

Interlaw Arbitration: Statistics, Trends and Ascendancy of Virtual Hearings in Malaysia, Singapore and China



by Crystal Wong Wai Chin and Stephanie Lim Shu Juin



The business community continues to shift away from traditional courts in solidifying arbitration as parties' cross-border dispute resolution of choice. During the Arbitration and ADR session of the Interlaw's 2022 Virtual Asia Pacific Regional Meeting in February, themed "Together, We Work", Lee Hishammuddin Allen & Gledhill (LHAG) partner, Crystal Wong Wai Chin, and senior associate, Lim Chee Yong, spoke to an expert panel — comprising Michelle Sunita Kummar from the Asian International Arbitration Centre (AIAC),¹ Pauline Low Pou Leen from the Singapore International Arbitration Centre (SIAC)² and Lu Fei from the China International Economic and Trade Arbitration Commission (CIETAC)³ — about the driving force behind the increase in popularity of arbitration in Asia Pacific, how it has reshaped the culture of business disputes and advancement in place to cope with the complications of the COVID-19 pandemic. The following is a summary of the discussion.

Statistics and trends

The SIAC has observed a continued increase in new cases since 1991. In 2020, the caseload crossed 1,000 cases.⁴ Out of the total number of cases that were registered with the SIAC, trade-related disputes formed the bulk, at 64%.

In its 2021 Annual Report, the SIAC announced its third-highest caseload, with 469 new case filings, of which 95% were cases administered by the SIAC and the remaining 5% were *ad hoc* appointments.⁵ The bulk of the cases received by the SIAC in 2021 were made up of trade and commercial disputes.⁶

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⁴ In 2020, the SIAC received 1,080 new case filings which included two sets of related cases. The SIAC has since announced its 2021 statistics

⁵ The Singapore International Arbitration Centre Annual Report 2021, "[Where the World Arbitrates](#)", at p 18

⁶ *Ibid*, at p 22



In China, CIETAC observed a steady growth in caseload over the past three years. From 3,333 new arbitration cases in 2019, CIETAC recently achieved a record-breaking figure of 4,031 new cases in 2021. As for the number of concluded cases, CIETAC observed a leap in 2021 with 4,306 cases concluded, compared to 2,892 cases previously in 2020. Based on these figures, Lu Fei remarked that instead of hindering or postponing arbitration proceedings, parties have learnt to accept workarounds for business to continue as normal despite the COVID-19 restrictions, especially with the immediate adoption of the online filing system and intelligent hearing platform set up by CIETAC following the COVID-19 outbreak, which facilitated parties in virtual proceedings. As a result, an increasing number of parties accepted CIETAC's new mode of conducting arbitration proceedings online.

Closer to home, the trend was the opposite in terms of the collective caseload for arbitration and statutory adjudication as the AIAC observed a dip in the number of cases being registered during the COVID-19 pandemic. However, Michelle clarified that this was not particularly attributed to the pandemic as the AIAC was left without a Director for a large part of 2020.⁷ Furthermore, the numerous lockdown orders implemented nationwide could have contributed to such figures in 2020. Although the exact figures for 2021 were still being finalised at the time of speaking, Michelle was happy to share that the number of cases has picked up again. For 2022, Crystal predicted a surge in cases being registered with the AIAC based on her observation of the number of cases filed by LHAG thus far. However, one prime concern worth noting is the financial viability of companies, which the AIAC was conscious about

throughout 2021 as several arbitrations had to be put on hold or were suspended because companies were being wound up and liquidated.

Another trend that the AIAC observed lately was the keen interest to convert *ad hoc* arbitration into administered arbitration. From this, it was inferred that there is a greater sense of reliance on administered arbitrations and trust in the administrative institutions among users. Pauline of the SIAC made the same observation and shared that in 2020, of the 1,080 new cases received, 98% were administered by the SIAC.

Energy, investment treaty and emerging technologies' claims: Where do they stand?

Each arbitral institution defines and categorises energy disputes differently. For CIETAC, Lu Fei shared that there isn't

⁷ Pursuant to the AIAC Arbitration Rules, it is the AIAC's Director who is empowered with the appointment of arbitrators

a specific category for energy disputes but instead CIETAC accepts around 220 to 240 cases each year under the natural resources category, which makes up less than 9% of CIETAC's cumulative caseload. Thus, if a strict separation of the categories is applied, then a good part of CIETAC's cases are made up of international sales of goods and investment disputes. However, Lu Fei also shared that some energy-related disputes may be parked under other categories, for example, the sale of raw materials. With a growth of 15% in financial sector disputes and 38% in construction engineering disputes in 2021, CIETAC sees an increasing trend in disputes in these two sectors rather than the energy disputes sector.

The AIAC has not seen much traffic involving energy disputes. Rather, it consistently records a substantial number of construction disputes, with disputes involving trade and sale of goods coming in second. At the SIAC, Pauline observed that the caseload for disputes involving emerging technologies, such as blockchain and cryptocurrency, remains relatively low. However, recognising the unique features and complexity of these disputes, the SIAC maintains a specialist panel, which comprises experienced arbitrators in the areas of intellectual property and technology.

