

## Challenges and Development of Chinese Commercial Arbitration in The Context of COVID-19 Pandemic

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### Abstract

The sudden outbreak of COVID-19 Pandemic challenges the normal economic and social order of countries all over the world. The corresponding measures of prevention and control of epidemic to some extent restrict the transnational movement of personnel and impede the smooth circulation of international goods, which makes the disputes between international trade and investment increase suddenly. Arbitration, as an important way to resolve international commercial disputes, has also been intensively tested and is facing a series of new challenges. Under the difficulties of obstruction of arbitration business and obstruction of cooperation and cooperation within and outside commercial arbitration, China has made a series of positive exploration including but not limit to arbitration mechanism construction, popularize Internet arbitration, promote Summit Forum, and strengthen arbitration publicity activities, which makes China not only a positive development against the COVID-19 disaster but also contributed its wisdom on how to make overall plans to achieve the dual goals of epidemic control and positive development of commercial arbitration.

### Keywords

COVID-19Pandemic; Commercialarbitration; Onlinearbitration; Challenges Development.

### 1. The Challenges of Chinese Commercial Arbitration During and after The COVID-19 Pandemic

With the sudden outbreak of the COVID-19 pandemic, which is unprecedented in human history in the past century, the eventful year of 2020 has witnessed disruptions in the global economy, international community and people's normal life. The inconsistent pace of countries in epidemic prevention and control has made COVID-19 cases keep cropping up. International cooperation on epidemic prevention and control has been interfered with by geopolitics, ideologies and populism, which has led to a prolonged epidemic cycle. Social, economic and commercial activities in various countries have been challenged, with declined demand, contracted supply, increased unemployment and declined expectations. The global economy has fallen into a serious post-war recession, which is even worse than that during the 2008 financial crisis. International commercial trade has also been severely affected. In accordance with the Interim Economic Outlook released by the Organization for Economic Cooperation and Development (OECD) on September 6, 2020, global output in the second quarter of 2020 was more than 10% lower than that at the end of 2019. WTO statistics show that the global exports and imports of goods fell by about 6.2% and 5.3% year-on-year respectively in 2020.

With the new situation of COVID-19 pandemic, countries have imposed restrictions on entry or quarantine on people and goods, and some companies have been forced to suspend operation

and production, which bring much uncertainty to the performance of contracts. Whether the epidemic and relevant prevention and control measures are force majeure has different interpretations in different jurisdictions. Even in accordance with the Chinese law, force majeure may not necessarily lead to contract rescission. While introducing economic stimulus policies, economies have also imposed restrictions on trade and investment, which have intensified disputes. Arbitration, as an important way to settle international trade and investment disputes, is confronted with many risks and challenges.

### **1.1. The Conduction of Arbitration Has Been Frustrated**

For the needs of epidemic prevention and control, crowds should be avoided to reduce the risk of infection and transmission according to guidelines on epidemic prevention and control. Unless necessary, it is not recommended to travel across borders or to medium- and high-risk areas. Large-scale flow of people should be avoided. These measures have also affected and even challenged the development of both domestic and international commercial arbitration. For example, the parties, witnesses, and arbitrators of international commercial arbitration are not allowed to gather or should reduce the gathering, which makes it inconvenient to submit documents on the spot to docket cases; and the trials, including production of evidence and cross-examination, have been suspended. Both the consideration of substantive problems and procedural advancement of arbitration cases have been affected.

### **1.2. Cooperation and Exchanges on Commercial Arbitration Are Hindered Inside and Outside the Jurisdiction**

The development of commercial arbitration in China is open and innovative. Inside the jurisdiction of China, there is a need for exchanges and cooperation; outside it, there is a driving force to learn advanced experience from each other to offset one's weakness. For being affected by COVID-19, countries have implemented strict quarantine measures on people crossing borders, and restricted cross-border travel. As a result, academic exchanges on commercial arbitration have been unable to be conducted normally, and cooperation on personnel mobility-based commercial arbitration has also been jeopardized, both domestically and internationally. Domestic exchange conferences, international conferences, exchanges and visits among scholars, and joint discussions and experiments of multinational academic teams are confronted with huge challenges. Many domestic and international academic conferences on commercial arbitration have been postponed or cancelled.

To tackle the challenges of the post-epidemic era, the international arbitration community needs to legally and properly settle foreign-related commercial disputes, improve arbitration rules, optimize the management of arbitration procedure, and enhance arbitration service.

