ADR CENTURION

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Delivering Excellence in ADR

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ADR Centurion

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ADR CENTURION

EVENTS

In wake of the suspension of Face to Face events and Training Sessions due to Covid-19 pandemic, AIADR will be launching events by Online Video Conferencing Platforms! Visit https://www.aiadr.world for updates.

⇒ ***A CISG@40 and Future of Caribbean Development Initiative***

24 June 2020, *Online Conference*

Members of AIADR keen to propose or moderate special discussion sessions and events, are invited to submit a proposal with details to thesecretariat@aiadr.world;

Cyber Space

MEMBER'S PORTAL ONLINE

Members who have yet to update their profile are invited to visit the website https://www.aiadr.world to update their profile from the Dashboard.

Members Portal is linked to the search engine for selection and nomination of neutrals as Adjudicators, Arbitrators, Mediators and Expert Witnesses to be appointed by parties, when required. If your profile is not updated, you will not be able to benefit from this service of AIADR to its members.

Volunteers

MEMBERS AND FELLOWS OF AIADR INVITED!

To contribute towards building of your Institute and be a Volunteer by joining the Committees and Subcommittees of AIADR as Chair or Committee Members.

Social

Visit AIADR Facebook and LinkedIn Pages to stay in touch with the latest updates!

Professionals with interest in ADR Forums, Education and Training, Members and non-members, are invited to visit the Facebook Page and LinkedIn Page to post news, views and comments.

Message from the President

Bracing the Geopolitical Storms & Pandemics

Prof Datuk Sundra Rajoo

Dear Members,

Since February 2020, we now live in strange and challenging times in the wake of the COVID-19 outbreak. The World Health Organisation (WHO) has officially declared the COVID-19 as a Public Health Emergency of International Concern. The number of people infected worldwide has soared. The death toll now goes into hundreds of thousands.

There is no clear indication on whether the pandemic is over as many countries continue to be afflicted by it. Most have implemented very tough measures to fight this disease. Multiple countries successfully slowed the spread of infection. The lockdowns, quarantines and other compulsory measures at containing the disease are severely handicapping the world economy, with knock-on effects on everyone.

Non-pharmaceutical interventions and preventive measures such as social-distancing, self-isolation and public gathering bans have prompted the widespread closure of most businesses, institutions and facilities. The economic downturn has had been severe. Disputes will probably arise.

Most governments have addressed negative aggregate-demand shock with stimulus measures to prevent economic depression. Everyone is looking for stability, foreseeability, relevant information and guidance to respond effectively in this highly unstable environment.

I am confident of ingenuity of our scientific community, steadfastness and determination will result in the end game with continued social control measures to tide over the time, new anti-viral medications to ease symptoms, and finally, a vaccine.

We at the Asian Institute of Alternative Dispute Resolution (AiADR) are touched to witness such strong spirits of heroic courage, resilience and selflessness shown during these very trying times. We know that we are not fighting this battle alone.

The crisis provides an opportunity for AIADR to look into the development of more flexible solutions, perhaps better use of distance learning and digital tools. I have watched with fascination on the short-term solutions emerging. But we must seize this opportunity to create long term positive impacts and develop greater resilience.

We will have to overcome the paralysis of our regular activities and training provisions.

The key to overcoming this challenge is to constructively focus on a collective purpose by increased cooperation, collaboration and continuation with the Institute's objective. We have to make best use of revised strategies, tactics and technologies.

Remote working is now the norm. It may become a large part of the new normal.

I wish you all the best and stay well protected!

Thank you!

Prof Datuk Sundra Rajoo

President

AIADR HIGHLIGHTS

Farewell Message to Mr. Vinayak Pradhan, Fellow, AIADR

With profound grief, we bid farewell and announce this to all our international members and colleagues that, AIADR has lost its strong founder, supporter and esteemed Pioneer Fellow.

Mr. Vinayak was instrumental in the development phase of AIADR and a dependable friend of the Institute throughout its infancy. Without his commitment, moral and material support, AIADR would not have come out of the incubator and grown to be what it is today.

AIADR Governance Council on behalf of all its members, pays tribute to Mr. Vinayak Pradhan who has left us for his heavenly abode on 8 March 2020. We pray for his family to be blessed with divine strength to bear with this precious loss. We will always cherish his good works and remember him at every milestone of AIADR's journey in to the future.

