

NOTES AND REFLECTIONS

SHAPING GLOBAL RELATIONS THROUGH INTERNATIONAL ARBITRATION: RECENT TRENDS AND OPTIONS

MISHA BAHMANI

drmishabah@gmail.com

Assistant Professor in IILM University, Gurugram, India. She was awarded doctorate of philosophy from Guru Gobind Singh Indraprastha University, Delhi (India). Her academic and research interests lie in the domain of International Commercial Arbitration, Alternative Dispute Resolution, Cyber Law, and Environmental Law. She completed her Master's in Law from Queen Mary University of London and the National Law School of India University. Her doctoral research specializes in the domain of International Arbitration. <https://orcid.org/0009-0005-3131-5034>

The nations across the globe continue to struggle due to lasting impact of Covid-19 pandemic. This has resulted in the weakening of the commercial relationship between the countries. To enhance investors' participation, it is must that its dispute resolution mechanism should be effective in reality. International arbitration has been a great support in strengthening relationships with investors. Unfortunately, this pandemic has disrupted many nations' FDI inflow in the last two years. The 2022's FTI Consulting report has reflected on the changes which have been incorporated into the international arbitration practice after this pandemic.

This paper will demarcate the current trends which have been followed across different industries and geographies to indulge in international arbitration practice. Queen Mary's 2021 International Arbitration survey has shown the various factors which have affected the positioning of the "destination seat". Welcoming technology in arbitration would be beneficial for accepting it as the mode for settling disputes. This will guide the nations in improving their performance and will be maintaining their contractual obligations. The developing economies must indulge in such practices to overcome their challenges. By maintaining ethnic diversity and security the parties would be able to maintain international standards for fostering global relations.

Introduction

Since the world is hit by economic and financial loss by the Covid-19 pandemic investors' participation has been very limited. With a huge amount at stake, the cross-border relationship has been impacted by this pandemic which has resulted in disputes between the parties. International arbitration practice has been beneficial in resolving matters confined to trade activities. To maintain and enhance GDP it is essential to indulge in those activities which are useful in maintaining economic balance. The World Bank has



reflected that in 2022 the world trade volume will be surging to almost seven percent.¹ IMF data has depicted that cross-border trade concerning goods would rise to seven percent. This demarcates that it is crucial that FDI inflow should be improved to enhance the financial stability of the nations.² The filing of international arbitration has been affected by this pandemic. There has been a surge in the average value of claims in 2020. For instance, the German Arbitration Institute in 2020 recorded the average value of claims to EUR 13.9 million as compared to EUR 3.8 million four years back.³ Unfortunately, due to a lack of transparency and inconsistency, there has been difficulty in tackling investment matters.

The 2020's Queen Mary survey has demarcated that ISDS requires changes for more efficiency which has gained seventy-five percent acceptance from the investors.⁴ This shows that resolving investor and State matters mode of dispute resolution has been playing a meaningful role worldwide. Post-Brexit has resulted in the formation of a new agreement between the EU and the UK to enhance investor participation.⁵ To maintain economic standards, it is symbolic to maintain growth in international arbitration practice. The 2021's International Arbitration survey has reflected the current adaption and the upcoming changes which are preferred by the users. This survey depicts the trends which are prevailing in the business community to resolve their commercial disputes. For instance, London and Singapore are among the most approachable seat for arbitration lately. To maintain neutrality judicial support has been beneficial which has resulted in proper award enforcement.⁶ In the near future client meeting by online mode and encouraging the practice of paperless work to require the assistance of trained persons to attain its sustainable development goal.⁷ Before this pandemic international arbitration was still considered to be the preferred way for solving cross-border matters. Forty-eight respondents supported this viewpoint in 2018's Queen Mary survey.⁸ To attain the goal of speedy relief, privacy, enforceability, flexibility, and neutrality this practice is appreciated worldwide.⁹

Geographies

Sadly, UAE legal system has been lacking in establishing a federal arbitration law. There have been circumstances that reflect that the court has received uneven applications and

¹IMF, WORLD ECONOMIC OUTLOOK xvi (1st ed. 2021).

