

The Impact of COVID-19 on the Administration of Justice

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In addition to the serious implications for people's health and public healthcare services, the COVID-19 pandemic also imposes challenges for the administration of justice.

Increasing Demand for Amicable Methods of Dispute Resolution

The current crisis creates a need for business and its legal representatives to consider carefully appropriate and alternative options for the efficient, timely and cost-effective resolution of disputes. They may need to focus on rebuilding their business relationship, re-negotiating the contract, or finding alternative paths to resolve their conflicts, rather than insisting on strict enforcement of contractual terms. This may lead to more demand for mediation, conciliation and other amicable methods of dispute resolution, as well as the combination of different dispute resolution processes.

Digitalization of Arbitration

The COVID-19 pandemic is also exerting greater pressure for the arbitration

community to find innovative ways to incorporate greater use of technology, through more use of online dispute resolution (“ODR”) or virtual hearings. Many leading arbitration institutions have provided guidelines and tools to facilitate virtual hearings (some insights from the ICC and SIAC are discussed in earlier blogs). More collaborations between different institutions are also emerging, such as the formation of the International Arbitration Center Alliance (“IACA”), and the Joint Statement on Arbitration and COVID-19 (“Joint Statement”) issued by thirteen arbitration institutions.

When the entire evidentiary hearing is conducted virtually, a number of issues could arise, which need to be carefully considered.

Access to Justice and the Due Process Issue

One question that arises is whether arbitrators can proceed with the virtual hearing if one or both parties object. One may argue that a face-to-face hearing is necessary for a party to fully present its case. Arguably, cross-examination of a witness is best conducted in person in order to see the facial expression and body language of the witness (particularly a factual witness) to test his/her credibility. Other practical and technical issues could also arise if a hearing is shifted fully online (such as accessibility of internet connection and other technological limitations; and separation of legal teams). In normal circumstances, tribunals are often inclined to hold at least one face-to-face hearing on the merits to ensure that each party is afforded procedural fairness. However, the pandemic may mean that it is not possible to hold a face-to-face hearing in a reasonable time. Waiting until it becomes possible may cause unwarranted and even prejudicial delay in the arbitration proceedings. “Justice delayed is justice denied”. Arbitrators need to carefully consider and balance the parties’ right to present one’s case and arbitrators’ overriding duty to conduct the arbitration in an expeditious and cost-effective manner.

The Joint Statement asks arbitral tribunals and parties to mitigate the effects of any impediments to the largest extent possible while ensuring the fairness and efficiency of arbitral proceedings. The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (“ICC Note”) allows the tribunals, in appropriate circumstances, to adopt different approaches as they

exercise their authority to establish procedures suitable to the particular circumstances of each arbitration and “*fulfill[s] their overriding duty to conduct the arbitration in an expeditious and cost-effective manner*”. The Delos Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19 (“Delos Checklist”) suggests that rather than an automatic suspension of the proceedings or of time limits due to COVID-19, tribunals should decide each case taking into account the provisions the dispute resolution agreement, the specific characteristics of the case, and requirements at the seat of arbitration.

Some institutional rules and practice guidance have progressively acknowledged the possibility of virtual hearings. For instance, 2017 Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (“ICAC”) allows a party to request the arbitral tribunal to “participate in the hearing by means of videoconferencing” (article 30(6)). Article 25(2) of the ICC Rules of Arbitration 2017 also does not preclude a hearing taking place “in person” by virtual means if the circumstances so warrant, as indicated by the ICC Note.

Interestingly, in the case of Capic v Ford Motor Company of Australia Limited (Adjournment) [2020] FCA 486, the Australia Federal Court denied the Respondent’s application for adjournment of the trial and decided that the trial would proceed as scheduled in the virtual mode. His Honour accepted that many aspects of a virtual trial were onerous and undesirable, but believed that those obstacles were not insurmountable and did not mean the trial would be unfair or unjust. Noting that “*public institutions such as the Court must do all they can to facilitate the continuation of the economy and essential services of government, including the administration of justice*”, his Honour concluded that a virtual trial should proceed, because the adjournment of matters indefinitely did not serve the public interest. The above decision may provide some comfort for arbitrators if they decide to proceed with virtual hearings despite the parties’ objections.

Confidentiality and Privacy

It is imperative to ensure all participants feel secure about the confidentiality of the information they disclose in a remote hearing. The ICODR’s Free Guide to Video Arbitrations (“IOCDR Guide”) provides some guidance to secure

confidentiality, such as a written commitment of no recording of audio or video, nor screen shots of the hearing, and locking the rooms once all parties have joined. It also recommends the use of a secure videoconferencing platform with end-to-end encryption. The CI Arb Guidance Note on Remote Dispute Resolution Proceedings (“CI Arb Guidance Note”) suggests circulation of full names and roles of all participants to a remote proceeding as well as their allocated virtual hearing and breakout rooms between parties and neutrals in advance and strict adherence to it.

