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RECENT TRENDS IN INTERNATIONAL ARBITRATION- AN OVERVIEW

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INTRODUCTION

In recent times a noticeable change is seen in the field of International Arbitration as it is witnessing a monumental transformation because of the global need for intensifying cost and time. Quest for professionalism, innovation and want of diversity of Arbitrators and uniformity of awards emerge as the few important aspects for the growth of International Arbitration. Institutions have amended the rules in 2017 and again in 2019 to bring in some changes¹. Several areas have experienced either small or significant development in an attempt to make Arbitration proceedings better to cater to the needs of the parties. The introduction of expedited arbitration processes and emergency arbitration are prominent examples. It is evident from the 2019(Arbitration Amendment Act)² that the focus of the Government of India is to make India a hub for both domestic and international Arbitrations. The insertion of new sections 43(a) to 43(m) in the Arbitration and Conciliation Act 1996³ which facilitates creation of Arbitration Council of India and will help promote ADR practices with a view to strengthen International Arbitration.

DEVELOPMENTS IN INTERNATIONAL INSTITUTIONAL ARBITRATION:

1) EXPEDITED PROCEDURE:

Several arbitration institutions have in recent years included Expedited Procedure in their rules for faster resolution of the dispute. These provisions allow parties to resolve their disputes in a

¹ <https://www.lexisnexis.co.uk/legal/guidance/institutional-arbitration-an-introduction-to-the-key-features-of-institutional-arbitration>.

² <https://egazette.nic.in/WriteReadData/2019/210414.pdf>.

³ <https://legislative.gov.in/sites/default/files/A1996-26.pdf>.

cost efficient and in reasonable time. Some examples of the Arbitration Institutes that provide for Expedited procedure are:

1. Singapore International Arbitration Centre (SIAC)
2. International Court of Arbitration (ICC)
3. Council for National and International Commercial Arbitration (CNICA).

The various provisions dealing with Expedited Procedure include:

1. Singapore International Arbitration Centre Rules⁴ [Rule 5]
2. The International Court of Arbitration Rules 2021⁵(Article 30, AppendixV1).
- 3.Expedited formation of Tribunal under London Court of International Arbitration Rules 2020⁶ (Article 9A).

In the case of Noble Resources International Pvt Limited vs Shanghai Good Credit International Trade Co Ltd⁷the Shanghai court refused to enforce a SIAC award passed under the expedited procedure. The court held that it is not in conformity with the intention of the parties and it does not uphold party autonomy. Following that, SIAC's Vice Chairman nominated a single arbitrator under the Expedited Procedure, who rendered an award.

In the case of AQZ vs ARA⁸ the Singapore High Court had discussed the issue of appointment of a sole arbitrator under expedited procedure despite the arbitration agreement specifying a three-member tribunal.

2) EMERGENCY ARBITRATOR:

⁴ <https://www.siac.org.sg/our-rules/rules/siac-rules-2016>.

⁵ <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration>.

⁶ https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.

⁷[2018] 1 CMCLR 18.

⁸[2015] SGHC 49.

An emergency arbitrator may be appointed under certain International Arbitration rules for determination of applications for urgent interim relief before the arbitral tribunal is constituted. Some examples of Arbitral institutions that provide for Emergency Arbitrators:

- 1) The International Centre for Dispute Resolution (AAA-ICDR)
- 2) Stockholm Chamber of Commerce (SCC)
- 3) Indian Council of Arbitration.

SIAC Rule 30.2(read with Schedule 1)⁹ states a party may apply to SIAC for the appointment of an Emergency Arbitrator for the purpose of grant of emergency interim relief. An application must be filed concurrently with or after the filing of an arbitration notice.

In the Indian context, the Emergency Arbitrator provisions have found greater resonance, given:

- 1) The tendency of parties making urgent interim relief applications before the Indian Courts,
- 2) Judicial endorsement of the SIAC Emergency Arbitrator provisions by the courts in India.
- 3) For example: In HSBC PI Holdings (Mauritius) Ltd vs Airtel Post Studioz Limited & others¹⁰, the Bombay High Court in exercise of its jurisdiction to grant interim measures of protection, directed relief in terms of the awards made by the Emergency Arbitrator under the SIAC Rules¹¹.
- 4) In Plus Holdings Limited vs Xeitgeist Entertainment Group Ltd and Ors¹², the petitioner approached the Bombay High Court to restrain the Respondents from releasing the film 'Hotel Mumbai' on the OTT platform. An Emergency Arbitrator was appointed in this case.