## **2. The Development of Commercial Arbitration in China in the Context of COVID-19 Pandemic**

Despite the COVID-19 pandemic, China's commercial arbitration has achieved relatively rapid development. What is little known is that the number of commercial arbitration cases in China is very high. In 2019, the number of cases before Chinese commercial arbitration institutions amounted to 540,000, and the total amount of subject matter exceeded 700 billion CNY, reaching 110 billion USD.

At present, although without national statistics on arbitration in 2020, statistical analysis of arbitration institutions in China's four megacities (i.e. Beijing, Shanghai, Guangzhou and Shenzhen) shows that even in 2020, when the epidemic was still severe, China's commercial arbitration made considerable progress. The total amount of subject matter in the four megacities alone amounted to 350 billion CNY.

In 2020, Beijing Arbitration Commission (BAC) accepted a total of more than 5,600 cases, with a total amount of subject matter of 9.4 billion CNY; Shenzhen Court of International Arbitration (SCIA, also known as South China International Economic and Trade Arbitration Commission) accepted 5,617 cases, with a total amount of subject matter of more than 65 billion CNY; Guangzhong Arbitration Commission (GZAC) accepted more than 1,800 cases, with a total amount of subject matter of 36 billion CNY. The number of cases before Shanghai Arbitration Commission (SAC) and the amount of subject matter both increased due to COVID-19. It tried 4,165 cases in 2020, a year-on-year increase of 8.27%, which was a record high; and settled 799 cases through mediation, accounting for 19.18% of total closed cases, a year-on-year increase of 84.95%, with the total amount of subject matter close to 35 billion USD.

The amount of subject matter of arbitration institutions in the above four cities alone exceeded 360 billion CNY, accounting for more than 50% of the total amount of 700 billion CNY in 2019. Since there are a total of 255 arbitration institutions in Mainland China, it can be expected that for being affected by the epidemic, the number of arbitration cases in China will far exceed that in 2019. The concentration of cases in several megacities indicates to some degree that the development of commercial arbitration is imbalanced in China, but it is in such imbalance that several international arbitration centers will emerge.

### **3. The Development of Commercial Arbitration in China in the Context of COVID-19**

Despite the challenges and adverse effects brought by COVID-19, the Chinese commercial arbitration community has properly responded and made active explorations, with some positive development achieved.

#### **3.1. The System Construction of Chinese Arbitration Institutions Had Important Development**

During the epidemic, the Chinese arbitration community has explored the building of institutional mechanisms and accumulated some practical experience. Various arbitration institutions have summarized their work and put in place new norms and rules.

On August 26, 2020, on the 40th anniversary of the establishment of Shenzhen Special Economic Zone (SEZ), the forty-fourth meeting of the Standing Committee of the Sixth Shenzhen Municipal People's Congress deliberated on and passed the Regulations of the Shenzhen Court of International Arbitration (hereafter referred to as the Regulations). As the first local legislation in China targeted on arbitration institutions, the Regulations will further improve the juristic person governance structure of SCIA, further legalize the reform fruits of SCIA in the form of regulations, enhance the independence and credibility of SCIA, and enhance the parties' confidence in the rule of law in the SEZ and China's arbitration, in a bid to provide forceful system guarantee for building a stable, fair, transparent and predictable world-class business environment that practices the rule of law. In a certain sense, SCIA has further improved the juristic person governance structure implemented in the past three years. The Articles of Association of the SCIA has been fixed legally through local legislation, which has strengthened the predictability and stability of its future development.

At present, Hainan Arbitration Commission (HAC) and SAC are to implement similar or even more open measures. The above-mentioned institutions have also revised or formulated many arbitration regulations based on their experience, which has improved their arbitration quality. In addition, in accordance with the Measures for the Administration of Overseas Arbitration Institutions' Establishment of Business Departments in the China (Shanghai) Pilot Free Trade Zone Lin-Gang Special Area issued by Shanghai Municipal Bureau of Justice, starting from January 1, 2020, overseas arbitration institutions that meet the prescribed requirements may

register and establish business departments in the Special Area and other places by approval to conduct foreign-related arbitration business, which has brought a new atmosphere to China's international commercial arbitration landscape.

### **3.2. Online Arbitration Has Achieved Large-scale Development**

For being affected by the epidemic and limited people mobility, the on-site docketing and hearing of commercial arbitration cases is not only difficult, but also has the risk of epidemic spread. On how to break through the space barrier to meet the needs of epidemic prevention and control and settle commercial arbitration disputes, domestic and foreign arbitration institutions, like GZAC, have offered an almost unanimous answer, i.e., to implement online arbitration.

