



## Challenges in Using Online Dispute Resolution for Arbitration Proceedings

By Peter Scott Caldwell

Online Dispute Resolution or ODR is much more than using video conferencing and includes using the ODR platform to conduct all aspects of a case. This short note covers only conducting an arbitration hearing online as this is the aspect of ODR which can most obviously offer significant savings. This is especially true where parties counsel, arbitrators or witnesses are located in different places. However, there are lingering concerns among practitioners that the savings in cost will be outweighed by a reduction in quality of the hearing and in the resulting award.

Video conferencing has been with us for decades and no doubt it has many regular users. Indeed most arbitration practitioners will have used video links for case management conferences or to hear witnesses who cannot, or will not, attend the face-to-face hearing. As a result of recent unprecedented events in the first half of 2020 many people, who had previously little or no familiarity with video-conferencing, have found that the use of Skype, Zoom, Microsoft Teams, WebEx or the like has become a daily occurrence.

Continuing on the theme of video conferencing; it is my own experience that I find many webinars boring. I suggest that there are two reasons for this. Firstly, we expect the polished performance which we usually experience on television but few presenters have the skill or experience of Sir David Attenborough in talking to a camera yet making the audience feel engaged with the presenter. Secondly, the people planning a webinar lack experience in getting the best out of whichever platform they are using and we, the audience, feel less engaged than with a live seminar.

So what has all of this to do with Online Dispute Resolution (ODR)? I suggest it has a great deal to do with how we adapt to online arbitration and I will return to our experiences with video conferencing after first briefly considering the technical aspects of ODR.

Much has been said by other commentators about the technical aspects of conducting dispute resolution online. The technical challenges, today are fewer than they were just a year ago and progress on the technical front has been very rapid. The success of the Vis Moot conducted with the help of eBRAM is testimony to the availability of the necessary technology.

That is not to suggest that there are no technical hurdles to using ODR. As noted by Christopher To in the previous issue of this Newsletter: *"The issues of confidentiality, security, examination of witnesses, their demeanour and body language remain obstacles."* In addition, the availability of stable connections to less developed locations than Hong Kong also can be a technical challenge.

In a recent ICC Webinar on virtual hearings, Prof Dr Abdel Wahab quoted Seneca the Roman philosopher and statesman: *"It is not because things are difficult that we do not dare, it is because we do not dare that they are difficult."*

I would suggest that the real challenge to adopting ODR is not technical but in the deeply rooted resistance to change which is part of the human psyche. The old joke attributed to a 19th century judge: *"Nothing should ever be done for the first time"* applies to us all more than we care to admit. How does this inertia manifest itself in the use of ODR? In my view the most common form of resistance is to overemphasise the difficulties of ODR and underplay the advantages. However, I can make no claim to being a neuroscientist so, before expounding my theory in print, I consulted Dr Ula Cartwright-Finch who many readers will know from her time in Hong Kong. Ula is a neuroscientist as well as being a lawyer and her response to my theory was:

*"If there's one thing the human brain is hard-wired to dislike, it's uncertainty. From a survival standpoint, uncertainty means potential danger. It*

Welcome to the July edition.

The Branch continues to remain busy from the last Newsletter. Despite the Covid-19 pandemic, the Branch resumes most of the planned events and training courses via webinars and virtual meetings during the last quarter.

In this edition, we are delighted to feature two special articles on Covid-19 related topics, written by Peter Caldwell (Chairperson of Hong Kong Branch 1993 – 1995), and Nicholas Turner (Chairperson) & Christopher To (past EAB Chairperson 2014/2015) respectively.

This edition also includes the details of the Branch Committee and the YMG Annual General Meetings. The latest Branch Committee for 2020/21 is included on the last page of this Newsletter.

Enjoy!