Jaymes Dhingra

Honorary Secretary, AIADR

Dato' Quek Ngee Meng Vice President

While some of the Asian countries are announcing recovery phase after months long partial lockdown and border control to contain the outbreak of Covid-19, **AIADR** is recovering and restarting its machinery to resume educational and networking activities.

Recovery is indeed a comforting word to hear in the current crisis. It is a blessing, after almost months of resolute and nationwide quarantine, the Malaysian government has decided to recover and revive its economy by allowing almost all economic sectors to resume work since May. Through a Conditional Movement Control Order and now a Recovery Movement Control Order, the government is seeking to normalize a 'new norm' where people and business entities are required to conduct their daily lives and activities by regularly taking care of their personal hygiene and observing social distancing. Through concerted understanding and conscious efforts from every individual, may this new normal of social distancing weave a strong unseen bond of togetherness amongst us and bless us with the ultimate goal of complete recovery.

Dispute Management in a New World: A Caribbean Perspective

Christopher Malcolm

The dispute management focus, which is core to the approach of the JAIAC, recognizes that the more commonly considered concept of dispute resolution is to be understood as a back-end component of a more holistic management of business and other relationships framework.

This more holistic framework, as promoted by the JAIAC, should include: negotiation at 'birth', which is geared to the implementation of effective avoidance and resolution mechanisms; dispute avoidance in the 'cradle', with reliance on mediation, conciliation and other amicable mechanisms; and dispute resolution at the 'grave', with reliance on adjudication, arbitration, litigation and other contentions mechanisms.

The new world focus is being considered from two angles – changed circumstances brought on by COVID-19; and in the traditional, by reference to history, context of new economies outside of Europe.

The latter category includes emerging economies, most of which continue to rely on dispute resolution systems that are failing to meet the needs of their communities for efficient delivery of administration of justice services.

All AIADR members are invited to participate in the online conference – **Dispute Management in a New World** - that has been convened by the Jamaica International Arbitration Centre Limited (JAIAC). It will be held on June 24 2020 from 09:00am to 04:30pm Jamaica Time.

The brief Overview of the Program:

A CISG@40 and Future of Caribbean Development Initiative

- Φ Business Continuity and Supply Chain Logistics
- Φ Force Majeure under the CISG
- Φ Adjudication of Construction Disputes
- Φ Mediation in Commercial Arrangements
- Φ Innovation and Going Online
- Φ Should Commercial Parties Jettison the Court?

About the Author & Organizer

Christopher Malcolm

Director General of the Jamaican International Arbitration Centre, Council Member of AIADR, Chartered Arbitrator, FAIADR, FCIArb.

Can Force Majeure Clauses in Offshore Oil & Gas Sector be Helpful in Mitigating Impacts of Pandemics?

Jayems Dhingra

The question in the minds of every enterprise engaged in long term Oil & Gas industry contracts, “Is Covid -19 Pandemic a Force Majeure Event?” Who decides it and whether it is provided in the contract? Contracts are considered as the sole governing mechanism or agreed legal authority for governing relationships between the parties, under the principle of pacta sunt servanda or sanctity of contracts. Thus, contracts once executed cannot be changed due to post-contract events, except by an agreement between the parties. Therefore, if a pandemic like Covid -19 is not an identified event of an FME clause, then the current crisis raises serious questions and shakes the jurisprudence of international contract laws.

Force Majeure Events (“FME”) a French term, represents Unknown, Unprecedented, Unexpected and Unavoidable events, having a negative impact on obligations and responsibilities under the contracts between the parties. In Chinese Contracts Law, it is noted that “force majeure means any objective circumstances which are unforeseeable, unavoidable and insurmountable.” In common law jurisdiction there is no specific definition of force majeure but is interpreted from the clauses provided in a contract and arguments based on the doctrine of frustration. The frustration may or may not be the direct outcome of a force majeure event.