The "Internet plus arbitration" mode, or the online arbitration mode, is a response and solution to the arbitration procedure and substantive issues affected by the epidemic. The application of Internet technology has given new momentum to the innovative development of international arbitration. Such technology has made possible the online submission of materials to docket cases, identification and verification of arbitration participants, electronic service, online submission of evidence, written procedure, electronic pretrial conferences, online hearing, online synchronization of transcripts, promotion of online reconciliation (electronic back-to-back mediation), arbitration tribunals' online collegiate discussions and partial awards, electronic signatures. Audiovisual materials, electronic data and other evidence can be easily displayed on the electronic network platform. The "Internet plus arbitration" mode can ensure that all parties involved in the arbitration can docket cases and participate in the hearings online without leaving their homes. This not only reduces people gathering, but also greatly saves time and costs, thus minimizing the impact of the epidemic on arbitration procedures, and ensuring the steady and healthy development of arbitration.

SAC conducts online hearings on a popular WeChat applet "SAC Micro Arbitration", which can realize fast registration and login, ensures security and confidentiality by face recognition technology, uses electronized evidence to achieve cross-examination of up to 18 people on the same screen, and uses computer- and mobile-based Internet technology to achieve seamless connection of multiple terminals. It has also formulated the Instructions on Online Trials, in order to maximize the compliance and convenience of online arbitration, and enhance the experience of arbitration tribunals and the parties.

In order to ensure that the parties can docket cases quickly and remotely during the epidemic prevention and control stage, Nanning Arbitration Commission (NAC) has established an arbitration column on its WeChat official account. By following the account through their mobile phones, the parties can docket cases, submit arbitration applications, calculate arbitration fees, and inquire arbitrators' roster and use other functions on it.

Domestic arbitration institutions have summed up their practical experience and upgraded it to norms and rules, thereby making online arbitration more scientific and stable. SCIA, BJA, and SHA have formulated rules and guidelines on online case docketing and remote trial, which have greatly standardized online arbitration. In particular, GZAC has taken the lead in implementing online arbitration in China and shortly after that, taken more innovative initiatives to release the "Guangzhou Standard", which was the first online arbitration standard around the world. The first part of the recommended standards, i.e. the Hearing Standards, has been promulgated, while standards on evidence certification and arbitration procedure are in the process of research and formulation. The Hearing Standards cover the hardware, software, venue, digital security and other technical standards required for online hearings, and aim to guarantee the legality of online arbitration procedure, the safety and stability of system operation, and the standardization of document quality. After its formulation, the Guangzhou Standard has been supported and recognized by more than 100 arbitration institutions at home

and abroad, which has further improved China's influence on online arbitration and is an important contribution to international arbitration rulemaking.

Statistics show that in 2019, 40% of arbitration cases nationwide were settled through online arbitration. In 2020, 93% of cases before SCIA were docketed online; more than 6,000 cases out of the total 18,000 cases before GZAC in 2020 were settled online. It is foreseeable that in the post-epidemic era, due to economic and convenience considerations, the "Internet plus arbitration" mode will continue to be recognized and advocated by domestic and international commercial arbitration institutions. Online case docketing, video trials, teleconferences, and online materials submission and exchange will become the new normal among domestic and international commercial arbitration institutions.

### **3.3. China Arbitration Summit 2020 Was Successfully Held**

Despite the black swan event of COVID-19, the largest annual event in international arbitration, i.e., China Arbitration Summit, was held on September 22, 2020 as scheduled.

The summit was co-sponsored by China International Economic and Trade Arbitration Commission (CIETAC), the International Centre for Settlement of Investment Disputes (ICSID) under the World Bank, and All China Lawyers Association. Gao Yan, Chairperson of China Council for the Promotion of International Trade (CCPIT) attended the opening ceremony and delivered a welcome speech. Yang Wanming, Vice President of the Supreme People's Court and Li Chenggang, Assistant Minister of Commerce were invited to deliver speeches at the opening ceremony, which was presided over by Lu Pengqi, Vice Chairman of CCPIT.

Unlike previous years, the summit this year was held simultaneously online and offline. The main venue was still in Beijing, China. The summit was broadcast to the global audience through an online live broadcast platform for the first time. Over 1.4 million people from nearly 40 countries and regions, including representatives of major arbitration institutions, arbitrators, judges, scholars, lawyers and people from the business circle, watched the summit through the global live broadcast platform.

