

The Impact of Covid-19 on International Commercial Arbitration (Challenges and Solutions)

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Abstract:

This article examines the potential impact on future international arbitration proceedings. In the first chapter of this article, the researcher addressed the definition and its introduction and in the second chapter the researcher addressed the impact of the COVID-19 epidemic on international arbitration, including the impact of the COVID-19 epidemic on an international arbitration hearing and the impact of the epidemic on international litigation that addressed developments. In this regard, at the international level, the most appropriate sources, technology and digital record systems are changing, with strategies used in technology that maintains processes. In the following current events, the researcher addresses the impact of arbitration practices.

In the Third chapter, the researcher dealt with the measures taken to Confrontation the challenges of international arbitration, and dealt with the legal basis for remote hearings in the International Chamber of Commerce, the American Arbitration Association, the London Committee of International Arbitration, and the Chinese International Economic and Commercial Arbitration Committee.

The researcher concluded this study in the last chapter with some findings and recommendations.

Key Words: International Arbitration, Commercial Law, Covid-19, Litigation

1. INTRODUCTION

At the start of 2020, the Covid-19 emerged as the pandemic that has applied an exceptional impact on the performance of countries and their connected businesses around the globe. This disease was discovered in late 2019, therefore it is coded and Covid-19.¹ It is also observed by Ioannidis, John PA, CathrineAxford, and Despina G. Contopoulos-Ioannidis that the commercial law practices of arbitration in the international community were also affected by the Covid-19.²

1.1 Relevant question

What are covid-19's effects on international arbitration?

How can these impacts be mitigated during the forward movement?

1.2 The problem of the study

Such problems of practicing international arbitration in the international commercial law are connected with the different factors of business size, nature, and the other performance related concerns that have their impact in the commercial law.

The corporates around the globe were witnessing the difficulties in conducting the related arbitration practices.

1.3 Research aim and objectives.

Develop some research objectives that can help achieve the desired results.

-To determine the commercial law practices required for international arbitration

-To determine the procedures that support international arbitration in commercial law practices.

¹Ranald, Patricia. "COVID-19 pandemic slows global trade and exposes flaws in neoliberal trade policy." *Journal of Australian Political Economy* 85 (2020): 108-114.

²Ioannidis, John PA, CathrineAxfors, and Despina G. Contopoulos-Ioannidis. "Population-level COVID-19 mortality risk for non-elderly individuals overall and for non-elderly individuals without underlying diseases in pandemic epicentres." *Environmental research* 188 (2020): 109890.

2. The impact of COVID -19 on international arbitration

This article examines covid-19's impact on international arbitration: its impact at of 2020 and the possible impact on the conduct of international arbitration in the future.³

Referring to Wilske, his study has shown that the pandemic Covid-19 has had significant impacts on the practices of international arbitration.

The researcher's view that with the challenges related to arbitration institutions, tribunals and associated participants, arbitration institutions have learned and are increasingly capable of facing the immediate challenges.

However, the study has raised the question of whether there will be a long-term impact of the Covid-19 experiences on international arbitration even when the pandemic is over, though the research has declared that probably the answer would be yes.⁴

2.1 Covid-19 and its Impact on International Arbitration Hearing.

According to Moussa, the impact of Covid-19 has changed almost the entire scenario on international arbitration hearings. It has been specified that in international agreements, most advisors have drafted arbitration clauses that need to inform, and also educate while creating the framework because this has been one of the difficult measures that the authorities have to cover during the pandemic.

Since they were not aware of the arbitration procedure in this case. There was an example that the international hearing was conducted and the users were not aware of the arbitration procedure and that this affected the overall hearing between the parties from different countries.⁵

Municipio has also given comprehensive guidelines on how remote hearings have been conducted and the court has been ensured in emphasizing the significance that has been related to ensuring the continued administration related to justice.

In USA According to Elman it has been discussed that in the United States almost all of the operations have been asserted that have impacted the public health crisis due to pandemic. In a pandemic, most of the adequate sources, technology as well as digital record systems have been changed in which the strategies have been used in technology that has maintained the operations in the given current events. Moreover, in the USA they have arranged a separate system of the federal courts through which the proceedings were continued, arranged in most of the twelve regional circuits by using technologies like video conferencing and digital record system⁶

According to Sorabji, there has been a global change in the entire world as the judiciary and the arbitral procedures need to be adopted by different countries during the pandemic to continue with the proceedings because such practices never stopped. However, the lockdowns that the UK adopted almost covered the UK.⁷

All of the hearings were done remotely, including by the government. Moreover, guidelines given from the Lord Chief justice mentioned the need to ensure the fair and continuous processes that need to be practised for all of the participants to a court or tribunal procedure.⁸

2.2 Impact of Arbitration practices

Dutta has exposed in his study that many changes have been done in almost all of the commercial and international processes in arbitration. The pandemic has impacted almost all of the procedures of the court in which their practices have changed and adapted the procedure of arbitration practices. Many arbitration institutes have been active in giving guidance to practitioners. As the pandemic has motivated many courts, arbitral institutions as well as law firms that have acted as counsel in using the technologies like video conferencing that has covered almost all the arbitration proceedings.⁹

³ The Future of International Arbitration following the Pandemic: The Hybrid Hearing? article. By . Anthony Connerty. 09 Oct 202. Available: <https://www.ciarb.org/resources/features/the-future-of-international-arbitration-following-the-pandemic-the-hybrid-hearing/>

⁴Wilske, Stephan. "The Impact of COVID-19 on International Arbitration-Hiccup or Turning Point?" *Contemp. Asia Arb. J.* 13 (2020): 7.