Gina Leung

*means threat. And avoiding threat is our number one priority. This is why we can seem allergic to change in contexts like this."*

The concept of disruptive change became a buzzword during 2019 but the disruptions to which it was applied were minor compared to the present global disruption. It takes a traumatic series of events such as a war or a pandemic to force real change on our communal inertia. It is my view that the people problems are greater than the technical problems which need to be overcome for ODR to become the mainstream of dispute resolution. The present disruption may well be the catalyst needed to propel the arbitration community into the widespread use of ODR. I close with a further quote from Dr Ula Cartwright-Finch which is reminiscent of Darwin's theory of evolution:

*The flipside to consider is: what's the cost of resisting change? Controlling our fear of uncertainty, our aversion to change, has the potential to bring big rewards. At moments like these, those that adapt, survive."*

# Some Practical Considerations When Running Virtual Hearings

By Nicholas Turner & Christopher To

Very few of us have actually participated in a virtual hearing, according to a recent study only 35% of respondents had. This is to be contrasted with figures from HKIAC where 85% of hearings in April / May 2020 were virtual hearings. To assist in understanding what is required (and expected), the CI Arb, along with many other dispute resolution bodies, institutions and organisations, have published guidelines on remote dispute resolution proceedings. These guidelines are valuable sources of reference for those who are considering or planning a virtual hearing.

The practical challenges to running virtual hearings can be numerous, they range from the initial resistance of parties, to technological challenges, to party participation issues such as working from home, or in different time zones. Once the initial resistance of parties is overcome, technological and party participation challenges will need to be addressed. The virtual hearing room is a far stretch from the physical hearing room experience.

There are many platforms to choose from, including Zoom, Teams, Google Meet, Cisco Webex, BlueJeans. You may have had some experience of these through online meetings or conferences. Factors which might influence your choice include: whether there is a jurisdictional standard; how many participants will there be; what do you want to see (not all platforms will allow the tribunal, counsel and witnesses to be seen simultaneously); can the platform be customised; how much control do you want over the proceedings (e.g. to mute and unmute participants, break out rooms, removing participants); do you want separate channels for translations; do you want to manage the document display through the same platform. Ideally all participants will agree on using the same platform, because trying to combine more than one will likely lead to additional technical issues such as compatibility and interfacing with different software.

Once you've agreed on your platform, another important technological issue is ensuring everyone has capacity (or bandwidth) to run the software and connect without any (or too many) glitches. Wired rather than WIFI connections, are more stable. But just in case, have a back-up plan either a second internet connection or at least a

telephone. Facilities provided by institutions or the like will provide more stability, if you can access them.

Hardware is equally important. If you don't already have the hardware it is worth investing or some facilitators may be able to loan equipment. It has been suggested that at least two, but probably three, computers/tablets with separate monitors are required – one for video feed, one for the transcript and one for the bundle and inter-party communications. Ideally a separate camera, speakers and microphone, to those built in to any computer, to ensure quality. Think about the lighting in your room, and eliminate natural light. Also the background, ensure this is plain. If needed, use one of the backgrounds provided by the platforms.

Once you've got your set-up, then test it (and test it again, and again!). This will be time consuming – it is suggested there should be at least one if not two mock hearings in advance and ideally one more on the day, before the substantive session starts. Consider having a moderator or facilitator (sometimes referred to as the 'new' tribunal secretary), to manage the technological side of things.

While using hard copy bundles is not impossible, there are likely to be challenges. If nothing else ensuring every participant has an up to date version which they can access. It is suggested that electronic bundles are the way to go. There are a number of ways this can be achieved, each with their pros and cons (and price tag). At one end of the spectrum is a share screen functionality. However, consideration needs to be given as to who would operate this and what risk is there of the wrong documents/screen being shared!

This brings us on to the topic of confidentiality and security. As with any online activity, the more you work online the more opportunity there is for hackers to take advantage. To meet this challenge, consideration needs to be given to the way participants are registered and passwords provided. Ensure all software is up to date. A waiting room will allow those joining to be scrutinised before being let in. Ideally all participants will be seen visually, and each participant's computer/tablet/phone should be

set to identify who they are. Ask all participants to confirm they will not record the session. If third party providers are involved then they need to be bound by confidentiality agreements.