Mr. Justice Bailhache; as he then was, in 1915, explained in Matsoukis v. Priestman: “The words force majeure are not words we generally find in English contracts. They are taken from the Code Napoleon .... In my construction of the words ... I am influenced to some extent by the fact that they were inserted by this foreign gentleman”. He further expanded on the meaning of force majeure as:

“I cannot accept the argument that the words are interchangeable with vis major or Act of God. I am not going to attempt to give any definition of the words force majeure, but I am satisfied that I ought to give them a more extensive meaning than Act of God or vis major. The difficulty is to say how much more extensive ... I think that the complete dislocation of business ..... as a consequence of the universal coal strike, did come within the reasonable meaning of the words force majeure ..... As to delay due to breakdown of machinery it comes within the words force majeure which certainly covers accidents to machinery. The term force majeure cannot, however, in my view be extended to cover bad weather, football matches or a funeral”.

(Matsoukis v. Priestman [1915] 1 K.B. 681, and McKendrick, Evan, “Force Majeure and Frustration of Contract”, London: Lloyds of London Press, 1991. pp. 213.)

The contracts in Oil & Gas industry, whether for construction of infrastructure, field development or sales and purchase of hydrocarbons (Oil, Gas and Coal) are generally of longer durations, ranging from 1 to 25 years or more.

The first three questions to be answered in determining the consequences of an FME like Covid-19 are:

Is a pandemic included in the list of FMEs in the Force Majeure Clause of the Contract?

What is the maximum duration of an FME provided for before the contract is terminated by default?

What are the statutory provisions under the applicable law of the contract, in addressing long term pandemics like Covid-19?

Can Force Majeure Clauses in Offshore Oil & Gas Sector be Helpful in Mitigating Impacts of Pandemics?

Provisions of a Typical FME Clause

The FME clause is a risk sharing strategy between the parties and lists out the events which were in the contemplation of the parties at the time drafting a contract. The risks or event which could not be foreseen or imagined, are generally left under the phrase of any unforeseen and unavoidable events, provided not caused by either of the parties directly or indirectly. FME clause normally provides Emergency Escape Routes or Exit Strategies, in time of trouble.

Sample from LNG Sales Purchase Agreement (AIPN Model Contract)

… By way of illustration and subject to satisfaction of the conditions specified in Clause 18.1.2, Force Majeure may include circumstances of the following kind: fire, flood, atmospheric disturbance, lightning, storm, hurricane, cyclone, typhoon, tidal wave, tornado, earthquake, volcanic eruption, landslide, soil erosion, subsidence, washout, epidemic, or other natural disaster or act of God;

… any change in Law after the date hereof, or a change in the interpretation or application of existing Law after the date hereof, subject to Clause 18.1.4(d); and

acts or omissions of a Governmental Authority, subject to Clause 18.1.4(d).

In the above sample epidemic is included but what if the country or geographical location of the project is not affected by Covid-19, then this clause may not apply. However, change in law and lockdown measures announced through decrees of various governments, would be within the ambit of this FME Clause. This is an arguable case and not an automatic or default application of the FME clause.

A Sample from a Rig Building Contract

"If, at any time before the delivery and acceptance of the Rig, either the construction of the Rig or any performance required under the provisions of this Contract and the Specifications as a prerequisite of delivery of the Rig is delayed due to war, blockade, revolution, insurrections, sabotage, plague or other epidemics, quarantines, or import/export embargoes imposed by any government including the State government; or due to acts of God including, but not limited to, earthquakes, tidal waves, or typhoons; or by destruction of the shipyard or works of Builder or its subcontractors or of the Rig, or any part thereof, by fire, flood or other causes beyond the control of Builder; each of such contingencies shall be deemed to be included in the definition of Force Majeure as used in this Contract, and in the event of delays due to the happening of any of the aforementioned contingencies, the Delivery Date shall be extended for a period of time sufficient and necessary to cover such delay. It is agreed, however, that Builder shall make all reasonable efforts to eliminate, resolve or otherwise minimize the efforts of Force Majeure."

This clause also refers to plague or epidemic within the geographical location of the contract or work site. Pandemics like Covid-19 would have to be argued if a party is genuinely affected by such events.

2. Permissible Duration of an FME

It is common to see a time limitation for an FME to be applicable. FME is a temporary event and projects or contracts are expected to continue after a specified duration provided or agreed between the parties. The situation where an FME like Covid-19 which seems to be continuing for an indefinite period, the FME clauses would provide for termination of a contract.