²World Investment Report 2021, UNCTAD, (2021), https://unctad.org/system/files/official-document/wir2021_en.pdf.

³International Arbitration after the pandemic, FTI CONSULTING, (2022), <https://www.fticonsulting.com/-/media/files/emea--files/insights/reports/2022/apr/international-arbitration-after-pandemic.pdf?rev=99711bd4cbed4c0aac79a728e96a7144&hash=434F6C319A7AC48D1943F0AC3A3B1F75>.

⁴2020 QMUL-CCIAG Survey: Investor's perceptions of ISDS, ARBITRATION QMUL, (2020), <https://arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf>.

⁵Kirstin Schwedt et al., Investment protection in the EU-UK trade and cooperation agreement, KLUWER ARBITRATION BLOG (Jan. 9, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/01/09/investment-protection-in-the-eu-uk-trade-and-cooperation-agreement/>.

⁶2021 International Arbitration Survey: Adapting arbitration to a changing world, ARBITRATION QMUL, (2021), https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WFB.pdf.

⁷Id.

⁸2018 International Arbitration Survey: The Evolution of International Arbitration, ARBITRATION QMUL, (2018), <https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>.

⁹Id.



enforcement proceedings have been time-consuming.¹⁰ This shows UAE's legal framework governing arbitration practice hasn't been insufficient in addressing modern arbitration practices.¹¹ The setting up of "Dubai International Financial Centre" along with LCIA and "Emirates Maritime Arbitration Centre" shows a well-organized initiative to have better performance. In 2019 there has been a twenty-nine percent surge in the number of cases filed which shows better performance than the previous year.¹² Recently in 2021, an ICC case management office has been opened in their global market.¹³ Since a year has passed it has been managing ICC arbitration users in the GCC. Due to the Covid-19 impact and economic influence, there has been a surge in cases in GCC which are required to be handled with care for maintaining their damages viewpoint.

Under the African practice, there has been a jump in the number of cases that have been resolved through the arbitral centers. Welcoming acceptance has been given to arbitration mode for resolving disputes by the parties. There has surge in arbitral centers in Africa which shows that this mode is gaining recognition in this nation. The lawyers have been indulged in attaining the skills which are essential for the successful delivery of arbitration practice.¹⁴ There are several States which are following the BITs and are facilitating resolving the disputes between the investors and States by this mode. Being a signatory to ICSID many states are obeying its guidelines.¹⁵ There have been twenty-seven percent progress in the registered cases by following this Convention and its facility rules.¹⁶ This shows that the parties from this nation's States have increased to seven percent and have indulged in ICC arbitration practice.¹⁷

The European practice reflects that disputes concerning the UK and EU are governed by the "Hague Choice of Court Agreements Convention". After departing from the EU now the UK still follows this framework for having court judgment enforcement. Although it has its limitation as it applies only to the exclusive jurisdiction clauses.¹⁸ London is a "destination seat" and is in process of introducing trade agreements it would be required to be observed if they cover ISDS than relying on BITs for protection.¹⁹ With well-established centers, the UK has been a preferable option for the parties. As there has

¹⁰Supra note 3.

¹¹H Al Mulla and A Mackenzie, *UAE approves New Federal Law on Arbitration*, GLOBAL ARBITRATION NEWS (Mar. 19, 2018), <https://www.globalarbitrationnews.com/2018/03/19/uae-approves-new-federal-law-on-arbitration/>.

¹²Supra note 3.

¹³ICC Court to open 5th oversea case management office in ADGM, ICCWBO (Dec. 21, 2020), <https://iccwbo.org/media-wall/news-speeches/icc-court-to-open-5th-overseas-case-management-office-in-abu-dhabi-global-market/>.

¹⁴M Ostrove et al., *Developments in African Arbitration*, GLOBAL ARBITRATION REVIEW (May 10, 2018), <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2018/article/developments-in-african-arbitration>.

¹⁵Hartwell, *Norton Rose Fulbright International Arbitration Report*, NORTON ROSE FULBRIGHT, (2019), https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/emea_15747_newsletter_international-arbitration-report_issue-13.pdf?revision=&revision=4611686018427387904.

