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With this thought, we hereby present to you

LEX BONA FIDE: LAW JOURNAL

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ARBITRATION AMIDST THE PANDEMIC

by Pooja Dave

ABSTRACT

While all realms of law have been affected by the pandemic, arbitration proceedings and the procedure governed by it has also made provisions to accommodate the dynamic scenario the world is facing. Covid-19, a global pandemic that has triggered lockdowns in many nations, is wreaking havoc on the planet. The worldwide chaos in all aspects of life looks likely to continue as the epidemic shows no signs of abating. The Indian legal system is no exception, with the Alternate Dispute Resolution Mechanism being negatively impacted as well. Although the current pandemic and subsequent crisis have brought many new problems to light, the situation provides an excellent opportunity for the arbitration community to better understand the dynamics of IT use and, more importantly, how the current crisis can be channelled into a more mature integration of IT and arbitration. The current developments have the potential to uproot physical arbitrations as we know them and replace them with virtual arbitrations. What remains to be seen is how quickly the system's stakeholders, such as counsels, parties, and tribunals, become aware of the new technologies, bearing in mind that virtual arbitrations can very well be the future.

INTRODUCTION

The COVID-19 pandemic is regarded as a global health disaster that has had a significant impact on the world's health and economy. This unprecedented situation, as well as the virus's rapid spread, is being felt across the world and affecting all business sectors. It's a crisis unlike any other, with factories and schools closing, borders closing, and half of humanity in some sort of lockdown. It has resulted in a significant decrease in company cash flow and the possibility of mass insolvency. Unfortunately, the crisis is far from over, with new lawsuits being filed all over the world and economies continuing to experience losses.

The Supreme Court of India issued an order on March 23, 2020, taking suo moto cognizance of the difficulties faced by litigants around the world as a result of the Covid-19 Virus in terms of the statute of limitations under various laws.^[1] It was decided that the statute of limitations in all cases before any Court or Tribunal be extended beginning March 15, 2020, and continuing until further orders are given.

Arbitration, as an alternative conflict resolution process, has changed the nature of commercial dispute resolution and is favoured by parties for a variety of reasons, including the flexibility to

decide procedures, set time limits, cost-effectiveness, and confidentiality. Covid-19 has interrupted regular court procedures, prompting practitioners to search out new, more effective ways of settling conflicts. Parties who previously refused to submit to arbitration are now deciding to settle their differences by mediation or arbitration. In contrast to conventional litigation, arbitration tends to have better technology integration capabilities, owing to the inherent party autonomy and flexibility in deciding the governing procedures. When taken into account, this tech-integration capability has greatly increased the adaptation and continued dependence on arbitration as an alternative and successful form of conflict resolution.

CONCERNS TO CONSIDER

Covid-19 and the resulting social-distancing policies have compelled disputing parties to enact and execute arbitration proceedings remotely. New issues emerge as arbitration moves toward a contact-free approach. One of the main reasons for the popularity of arbitration for commercial disputes is the confidentiality of proceedings, records, and/or documents. However, recent hacking and data breaches have not only eroded parties' trust in virtually managed arbitrations, but have also raised questions about due process.

Another important aspect of arbitration that contributes to its popularity is its cost. However, with the rising costs of fees charged to institutions, tribunals, legal counsels, and experts, this function may have lost its usefulness and importance. Virtual arbitrations will impose additional costs for the use of appropriate technology such as the internet, virtual data rooms, video-conferencing platforms facility, transcription, translation, and appropriate hardware in addition to the costs normally incurred by parties in an in-person arbitration.^[2]

In normal circumstances, in-person hearings are the norm; however, due to Covid-19, this is no longer possible. As a result, India's courts and other judicial and quasi-judicial forums are increasingly relying on video-conferencing platforms to resolve pending cases. Although it's encouraging to see the long-overdue shift toward the use of technology in conflict resolution, there are still several roadblocks in the way.

During a simulated proceeding, one of the key problems that the parties face is performing a witness investigation. This may be for several reasons: first, counsel and tribunals rely on the witness's facial gestures, body language, and hand gestures during an interrogation, which can be difficult to replicate over just a content; second, ensuring that the witness is alone and not receiving any directions or assistance while giving his testimony can be difficult. It's worth mentioning that many professionals have stated that this is merely an empirical problem and that

performing a witness examination over just a video conference with high standard communication tackles the mentioned problems to a significant degree.

In the normal course of arbitration in India, the participants' general tendency is to depend on physical documentation from filing to referring to documents at the hearing. Participants have developed a mental block against using and relating to electronic versions of the related documents as a result of their reliance on paper. As a result, a sudden switch from paper to paperless is bound to be difficult for anyone who isn't used to it.