A Sample from an OSV Towage Contract

"… has the right to cancel its performance under this Contract whether the loading has been completed or not, in the event of force majeure, Acts of God, perils or danger and accidents of the sea, acts of war, warlike-operations, acts of public enemies, restraint of princes, rulers or people or seizure under legal process, quarantine

Can Force Majeure Clauses in Offshore Oil & Gas Sector be Helpful in Mitigating Impacts of Pandemics?

restrictions, civil commotions, blockade, strikes, lockout, closure of the Suez or Panama Canal, congestion of harbours or any other circumstances whatsoever, causing extraordinary periods of delay and similar events and/or circumstances, abnormal increases in prices and wages, scarcity of fuel and similar events, which reasonably may impede, prevent or delay the performance of this contract.

The event "quarantine restrictions" is an extremely broad term and would encompass Covid-19 restrictions, resulting is a serious loss to the rig owner waiting for a rig to be transported. The right to cancel the contract is immediate without waiting for a period after an FME has occurred.

A Sample from Drilling Rig Charter Party

"… should any circumstance of force majeure continue for more than 30 days then, unless Charterer chose to extend its well drilling programme for a period equal to the period of the delay, Charterer might "terminate this contract as provided in Clause 28."

A Sample from OSV Charter Party

"… if a force majeure condition prevents or hinders the performance of the Charter Party for a period exceeding 15 consecutive days from the time at which the impediment causes the failure to perform if notice is given without delay or, if notice is not given without delay, from the time at which notice thereof reaches the other party."

In above examples and several other similar circumstances, the duration of an FME will be shorter than 30 days. Given the circumstances around the world due to Covid-19 Pandemic, it will be hard to say which contracts are not affected either due to quarantines or due to breakdown in supply chain and mobility of humans, an essential resource in every contract.

3. What are the statutory provisions under the applicable law of the contract?

Given the current scenario and uncertainty surrounding every business, especially with downward steep fall of oil prices, it may be an opportune moment to exit from long term contracts and avoid unprecedented losses. For some oil trading companies, it was too late to mitigate or were too slow to react and avoid bankruptcy proceedings.

Contractual clauses may appear to be too harsh in context of Covid-19 and renegotiations in good faith will depend on the willingness and commercial bargaining position of the parties. The statutory provisions in some civil law countries, like France, do provide for termination of contracts if FME is of permanent nature, however infectious diseases are foreseeable and not considered as FME. The position taken by emergency decrees by governments and temporary Laws passed by legislative assemblies, may provide for some reprieve but it is yet to be tested.

Recommendations

- Φ No one should take comfort that Covid-19 is a global FME, so our contract is secure. it is time to review the commercial situations, market dynamics and conditions of the contracting partners.
- Φ Terminating contracts or breaching contracts under the pretext of Covid-19 as an FME, may prove to be a wrong and expensive move.
- Φ In any relationship whether contractual or otherwise, there is no harm in establishing lines of close communications and working together to mitigate the impacts.
- Φ It may also require renegotiating the contracts and avoid unnecessary litigation in courts or arbitration. Mediation through an independent neutral, could also help in exploring options and finding a win-win strategy.

About the Author

Jayems Dhingra

Certified International Arbitrator, Chartered Arbitrator, Accredited Adjudicator, Accredited Mediator, Management Consultant

LL.M. (IP Laws), M.Sc. (Maritime Studies) MBA, MTech (Knowledge Engineering) +++

Ratifications and Entry into Force of UNCITRAL and UN Conventions

Bahrain accedes to UN Convention on the use of Electronic Communications in International Contracts

Bahrain becomes the 14th State Party to the Convention and it will come into force for Bahrain on 1 January 2021. This enhances the position of Bahrain in international trade and communication between contracting parties, thus removing legal hurdles in recognition of electronic documents.

Bahrain accedes to UN Convention on the use of Electronic Communications in International Contracts

On 19 May 2020, Saudi Arabia has ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation. Saudi Arabia is the fourth State Party to the Convention and it will enter into force for Saudi Arabia on 5 November 2020.

Kiribati accedes to the UN Electronic Communications Convention

On 23 April 2020, Kiribati has acceded to the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) (the "Electronic Communications Convention"). With its accession to the Electronic Communications Convention, Kiribati becomes the thirteenth State Party to the Convention. It will enter into force for Kiribati on 1 November 2020.

