

# THE ARBITRATION DURING THE PANDEMIC. UTILIZING VIRTUAL ARBITRATION

Abdusolikhova Yulduzkhon  
Student of Tashkent State University  
of Law

Abdullaev Khatam  
Student at the Tashkent State  
University of Law

Malikov Nodirkhon  
Associate at “Leges Advokat” law  
firm  
Member of Secretariat at the  
Tashkent International Arbitration  
Centre (TIAC)

**Abstract** – This article reviews the arbitration during the Pandemic as well as utilizing the virtual arbitration. The special attention is paid to the quick response of arbitration institutions to the Pandemic, i.e. the measures taken by them that are aimed at continuing the work of their offices. Moreover, the peculiarities of the virtual arbitration along with advantages and risks of which are analysed.

**Keywords** – Arbitration, virtual arbitration, online hearings, the Pandemic, advantages and risks.

## I. INTRODUCTION

There is no doubts that nowadays we are living is a rapidly changing diverse society in era of a big technology boom. Each industry, maybe not by choice, has learned to work remotely in the shortest possible time. The work of the arbitral institutions is not an exception. The pandemic had a particular impact on international arbitration, not by transforming it, but by affirming the correctness of the changes that had taken place in arbitration in recent years. For sure, in the coming months, either the virus will go away or the quarantine will no longer be possible, but the consequences of the pandemic will remain with us for a long time. In the international arbitration community, for example, the voices of those who call for refraining from hearing in person, at least until this virus is finally defeated, are growing louder. And this is despite the fact that the number of commercial disputes should increase sharply in the near future due to the violation of supply chains, claims of force majeure and the objective inability to fulfill many agreements. Videoconferencing and virtual hearings, as well as other "technological solutions" (electronic interaction of parties, preferential use of electronic documents, completely paperless dispute resolution) were widely used in international arbitration even before the COVID-19 pandemic. But today more than ever, the role of the internet and technology has come to the forehand. This Article analyzes the responses of leading world arbitral institutions to the lockdown and scrutinizes the virtual arbitration that has become the most flexible method of dispute resolution worldwide.

## II. THEORETICAL ANALYSIS

### RESPONSE OF ARBITRAL INSTITUTIONS

It worth to be mentioned that the arbitral institutions promoting the flexible dispute resolution gears were nearly ready to such drastic changes with the foresight, as the remote work of arbitrators and disputing parties has been implemented long time ago. Therefore, given the consensuality and flexibility of arbitral proceedings, the arbitral institutions coped to handle their business without acute echoes.

In April 2020, 13 arbitral institutions have released a [joint statement](#) as a response to the Covid-19 outbreak promoting the idea of reaching the solidarity in dispute resolution process and encouraging for remote work. The particular emphasis of the statement was as follows: “*Collaboration is particularly important as each of our institutions looks to ensure that we make the best use of digital technologies for working remotely.*” [1]

Despite a high competitiveness among the arbitral institutions, they decided to unite their efforts in these challenging times in order to stay afloat and assist each other. Although the coronavirus has touched every institutions, most of the worldwide arbitral forums announced that their operational work will continue along with the introduction of preventive and precautionary safety measures. For instance, the most renowned global arbitral institution the International Chamber of Commerce (“**ICC**”) has published the earliest [heads-on](#) for arbitration practitioners named as “*ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic*” [2].

While the ICC and the London Court of International Arbitration (**LCIA**) has warned its users about possible delays in the issuance of awards, this appears to be the case in other arbitral institutions. Regardless of changed operational system of arbitral institutions, there were reportedly a number of reported delays and cancels in the pending cases.

There are following common features at the measures taken by the arbitral institutions in response to the Covid-19 outbreak:

- Submission of filings, including those related to the expedited proceedings, through email or special online filing system;
- Planned meetings are cancelled and shall be rescheduled between the Parties with the following communication to the arbitral institution;
- Any correspondence or evidences are to be sent by courier, the arbitral institution should be notified beforehand in order to apply the necessary arrangements;
- Any hearings planned outside the arbitral institutions' facilities are permitted to go ahead in case of compliance with relevant regulators and protection measures. For instance, Singapore International Arbitration Centre (SIAC) warned its users that attendees of their office who will be having a temperature of 37.6C or above will be denied entry;
- Given the remote working of all staff, the arbitration practitioners are advised to contact relevant individuals in charge, instead of approaching the office.

Also, at the beginning of arbitration, the parties must pay registration fees and sometimes also arbitration fees. Since banks continue to operate and make payments, most parties should not have any difficulties in fulfilling this obligation. Some arbitration institutions (such as LCIA) allow you to pay the registration fee with a credit card when submitting a request for arbitration through their online system. Thus, despite the significant difficulties caused by measures to combat coronavirus, it is now possible to start arbitration proceedings without any problems in all major arbitration centers [3].

### UTILIZING VIRTUAL ARBITRATION

In practice, the entire exchange of documents, evidence, testimonies, expert opinions, and procedural requests (for example, for the disclosure of documents) in international arbitration has long been transferred to the electronic plane. Documents are usually sent by email, but sometimes the parties use special systems for exchanging and storing documents.