Not only does virtual arbitration require electronic serving/filing of documents like the notification invoking arbitration, the statement of the argument, the motion of defence, and the counterargument, but it also requires referring to electronic versions of the documentation during an online proceeding of the arbitration proceeding.

- For disputes involving complex legal and factual problems with high stakes, in-person arbitration can still be preferred.
- In the absence of a prior agreement, the dispute between the disputing parties over whether to perform the arbitration remotely or in person is likely to escalate. In this case, the arbitral tribunal has the authority to resolve the dispute^[3]. The party opposing virtual arbitration, on the other hand, may contest the arbitral award, citing concerns about due process.
- India's existing legal system does not put a heavy emphasis on supporting virtual arbitrations. Established rules, on the other hand, do not limit it in any way, as detailed below.
- Some nations have regulations that require the award to be in a particular format, while others may only require the award to be written. Flexible legislation that allows parties and tribunals to choose the type of award will be beneficial.
- The arbitral tribunal would have to decide if the discovery request is practicable and appropriate. As a result, the arbitral tribunal would need to exercise caution and consideration when granting or denying the discovery request, to strike a balance between the parties' rights to present their case completely.

APPLICABLE INDIAN LEGISLATION

The 1996 Arbitration and Conciliation Act (the "Act") is silent as to whether arbitration hearings can be held through virtual meetings or other digital communications. The Act's Section 24

(Hearings and written proceedings): (a) allows the parties to have oral hearings or waive this right if they so choose; and (b) allows the arbitral tribunal to rule on the need for oral hearings if the disputing parties cannot agree.

The Legislation does not describe 'oral proceedings,' but Section 18 (Fair treatment of parties) establishes the foundation of due process: (a) equal treatment of all parties; and (b) complete opportunity for each party to make its case. As a result, as long as the instruments (i.e. electronic means) used to hold "oral hearings" meet the requirements of Section 18 of the Act, virtual proceedings should be legitimate, limiting a party's right to appeal such proceedings or an arbitral award solely because the oral hearing was held electronically.

The Act recognises the right to an oral hearing, although that doesn't specify that this right can only be exercised by being physically present in the presence of the tribunal and that the other disputing entity. The Supreme Court of India held in *State of Maharashtra v. Praful B. Desai* [4] that because both parties are present in a video conference, recording evidence using such electronic means and in the virtual presence of the accused complies with the requirement that evidence is taken in the presence of the accused. As a result, the accused's physical presence requires a virtual presence as well. As a result, concluding that perhaps the right to an oral hearing is equal to an in-person hearing limit the extent of such a right and undermines the intent of good governance.

In the absence of any agreement between the parties, Section 24 of the Act, read with Section 19(3) (Determination of rules of procedure), empowers the arbitral tribunal to decide how the arbitral proceedings will be conducted. Even if no agreement to conduct the arbitration virtually exists, the arbitral tribunal can issue a virtual arbitration order. However, before deciding the matter, the tribunal may take into account the nature and complexity of the dispute at hand.

The ingredients of due process are defined in Section 18 of the Act. The effect of Covid-19 has compelled India's judicial forums. to hear pending cases using electronic means The Hon'ble Supreme Court of India has issued guidelines on the use of video-conferencing in court proceedings.[5]

Digital assessments are more difficult in India for a variety of factors, including a lack of technological awareness, poor network access, oscillating connection speed, and a generalized aversion to using technology. However, although virtually interviewing witnesses is not new to arbitration, Indian courts have allowed such examinations on many occasions for reasons such as expense, the presence of witnesses in other countries, and so on. Furthermore, the relevant person

has to ensure that its witnesses are available on schedule and using the appropriate technical devices.

In 2015, the legislature amended the Act to add Section 29B in response to the increasing demand for quick resolution of conflicts, urgency, and expedited proceedings (Fast track procedure). The Indian version of a document-only arbitration is Section 29B of the Act. It requires the parties to select a tribunal (consisting of a single arbitrator) to settle disputes exclusively based on written pleadings, papers, and representations filed by the parties, with no need for an oral hearing.

The parties may consider using this document-only arbitration method in light of the ongoing social distancing steps. Although it may not be advisable to use a fast track method to resolve data-intensive disputes involving complicated issues of fact and law, parties with simple contractual disputes may use such a process to resolve disputes quickly and efficiently.