Palau accedes to Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The 163rd country to become party to the Convention

On 2 April 2020, with its accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also commonly known as the "New York" Convention), effected on 31 March 2020, Palau becomes the 163rd State party to the Convention. The Convention will enter into force for Palau on 29 June 2020.

Virtual Dispute Resolutions in India

Krrishan Singhania, Srishti Singhania and Alok Vajpeyi

Krrishan Singhania

With the advent of Covid-19 pandemic, and the consequent lockdown imposed by the Indian government, it may be imprudent or even practically difficult to conduct physical arbitration hearings considering the social distancing norms and the safety of the parties, their counsels, their witnesses and the arbitral tribunal. This present situation has forced the parties and the arbitral tribunals to innovate and consider holding arbitration hearings virtually, especially in a situation where it may be impossible to conduct physical hearings due to travel restrictions. Even the Indian Supreme Court and other High Courts of India have recognized the importance of virtual hearings and are conducting hearings through video-conferencing for urgent matters. There is, thus, a strong impetus for arbitration in the country to follow the guidelines issued by various Courts and consider the use of technology in conducting arbitration hearings remotely.

While there is no doubt that most of the steps in an arbitration proceedings can be done virtually, including sending request for arbitration, selecting and confirming arbitrators, holding case management conferences and deliberations among arbitrators; however, the parties and the arbitral tribunal may be sceptical to holding virtual hearings especially at the stage of evidence and final hearing. Virtual hearings may also pose other issues such as confidentiality and technological interruptions. However, it is the need of the hour to look beyond the conventional methods of conducting arbitration and come up with solutions to tackle these issues. We cannot let the crisis stall the arbitration proceedings indefinitely.

National Framework for Virtual Hearings

The Indian arbitration law, i.e. the Arbitration & Conciliation Act, 1996 ("**Arbitration Act**"), as well as the 1985 UNCITRAL Model Law, are silent on remote hearings. Even though there may not be express provisions on conducting virtual arbitration hearings under the Indian law, one of the advantages of the arbitration process is that it accommodates great amount of flexibility based on the principles of party autonomy. Further, there are various provisions under the Arbitration Act that may facilitate this new virtual way of conducting arbitration proceedings.

Section 29 B of the Arbitration Act provides for documents-only arbitration in order to fast track the arbitration process with limited oral hearings, where-ever necessary. Such arbitrations can surely be conducted through a reliable electronic platform and tools during these times. Further, Section 19(2) of the Arbitration Act gives the parties the freedom to mutually decide upon the procedure for conducting the proceedings, which could include virtual proceedings. In absence of an agreement between the parties, the arbitral tribunal has been given the powers to determine the manner of conducting the proceedings under Section 19(3) of the Arbitration Act. Section 20(3) of the Arbitration Act, further provides that "[t]he arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property." In the absence of any agreement or clause in the arbitration agreement to the contrary, the arbitral tribunal's broad power to conduct the proceedings includes the decision on whether hearings should be held physically or virtually.

Further, Section 24 of the Arbitration Act gives the parties a right to oral hearings, however there is no explicit requirement of

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Srishti Singhania

'in-person' hearings. The Supreme Court of India has also made an interesting observation that hearings on video-conferencing can be said to equivalent to in-person hearings, even in criminal proceedings, as one can hear and observe the parties as if they are in the same room.

Thus, in cases where one party requests for virtual hearings and the other party opposes the same as dilatory tactics, the arbitral tribunal can direct that the proceedings will be held remotely as per its powers under Section 19(3) read with Section 24 of the Arbitration Act. In the absence of an agreement between the parties, Section 24 of the Arbitration Act also grants the power to the arbitral tribunal to direct for electronic discovery of documents and limit the scope of discovery to strictly what is necessary. However, the arbitral tribunal should ensure that due-process is followed and both parties are given a fair and equal opportunity of presenting their case.

Recently, the Delhi High Court issued a guidance note for conducting arbitration proceedings by video conferencing and directed the Delhi International Arbitration Centre to adopt these guidelines with effect from 8th June 2020. The guidelines provide for: E-filing of cases; conducting hearings and examination of witness through a video conferencing platform and arbitral awards and orders to be digitally signed and circulated through e-mail among the parties.

The guidelines also provide for the parties to submit written submissions, with copies of relevant documents and judgments, and video clips of their oral arguments. These steps have been incorporated to make virtual hearings through video-conferencing more efficient, and dispense with hearings through video-conferencing in cases where the parties are satisfied with the written submissions and video clips.