⁵ Moses, Margaret L. *The principles and practice of international commercial arbitration.* Cambridge University Press, 2017.

⁶Sorabji, John. "English and Welsh Courts in the Age of Covid-19." *Septentrio Reports* 5 (2020): 16-19.

⁷ Ibid. p.16-19.

⁸ Same reference .

⁹Dutta, Somesh. "Will 'Investor-State Arbitration' Survive the COVID-19 Crisis?." *OpinioJuris* (2020).

Moreover, **Scherer** has also explained that through the use of the technology of video conferencing in most of the countries in which it has been found that it has been declared as one of the challenges mainly because the proceedings in the arbitration was new for the practitioners which also include the associated risk.¹⁰

Van Denand anthers provided an analysis of the practical challenges arising from planning and preparing remote hearings. Useful and practical advice on the virtual and digital aspects of remote hearings was provided to arbitral tribunals, lawyers, parties and witnesses Consideration.11

The researcher suggests that there should be a sample of the procedural system of remote hearings that provide various variables for arbitration practitioners to choose from, along with insightful commentary on all procedural and practical consideration.

Further, in most of the arbitration, it has been observed that they have been considering taking the specific provisions as well as the actions that have been conducted in the arbitration hearings through video conferencing technology.

This has been taken from one of the examples in article 14 of the arbitration rules where it has been declared that through the arbitral process they need to communicate with each other along with the face to face meetings which include video conferencing, along with that the exchange of the correspondence.¹²

2.3 Impact of International Litigation.

The pandemic has had an unprecedented impact on individuals, businesses, and entities. Though the national court system, as well as the alternative, has disputed with the resolutions as this has also affected. Nonetheless, international arbitration has also been evaluated as both resilient and adaptable throughout the crisis and has been strongly positioned as well as emerged as one of the methods of dispute resolution. This has been explored in many books as well as how international arbitration has been affected through the Covid-19 revolution.13

Referring to Kidane, Inresponse to the pandemic, most of the courts were using the practices of video conferencing that was easy for the continuation of the court proceedings, and also the institutions were helping the members in guiding them the procedures of the court proceedings. However, there were many practitioners that were involved along with the diverse culture in an international arbitration which included various parties with different cultures and efficiency. This was resolved through the translator that was also there during the practice of video conferencing.¹⁴

Still, there has been a difficulty that was faced by most of the participants, in that case countries have arranged The study has gone through the previous body of the literature that has examined the overall Covid-19 experience and also assists in guiding future research as well as the use of remote hearings.¹⁵

3. Procedures for Confrontation the challenges of international arbitration.

The COVID-19 pandemic has had an unprecedented impact on individuals, entities, businesses and countries. The national court system and alternative dispute resolution mechanisms have also been severely affected. However, throughout the crisis, international arbitration has proven its adaptability and flexibility.

3.1 The legal foundation for remote hearings.

While providing guidance on whether or not to hold a hearing remotely in different scenarios and basedon different considerations. For example, she considers thoseinstances where one party is in favour of a remote hearing, and the other is not. This chapter provides guidance for arbitrators on how to engage in a balancing test when faced with such decision-making dilemmasthat fall under their discretion.¹⁶

¹⁰ Scherer, Maxi. "Remote Hearings in Arbitration and What Voltaire Has to Do With It." *CLE* (2020): 22.

¹¹ 'International Arbitration and the COVID-19 Revolution' (Part 1 of 2)Maxi Scherer (WilmerHale& Queen Mary University of London), NiuschaBassiri (Hanotiau& van den Berg), and Mohamed S. Abdel Wahab (Zulficar& Partners)/October 8, 2020 /

¹²Singh, Ratan K., and Gracious Timothy Dunna."Virtual Arbitration and Remote Advocacy." *Available at SSRN 3755435* (2020).

¹³ Dissertation Report: Future of International Arbitration Commercial Law in a Post-COVID-19 World By (Tutor.2021.P.42.

¹⁴Kidane, Won. *The culture of international arbitration*.Oxford University Press, 2017.

¹⁵Municipio De Mariana &Ors v BHP Group Plc [2020] EWHC 928 (TCC) (20 April 2020)

¹⁶ International Arbitration and the COVID-19 Revolution' (Part 1 of 2) October 8, 2020availabbl at <http://arbitrationblog.kluwerarbitration.com/2020/10/08/international-arbitration-and-the-covid-19-revolution-part-1-of-2/>

The researcher's view that remote arbitration proceedings "herald an opportunity for a different approach to arbitration and advocacy", which will save parties time, cost, and complexity by turning arbitration into an alternative to modern dispute resolution. Therefore, the researcher deals with some of the measures taken by many international institutions - by giving broad discretion to the arbitrators regarding how arbitration will be conducted as follows.