#### *Advantages of Online Dispute Resolution*

Online dispute resolution helps reduce the costs (A) of dispute resolution. Secondly, assessing Methods of Online Dispute Resolution encourages better enforcement of the solution by the chosen institution. (B)

##### A. *Cost-effectiveness*

Dispute resolution is cost effective because of (a) rapid processing of disputes, (b) the lower costs involved.

##### a. *Speed of Dispute Resolution*

Traditionally, the main advantage associated with ADR is in achieving a rapid solution that does not paralyse business life and the normal exchanges between commercial partners. The same is true of fast-track arbitration systems, the main advantage of which is the speed of the procedure. When working online, the instantaneous circulation of information reduces the time still further. Of course, the arbitrators always need a certain amount of time to familiarize themselves with the file and to make an award. It is also true that the lack of complexity in "quality disputes" helps speed up the procedure. Thus the majority of organizations offering online dispute resolution emphasize the speed of the procedure.

##### b. *Lower Costs*

Online dispute resolution allows the dispute to be settled remotely, without requiring the parties or their legal representatives to be physically present. The parties merely have to connect from their workplaces to the site of the chosen organization and transfer documents and data messages for the cost of a local phone call. This is a crucial advantage in international disputes, where, normally, one of the parties would have to travel to appear before the courts in the country of the other party.

##### B. *Assessing Methods of Online Dispute Resolution*

The rapid rise of online dispute resolution, using various formulae specific to each resolution organization, does not dispense with the need to assess the process or procedure being considered. Indeed, this assessment determines the subsequent conduct of the parties and their respective obligations throughout the online dispute resolution process. In this subsection, we first identify the determining factors, and then measure the extent of the obligations of the parties when they agree to settle their dispute by electronic means.

#### **Risks associated with online hearings.**

- A. The selection of the videoconference platform. The parties may disagree on this issue. Therefore, the best solution in this case would that the parties should be held responsible for investigating the suitability and adequacy of a specific platform, any associated risks regarding security, privacy, or confidentiality, and for obtaining an estimate of the costs. Thus, the parties and legal counsel will have an opportunity to get familiar with and comfortable using a mutually chosen platform.
- B. The possibility of recording of an online hearing. Unfortunately, any participant of can secretly record the online conference. Presently, no videoconferencing innovation can recognize with 100 percent sureness whether a participant of a videoconference has a recording gadget.

Therefore, it is appropriate to request from participants a confirmation in writing stating that they will record a videoconference.

- C. Access to the videoconference. To ensure the security of a private hearing, access ought to presumably be by invitation and password-secured. The ADR supplier or the arbitrator—the meeting host—send an invitation to those approved by the authority to join in. The invitation ought to obviously express that the inserted hearing connection or secret word ought not be imparted to unapproved people and that password will change every day for better security. The hearing host ought to announce a list of approved participants before the meeting. The list ought to incorporate every participant's name, email address, dates they will join in, and a telephone number.
- D. Technical failure. At an absolute minimum, the hearing host should save a discretionary dial-in phone call number in the event that the sound from a member's gadget is poor in quality. The hearing host ought to most likely likewise give the name and phone number of an assigned individual to contact in the occasion any member is separated. Should one member's videoconferencing connection come up short, the arbitrator ought to ask members staying on the conference to mute their sound and switch off their video to evade concerns with respect to potential ex parte interchanges. On the off chance that a member is disengaged or encounters some other technical problem and the issue can't be corrected after a sensible timeframe, the arbitrator should "delay" the procedure.

A ton of easily overlooked details can turn out badly during a videoconference in the event that they are not envisioned and addressed in advance. For instance, screen size will probably be particularly significant during hearings if there are a lot of members. Members of the videoconference, along these lines, are anticipated to use laptop or PC not a cell phone or tablet. Members need to guarantee all gadgets are adequately charged and that power cables or reinforcement batteries are promptly available. Sound quality can be influenced by the way a member is accessed the meeting—by telephone, PC speakers, or a headset. An internet connection that is high-speed and hard-wired may be desirable over a wireless connection. Thus, counsel and the arbitrator should test the system and note any kind of disturbances, for example, delays or time lags, volume, camera setting and lighting.

## **FORMATION OF THE ELECTRONIC ARBITRATION AGREEMENT**

In an arbitral clause, the parties undertake in advance to submit any dispute that arises to an arbitral tribunal. In so doing, they renounce the right to refer the dispute to State courts. It is necessary to confirm the consent of the party against whom the clause is invoked. In general terms, consent to arbitration is often contested when the clause appears in the general provisions. Second it should be ensured that the requirements of form ad validitatem, prescribed by national laws and certain international conventions, have been properly observed. This second condition therefore relates to the form of the arbitration agreement [4].