The guidelines also provide for taking consent of the parties before recording evidence through video-conferencing, getting the parties and arbitrators sign a confidentiality undertaking, and a fast track arbitration procedure.

Challenges & their Remedies

Before fully embracing virtual arbitration hearings, we need to address the practical and legal challenges posed by this new way. Some of the challenges are as follows:

Virtual witness examinations

In cases where a witness' testimony is not decisive, such as when there are differing versions of facts from both the sides, the party cross-examining the witness may perceive a disadvantage in not being able to gauge the body language and demeanour of the witness on the virtual platform.

However, these concerns may not come up in commercial arbitrations where the arbitral tribunal relies more on commercial documents and records rather than witness credibility. It is also interesting to note that the Supreme Court of India has remarked that these issues with respect to assessing the witness' demeanour and credibility may not arise if the technology works effectively even in the context of criminal cases. Thus, the arbitral tribunal should ensure that the proceedings are being conducted on an effective technology platform and in case it is of the view that parties right of a fair hearing is impacted then they may adjourn the proceedings and direct for evidence to be lead again in the most appropriate way.

Witness Coaching

There also exists the risk of

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Alok Vajpeyi

coaching or improper assistance to witnesses being examined via video-conference, as during the proceedings the witness may be engaging with his counsel through different means. The parties and the arbitral tribunal should agree on the measures for maintaining the integrity of the presentation of the witness amd for eliminating any illicit interference or suggestions to the witness. The arbitrators and parties can follow guidelines issued by international arbitration institutions, such as Chartered Institute of Arbitrators and Seoul International Dispute Resolution Centre, to be able to address these issues. Some of the steps that could be taken are as follows:

Before proceeding with the examination, the witness must confirm if they are alone in the room they are testifying from, or make disclosures as to persons present, and affirm that they are not receiving any directions or assistance while providing testimony.

Issues like coaching of witness can be averted through requiring the witness to enable their screen-sharing function, so that any notification that comes up on their screen is visible to the other participants. The witness should be clearly visible to the other participants, the witness should not be permitted to use features like "virtual backgrounds", and a sizeable view of the room they are seated in must be visible.

Parties should consider using 360° cameras that can provide a full view of the room, and can be controlled by the tribunal.

Technological Interruptions and Inequality

The parties and the arbitral tribunal should also consider whether the parties and their witnesses have equal or comparable technological facilities, including access to reliable technology and a stable internet connection. An inequality in the technological capacity of the parties may pose a challenge with respect to the issue of due process at the enforcement stage of the award. Thus, steps should be taken to ensure that both parties are given a fair opportunity of hearing. It is advisable that the parties agree in advance with respect to the technology to be used, the procedures and technicalities for conducting the virtual hearing, and the steps that will be taken in case of linkage interruptions, to avoid challenges at the enforcement stage. The Arbitral Tribunal may also pass a procedural order to this effect. It is also essential that the parties test the technology to be used before commencing the virtual arbitral proceedings and point out the issues at that stage itself so that they are estopped from doing so at the stage of enforcement.

Confidentiality

Section 42A of the Arbitration Act mandates that the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings. Breach of confidentiality may also be lead to setting aside of the arbitral award under Section 34 of the Arbitration Act. Thus, during virtual proceedings, it is important for the arbitral tribunal to ensure that confidentiality is maintained by all participants in the proceedings including witnesses and technical assistants; and thus, take an undertaking of confidentiality from them, and perhaps impose sanctions for breach of confidentiality. It should also be ensured that the parties choose a reliable and encrypted platform for the proceedings. This is

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particularly important in sensitive cases to prevent leakage of data, such as in disputes relating to Intellectual Property.

The Way Forward

This crisis has compelled all of us to consider virtual arbitration proceedings as the way forward and come up with plausible solutions to deal with its challenges. However, virtual hearings could be a transformational tool in innovating domestic arbitrations and India-seated international arbitrations during post Covid-19 times too; and making the process more efficient and cost-effective. Virtual hearings could also give access to the parties to the best of lawyers and arbitral tribunals from across the world at reasonable cost.