¹⁶The ICSID Caseload- Statistics: Issue 2021-1, ICSID WORLD BANK, (2021), <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf>.

¹⁷ICC Dispute Resolution 2020 Statistics, NYIAC, (2020), <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf>.

¹⁸Supra note 3.

¹⁹International Arbitration in 2021, FRESHFIELD BRUCKHAUS DERINGER, (2021), https://www.freshfields.com/4925a6/globalassets/our-thinking/campaigns/arbitration-10kt/08486_pg_dr_international-arbitration_interactive_aw.pdf.



been a surge in the caseloads performed by these centers.²⁰ They are not only confined to Covid-19 concerned matters but they are covering issues confined to ESG matters too.²¹ There have been changes introduced in the arbitral rules of LCIA and ICC which shows these centers are keeping themselves updated despite having a competition with other centers.²²

In the North American context recently the USMCA has been introduced and NAFTA has been replaced by it.²³ As per the new practice now USMCA has provided ISDS a limited approach to some sectors and it is not providing between the US and Canada. This agreement gives a restricted scope concerning investment protection confined to Mexico and the US. Although it is not facilitating foreign investors which is a matter of concern as it is limited to NAFTA. With the Covid-19 pandemic, there has been the utilization of technology to perform the procedure. The remote hearing has been welcomed across the nation it can be seen even today that this practice is still in continuation.²⁴

Interestingly, Brazil has been among the Latin nations which have been contributing the second highest nationality where parties have shown their participation in ICC cases. There has been a climb in arbitral institutions and as a result of ICC's office and case management, their performance has been improved.²⁵ The EU- Mexico free trade agreement has been brought into practice which will be beneficial for the appealing process and transparency in the arbitration mechanism.²⁶

Recent Trends

Under the energy sector, it has been noted that forty-one percent of cases were considered under ICSID. Twenty-six percent of the caseload in LCIA is confined to this sector.²⁷ Since European nations have increased their energy transition there have been changes brought in the real practice which has resulted in a surge in disputes. Switching to gas, the conflict between Ukraine and Russia has impacted the relationship in this sector. The primary energy has become costly and the contractual obligations have changed after these unfriendly events. Due to fluctuations in energy prices, there has been a surge in investment and contractual disputes. With stranded assets and participation, the sector is exposed to more risks and failures which has resulted in unhealthy ends. Maintaining the practice of healthy climate change the governments are making amendments to their policies which have contributed rise in global disputes.²⁸

Due to social distancing and restrictive movement during this pandemic there has been a surge in material prices, profits have been reduced and financial instability has arisen

²⁰Supra note 3.

²¹Id.

²²Trends in International Arbitration, BURFORD CAPITAL (2022), <https://www.burfordcapital.com/insights/insights-container/burford-quarterly-2022-arbitration-trends/>.

²³Supra note 3.

²⁴Id.

²⁵Alison Ross, ICC opens hearing centre in Sao Paulo, GAR (Mar. 16, 2018), <https://globalarbitrationreview.com/article/icc-opens-hearing-centre-in-sao-paulo>.

²⁶EU and Mexico announce the Finalization of an updated Free Trade Agreement, AKINGUMP (Apr. 29, 2020), <https://www.akingump.com/en/news-insights/eu-and-mexico-announce-the-finalization-of-an-updated-free-trade-agreement.html>.

²⁷LCIA Annual Casework Report 2020, LCIA (2020), <https://www.lcia.org/News/lcia-news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx>.

²⁸Supra note 3.



under the activities of this sector. Financial distress has impacted cross-border construction projects which have resulted in a climb in construction disputes.²⁹ It is expected that in the coming years under the natural resource sector there would be a rise in resource nationalism.³⁰ This would result in the highest risk under this aspect as these resources are now under government control. The policies and regulations are formulated in such a manner that future projects would come across resource nationalism at its extreme. While focusing on ESG it is expected that the supply and its security would be affected. For instance, in the mining sector, there are chances that there would increase in matters related to this sector.³¹ This shows that geographical competition would rise due to the difficulties which have arisen due to this pandemic. The 2022's FTI Consulting report depicts that there will be an imbalance of power, complexity in agreements and joint ventures, and investment participation will be affected under such circumstance arbitration practice would be a great support to resolve their concern.³²