In electronic commerce operations, the arbitral clause often appears in the general conditions that have been proposed and accepted by electronic means. In checking the validity of the arbitral clause, therefore, one main questions need to be addressed: Does an arbitral clause posted on a computer screen, without a hard-copy contract, meet the formal requirements of a written (a)

### *A. Electronic Consent to Arbitration*

The validity of the electronic arbitration agreement must first be assessed from the point of view of international agreements setting out the material rules relating to arbitration. It is by no means sure that these international agreements can be interpreted as favouring electronic documents, since the agreements were adopted almost 50 years ago, at a time when the drafters could not foresee that a written document could take other than a physical form. The legal systems in some countries still require a written document ad validitatem. Arbitration law must therefore be adapted to electronic commerce by legislation or by application of case law. Finally, the link between the New York Convention and national provisions that are more favourable to electronic documents must be specified.

### *Conduct of Electronic Proceedings.*

The various stages of the electronic proceedings can be organized by electronic means. However, it is important to make sure that the principles of good justice are not adversely affected by electronic exchanges.

#### *Stages of Electronic Proceedings*

In this subsection, we look at the major stages of the proceedings in turn, from initial submission to deliberation and rendering of the award.

#### *A. Initiation of Electronic Proceedings*

When a disagreement between parties that have stipulated an arbitration agreement cannot be resolved, it is up to the claimant to refer the matter to

the arbitral tribunal. This referral can be drawn up and sent electronically. Secure electronic signature technology allows the arbitral tribunal to be certain that the referral e-mail is indeed sent by the person claiming to be the author. The arbitral institution then informs the respondent of the existence of the proceedings by e-mail. The referral by the claimant and the notification to the respondent can perfectly well be done by e-mail if the arbitration rules to which the parties have signed up so provide. In the case of ad hoc arbitration, the claimant would have to notify the respondent that it is incumbent upon him/her to appoint an arbitrator. At this stage, the electronic proceedings are under way. The parties are then able to exchange their conclusions and arguments in electronic written statements.

#### *B. Electronic Request for Arbitration*

The Request for Arbitration sets out the claims of the parties and the questions at issue for the arbitral tribunal to resolve. It also defines the main rules that will govern the arbitration procedure. In principle, it should bear the signature of the arbitrators and the parties. It can be of particular use in electronic procedures when the arbitration rules do not specifically deal with certain questions. The parties could use the Request for Arbitration to agree to exchange documents electronically or even to decide on the seat of the electronic arbitration.

#### *C. Online hearings*

Arbitral practice already allows for deliberation by telephone, fax and even videoconference. Current technologies, applications that are created in huge numbers, help to conduct hearings on the course without any problems. Parties, their representatives, arbitrators, and all other disputants do not need to come together in one place.

#### *D. Electronic Award*

Placing the award online is certainly not sufficient to satisfy the demands of arbitration laws that require the text of the award to be notified or for the award to be sent to the parties. It is certainly more prudent, in addition to placing the award online, to send a secure e-mail with acknowledgement of receipt, or even to send a hard-copy version of the award by registered mail. A hard-copy version of the award is also necessary to enable the arbitral institutions to keep and archive awards. The constant evolution of technical standards in the area of computer archiving platforms is a threat to this activity in the long term. In these circumstances, such a well-known arbitral

institution as the ICC has chosen to continue to archive awards in hard copy, even when arbitration is electronic [5].

Article IV of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires that the party seeking recognition or enforcement of the award produce the “duly authenticated original award”. If the original is not produced, the successful party in the arbitration will not be able to invoke the New York Convention system, and will therefore not be able to have the award enforced.

Eminent authors rightly consider that the object of Article IV of the Convention is to confirm the integrity of the award and the identity of the arbitrators. The function of Article IV is thus respected by a secure electronic document. Finally, other texts, such as Article 31.1 of the UNCITRAL Model Law on arbitration, make no mention of an original, but simply require that the award be in writing and that it be signed by the arbitrators.

#### *Seat of Electronic Arbitration*

It is difficult to centralize the electronic arbitration procedure in a single location, since it is a procedure that brings together litigants and arbitrators who interact from different places. The various procedural acts are performed by means of electronic communications and exchanges of data. This obvious multiple location of the arbitration procedure may raise concern because it is necessary to determine the place of arbitration in order to implement certain rules. The concept of the seat of arbitration overcomes the problem of multiple locations of procedural acts. The seat of arbitration is in fact a strictly legal concept.

### III. CONCLUSION

The natural outcome of an online arbitration procedure is the publication of the award by exclusively electronic means. The obstacles to electronic awards are more practical than theoretical. In theory, it is believed that an electronic award accompanied by the secure signature of the arbitrators meets the requirements of form set by the law and by international agreements.

However, in practice, the successful party needs the agreement of the ratifying judge of the State in which the assets of the losing party are located. A practitioner concerned about the international efficacy of an award would therefore be well advised to obtain a hard-copy original as well, signed by the arbitrators.

#### IV. REFERENCE

- [1] “*Arbitration and COVID-19*” Joint statement of arbitral institutions. Available in the [link](#).
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