The epidemic has left a special mark on the summit, from the way of holding to the topics including the "Innovation and Development of Dispute Settlement During the Epidemic", "New Situation and New Challenges of International Dispute Settlement", "International Arbitration Cooperation and Epidemic Response in the Era of Belt and Road Initiative", "Innovative Development in Online Hearings and Arbitration".

Experts at the summit believed that with the new situation of economic globalization, the global spread of COVID-19, intensified trade and investment disputes, and changes and new challenges in international dispute settlement, arbitration, as an important way to settle international trade and investment disputes, is bound to play an important role in the current era. The international arbitration community should unite its efforts, strengthen international exchanges, deepen pragmatic cooperation, and adopt practical and effective countermeasures to make contributions to the stable development of the world economy.

### **3.4. Arbitration Propaganda Activities Are Flourishing in China**

The Arbitration Week of CIETAC has been held for more than a decade. Instead of being disturbed by the epidemic in 2020, it has been expanded by publicizing and introducing in depth the basic knowledge of arbitration, and has also gained some influence at home and abroad.

For example, BAC hosted 80 events on arbitration publicity and outreach activities in 2020 despite difficulties brought by the epidemic. Among them were 9 offline meetings and 17 online meetings. BAC also offered 54 online courses, covering more than 40 countries and regions and benefiting hundreds of thousands of people.

In addition, the annual event of SCIA, i.e., China Corporate Law Forum, has been held for 11 sessions, each of which was attended by more than 500 entrepreneurs, including more than 10 entrepreneurs from Fortune Global 500 companies.

Besides, the Yellow River Forum, Laoshan Forum, and “Arbitration Day” are being conducted in various places. Far from decreasing, publicity activities like these held in 2020 were even larger in scale, higher in quality, and more influential.

#### **4. Enlightenment from the Development of China’s Commercial Arbitration in the Context of COVID-19**

Despite the epidemic, China’s commercial arbitration field has made achievements. Lessons can be learnt from at least the following three aspects.

##### **4.1. A Stable and Orderly Society and the Comprehensive Practice of the Rule of Law Are the Prerequisites for A Country to Develop Arbitration, Especially in Times of Disasters**

The rule of law is a guarantee not only for maintaining social order and stability, but also for the smooth conduction of epidemic prevention and control work.

Social stability is a prerequisite for epidemic prevention and control and even for economic and social development. The lawful prevention, control and governance can effectively ensure that institutional advantages are better transformed into governance efficiency. The more severe and complex the epidemic situation is, the harder we must work to maintain social stability, legally and severely punish illegal and criminal acts that disrupt medical, epidemic prevention, market, and social order, and promptly tackle signs and trends of problems in epidemic prevention and control. China attaches great importance to the construction of the rule of law. In a critical period for the prevention and control of COVID-19 in 2020, the Supreme People’s Court, the Supreme People’s Procuratorate, the Ministry of Public Security, and the Ministry of Justice jointly formulated and issued the Opinions on Punishing Criminal and Illegal Activities that Hinder the Prevention and Control of Novel Coronavirus Pneumonia, to advance various prevention and control work on the track of the rule of law by applying the law-based thinking and approaches, effectively improve the level of and strictly regulate fair and civilized justice, and legally and severely punish illegal acts and crimes that hinder the prevention and control of the epidemic, so as to protect the lives, health and safety of the people and ensure a stable and orderly society.

On April 5, 2020, the State Administration for Market Regulation (SAMR) issued the Announcement on Supporting Anti-Monopoly Law Enforcement in Epidemic Prevention and Control and Resumption of Work and Production (hereinafter the Announcement) on its website, to severely, heavily and rapidly investigate and handle monopolistic acts that hinder epidemic prevention and control, resumption of work and production and the interests of consumers as legally required. The Announcement gives priority to investigation and handling of monopoly agreements reached and implemented among operators of prevention and control supplies and raw and auxiliary materials including masks, drugs, medical devices and disinfection-related products, public causes like water, electricity and gas supply, and other fields and areas closely related with people’s lives, on concerted price increases, limited production, market segmenting, united boycotting, fixing or limiting resale prices, as well as unfairly high prices, refusal to trade, restricting transactions, tying or attaching unreasonable transaction conditions, differential treatment and other abuses of market dominance, in a bid to create a market environment that encourages fair competition for the epidemic prevention and control and resumption of work and production and protect the interests of consumers.

#### **4.2. Make Full Use of High-tech Achievements and Internet Technology to Promote the Development of Arbitration**

The outbreak of the epidemic has restricted the flow of people, leading to the accumulation of a large number of arbitration cases which cannot be settled in time, catalyzing the development of online arbitration, and letting people see that the application of Internet technology has given new momentum for the innovative development of international commercial arbitration. The core difference between online and traditional arbitration is that the former uses the network as a medium, and the arbitration procedure including contract conclusion, arbitral applications, trials and awards, is conducted through the Internet.