Preparation for the hearing is not restricted to the technology set-up, counsel's approach to advocacy will need to be adjusted because old style presentation skills will not always work. Counsel should know their case inside out, in case there are technical glitches. Communications between counsel, their legal team and client will be more challenging, if they are all remote from each other. WhatsApp groups, emails etc can overcome this, but likely more breaks will be required to allow consultation.

This will likely impact sitting times. Other factors which will impact sitting times include: the time zone of participants; the fact a virtual hearing environment is likely to be more tiring and stressful for the key players; and that the pace will be slower (accessing the bundle, judging of reading times and translations will inevitably be longer).

Concerns have been raised in relation to factual witnesses, in particular the steps that should be taken to ensure they are alone if located remotely. To overcome these, they should be asked to show they are alone in the room (a 360 camera may be used) or a third party neutral observer could be introduced. Whether these concerns are justified is questionable, particularly where experienced tribunal are involved. If it becomes obvious a witness is being prompted this is likely to impact the weight placed on their evidence. Ultimately it will come down to the parties trusting the witnesses or experts. Another concern expressed by counsel is that they can't get a feel for the witnesses expressions when cross examining or may not feel able to push hard in their cross examination. Whether these concerns are valid may depend on the setting and connectivity of the witness. It has been suggested that witnesses may give more truthful testimony, because they don't have the party who has adduced sat in the same room to 'influence' their response.

A considerable advantage of virtual hearings is having a video recording. With the wonder of technology, transcripts and video can be synced so the evidence can be watched, read and heard!

Some additional practical tips:

- Participants should shut down all background browsers and applications on their device (including disabling “pop up” notifications), turn off all other devices which might use necessary bandwidth or produce audible notifications.
- Participants should start by confirming that they can see and hear everyone; they are in a private space (and, so far as is possible, that they are alone and cannot be overheard); they are not relaying the hearing to any

third parties; and they are not making any recording of the hearing.

- If there is a glitch and the connection can't be remade, there should be a back-up plan such as convening a telephone hearing to determine the appropriate next steps. Sometimes whatsapp can be useful to alert all that you are having problems with access, so that the matter can be promptly rectified.
- If any participant comes down with Covid-19, as unfortunate as this might be the hearing should continue with others stepping-up as

appropriate. It would be no different if there was another illness during a face to face hearing.

- Counsel, witnesses and tribunal should all look at the camera, not at the screen, when talking. They should speak clearly and ensure they can also hear clearly. This should be made a lot easier if all others are on mute. Using a headset with a microphone can assist clarity.
- Finally, remember that you are always on camera even if you are not speaking.

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## Annual General Meeting of Chartered Institute of Arbitrators (East Asia Branch)

### 16 April 2020, Hong Kong

The 48th Annual General Meeting ('AGM') for the Chartered Institute of Arbitrators (East Asia Branch) took place on 16 April 2020. A virtual meeting was held for this year AGM due to Covid-19 restrictions. Mr Nicholas Turner, the Branch Chairperson, chaired the AGM. The focus of the AGM was the announcement of the election results for the Branch Committee members for 2020/2021 term. Mr Donovan Ferguson, the Branch Secretary, reads out the names of newly elected Committee members in the meeting. Congratulations! The list of the new Branch Committee members can be found on the last page of this Newsletter.

*Gina Leung*

## Young Members Group AGM 2020/2021

### 24 April 2020, Hong Kong

The Annual General Meeting ('AGM') for the Young Members Group ('YMG') was held on 24 April 2020. The AGM this year was held virtually due to the current Covid-19 restrictions.