⁹Supra note 4.

¹⁰Civil Appeal No. 5158 of 2016 with Civil Appeal No. 9820 of 2016.

¹¹Supra note 9.

¹²Com Arb Pet 399 of 2019.

3) JOINDER OF PARTIES- SIAC RULES:

A party or a non-party to the arbitration can file an application for joinder of one or additional parties to the tribunal or with the Registrar (Rule 7)¹³. In order to apply for a joinder, the following criteria needs to be satisfied:

- 1) The joining party is deemed to be bound by the arbitration agreement; or
- 2) All parties, including, the additional party to be joined have consented to the joinder of the additional party (Rule 7.1 and Rule 7.8)¹⁴.

In the case of PT First Media TBK vs Astro Nusantara International BV¹⁵ the Singapore Court of Appeal considered the earlier SIAC Rule 24.1(b)¹⁶ which gave the tribunal the power to allow other parties in the arbitration with their express consent, and make a single final award determining all disputes among parties to the arbitration.

4) MULTIPLE CONTRACTS AND CONSOLIDATION OF ARBITRATION-(Rule 6 and Rule 8)¹⁷:

If a claimant has a dispute resulting from or related to more than one contract, he or she may, under Rule 6.1¹⁸:

- 1) Register for consolidation under Rule 8¹⁹ or file a Notice of Arbitration with SIAC for each arbitration agreement entered.
- 2) File a single Notice of Arbitration in respect of all arbitration agreements whereby the claimant is deemed to have commenced multiple arbitrations and the said Notice of Arbitration would be considered as an application for consolidation.

¹³Supra note 11.

¹⁴Ibid.

¹⁵[2013] SGCA 57.

¹⁶Supra note 14.

¹⁷Ibid.

¹⁸Ibid.

¹⁹Ibid.

Rule 8²⁰ permits the process of consolidation of multiple arbitrations into single arbitration. In the case of Global Infonet vs Lenovo and Ors²¹ a Single Judge of the High Court allowed an application filed under Section 8 of the Arbitration and Conciliation Act 1996²², seeking reference to arbitration proceedings that technically arose out of three separate and distinct arbitration agreements between different parties.

ARTIFICIAL INTELLIGENCE IN ARBITRAL PROCEEDINGS

Artificial intelligence is the process of stimulating human intelligence in systems that are programmed to think and act like humans. Additionally this concept also applies to any kind of machine that exhibits traits associated with the human mind such as problem solving and learning. Artificial intelligence's ability to rationalise and take actions that have the best possibility of reaching a specified and definite objective is a key feature. Arbitration is one among the most prominent and accepted means of dispute resolution amongst the other Alternative Dispute Resolution mechanisms available. Arbitration is preferred by the disputing parties who don't want to go to courts or require a hustle free, speedy, effective and binding decision in a lesser time.

Unlike other means of dispute resolution, in arbitration, a private tribunal is constituted wherein the arbitrators are appointed by the disputing parties. It is usually human arbitrators who are appointed. But through the development of technology, arbitration has also seen development. According to experts, in due course of time, AI powered arbitration will come into effect taking the position of human arbitrators. This is said to be technologically feasible and will be able to efficiently perform the functions which a human arbitrator is required to perform²³.

“AI” IN INTERNATIONAL ARBITRATION

In arbitration it is necessary that the arbitrators to be appointed should have relevant experience in dealing with various types of issues and disputes. Therefore, it is necessary that potential arbitrators should be appointed. Additionally, translation and transcribing programs are equally important in arbitral proceedings. Further, the techniques used during document production i.e to scan and process documents are equally important. Thus, through implementation of AI tools in Arbitration will be helpful as heavy volumes of evidence can be summarized by classification

²⁰*Ibid.*

²¹*Judgement dated July 25, 2019 in C.S.(Comm)No.658 of 2017.*

²²*Supra note 3.*

²³ https://www.disputeresolutiondata.com/artificial_intelligence_in_international_arbitration_an_overview.

and grouping when and were required. Also, with the help of AI tools relevant facts, common and disputed positions of the parties, and procedural history can be added so as to assist and for speedy drafting of the award. The use of AI tools in this manner can help in resolving the problem of ‘user disappointment’ caused due to various factors seen in arbitration proceedings.