In sectors such as the financial market due to the complexity of the disputes, arbitration has been preferred since the arbitration clause has been the common practice under financial matters. Brexit and LIBOR interest discontinuation after this pandemic has resulted in a surge in participation in the travel and financial market which has considered arbitration to resolve their issues. Matters confining to confidentiality, specialized arbitrators, and speedy redressal have been among their prime concerns. With a panel of recognized international market experts in the finance sector, it has published its new arbitral rules for maintaining commercial ethics.³³ This reflects that international arbitration forums are beneficial in governing financial instrument documentation. Significantly, with the support of the national legal framework IP rights, it becomes the responsibility to handle multi-State matters to safeguard these rights. ADR guidelines by WIPO have contributed to solving these matters through expert determination, mediation, and good offices.³⁴ The 2022's FTI Consulting report states that license fee matters would be considered to be resolved by international arbitration as it involves a huge amount at stake concerning the patents.³⁵ Further, ICDR has allowed the tribunal to set the arbitration's cost and apportion that reflects the arbitrators under this would be compensated by hourly rate.³⁶ The ICC court plays a remarkable role in ensuring the ICC's rules implementation through arbitration.³⁷

²⁹Supra note 3.

³⁰J Blanco and M P Machado, *Resource Nationalism surges in 2020, Covid-19 worse outlook*, MAPLE CROFT (Mar. 4, 2021), <https://www.maplecroft.com/insights/analysis/resource-nationalism-surges-in-2020-covid-19-worsens-outlook/>.

³¹*Resourcing the Energy Transition: Making the World go round*, KPMG INTERNATIONAL (2021), https://home.kpmg/ky/en/home/insights_new/2021/03/resourcing-the-energy-transition.html.

³²Supra note 3.

³³Ian McDonald et al., *Prime time for updated arbitration rules for financial disputes? A review of the P.R.I.M.E. Financial Arbitration Rules 2022*, MAYER BROWN (Jan. 5, 2022), <https://www.mayerbrown.com/en/perspectives-events/publications/2022/01/prime-time-for-updated-arbitration-rules-for-financial-disputes-a-review-of-the-prime-finance-arbitration-rules-2022>.

³⁴WIPO Caseload Summary, WIPO (2021), <https://www.wipo.int/amc/en/center/caseload-2021.html>.

³⁵Supra note 3.

³⁶IDRP art. 37 (2021).

³⁷David Salton, *Recent trends in International Arbitration and 2021 International Rule*, CONSTRUCTION LAW JOURNAL 81, 83 (2022).



Current Options

The 2021's Queen Mary survey depicts that ninety percent of the respondent have preferred international arbitration mode for resolving cross-border matters. This shows that the support of local courts and judicial encouragement has been made to prevail neutrality and impartial practice in the legal system. Making the arbitration rules and institutions inviting requires administrative support.³⁸ Thirty-two percent of respondents have agreed that with administrative strengthening the virtual hearings will become more approachable.³⁹ This survey has shown that to make institutions or rules alluring for the users it is essential that there should be arbitrators belonging to different diversity. Twenty-four percent of the respondent have consented that with the support of a well-structured procedure multi-party and complex matters can be taken into consideration. By incorporating provisions for conducting in-person and virtual hearings the arbitral process will be smoothly conducted. In this survey, twenty-three percent of the respondent supported this viewpoint. Twenty percent of the respondent have stated that by having adequate electronic filing and document-sharing facilities the process can be more convenient. Interestingly, it is suggested that there should provision confining to expedited procedures. Almost twenty-five percent of the respondent supported this change should be introduced in the practice. There should be cost sanctions related to delay by the arbitrators which have been recommended by twenty-one percent of the respondent in this survey. To enhance the case management practice rules should be made to provide power to the arbitrators. This shows parties' and counsel's behavior has to be as per the directions of these rules.⁴⁰

