasoning and ensuring that requirements under Section 18 are met. Thus, virtual hearings may be conducted by the Tribunal either via oral hearings or on the basis of documents and other materials submitted by the parties. Brief, coherently structured written submissions also reduce the likelihood of error and help in saving time. Since Section 24(3) ensures full disclosure of applications filed, reports and documents referred to etc. between the parties and the arbitrator, the mandate of due process will definitely be upheld.

### **CASE LAWS**

With the boom of e-commerce, a need was felt to redress the disputes of the consumers online. As the name suggests, online arbitration means settlement of disputes with the aid of technological related laws. This however does not mean that it has parted away with the provisions of the Arbitration and Conciliation Act 1996. Both the conventional Arbitration Act as well as the technology laws is applicable to the online arbitration.

Agreements wherein the parties agree to resolve the matter in dispute through emails is considered to be valid as well as enforceable as the validity of such agreements have been upheld by the Supreme court of India in the suit of “ *Shakti Bhog Foods Ltd. Vs. Kola Shipping Ltd.*” and “ *Trimex International FZE Ltd. Vs. Vedanta Aluminium Ltd.*”. Moreover, such agreements are admissible as evidence as per section 5 of the Information Technology Act, 2000.

## CONCLUSION

- This research paper proposes the inclusion of virtual hearings in dispute resolution clauses in Commercial Agreements during the commencement stage of such commercial agreements and the decision from such virtual hearing and resolution of disputes will have the same effect as if it were a physical dispute settlement hearing.
- Such virtual hearing arbitration clause in Commercial Agreements could exist in a design as follows :

“Any dispute, controversy, or claim arising out of or in relation to this agreement, including any question regarding its breach, existence, validity or termination of the legal relationships established by this agreement, shall be finally resolved by arbitration under the specified & agreed Rules/Applicable Law, the Seat of the Arbitration , the Venue of the arbitration , the Number of Arbitrators , the Language of the Arbitration, where a dispute can be determined fairly otherwise than by physical hearing, as determined by the arbitral tribunal, hearings in the arbitration shall be conducted virtually in accordance with Virtual Hearing Protocol 2020 and any such procedural order as may be issued by the arbitral tribunal. It is hereby agreed that no objection shall be taken to the decision, order, or award of the arbitral tribunal on the ground that the hearing regarding the dispute was conducted virtually”.

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