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# THE IMPACT OF COVID-19 ON THE FUTURE OF LITIGATION AND ADR

## Introduction

- 1 The effect of the pandemic has been felt across various sectors around the world, similarly in the sphere of litigation.
- 2 Ever since COVID-19, the Legal sector in India embraced a new mechanism which was virtual hearings, virtual conferences and arbitrations.
- 3 Courts were posed with a sudden challenge to completely shift to virtual mode as an effect of the pandemic as soon as the lockdown was imposed in the country to ensure safety of the litigants, advocates and the judges.
- 4 All courts and arbitrations were functioning virtually and people had to suddenly adapt to the new regime.
- 5 The developments that took place during such period have highly impacted the present times as well and is expected to shape the future in the way courts deal with dispute resolution and also the way litigants look towards courts.
- 5 When more than 2 years have passed since COVID-19 first revealed its threats to the world and has disturbed the normalcy on numerous occasions after that, the question that now arises is, what is the future in respect of litigation and alternative dispute resolution mechanisms, how will the decisions of the courts be affected and how will it impact the functioning of the courts.

## Is Alternate Dispute Resolution (for short “ADR”) the future?

- 1 In the pre-covid era, ADR was seen as means to relieve the courts from the burden of pending cases and also to promote out-of-the-court settlement.
- 2 Arbitrations, mediations and conciliations have been substantially impactful and partly-successful in addressing the objectives of the UNCITRAL Model Law on arbitration and mediation. for interim injunction, or such other measures as may appear just and convenient to the tribunal.
- 3 However, in the after effects of COVID-19, multiple arbitrations also stood pending as tribunals, both in

case of ad-hoc and institutional arbitrations were not well-equipped to answer the sudden grievances that arose by reason of the pandemic.

4. Just like courts, arbitrations were also being held in the virtual mode.
5. What is noteworthy is that in the aftermath of the pandemic, many institutions have prepared guidelines for virtual hearings in arbitration.
6. In view of the grand shift in the choice of corporates and individuals from choosing courts to now arbitrations as their preferred forum for dispute resolution, giving due recognizance to virtual mode may be a significant step.
7. This is not only by reason of the pandemic but also because in most cases, especially international arbitration, parties reside in different parts of the world.
8. Accepting and making provisions for technology to play a role in dispute resolution would be a huge step towards ensuring that ADR grows and substantially reduces the burden of the courts.

## Invoking the Force Majeure Clause in Contracts as a result of COVID-19

1. By reason of the nation-wide lockdown for the better part of the last two years, several businesses were affected and parties mutually failed to give effect to their contractual obligations.
2. The related question that consistently arose in relation to COVID-19 was whether non-ability to perform terms of the contract as an effect of the pandemic could be termed as a Force Majeure scenario.
3. Considering that COVID-19 and the resultant lockdown did give rise to situations wherein it was impossible to perform a contract, it may be considered as an example of an event of force majeure that could not have been stipulated by either of the parties.
4. However, the balance of proof lies on the party seeking to establish that covid really affected the performance of the contract. McDermott Interna-



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tional Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181.

5. A judgment of the Delhi High Court in *M/s Halliburton Offshore Services Inc vs. Vedanta Limited* 2020 SCC OnLine Del 542 held that COVID-19 was unprecedented and could not have been predicted and hence prima facie was in the nature of force majeure.
6. Another judgment in *M/s Halliburton Offshore Services Inc vs. Vedanta Limited* 2020 SCC OnLine Del 2068 of May, 2020 did not accept the force majeure argument as it was found that the contractor took no steps towards mitigation.
7. The courts have not specifically stated whether or not COVID-19 could be said to be force majeure, since there have been differentiating views. However, it has been clarified that justification for COVID-19 being the reason behind non-performance would have to be established in the facts and circumstances of each case
8. The Ministry of Finance had also issued an Office Memorandum (No.F.18/4/2020-PPD) on 19th February, 2020 clarifying that a force majeure event is an extraordinary situation beyond human control but that does not excuse a party's non-performance entirely.

### **Extension of Limitation**

1. Connection may be drawn on the point of limitation period being excluded by the Supreme Court vide *Suo Motu WP(C) 3 of 2020* with effect from 15.03.2020 and was last extended till 28.02.2022 considering the difficulty of advocates and litigants in filing applications. The order of the Supreme Court in this regard first came into light on 23rd March, 2020 when the lockdown was announced and all services including filing of applications across courts were suspended.
2. yet in some cases the courts did not condone delays on the ground that parties showed reluctance on their part but sought to take advantage of the order of the Supreme Court. 3. Hence, even during the pandemic, the arguments in relation to Covid-19 were given importance by the courts only in the facts and circumstances of the case and not as a general rule.

### **Online Dispute Resolution beyond COVID-19**

1. There is no statutory or regulatory definition available in relation to online dispute resolution (ODR). It is believed that utilization of virtual facilities, technology and the internet for dispute resolution mechanisms may be termed as online dispute resolution.
2. The benefits of the courts functioning in virtual mode is beyond mere cost-saving. Online modes also help advocates appear before any court across the country irrespective of where they reside, thus shredding the physical barriers and boundaries. In addition, online mode is time effective. It also allows parties to watch proceedings and attend meetings without having to be physically present.
3. Even after the pandemic, ODR mechanisms in India are not as developed as in some other countries which lead to multiple problems in proper implementation of such mechanism. Under the rules available today (Model Video Conferencing Rules and Standard Operating Procedures) there are various concerns that arise due to which online dispute resolution might not seem like the most feasible option for dispute resolution especially in relation to evidence and witness examination.
4. In *Suo Motu WP(C) 5 of 2020*, the Supreme Court had clarified that robust system of video conferencing technologies must be adopted and video conferencing shall not be adopted for recording evidence without mutual consent of parties.

- 5 In the interim, the courts have applied virtual as well as hybrid forms (allowing physical as well as virtual appearance) in the court proceedings.

### **Impact of COVID-19 and delays in litigation**

- 1 During the pandemic, only urgent matters were being heard for a substantial period by reason of which the pendency meter has only gone up. Litigation is thus delayed as courts continue to work through backlogs. In view of the same, courts must give serious effect to the provisions for e-courts and virtual hearings.
- 2 As of today, the courts, including the Supreme Court, have already announced that the courts will be functioning in an entirely physical mode, with a few exceptions. The SC started full-fledged physical hearings from April 4, 2022.
- 3 The courts need to constantly update the rules for a uniform virtual regime that may be followed across the country in case any other such pandemic or variant poses threat to the country again.

### **Will the impact of covid delays make disputes more likely or less likely for corporates in 2022?**

- 1 The loss of business across different sectors has also reduced the potential of disputes arising between corporates.
- 2 However, there is no such data available that could substantiate these points. There is also no data available that could lead to a conclusion that filing of cases before courts have reduced.
- 3 On the practical aspect what seems to be of importance is that virtual hearings have had numerous advantages for both advocates and litigants decreasing cost and increasing time-efficiency. However, if virtual hearings were to continue, apposite provisions would have to be made to address the subsisting issues including the fact that number of people still lack the proper means for utilizing the virtual medium.
- 4 In order to avail the complete benefits of the virtual world courts need to be prepared with better facilities and the legislation needs to address the underlying issues.