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# CHALLENGES OF EXAMINATION AND CROSS-EXAMINATION OF WITNESSES IN VIRTUAL ARBITRATIONS

## A INTRODUCTION

- 1 The current COVID – 19 pandemic has forced different industries to adopt creative solutions to carry on their businesses. The legal profession is no exception. The outbreak of corona virus and consequent national lockdown and state lockdowns led to our judiciary adopting video-conferencing technology to carry out hearings and continue with the dispensation of justice.
- 2 The Supreme Court of India and various High courts have adopted this modern technology to reduce the physical presence of lawyers, litigants, court staff in the court premises and prevent the spread of the deadly virus.
- 3 Arbitral tribunals and centres are also holding arbitration hearings virtually. Most of the steps in arbitration like sending arbitration invocation notices, holding conference(s) for selecting and finalising the arbitrator(s), obtaining disclosure statement of the arbitrator, holding case management hearing etc can be carried out online seamlessly. However, many parties to arbitration as well as arbitrators have expressed concerns on taking of evidence of witnesses on online platforms.

## B ARBITRATION AND CONCILIATION ACT, 1996 AND VIRTUAL ARBITRATIONS

- 1 The Arbitration and Conciliation Act, 1996 (hereinafter referred to as the ‘Act’) is silent on the permissibility of virtual arbitrations. As the principle of party autonomy is well reflected across provisions of the Act, various provisions of the Act can be used to facilitate virtual arbitrations in India.
- 2 Section 19(2) of the Act provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings and hence this could include online hearings.
- 3 Section 20(2) of the Act provides that the parties to the arbitration have the right to agree on the place of arbitration and if the parties do not agree on a place then the arbitral tribunal can decide on the place of arbitration based on the convenience of the parties. Section 20 (3) of the Act gives broad powers to the arbitral

to meet at any place it deems appropriate for hearing witnesses, experts or parties or for inspection of documents, goods or property. In the absence of any agreement between the parties, the arbitral tribunal can decide whether arbitration hearings should be held physically or virtually.

- 4 Section 24(1) of the Act gives parties to an arbitration the right to conduct oral hearings for the presentation of evidence or for oral arguments. Section 24 (2) of the Act provides that if a request is made by a party to the arbitral tribunal for holding oral hearings then it shall hold oral hearings unless parties have previously specifically agreed not to hold any oral hearings. It is pertinent to note that this section does not put a specific requirement of “in person physical” hearings for conducting oral hearings.
- 5 Hence as long as the arbitral tribunal follows procedural due process and gives all parties an equal opportunity to present its case, virtual arbitrations can be conducted and are beneficial to the parties in these times.

## C ISSUES, CONCERNS AND CHALLENGES THAT ARISE IN RECORDING OF EVIDENCE, CONDUCTING EXAMINATION AND CROSS-EXAMINATION OF WITNESSES IN VIRTUAL ARBITRATIONS

- 1 *Confidentiality and security of data:* Confidentiality of the arbitral proceedings and that of the data and the documents shared via video-conferencing platforms is a primary concern for parties to an arbitration. Risks of hacking make parties/ witnesses apprehensive of giving evidence on an online platform. Section 42A of the Act provides that the arbitrator, the arbitral institution and the parties to the arbitration have to mandatorily maintain confidentiality of the proceedings. However, section 42A does not apply to witnesses, technical support assistants, law clerks, stenographers, etc who participate in the arbitration proceedings online. Further Section 42A appears to be a toothless provision as no specific penalty is prescribed in case of violation of this provision.
- 2 *Difficulty in examination and cross-examination of*



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witnesses which is given online as they are not able to gauge the body language, facial expressions and the complete surroundings of the witness on an online video-conferencing platform. Thus, sometimes the arbitral tribunal is not able to determine the credibility of the witness. Sometimes, arbitrators may face difficulty in identifying the witness giving evidence on an online platform as physical copy of the concerned witness' identity card is not available to the arbitrator. Difficulties arise especially when internet connectivity is not stable, there are many persons who have logged in on the platform, bad quality cameras and audio systems.