Cybersecurity and Data Protection

Related to confidentiality, cybersecurity is crucial in arbitration as the credibility and integrity of the dispute resolution process depends on it. When an arbitration hearing is conducted virtually, it is important for arbitrators to consult with the parties with the aim of implementing a cyber-protocol to comply with any applicable data privacy regulations (such as the European Union General Data Protection Regulation).

To this end, the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020 edition) provides guidelines on how to adhere to a high standard of information security during an international arbitration. The ICCA-IBA Roadmap to Data Protection in International Arbitration (public consultation draft) has been developed by the ICCA-IBA Task Force on Data Protection in International Arbitration to help arbitration professionals better understand the data protection and privacy obligations to which they may be subject in relation to international arbitration proceedings. The ICC Note includes suggested clauses for cyber-protocols and procedural orders dealing with the organization of virtual hearings (Annex II). The African Arbitration Academy Protocol on Virtual Hearing in Africa also provides minimum cybersecurity standards (Annex I) and tribunal-issued cyber protocol (Annex IV).

Practical and Technical Issues

There are other important technical and practical issues that need to be considered to ensure the quality of the virtual hearings. The ICC Note suggests the

tribunals to ensure any video sharing platform used for virtual hearings “*is licensed and is set to maximum security settings*”. The [Seoul Protocol on Video Conferencing in International Arbitration](#) (“Seoul Protocol”) provides more detailed guidance on best practice in this context, including the logistical and technological guidelines to ensure quality of video conferencing. [The HKIAC Guidelines for Virtual Hearings](#) provides detailed guidelines for virtual hearings based on HKIAC’s experience and aims to ensure that participants experience a seamless and effective virtual hearing. The ICODR Guide suggests that if one party disconnects, the session should be suspended until they can re-join, in order to ensure fairness, impartiality and neutrality. It also recommends to always have a back-up option for sound, for instance dialing in by the phone.

Language and Interpretations

In terms of language, the ICC Note suggests the parties should coordinate amongst themselves, with a view to agreeing, among other things, whether an interpreter is needed, arrangements needed to ensure that the interpreter is able to provide his/her services virtually, whether interpretation will be simultaneous or consecutive, and whether certain additional equipment is needed. The Seoul Protocol also states the importance of ensuring interpretation services are made available to the witness, and recommends consecutive interpretation over simultaneous interpretation as a general rule.

Internet Courts and Robot Justice

Courts around the world are also adapting to find “remote” alternatives to traditional hearings to ensure ongoing access to justice. [Remote Courts Worldwide](#) is one effort to capture remote-court innovations.

China is at the frontlines of the use of technology in court services. It is encouraging digitization to streamline case-handling within its sprawling court system using cyberspace and technologies like blockchain and cloud computing, according to the Supreme People’s Court. Millions of legal cases are now being decided by internet courts that do not require citizens to appear in court.

The Hangzhou internet court was established in August 2017, followed by Beijing internet court and Guangzhou internet court established in September 2018. Digital court cases in China have seen a sharp increase in recent years, as the number of mobile payments and internet-based businesses has grown. The internet courts mainly deal with cases involving legal disputes over digital matters, such internet trade issues, **copyright** cases and disputes over online product sales. Non-human judges powered by artificial intelligence (“AI”) have been used to carry out simple functions, so as to help ease the burden on human judges, who can focus their efforts in monitoring the proceedings and making the major rulings.

In response to the COVID-19 pandemic, the Beijing Internet Court has developed a matrix, combining physical court, online court based on physical court environments, online platforms, virtual courts and virtual technology-based physical cabins to enhance its efficiency. Based on the technology of semantic segmentation model in deep learning, the virtual courts resemble real court scenes with national emblems displayed. Since the start of the pandemic, the number of cases received is basically the same as last year, with 30 cases heard via the virtual court. Such initiatives may become a new model of building for the administration of justice, consistent with the goals of sustainable development.

Conclusion

“Justice delayed is justice denied”. The greater and better use of technology in the administration of justice is an inevitable trend, and the current pandemic may have significantly pushed the digitalisation process much forward, leading to more e-mediation, e-arbitration, online courts and the use of AI in the future. Alan Kay says “the best way to predict the future is to invent it”. Arbitrators, judges, counsels, parties, arbitration institutions and courts should prepare themselves to such evolution and make best efforts to facilitate the just resolution of disputes as quickly, inexpensively, and efficiently as possible.