This doesn’t show that the use of AI tools in arbitration is out of issues. The use of AI tools in the decision-making process can become problematic or chaotic. When technology is allowed to ‘interfere excessively into the adjudication process’ there will arise some or the other kind of issue²⁴. It is therefore necessary that technology and adjudication process should be linked in such a manner that they don’t cross the paths of each other taking away the position of each other thus making it work efficiently. While arbitration is often concerned with private rights, there are still certain required procedures both procedural and formal to protect the interest of parties and the integrity of arbitration. The use of AI tools in adjudication carries the risk of violating due process rights and the seat's public policy. As a result AI’s use in the adjudication process should be kept to a very minimum. It can be used to do legal research and summarise the law, along with process and analyse parties' submissions and evaluate tribunal decisions to those of the AI. It is therefore very much necessary to ensure that AI tools must only be used with the consent of both the parties and through following appropriate protocols in place, and without causing any kind of unequal treatment to either of the parties to the arbitration²⁵.

“AI” AS A DISRUPTIVE TECHNOLOGY:

Despite the several benefits that AI has it is also known for being the ‘most disruptive technology’ in the field. It is contemplated that in the coming years, AI will be performing the tasks of paralegals and associates as well. The credibility of this assertion cannot be confirmed, as it is not ruled out. In order to address this concern, one must understand that AI necessarily requires a large data set and user feedback for its proper functioning²⁶. This in particular is relevant in the context of arbitration, as most of the documents are confidential, and exist in smaller data sets in comparison to other practices.

The multiplicity of laws and diverse practice areas which are connected with arbitration further limits the scope of training and testing of AI in the process of arbitration. Also because there are

²⁴ <https://www.financierworldwide.com/machine-arbitrators-science-fiction-or-imminent-reality>

²⁵ <https://www.mondaq.com/india/arbitration-dispute-resolution/1027248/artificial-intelligence-in-arbitration-revolutionary-or-impractical>.

²⁶ <http://arbitrationblog.kluwerarbitration.com/2020/09/26/future-of-ai-in-arbitration-the-fine-line-between-fiction-and-reality/>

few precedents in arbitration, and cases are decided on the merit of individual circumstances of each case, this puts forward an issue in bringing AI to arbitral proceedings. Arbitrators are appointed based on their experience too. Both inductive and deductive reasoning are equally important in case of an arbitration. Another aspect to be taken into consideration is that the practical understanding and realm of experts in specialised fields cannot be fully substituted by technology, as AI tools will process information in a manner which is closer to inductive reasoning, rather than deductive reasoning. All of the above-mentioned aspects make it extremely difficult for AI to stimulate many aspects of arbitration²⁷.

Thus, we can safely conclude that arbitration has proven to be particularly strong as seen now. While technology has automated numerous processes for the advantage of practitioners, it is inadequate or unable to replace junior associates. In recent times, the possibility and discussion to the implementation of AI-arbitrators or, machine arbitrators replacing human arbitrations is huge. In simple terms, legal decision-making requires both subjective and emotional capabilities which AI does not possess. Assuming this possibility in the due course of time people tend to support human arbitrators more than AI arbitrators. There are reasons for this too. One being human beings are set to the notion of humans performing this process. Also, parties prefer understanding the reason why arbitrators arrived at a decision, which is rarely done away with. Parties always tend to seek the reason behind every action. Artificial Intelligence lacks this means to satisfy the requirement of giving reasons for the award, as it's better suited to provide a binary response based on probabilistic inference, which would lack legitimacy. As a result, it may create many controversies under the title of objective analysis. Thus, reasoning will always be inherently and uniquely a human task. AI would lack the same also. Further, the limits of AI are vast and will mostly consist of selective information only i.e which are provided²⁸. Furthermore, data bias would be a considerably worse concern than human arbitrator bias, because the latter can be deduced and the arbitrator and award may be questioned, whereas in the case of AI arbitrators, this is not possible.