These are the choices that are reflected recently by this survey to make international arbitration practice flexible and party autonomy prevails properly. The adaption requires to be a welcoming step to enhance cross-border transactions. In this, the respondent has expressed their concern about avoiding having lengthy written submissions. Sixty-one percent of respondents agreed with this approach. Thirty-eight percent supported the concern that while addressing procedural matters oral hearing can be excluded.⁴¹ To sacrifice the practice of document production was agreed by the twenty-seven respondent. This survey has shown that in-person hearing can be less encouraged. Twenty percent of respondents shared that now users are similar to virtual hearing. There should be a removal of early case management conferences. Fifteen percent supported the view that there should be no cross-examination. Further, thirteen percent said no to party-appointed experts as it can be used as a mode for creating pressure. In this survey, it has highly suggested that to maintain flexibility it is essential to be cost friendlier steps to have greater efficiency. There has been an improvement in gender diversity. Fifty-six percent of respondents agreed that this has been beneficial for maintaining impartiality and neutrality in the process.⁴²

Encouragement has been made to utilize cloud-related storage. Among them, eighty-seven percent agreed that if offline hearing can't take place online would be preferred.⁴³

³⁸*Supra* note 6.

³⁹*Id.*

⁴⁰*Supra* note 6.

⁴¹*Supra* note 6.

⁴²*Id.*

⁴³*Supra* note 6.



Such a process has resulted in maintaining greater efficiency, and diversity in the arbitral process. Due to online hearings, the arbitrators can attain dates and in this survey, sixty-five percent of respondents supported it. There is a need to focus on the adoption of soft laws which promote the practice of green arbitration. The "green pledge" needs to take seriously by the arbitrators. Carbon offsetting requires to be reduced which can be possible if there is less traveling and more hearing by online mode.⁴⁴

Challenges

Unfortunately, one-third of the respondent have expressed their concern that there is a requirement to improve ethnic diversity. It is the responsibility to carry the onus of enhancing diversity through their arbitrator choices. Since still thirty-four percent have emphasized that there is no growth done concerning ethnic diversity reflects that there is a necessity to have improvement.⁴⁵ It is found that AI still requires improvement in arbitration practice. Users were forced to adapt to online hearing during the Covid-19 pandemic. One needs to understand that AI can't substitute for human arbitrators as well as counsel. There is a requirement to maintain confidentiality and cybersecurity needs to prevail properly. The arbitrators online do come across online disturbances while proceeding with the online mode. Due to variations in time zones arranging the online hearing has been a difficult task. Virtual hearing has its difficulties during and after this pandemic.⁴⁶

To improve visibility, it is essential to indulge in awareness camps focusing on promoting and educating students. To build proper visibility more mentoring programs should be organized to train the arbitrators.⁴⁷ Appointing authorities as well as institutions that follow an express policy for incorporating suggestions and appointing candidates belonging to larger diversity should be given the responsibility of an arbitrator. In 2021's Queen Mary survey fifty-nine percent of respondents admitted to this practice and forty-six have shown their consent that there should be counsel which would emphasize engaging the clients to appoint arbitrators belonging to greater diversity.⁴⁸ To keep interactions engaging forty percent of the respondent have agreed to conduct substantive hearings in person and virtual way. Of this sixty percent have supported that post covid client meetings would take place in offline and online modes. This depicts that the best interest of the client should be the priority of the arbitrators to follow any form the arbitration practice. There is a need to have reliability on technology, be environment friendly, express provisions in rules and laws to provide recognition to online hearings, and good quality hearings are the fundamental requirements which are required to be fulfilled in near future.⁴⁹

⁴⁴*Id.*

⁴⁵*Supra* note 6.

⁴⁶*Supra* note 6.

⁴⁷*Id.*

⁴⁸*Supra* note 6.

