Virtual arbitrations and the new normal

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Alternate dispute resolution systems such as arbitration, stand on a different footing than litigation in the judicial system. Procedural flexibility and party autonomy, being the key factors as to why parties opt for arbitration, in fact aid the arbitration process to better adapt to the “new normal” in this pandemic. The widespread use of information technology presents a real advantage over traditional litigation.

As one might expect, COVID-19 put the brakes on a practice where in-person evidentiary hearings bringing together arbitrators, counsel and witnesses from far and wide was the norm. But not for long. After a few weeks of scrambling, many matters were back up and running, relying on remote technology to continue hearings. Long-standing reliance on those technologies for procedural conferences, positioned international arbitrations well, to dive into the deep end of fully-remote proceedings. These proceedings have been aided by the promulgation of copious guidance on how to use such technology effectively and best practices to ensure procedural fairness.

Institutional arbitrations especially, are known to be better equipped with their own set of procedural rules that ensure uniformity and a definite structure for conducting arbitration proceedings while also maintaining party autonomy and flexibility to model the procedural rules as per the convenience of the parties and the arbitral tribunal. These rules, even prior to the pandemic, contemplated remote hearings, e-service of documents, e-filing and video conferencing. These aid the adaptability of the proceedings to shift away from in person hearings and physical service/filing of documents to virtual hearings and e-service/e-filings. It is this very aspect that has enabled these institutions to quickly adapt to the “new normal”.

Arbitral institutions have moved quickly to minimize disruption caused by the pandemic: the ICC, for example, has digitized requests for arbitration, the LCIA has set up a virtual platform to file applications, parties governed by ICSID rules are encouraged to file submissions electronically and many arbitral bodies have now published guidance to online hearings. Issues remain, of course— technology failures, time differences, the challenges of virtual cross-examination, etc. — but the flexibility of international arbitration makes it especially well-placed to adapt to the new normal.

Domestic courts had generally not adopted remote technology in any form, and those courts own the important task of enforcing arbitration awards. The fear had been that such courts would view remote evidentiary hearings as categorically procedurally unfair. But, COVID-19 has had an equalizing effect on litigation as well. Domestic courts, like most of us, have been forced to engage with remote technology to keep their dockets moving during this crisis.

Arbitration is considered to be a convenient, cost-effective and progressive mode of dispute resolution which provides some concrete and binding result to the parties. Arbitration, with its inherent flexibility, has an important role in dealing with the fallout from coronavirus in the coming months and years. However, it poses its own challenges, including for proper implementation of the virtual model keeping in mind the privacy and confidentiality. Another critic is that due to lack of the proper infrastructure parties do not get the decisions on time which further increases the complexities and enforcement of the awards rendered through virtual hearings.

Privacy and confidentiality are hallmark attributes of arbitration. The arbitration process is carried out through private telephone calls, video conferences and/or in-person meetings among counsel and arbitrator. The evidentiary hearing is conducted at a private location. Contrary to the understanding of some, arbitration is not inherently a confidential process. The arbitrator is bound by applicable rules and ethical obligations to keep the arbitration proceeding confidential.

Confidentiality, as an aspect of arbitration, may be achieved by the parties' agreement. Parties also may agree to certain forms of confidentiality after a dispute has arisen. A confidentiality agreement may be expressly provided for in the underlying arbitration clause, or it may be imbedded in the adoption of the arbitration rules of a designated arbitration service provider that requires specified confidentiality levels.

The 2019 Amendments to the Arbitration and Conciliation Act, 1996 ("Act") introduce section 42A and section 43K to the Act. Once notified, they will bolster data confidentiality in arbitration proceedings. Section 42A imposes data confidentiality obligations upon the arbitrator, the parties to the arbitration, and the arbitral institution. Section 43K enables the Arbitration Council of India to be the repository of arbitral records. However, the contours and exceptions to data confidentiality under section 42A remain unanalysed, and the governing regulations of the data security protocols for the ACI are yet to be notified.

Arbitral awards usually have to be rendered in writing, have to bear the arbitrators' signatures, have to be delivered to the parties and have to be submitted to court in order to be recognized and enforced. A multitude of national laws, which are harmonized only in part, govern these issues. If arbitration agreements or arbitral awards are invoked before foreign courts, the same issues of form are even governed by another legal regime.

The Act envisages such requirements. Section 31(1) of the Act lays down that the arbitral award shall be in writing and shall be signed by the members of the arbitral tribunal. The Information Technology Act, 2000 through Section 5 provides that the digital signature have the same effect as a paper signature.

Arbitration being a creature of contract between the parties, has the flexibility of being governed by the procedure agreed upon by the parties and in the absence thereof by the arbitral tribunal, including the procedures relating to use of technology. Likewise, the award can be issued through email by sending scanned signed copies. In the alternative, the arbitrators can also put their digital signatures and provide accuracy and integrity to the award. For enforcement of the award, the original signed copy received by post or the digitally signed awards, as the case may be, can be filed before the Court.

Model law of electronic commerce promotes the equivalent approach whereby electronic documents can be considered original for enforcement. The international conventions relating to arbitration require filing of original or duly authenticated copy of the award for enforcement.

The panacea to the drowning future of the Arbitration is the promotion of the Institutional Arbitration in India. The High Level Committee in its report submitted different measures to promote India as the most preferred Seat of Arbitration including setting up of an autonomous body as the Arbitration Promotion Council of India.

The situation of the Institutional Arbitration is very critical in India even after the reluctant efforts being made by the Government to attract the international parties. To encourage the dispute resolution through arbitration there is need to promote institutional arbitration in India. It is well-known fact that arbitration in India is predominantly conducted through the ad-hoc method and institutional method is not preferred.

Given collectively rising comfort levels and the existence of acceptance guidance on best practices, the increased use of remote technology in arbitrations is likely here to stay. Cost savings for clients and convenience for arbitrators, counsel and witnesses had sparked an interest in broader adoption of remote technology even prior to COVID-19. But the enforcement risks to an arbitration award produced by a fully remote proceeding, an inhibiting factor to the expansion of the use of remote technologies in final evidentiary hearings, may be permanently diminished by the virus.

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