RECENT TRENDS WHICH EMERGED DURING THE PANDEMIC

1. COVID-19 RELATED DISPUTES:

²⁷ <https://www.cyberlaws.it/en/2020/artificial-intelligence-arbitration>.

²⁸ <https://www.ibm.com/in-en/cloud/learn/what-is-artificial-intelligence>

The present pandemic has given rise to a large number of disputes eventually leading to arbitration. Government funded packages and temporary renegotiation of contracts have reduced an anticipated major strike in cases. However, contractual disputes have arisen on the scope of force majeure clauses and a rise in further disputes from the economic unrest due to the pandemic, as well as potential investment treaty claims can be predicted.

2. INSOLVENCY AND ARBITRATION:

Major economies around the world are expected to experience a sharp rise in corporate insolvency. Where an arbitral counterparty is insolvent, or at risk of becoming insolvent, the case needs to be carefully managed strategically to minimize the risks related to insolvency and the arbitral process.

3. INVESTMENT ARBITRATION TRENDS:

Following the landmark decision in *Portigon AG vs Spain*²⁹, which paved way for project finance lenders to benefit from investment treaty protection, lenders have an opportunity to upgrade their risk and investments against the risk of future inimical state measures. Over the last year due to the Covid-19 pandemic has led to unprecedented government intervention. Despite the fact that there have been limited challenges against States under bilateral and multilateral investment treaties, a further rise can be expected in the coming years.

4. COST-EFFECTIVE VIRTUAL ARBITRATIONS:

Recent reforms of the major arbitral institutional rules have resulted in greater efficiency and more cost-effective conduct of arbitrations, with increased tools, procedures and technology at the tribunal and party's disposal. This is one of the important recent developments in the aspect of international arbitration.

5. CONTINUING ECONOMIC DISTRESS FOR THE CONSTRUCTION AND INFRASTRUCTURE SECTORS:

²⁹*ICSID Case No. ARB/17/15.*

The pandemic has hit the international construction and infrastructure industry very badly. The combination of uncertainty in markets, reduction in financial availability and a hardening of both national and commercial protectionism is likely to lead to more disputes as on-going projects reach conclusion and the parties seek to confront the economic realities of the pandemic.

6. ARBITRATION IN THE EU AND UK-A CHANGING LANDSCAPE:

Investment protection in the European Union will be an area to look out for as the arbitration community considers the impacts of the agreement terminating intra-EU Bilateral Investment Treaties (BITs) and the UK's formal exit from the EU. The approach that will be taken by UK in its international investment agreements, is very uncertain but the lack of ISDS provisions in the new EU-UK and Japan-UK trade agreements clearly shows that the investors in UK rely on its BITs network to safeguard their investments.

7. ARBITRATOR'S DUTY OF DISCLOSURE:

During the past one year (2020), several cases addressing the question of whether arbitrator's have the duty to disclose potential conflicts were seen. Broadly, a more pro-transparency attitude tends to grow; arbitrators are held to high standards, which are generally regarded as a standard procedure³⁰.

CONCLUSION:

With the changing time there also arises a need to bring in change in the process of arbitration. Global businesses have turned to arbitration to have their disputes resolved, because the court systems were unable to move forward with civil cases in the light of the pandemic crises and certain local laws requiring public gatherings to be restricted came forward. The International Arbitration Community responded swiftly with alternative options for handling disputes through virtual means, and the arbitrators and practitioners adapted themselves to the new environment quickly and effectively. Businesses appear to have adopted virtual techniques as their preferred dispute resolution mechanism after they noticed that their concerns could be solved through

³⁰<https://www.lexology.com/library/detail>.

virtual means, saving time and money. Thus, going forward more virtual options can make International Arbitration serve their clients better. This is when AI also has come forward along with arbitration to the dispute resolution mechanism. It can be concluded that the involvement of Artificial Intelligence in Arbitration is not far from reality. At the same time it is equally important to look into the drawbacks of the same and work for a mechanism to eradicate or minimise the issues with regard to this.