3.2 The International Chamber of Commerce. (ICC)

The Arbitration Rules of the International Chamber of Commerce- like many of the international institutions- give a wide discretion to arbitrators as to how they conduct arbitration. Article 22 states that, in order to ensure effective case management, "the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties." Article 24 provides that, when drawing up the Terms of Reference, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.¹⁷

- 1) Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential.
- 2) Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.

3.3 The American Arbitration Association's (AAA) and the International Centre for Dispute Resolution (ICDR)

The International Arbitration Rules of the American Arbitration Association's International Centre for Dispute Resolution give a similarly broad discretion to a tribunal, and expressly provide for the use of electronic communications. Art 20 dealing with the conduct of an arbitration provides that an arbitral tribunal: "...may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."¹⁸

The tribunal may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the parties. In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings.¹⁹

3.4 London Court of International Arbitration (LCIA)

The LCIA has updated its Arbitration Rules to take effect from 1 October 2020. The updated Rules contain revisions relating to the use of technology and the conduct of hearings "virtually"- for example:

Art 14.3the parties and the Arbitral Tribunal shall make contact (whether by a hearing in person or virtually by conference call, videoconference or using other communications technology or exchange of correspondence) as soon as practicable but no later than 21 days from receipt of the Registrar's written notification of the formation of the Arbitral Tribunal.

Art 14.6The Arbitral Tribunal's power under Article 14.5 includes the making of any procedural order with a view to expediting the procedure to be adopted in the arbitration by:

"(iii) Employing technology to enhance the efficiency and expeditious conduct of the arbitration (including any hearing)".

Art 19.2The Arbitral Tribunal shall organize the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).

As to content, the Arbitral Tribunal may require the parties to address specific questions or issues arising from the parties' dispute. The Arbitral Tribunal may also limit the extent to which questions or issues are to be addressed.

Art 26.2 now expressly provides that "any award may be signed electronically and/or in counterparts and assembled into a single instrument".

¹⁷ The Future of International Arbitration following the Pandemic: The Hybrid Hearing? Anthony Connerty
09 Oct 2020. *ibid*.

¹⁸ <https://www.ciarb.org/resources/features/the-future-of-international-arbitration-following-the-pandemic-the-hybrid-hearing/>

¹⁹ *ibid*.

3.5 China international Economic and Trade Arbitration Commission(CIETAC)

The China International Economic and Trade Arbitration Commission, like the ICC, gives an arbitral tribunal considerable discretion as to the manner in which it is to conduct a CIETAC arbitration: oral hearings may be unnecessary. Article 35 states that the tribunal shall:

“...examine the case in any way it deems appropriate unless otherwise agreed by the parties”. In any case, the arbitration tribunal shall act impartially and fairly, and shall provide both parties with a reasonable opportunity to make statements.

The researcher's view that the arbitral tribunal shall hold oral hearings when examining the case.

The researcher believes, the arbitral tribunal may examine the case on the basis of documents only if the parties so agree and the arbitral tribunal consents or the arbitral tribunal deems that oral hearings are unnecessary and the parties so agree.

CONCLUSION:

It has been mentioned that the international arbitration has been significantly adopted in almost most of the countries as this has evolved and allowed the parties from various legal and cultural backgrounds. Although the use of the international arbitration has been engaged with the formalities and the procedural rules along with the legal systems. Moreover, it has also been mentioned that international arbitration has been declared as one of the leading forms of the international dispute resolution that has come between the businesses of the different nationalities between the state and the foreign investors.

Thus, highlighted arbitrations have also been surfaced due to the covid-19 in which most of the disputes have been increased with the complexity that would arise rendered with the importance of the points as this has been discussed in the study. As Covid-19 has been declared as one of the challenge to the arbitration as the follow up persons have only been focused with the experiences and they have been engaged with the practices to improve their process.

Results:

- 1- In fact, the prevalence of remote hearings may increase online fraud. Therefore, the parties and their lawyers should continue to take measures to protect themselves and their arbitration procedures, and may wish to consider the guidance provided in the 2020 International Arbitration Cyber security Agreement.
- 2- Electronic signatures are common in business life, and there are multiple technical options to support this and enable individual arbitrators to use their signatures. However, it is not clear whether the law of the corresponding place of arbitration allows this.
- 3- The London Court of International Arbitration (LCIA) uses online registration for applications and fee payments via bank transfers or credit card, and parties can use the online registration/registration facility as well.

Recommendations:

- 1- The need for translators in a jurisdiction where broadband or other necessary technology is unavailable or insufficient, and we do not expect arbitration to be deferred - however, the parties will need to review the circumstances of their individual affairs and take appropriate action to advise.
- 2- Using e-mail to deliver arbitration decisions, and when possible distribute certified hard copies to the parties, and most institutions provide this..
- 3- Submitting the International Chamber of Commerce's requests for arbitration and emergency arbitration (including documents) to the General Secretariat by e-mail.
- 4- Preparing a protocol to follow up on the remote hearing.

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