During the meeting, our incumbent chair, Mr Mac Chan addressed the young members on the highlights of the past session. Ms Jessica Chan, the Treasurer also reported on the finances arising from the year. Following several nominations for committee members, we would welcome two new committee members, Ms Karen Lau and Ms Jennifer Wu. We are excited to form a new YMG committee for 2020/2021. We would expect the upcoming session to be an eventful one with several events in the pipeline, including the Annual Young Members Group Conference, which is being

organised and hosted by our the Philippines Young Members Group.

Lastly, I am happy to introduce the 'Young Member Committee' for 2020/2021 as follows:

**Ronald Pang** (YMG Chairperson), **Mac Chan** (Immediate Past Chairperson), **Jessica Chan** (Co-Vice-Chairperson), **Edward Chin** (Co-Vice-Chairperson), **Victor Fung** (Secretary), **Alvin Cheng** (Treasurer), **Genevieve Lam** (Event Coordinator). Committee members also include **Cordelia Cheng**, **Bryan Fok**, **Fred Ho**, **Gordon Kwok**, **David Luk**, **Karen Lau**, **Annie Po**, **Jennifer Wu**. Co-opted members include **Angie Chai** and **Lavesh Kirpalani**.

*Ronald Pang*

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## Arbitration and Conciliation (Amendment) Act 2015

### By Jagmeet Makkar

India has had a long history of association with arbitration (tribunals were chosen by parties in dispute, to help resolve issues, even as far back as ancient India – three types of popular courts, Puga, Sreni, Kula). In more modern times, the village panchayat has been a prevalent form of alternate dispute resolution. Unfortunately, India's reputation in the international Arbitration scene leaves a lot to be desired. As of 2015, India ranked 131 of 189 economies in the World Bank's 'Ease of Doing Business' list. Compared to a regional average of 538 days for resolution and 21.1% of claim value as fees – Asia is at 1077 days, 30.5% – India sits at 1420 days (close to four years) for dispute resolution, and an exorbitant 39.6% in fees of the total claim value.

In 1996, the "Arbitration and Conciliation Act" (based upon 'UNICTRAL 1985' model

law and rules) was enacted. Various problems arose as a result of the working of this act over the years, finally gaining partial resolution in the form of the 'Arbitration and Conciliation (Amendment) Act' in 2015. The amendment has resulted in advancements in India's arbitration capabilities. The provision permitting institutions of arbitration to create their own rules consistent with the ACA 2015 amendment has helped lower the amount of time an arbitration takes (limiting the time limit to one year, with option of extending by six months with consent from the disputing parties), as well as curbing the high claim value percentage of fees by arbitrator tribunals. In addition, a 'carrot and stick' approach with incentivised fees for earlier resolution and penalised fees for delayed resolutions, aiding the rise of India's ranking on the World Bank's 'Ease of Doing Business' list.

Through the changes from the amendment, once a dispute is registered with either an institution or an independent body of arbitrators, an arbitrator must be appointed to the case within six months, and a challenge to an award within a year. In addition, to disincentivise dilatory tactics, costs of the proceedings are determined on the basis of the parties' conduct during the case, and may be a proportion of the other party's costs. This new 'costs follow the event' rule empowers the arbitrator or tribunal to order security for costs.

It is hoped that with the 2015 Amendment Act and more reforms to come, India will be able to provide alternate dispute resolution services for domestic as well as international arbitration.

## CIArb Taiwan chapter YMG – Handover Ceremony

24 May 2020

With Taiwan reporting zero coronavirus cases for now 24 days in a row, and with no local cases for 42 days, we were proud to hold an indoor, in-person activity for the young members of CIArb to get together on 24 May 2020. The activity was well received and enjoyed by over 20 attendees. The handover ceremony took place in a cozy space in Taipei, and it marked the perfect ending to the term under the leadership of former Head of the Taiwan Chapter YMG, Alison Chang (FCIArb), and former Secretary-General, Felice Lu (MCIArb). The new Head and Secretary-General are Felice Lu (MCIArb) and Sue Chen (MCIArb), respectively.