- 3 *Witness coaching*: There is always a risk of witnesses receiving suggestions and advice from their counsels through different devices like WhatsApp messages on a different phone, laptop, etc while they are being examined or cross-examined in a virtual arbitration.
- 4 *Availability of competent stenographers*: For taking of evidence in a virtual arbitration, experienced and technologically savvy stenographers are required. A stenographer has to quickly understand the question asked by the counsel(s) to the witness and type it and share his/ her screen in the video conference hearing. Similarly, the stenographer also has to quickly understand the answer given by the witness and type it simultaneously and screen share it. If the stenographer does not understand the questions asked to the witness and/or the answers given by a witness, then taking of evidence will be a very time-consuming process. It is also necessary that the internet connectivity, the ear-phones and the computer/ laptop used by the stenographer during the virtual arbitration are of good quality.

#### **D GUIDELINES ISSUED BY VARIOUS ARBITRAL INSTITUTIONS AS WELL AS COURTS FOR CONDUCTING ARBITRATIONS BY VIDEO- CONFERENCING.**

- 1 *The Seoul Protocol on Video Conferencing in International Arbitration, 2018* lists out various standards which serve as a guide to the best practices to be followed while conducting arbitration via video-conferencing. The Protocol was drafted by Kevin Kim (Peter & Kim), Yu-Jin Tay (Mayer Brown), Ing Loong Yang (Latham & Watkins LLP) and Seung Min Lee (Shin & Kim).
  - a Article 1.2 of the Protocol provides that the video conferencing system at the venue shall allow a reasonable part of the interior of the room in which the witness is located to be visible on screen. Article 1.3 of the Protocol provides that a witness shall give his/ her evidence sitting in front of an empty desk or standing and his/her face shall be clearly visible.
  - b Article 2 of the Protocol provides that to the extent possible and as agreed between the parties or ordered by the arbitral tribunal the video conferencing facility shall meet certain specified minimum standards: (i) all the participants in the video-conference are connected and the platform is accessible to all and (ii) The connection should be adequately safeguarded so as to prevent unlawful interception by third parties, for example by providing IP to IP encryption.
  - c Article 3 of the Protocol provides that each Party to the arbitration shall provide the identities of every individual in the room to the other Party/ Parties and to the Tribunal prior to the video conference and the Tribunal shall take steps to verify the identity of each individual present at the start of the video conference.
  - d Art.4.1 provides that all documents on record which the witness will refer to during the course of his/her evidence must be clearly identified, paginated and made available to the witness.
  - e Article 8.1 of the Protocol provides that no recordings of the video conference shall be taken without leave of the Tribunal.
- 2 *The International Court of Arbitration Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID – 19 Pan-*

*demia, 2020 inter alia* suggests a checklist that may be agreed upon among the parties and the arbitral tribunal before commencing any virtual arbitration hearings.

- a The ICC Guidance Note provides that the parties may agree in advance as to the number of participants that may be permitted in the virtual hearing and give their identities, log-in locations and point of connection and the same shall be verified by the arbitral tribunal before commencement of each virtual arbitration hearing. The Guidance Note further provides that parties may agree as to whether a 360 degree room view of all the participants' surroundings is required or not.
  - b The ICC Guidance Note also provides certain suggested clauses for cyber protocols that may be included by the arbitral tribunal in its procedural orders in virtual arbitration hearings.
- 3 *Supreme Court of India's Guidelines for court functioning through Video conferencing during COVID – 19 pandemic, 2020* laid down in *Suo Motu Writ (Civil) No. 5/2020* dated April 6, 2020 *inter alia* provides that in no case evidence shall be recorded by video-conferencing without the mutual consent of both the parties.

#### **E CONCLUSION**

Virtual arbitration hearings, if conducted by exercising all due precautions as per the guidelines prescribed above will be immensely beneficial to all parties. Virtual arbitration hearings save costs of travelling, etc of parties, witnesses and arbitrators and also provides access to the best lawyers to the parties. No doubt, the diametric of legal practice has changed and is going to further change further drastically, which will be based on technology and virtual working, including hearing. Change is always better for times to come.