

**ONLINE ARBITRATION IN
MALAYSIA: OVERCOMING THE
CONSTRAINTS OF THE COVID-19
PANDEMIC**

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CLIENT ALERT: ONLINE ARBITRATION IN MALAYSIA: OVERCOMING THE CONSTRAINTS OF THE COVID-19 PANDEMIC



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INTRODUCTION

There are multiple available mechanisms when it comes to alternate dispute resolution, and arbitration is one of the common avenues that is used in most commercial transaction in Malaysia and in the global market. Arbitration is essentially a procedure to resolve disputes between parties and its principal characteristics includes that it is consensual, neutral, confidential, the right of parties to choose the arbitrator and the enforceability of the arbitral award.

Ever since the emergence of the Covid-19 pandemic in December 2019, it has drastically affected businesses which in turn has negatively impacted arbitration cases in Malaysia. In view of the said pandemic and the movement control order ("MCO") which was and is currently being implemented in Malaysia, and other similar measures taken by nations across the globe, we may begin to see a significant change to the manner on how arbitration is to be administered.

As it is no longer possible or advisable to conduct physical hearings and trials, arbitration is taking matters remotely and virtually in order to ensure access to justice remains available to the public throughout this period.

Parties of arbitration may have difficulties in initiating or participating in proceedings for both domestic and international arbitration for the simplest reason that they are unable to move around and conduct physical meetings with their appointed arbitrators and the hearing itself.

The Asian International Arbitration Centre ("AIAC") which is the sole arbitration body in Malaysia has closed its Kuala Lumpur offices in order to comply with the MCO directive. However, the operation of the case management team remains available online to ensure expedient arbitration.

ONLINE ARBITRATION

The term online arbitration, e-arbitration or virtual arbitration generally refers to communication through an electric medium using various systems and software which allows communication through the internet on platforms like Zoom, Google Meets or Microsoft Teams.

As testimonies and arguments are conducted remotely in this manner, cost may significantly be reduced since parties are no longer required to leave their respective location/countries as compared to the conventional way previously

Another positive feature of online arbitration also includes allowing parties the opportunity to control the resolution process by selecting the governing law. This can be viewed as a flexible method in solving disputes since it is now within parties' control to construct their settlement as deem fit and effectively, regardless of its value or complexity of dispute.



OTHER JURISDICTIONS: UNITED KINGDOM

The Chartered Institute of Arbitrators (“CI Arb”) has issued its Guidance Note on Remote Dispute Resolution Proceedings (“Guidance Note”) which was designed to provide the parties with all the tools and techniques for conducting dispute proceedings in full compliance with the social distance regulations implemented in the UK.

The said Guidance Note addresses technical, legal and logistical issued and offers practical advice on how proceedings may take place under remote conditions and to pro-actively improve the orthodox practice of dispute resolution. Procedures that must be agreed by the parties include the following:-

- Technology, software, equipment and type of connection to be used must be agreed prior to any meetings or hearings.
- Allocating sufficient time frames to eliminate possible connection or other technical failures once the meeting or hearing has begun. Technical assistance and monitoring of status of connection at all stages of the proceeding should be provided.
- The highest possible quality of audio and/or video connection available to parties must be used. Connections should be capable of showing full image of the persons with clear audio of their pleadings and interventions.
- The level of cybersecurity and security technology required should be taken into consideration and agreed by the parties.

HONG KONG

The demand for Hong Kong International Arbitration Centre's ("HKIAC") virtual hearing services has increased drastically with the onset of the Covid-19 pandemic. In April and May 2020, approximately 85% of all hearings required virtual hearing services either in full or part. For the period of February to September 2020, 65% of all hearing related enquiries received by the HKIAC involved virtual hearing support with users opting to proceed with hearings and incorporate virtual hearing aspects as necessary rather than to postpone the proceedings.

The HKIAC has partnered with leading legal technology specialists to offer users a comprehensive range of integrated virtual hearing services which may be used for all dispute resolution proceedings.

By doing so, the HKIAC's virtual hearing services comprise of six major tools which can be used in any combination or individually such as:

- Video conferencing that includes IP-based video conferencing system to support up to eight different locations and a cloud-based compatibility with all major video conferencing platforms.
- Audio conferencing with seamless technology and high-speed connectivity to more than 80 countries, supporting up to 30 lines.
- Electronic bundles services including both online and offline eBundling services.
- Electronic presentation of evidence including assembly of evidence from multiple media sources to view electronic formats presented as evidence during hearings.
- Transcription services which include onsite or remote real-time transcription services across different locations.
- Interpretation services including simultaneous and consecutive interpretation services, onsite or remote attendance.

The HKIAC will also have an IT specialist in attendance at all times as hearing managers to monitor the proceedings and provide IT support across all times zones.

Taking into consideration of the procedures and regulations that has been implemented by HKAIC and CIArb, the AIAC may possibly choose to incorporate similar measures as well.



CONCLUSION

The AIAC should engage with legal technology specialists to provide a comprehensive system and software which will allow the AIAC to provide its users all the tools and services to carry on virtual proceedings in the most seamless manner.

The key considerations include access to hardware and software, proceeding involving witnesses, communication within teams, navigating bundles of documents during a virtual hearing, recording of virtual proceedings and the general conduct of parties during virtual hearings. By establishing a sound and comprehensive rules and regulations along with a highly dependable software, all these considerations can be catered to by the AIAC.

Despite the ongoing obstacles and challenges for arbitration and dispute resolutions as a whole, it does appear that the profession has taken several measures, steps and solutions in creating a more efficient arbitrary framework in the wake of the pandemic.



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