⁴⁹*Id.*



Future Trends

To make a nation arbitration friendly there are countries that are encouraging resolving ESG matters. It is expected that with a surge in contractual disputes in near future it can be under this ambit. The disputes between States and investors focusing on ESG aspects are among the new trends in international arbitration practice.⁵⁰ Also, in the future third-party funding is expected to enhance its strength. There is a need to have clarity concerning alternative means for maintaining investors' protection. With an objective to maintain standards ICCA's Guidelines and Code of Conduct meant for Adjudicators concerning global investment matters are published recently in 2021. This encourages the practice to maintain uniformity in its implementation. By creating awareness about the investment treaty focus has been made on encouraging a platform for their protection. It has welcomed blockchain, AI, and cryptocurrency matters which can be addressed under tech issues through arbitration. Investment treaties are helpful in creating a developed banking community that can prevail by incorporating arbitral procedures in these matters. Since there has been involved in renewable as well as low carbon projects if an issue arises it can be addressed under the ambit of construction arbitration which in the coming years requires assistance while focusing on new technology and its impact on the climate. This display that it is predicted that these practices will be constructive in strengthening international arbitration practices across the globe.⁵¹ This shows that in the future the clients and the arbitration community would be engaging in these trends in much more depth and would have their own challenges with the passage of time which requires adequate monitoring and implementation of the new rules to maintain investors friendly relationships.

There has been a surge in caseloads which has indulged arbitral institutions in initiating funding and focused on adopting financial rules globally. For instance, ACICA has welcome third-party funding. A reasonable disclosure rule meant for third-party funding has been adopted by ICC. In nations like Latin America, the ECLAC has estimated that there will be a fall in its average growth in 2021. For nations that are facing oil and gas issues such as Bolivia and Venezuela, it is expected these disputes can be resolved by it. Due to complex issues and investors' protection international arbitration would be a great support.⁵² To be a "destination" seat international arbitration must have effective sanctioning during the arbitral process and power should be vested in third parties.⁵³ Providing recognition to the seat and maintaining an impartial practice in the local legal mechanism would be beneficial in making a seat desirable.⁵⁴

Conclusion

The Covid-19 pandemic has brought instability and has led to restrictions in supply which have resulted in the cancellation and postponement of projects. Since most of the sectors were badly affected by this pandemic the parties weren't able to fulfill their contractual obligations. This has resulted in impacting the connectivity between them. As a result,

⁵⁰Ashley Jones, *International Arbitration in 2022: Top Trends*, LEXOLOGY (Feb. 7, 2022), <https://www.lexology.com/library/detail.aspx?g=41db7bca-0ee0-4685-9250-22cdcaf5e399>.

⁵¹*Supra* note 50.

⁵²*Supra* note 22.

⁵³*Supra* note 8.

⁵⁴*Id.*



there has been a surge in these matters, and the relationship between the investor with the State has been put at stake. Cross-border issues are expected to have risen and international arbitration will be the most preferred way to resolve these disputes. The “new normal” practice has been welcomed worldwide across many nations which have considered this method to be efficient and cost friendlier to facilitate its process. With a rise in complexity in the economy in the near future, the output and investment flow are expected to get worse under such circumstances arbitral institutions would play a significant role.⁵⁵ There has been a surge in international arbitration filing till 2020 but unfortunately, with this pandemic, the FDI flow has fallen and the nations are now making an effort to recover from its impact. With the reform of ISDS and EU emphasis has been made on establishing an investment court which would be beneficial for gathering growth in international commercial activities.⁵⁶ With 2021’s ICC rules emphasis has been made on preventing conflicts of interest. This has resulted in developing the relationship between the arbitrators as well as new representatives.⁵⁷ In the arbitral panel, there is a need to promote diversity for which among the counsel team there is a requirement of promoting diversity.⁵⁸ Users should be updated with transformative technology. The green arbitration practice would be beneficial in attaining the goal of sustainability. To be a desirable seat it is necessary that the seat must comply with all the valuable traits of international arbitration which would promote addressing cross-border issues amicably. AI utilization has been appreciated globally for specific tasks for enhancing international relations⁵⁹.

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⁵⁵*Supra* note 3.

⁵⁶*Id.*

⁵⁷Salton, *supra* note 37.

⁵⁸*Supra* note 6.

⁵⁹*Annual Arbitration Survey 2023: The rise of machine learning*, BCLP (2023), https://www.bclplaw.com/a/web/tUW2SW6fjHrpXVrA7AfWKS/102932-arbitration-survey-2023-report_v10.pdf.