Virtual arbitrations include electronic deliberations, claims, applications, testimony, notices, hearings, and orders. This raises questions regarding the legality, validity, and acknowledgement of such trials, records, and orders/awards. Sections 4 (Legal recognition of electronic records)^[6] and 5 (Legal recognition of electronic signatures) of the Information Technology Act of 2000 ^[7](“IT Act”), together with Section 65B (Admissibility of Electronic Records) of the Indian Evidence Act of 1872, provide the requisite legal recognition of such electronic records and proceedings.

While the implementation of Sections 4 and 5 of the IT Act to pleadings (such as allegation statements, defence statements, rejoinders, and so on) is clear, affidavits raise questions. India currently prohibits e-notaries and lacks the necessary infrastructure. As a result, the affidavits that accompany the pleadings are unable to be notarized remotely. If notaries are required to electronically notarize documents, this may be a major roadblock in the transition to a completely electronic process.^[8]

Within India, a domestic award must be properly stamped with the appropriate value in compliance with the relevant laws before it can be performed and enforced. ^[9]An unstamped or insufficiently stamped document (such as an arbitral award) is inadmissible in a court of law, according to Section 35 of the Indian Stamp Act, 1899. This defect of inadequate stamping/unstamped arbitral awards can be remedied by paying the necessary stamp duty and penalty.

An arbitral award must also be registered under Section 17 of the Registration Act of 1908 [10] if it affects the ownership status of immovable property. At the moment, none of India's states provides for the electronic registration of arbitral awards. In light of Covid-19, measures aimed at simplifying registration and stamping procedures would go a long way toward fostering virtual arbitrations.

Confidentiality and data protection are also major concerns for virtual arbitration parties. The Act's newly added Section 42A (Confidentiality of Information) allows the arbitrator, the arbitral agency, and the parties to keep the proceedings confidential. During case management proceedings, questions regarding confidentiality, including the adequacy of any pre-existing confidentiality agreement, can be raised and answered. Separate confidentiality arrangements may be enforced by the parties for those that are not covered by Section 42A if necessary, to ensure enforcement and prohibit unwarranted disclosures.

Personal data about the parties concerned, including witnesses, experts, and other related people, is shared, processed, exchanged, and transferred as part of the arbitration procedure. As a consequence, when gathering and processing personal data as part of the arbitration, the arbitral tribunal must urge caution. The current situation's challenge to arbitral proceedings, as well as the ramifications of Section 29A- The country's current state of full lockdown, forbids the physical operation of arbitral proceedings. The failure to hold hearings creates its collection of issues. The Arbitration and Conciliation (Amendment) Act of 2015 added Section 29A, which sets the time limit for passing an arbitral award at twelve months from the date of reference to the arbitral tribunal (i.e. when the arbitrator receives notice of appointment) and can be extended by another six months with the parties' agreement.

As a consequence, though Section 29A sets a strict deadline for the completion of arbitration proceedings, it also includes a safety net that can be used in cases like this one. Both parties (jointly) or any of the parties individually may file an application with the concerned court within a fair timeframe before or after the statutory deadline for completion of arbitration proceedings expires, to request an extension of the statutory deadline for completion of arbitration proceedings.

On the reopening of the courts of law, pending arbitration proceedings where the stipulated period is expiring within the lockdown period as mandated by the Government of India which invoke Section 29A for a time extension. According to the rules, the Arbitral Tribunal has the authority to conduct arbitration proceedings by video conference, telephone, or any other means of

communication considered appropriate. Since the parties in international commercial arbitration are often from different countries, the use of modern technology is more than a requirement to allow cost-effective arbitration proceedings and to meet the strict statutory deadlines.

Even though virtual hearings are already a norm in international commercial arbitration, domestic arbitration proceedings will benefit from taking a page from their book and applying it to today's turbulent situation.^[11]

CONCLUSION

Despite the tightening of restrictions and the country's full lockdown, some urgent arbitral hearings can be performed digitally. ^[12]The Code of Civil Procedure, 1908, and the Indian Evidence Act, 1872 are not binding on the Arbitral Tribunal, according to Section 19 of the Arbitration & Conciliation Act, 1996. The Arbitral Tribunal or the parties to the arbitration proceeding decide on the procedure to be followed in a conducive setting.

Although the Arbitration & Conciliation Act of 1996^[13] is silent on the use of video conferencing in arbitration proceedings, Section 19 specifically empowers the Arbitral Tribunal to do so. The Arbitral Tribunal has the authority to guide the parties to the arbitration proceedings to file pleadings via electronic mail and conduct proceedings via video conferences, allowing for social distancing with minimal productivity loss.

In reality, arbitral tribunals which use video conferencing in routine circumstances for convenience and cost-effectiveness, including in domestic arbitration proceedings, following evolving technology and the strict legislative deadlines enumerated in the Arbitration & Conciliation Act, 1996.

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