Adoption and ascendancy of virtual hearings

While talks on digitisation and virtual proceedings have been going on for years, Michelle shared how the lockdown accelerated the process. This led to the standardisation of directions and guidelines for users. Users of the AIAC have expressed a very keen interest in adopting virtual proceedings and in using the AIAC's brand new 2021 Arbitration Rules.

On the topic of hybrid virtual proceedings, two different methods

were discussed; one where pre-conference meetings are conducted virtually and the actual hearing itself conducted in-person, while the alternative is where the examinations are conducted virtually for some witnesses and in-person for others. The glaring issue with the latter is the imbalance of access to technology by the parties and witnesses, which is why the former would be more acceptable, according to Michelle.

Across the Causeway, Pauline shared how the SIAC rules afford the parties and the tribunal the flexibility to decide how the hearing may be conducted. Although the concept of virtual hearings is not new in international arbitration, the shift from in-person to virtual proceedings may not always be straightforward. Pauline, however, observed that the parties and the tribunal were able to make that shift and there was an increased use and acceptance of virtual hearings during the COVID-19 pandemic. In fact, at the height of the COVID-19 pandemic when there was a surge in the number of emergency arbitration cases at the SIAC, the hearings were conducted efficiently and timeously through remote means.

With the foresight of reliance on information technology for dispute resolution, CIETAC had developed its online filing system and intelligent hearing platform even before there was any indication of the pandemic. In 2020, when the COVID-19 pandemic was rampant, CIETAC had conducted 347 virtual hearings and the number increased to 434 in 2021. This indicated that users were acclimating to virtual hearings, according to Lu Fei.

The adoption of virtual hearings has enabled further achievements as parties may now dial in from any part of the world. Additionally, the assistance by arbitral institutions in providing the facilities and services to

another arbitral institution in certain instances also facilitates, smoothens and encourages the adoption of virtual hearings. For example, Crystal shared her experience where she was acting as counsel for one of the parties which had a witness participating from China because it was still during the COVID-19 pandemic and the Malaysian border was closed. CIETAC's assistance was sought to provide the requisite facilities and services to enable the witness to participate from CIETAC's centre in Xi'an.

Another example shared by Lu Fei concerned an arbitration involving more than 20 participants and was held simultaneously across four cities with the support of CIETAC Fujian and CIETAC Hong Kong. This shows the far-reaching capabilities of virtual hearings supported by the various facilities and services offered by each arbitral institution. Crystal echoed the support being provided from arbitral institutions in sharing examples of dedicated facilities and services provided by arbitral institutions, such as rooms specifically for virtual hearings, 360° cameras, secured facilities, and the assignment of case counsel as an observer, if needed.

Suitability of virtual hearings

With the rapid development of technology these days, Lu Fei opined that technology would not create difficulties in the conduct of virtual hearings. Rather, based on CIETAC's observation, an obstacle arises when parties are not cooperative in advancing the case. In Lu Fei's opinion, when deciding the mode of the hearings, one possible consideration could be the volume of documents, and limitations with cloud storage in some extreme cases. However, this view was challenged by the AIAC's Michelle, who shared that voluminous documents are now no longer a good justification to avoid virtual hearings. Another potential complication lies with the

local procedural laws. For example, in China, Lu Fei shared that the civil procedural law requires the original copies of all evidence to be produced during the hearing or the examination. Thus, if parties insist on cross-checking the original copies, then such matters would probably be better off being conducted in-person.

For Pauline of the SIAC, she opined that the suitability of the mode of hearing would depend on factors including confidentiality and security. This view resonated with Michelle, who recalled an instance where a dispute required a large sculpture to be physically brought to the hearing and be examined. With more than 40 people involved in that particular matter, a virtual hearing setting would not have been appropriate.

Collaborations between arbitral institutions

It was common ground among the expert panel that arbitral institutions no longer view each other as competition but rather look to each other for guidance and knowledge. Equipped with their respective assets, benefits and advantages each arbitral institution possesses, all three representatives agreed that there should be more collaboration to provide a more prevalent service where the facilities and services offered by each arbitral institution are made available to users from another arbitral institution, especially where parties and witnesses dial in from different countries. By banding together and lending each other's expertise and facilities, arbitral institutions would be offering the parties and users the best experience possible.

Room for improvement?

Pauline opined that key areas for improvement when it comes to virtual hearings include security, confidentiality and access to technology. Additionally,

as Lu Fei pointed out, the arbitration world could also benefit from a more supportive judiciary, particularly with regard to the supervision and enforcement of arbitral award. Crystal agreed and further stressed the importance of having all stakeholders be more forward-looking and progressive. Therefore, although virtual proceedings are not particularly nascent in the arbitration community, there remains much work to be done to continue adapting to the needs of its users. **LH-AG**

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