The majority of the attendees were young practitioners interested in international arbitration and who are eager to connect

with new friends in the field. The event started with opening remarks from Dr. Helena Chen (FCIArb), who thanked Alison Chang (FCIArb) for her efforts and contributions, and encouraged young members to participate enthusiastically in activities and lectures held by CIArb.

The handover ceremony was followed by enjoyable board games. Participants split into two groups playing different board games, and switched an hour later. Thanks to the full support given by Dr. Helena Chen (FCIArb) and Monica Wang (FCIArb), the activity was a success and participants had a great time. We look forward to having another excellent term led by Felice Lu (MCIArb) and Sue Chen (MCIArb).

*Felice Lu*



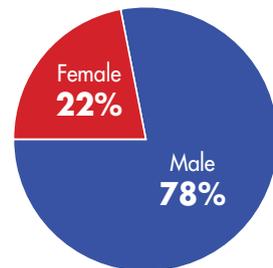
## Current Branch Membership

### Distribution by Membership Grade

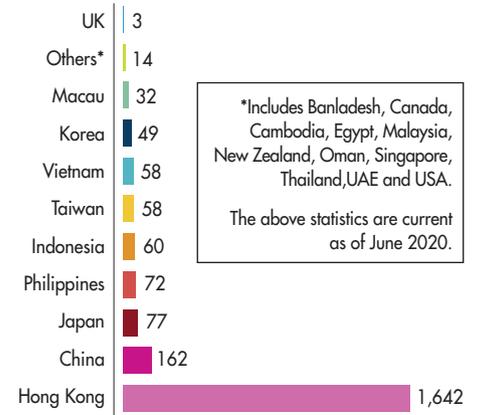
(excluding the Retired Members and students)



### Distribution by Gender of Members



### Distribution by Region



## CIArb East Asia Branch

The East Asia Branch provides a regional organisation for members of the Chartered Institute of Arbitrators who are residents in the geographical area of Hong Kong, mainland China, Indonesia, Japan, Korea, Macau, Mongolia, the Philippines, Taiwan and Vietnam. Thailand and Singapore, formerly part of the Branch, were constituted as separate branches in 2003 and February 2010 respectively.

The objectives of the Branch are to promote, encourage and facilitate the practice of settlement of disputes by arbitration, mediation and other means of dispute resolution, and generally to support and promote the status and interests of the Institute.

## CIArb East Asia Branch Committee 2020/21

Chairperson – **Nicholas Turner**, Vice Chairperson – **David Fong**, Branch Secretary – **Helen Au** assisted by **Donovan Ferguson** (co-optee), Branch Treasurer – **John Cock**, Adjudication – **Joseph Leung** (observer), ADR Editorial – **Christopher To**, Communications within CIArb – **Nicholas Turner** assisted by **Scott Ramsden** (observer), Communications with outside bodies/Public Relations Officer – **David Fong**, Diversity – **Giovanna Kwong** (observer), LinkedIn – **Vincent Li**, Mediation – **Lawrence Lee**, Membership – **Cordia Yu** assisted by **Jagmeet Makkar** (observer), Newsletter – **Gina Leung** (observer), Professional Development & Training and Faculty List – **Christopher To** assisted by **Stephen Chu** and **Saniza Othman** (observer), Programme – **Albert Yeu** and **David Luk**, Regional – PRC – **Mingchao Fan** assisted by **Richard Leung**, Regional – Taiwan, Korea, Japan, Indonesia and others – **Glenn Haley** assisted by **Anny Wong** (observer), YMG Chairperson – **Ronald Pang** (co-optee), University Promotion – **Helen Au**, Vis East Moot – **Mary Thomson** assisted by **Jagmeet Makkar** (observer), Website – **Micky Yip**, **Karen Mills** (co-optee), **Chun Wai Ling** (observer)

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