

Conducting International Arbitration online in the times of the COVID-19 Pandemic

Shujoy Mazumdar*

Abstract

With a view to contain the spread of the COVID-19 Pandemic States across the world resorted to number of restrictions on the right of people to assemble and travel. Places of work were shut and work was to be conducted at home, while following social-distancing protocols. In such a situation information communication technology or ICT attained primary importance for any work that could be done from a remote location, facilitated by various software and other commuter applications. The field of International Arbitration in this respect was no exception, almost over-night without much time to react; arbitration being conducted online was accepted as the norm for the international business community. Given that international arbitrations involve parties, counsel and arbitrators from across the globe remote hearings were the automatic solution adopted by a number of tribunals. While remote hearings signaled a reduction in costs, whether an award would be universally enforceable at the end of the proceedings was a question the answer to which, could only be indefinite. This paper looks at the jurisprudence of the national courts of enforcement and their attitude towards international arbitration conducted online that have to deal with an unprecedented world crisis reconciling the same with past precedents.

1. Introduction

The Corona Virus Disease or COVID-19 engulfed the entire world in the first quarter of 2020 and left governments with no option but to institute severe emergency restrictions on movement and gatherings in the interest of health and safety of the populations. The restrictions aimed at reducing the spread of the pandemic restricted the movement of people outside their homes and ordered the shutting down of business and establishment along with crucial transport services. International air travel was one of the earliest to be affected followed by an unprecedented economic crisis in almost every sector of the world economy. Apart from emergency and essential services all services were either stopped or only continued to function remotely, where employees worked from their place of residence rather than report to work.

In such a situation the number of international arbitrations that were currently under process were severely impacted especially due to its international character at the least involving persons from at least from

* Legal officer, AALCO Secretariat, New Delhi, India.

two different legal jurisdictions. It is well known that parties from two different jurisdictions often choose an unrelated neutral seat to resolve their disputes and choose arbitrators of different nationalities and places of residence. Often the subject matter of the dispute relates to a number of jurisdictions with evidence being procured from different physical locations around the world.

With physical hearing either not being permitted or considered too hazardous for the attending parties, arbitrators were faced with no choice but to initially delay the proceedings hoping to resume as soon as the restrictions were lifted and activity normalized. However, with no end in sight of the pandemic restrictions it would be reasonable to assume felt that such a course of action may unreasonably delay in the adjudication of the dispute and cause irreparable prejudice to either of the parties.

As the number of days of the restrictions passed it was soon realized that the availability information and communication technology proved to be a boon and allowed some services to continue their work online. Even those services that were traditionally not used to working remotely and providing their services online quickly transformed themselves to being able to work via the internet.

While online arbitration is not a novel concept it was considered impractical for large and complex disputes involving detailed evidence, oral hearings and cross examination for which generally a physical hearing was preferred. In fact, the 2018 White & Case and Queen Mary University Arbitration Survey, 78% of the respondents had specified that they had never participated in an online arbitration, and even of the remaining respondents it was not clear whether they participated in a part of the proceedings and whether closing argument and cross examination had been conducted during those virtual hearings.

It was not even clear whether the rules of the arbitral institutions or ad-hoc arbitration that chose to apply certain arbitration rules were capable of governing an arbitration conducted wholly virtually completely online without conducting a physical hearing. Even where the rules permitted an arbitration to be conducted online it was difficult to ascertain as to whether there was any recourse in the law that permitted an arbitrator to conduct the hearing online without the consent of both parties. Further the final aim of arbitration which is to yield an enforceable award was also under jeopardy as parties and their counsel could not be sure that the award so rendered would be enforceable.

The present article aims to present certain answers to these questions from an appraisal of the responses of the arbitration community to the present crisis during the past year, and how these challenges have been met retaining the revered place of arbitration as the preferred means