Further, it is also important for the parties and the arbitral tribunal to consider whether the dispute will be able to be resolved in a fair manner through virtual hearings depending on the complexity of the case, nature of the dispute and the circumstances of the parties. For example, a case that would involve large volume of documents as well as many witnesses and experts may be difficult to conduct virtually, and the parties may have to opt for a virtual platform that can ensure confidentiality of the documents and other evidence and facilitate the proceedings with multiple participants.

The arbitral tribunal may also have to assess as to which issues can be resolved through a document-only procedure or virtual hearing and which issues may need a physical hearing. The arbitral tribunal may also have to use its discretion in limiting evidence, written submissions and oral hearings in order to facilitate virtual hearings; but at the same time it should ensure that due-process is followed.

Under Section 29A of the Arbitration Act a time limit of 12 months from the date of completion of pleadings has been provided to the parties and arbitral tribunal to come up with an arbitral award in the case of domestic arbitrations and international arbitrations seated in India. The parties through mutual consent can extend this time limit only for a further period of 6 months. Thereafter, the parties may have to seek extension of the Court, which may grant this extension only for sufficient cause. It will be interesting to see if the Courts will grant extensions owing to the lockdown or look at the efforts taken by the parties in adhering to the timelines and opting for virtual hearings. Virtual hearings may also assist parties in adhering to these timelines.

India has more of ad hoc arbitrations, therefore the arbitrators should adopt the guidelines suggested by various arbitral institutions and Courts when administering arbitration proceedings through video conferencing and direct the parties accordingly. Ad-hoc arbitrators could also take the assistance of arbitral secretaries, who are technologically advanced, and can assist the parties during the virtual process. This is a great opportunity for younger lawyers to train as arbitral secretaries and assist in virtual hearings in the coming future.

The world as we know it has changed, and there is no looking back. It is only time that we adapt and acclimatize to this new world of dispute resolution.

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Book Review by Datuk Sundra Rajoo

Dr. Reinmar Wolff; Christian Borris; Bernd Ehle; Tod J. Fox; Rudolf Hennecke; Angela Kölbl; Christoph Liebscher; David Quinke; Maxi Scherer; Stephan Wilske: *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary* (2nd Ed.), edited by Dr. Rienmar Wolff, 2nd Edition 2019, Beck, Hart & Nomos. ISBN 978-3-406-71445-0

This second edition is the best book on the New York Convention 1958 on the enforcement and recognition of foreign arbitral awards. It is impressive and authoritative and beyond just a good introduction to the New York Convention and international commercial arbitration. As a new commentary, it is definitely a must have in any library of note or working data base for use by all manner of persons – lawyers, arbitral practitioners, professionals, academics, policy makers, students.

As such, it is a significant boon to the study and use of the New York Convention 1958, one of the two pillars of the modern system of international commercial arbitration. The other pillar being the UNCITRAL Model Law 1985 on International Commercial Arbitration. These two pillars have hastened the fact that modern international arbitration has become the dispute resolution mechanism of choice in cross-border commercial transactions. Arbitration now plays a critical role as a peaceful means to settle international trade disputes. The effectiveness of international arbitration depends on whether awards can be enforced against the losing party. The enforcement of foreign arbitral awards is significant in international commercial arbitration.

The New York Convention is applied and ratified by 160 states, including all the important trading nations. It includes virtually all that are leading international arbitration centres. It is hailed as the most successful Convention in the history of mankind allowing the universal transnational enforceability of arbitral awards.

The scope and comprehensiveness of the book is best appreciated by examining its Table of Contents which cover all 16 articles of the Convention and more. The Commentary provides detailed legal and practical analysis of issues arising under the Convention. Its comparative article-by-article comparative analysis from both a theoretical and practical viewpoint with judicial interpretations by various national courts. In so doing, it shows best approach to implement foreign arbitral awards. The book is well researched, cogently written, and coordinated in its organisation. I can do no better to show the scope and detail of the coverage as in the full Table of Contents together with the individual authors. The contributors led by Dr. Reinmer Wolff are well qualified, seasoned practitioners and academics. The editing of the volume is superb. It reads seamlessly providing a uniform interpretation of the provisions of the convention. If one is looking for answers to whether there are grounds to uphold or refuse enforcement and recognition of awards, it is all clearly set out in the book.

The book is a clear exposition of the many legal issues that arise from the recognition and enforcement of arbitral awards under the New York Convention. Being an author myself on the law, practice and procedure of arbitration and on UNCITRAL Model Law and arbitration rules, I find the book a complete up to date work. For me, it will be the reference of choice and indispensable tool to navigate through the New York Convention.

All in all, Dr. Reinmer Wolff and his fellow contributors must be thanked and congratulated for providing the second edition of their magnum opus on the New York Convention – article by article commentary. In each step of their analysis, they shift out what is essential and are always on point. It is voluminous one stop textbook and reference and valuable to a global readership at large. This second edition is indeed a welcomed contribution to the cause of international arbitration.

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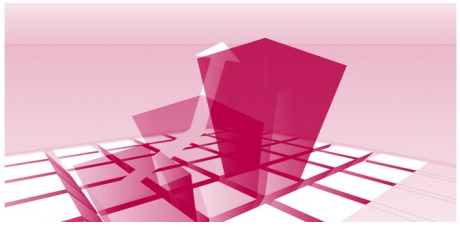

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Matt Mortazavi is licensed to practice and provide construction and engineering related advice and services in the Province of Ontario, Alberta and British Colombia. He is member of Project Management Institute (PMI) and four major dispute resolution organizations. He is member in Canada, United States of America, in the United Kingdom and Malaysia. Matt Mortazavi is a chartered arbitrator with ADR institute of Canada and accredited construction adjudicator with Chartered Institute of Arbitrators in London, UK and Canada Branch. He is also an Adjunct Professor at the Angelo Del Zotto School of Construction Management at George Brown College where he teaches Law and Construction Contracts on as required basis. As part of the curriculum, he teaches related construction topics of the Ontario Lien Act, Delay Claims, Damages, Construction Adjudication and various types of construction contracts for project delivery and tender procedures.

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Salim has to date mediated 62 cases at the State Courts, Singapore Mediation Centre (SMC) and privately. These cases involve commercial and contractual matters arising from disputes in insurance, personal injury, construction, renovation, sale of goods, employment, real estate, adoption and family disputes.

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Mr Chong has been in legal practice for about 30 years since 1990 in a variety of civil and commercial cases in Malaysia, acted as legal counsel in criminal cases involving capital punishments as well as arbitration and adjudication cases.

He is an accredited Adjudicator on the AIAC's Panel of Adjudicators as well as an accredited Arbitrator on AIAC's Panel of Arbitrators. In between his legal practice, he also contributed his time by serving as Chairman of Disciplinary Committee under the Advocates & Solicitors Disciplinary Board as well as legal counsel for the Bar Council in disciplinary cases at all levels of Courts in Malaysia. Mr Chong is also a Notary Public and Commissioner for Oaths.

Members Joined AIADR in April - May 2020

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Expert on Labor Laws of Afghanistan before Fairfax Circuit Court, VA, Expert on Afghan Laws before the High Court of Justice Queen's Bench Division – London; Declaration on Laws of Afghanistan Submitted to The Superior Court of The State of California for the City and County of San Francisco; Subject Matter Expert before Special Immigration Appeal Commission - London; Assistant Counsel with Michael Berry, American Attorney, in International Arbitrations under AAA.

2. Mr. Vinodsagaran Gunasakaren, Member AIADR (MAIADR)

Advocate and Solicitor, High Court in Malaya and Advocate and Solicitor in the Federal Court, Court of Appeal, High Court in Malaya, Sessions Court and Magistrates' Court in Peninsular Malaysia

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4. Ms. Viviene Sandhu, Fellow, AIADR (FAIADR)

LLB (Hons.), Accredited Mediator,

She has been an Associate Mediator with the State Courts and Singapore Mediation Centre since 2010. Since then, she has conducted several mediations on a variety of disputes at the State Courts Court Dispute Resolution Centre, Small Claims Tribunal and the Singapore Mediation Centre. She is also a Senior Mediator with the Law Society Mediation Scheme and an accredited mediator with the Singapore International Mediation Institute.

Viviene is also a litigator with 21 years of experience, in all areas of civil litigation and family law. She graduated from the University of Liverpool in 1995. She was called to the Bar of England & Wales in 1996 (Middle Temple) and to the Singapore Bar in 1998. In 2005, she co-founded Clifford Law LLP where she is currently a partner.

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