Online arbitration has the following advantages: (1) Low fees. All links of online arbitration are carried out on the Internet through digital methods. Arbitration commissions and the parties need neither to print paper documents, and nor to travel a long way to attend the hearing. Therefore, it saves a lot of time and cost, and can significantly decrease arbitration fees. (2) High efficiency. Through the application of Internet technology, the arbitration procedure can be carried out online and instantaneously. Information transmission and communication have broken the limitations of time and space, allowing the participants to communicate quickly and fully, by saving unnecessary travel time and greatly shortening the trial time. (3) Convenient service. Traditional litigation and arbitration activities are restricted by geographic boundaries and working hours. In contrast, online arbitration enables the parties to participate at any time in any place, and has an expanded scope of cognizance and more convenient service.

With the continued development of technologies such as the Internet, blockchain and artificial intelligence (AI), online arbitration is no longer just moving the arbitration procedure online. Instead, with continuous technological breakthroughs, it has gradually shown a new development trend. (1) The service concept of arbitration institutions is changing. Online arbitration provides opportunities for small- and medium-sized arbitration institutions to enter the market. They can reform their operating mechanisms, change their service concepts, and provide high-quality arbitration services to the market, thereby occupying a place in the supply of public legal services. (2) Modern technology and arbitration are being integrated fully. The application of Internet technology enables real-time connection and communication between arbitration committees, arbitrators, and the parties; the popular mobile Internet provides technical and hardware support for arbitration service; electronic signature technology helps guarantee the subject's identity authentication; the application of blockchain technology in electronic data storage has overcome the shortcomings of electronic evidence that are easily tampered. The deep integration of modern technology and arbitration has enabled online arbitration to ensure fairness and maximize efficiency. (3) Arbitration services are more professional. Internet-related disputes are usually categorized and centralized. To better satisfy the parties' pursuit of fairness and efficiency, online arbitration must analyze the characteristics of different disputes and apply different arbitration procedures accordingly. This raises higher requirements for arbitrators. (4) Arbitration approaches tend to be intelligent. The scientific and professional development of arbitration has laid a foundation for the standardized processing of information in arbitration activities, while the application of AI technology can realize automatic processing in the entire arbitration procedure. In the future, whenever arbitration committees are inundated with cases, they may use AI technology to perform intelligent batch processing, to greatly enhance their arbitration efficiency and provide powerful arbitration services and guarantees for the effective prevention and settlement of contradictions.

Efforts should be made to actively develop online arbitration. It is necessary to strengthen the theoretical, institutional, and security research of online arbitration, and continuously ensure the legality and compliance of arbitration procedure in different jurisdictions. To meet the

needs of the development of new economic and business formats such as the Internet, it is necessary to rely on Internet-based financial technology, establish an online case management system and an arbitration platform that connects with e-commerce and Internet-based finance platforms, and research on and explore online and intelligent arbitration, to realize online and offline coordinated development. Efforts should also be made to formulate and improve Internet-related arbitration rules, clarify the cognizance of Internet-based arbitration cases, improve arbitration procedure and working procedure, and provide economic, convenient and efficient arbitration services. It is also important to study the construction of and strengthen the analysis and application of arbitration-related big data, promote the interconnection and intercommunication of data with relevant departments, play the unified role of the United Nations international conventions, promote the integrated development of international arbitration, and ensure the fairness and justice of international arbitration, so as to build a more stable, fair, transparent and predictable global governance environment.

#### **4.3. Give Full Play to the Traditional Thinking of Dispute Settlement, That Is, To Give Full Play to the Idea of “Valuing Harmony The Most”**

At present, the global epidemic has not been fully controlled, and the development of international arbitration is confronted with unprecedented opportunities and challenges. Only by comprehensively strengthening international solidarity and collaboration, and by gathering the wisdom and strength of everyone can crises be turned into opportunities to usher in innovations and breakthroughs in the development of international arbitration.

Harmony is not only part of the traditional Chinese culture, but also one of the goals of social justice. Harmony allows people to deal with problems calmly and efficiently. By incorporating harmony into the arbitration culture, pursuing it in the whole process of arbitration, and advocating it especially in the handling of cases that are difficult or have serious social and international influence, the parties will move from confrontation to dialogue through arbitration in a peaceful manner. By shaking hands and making peace, the parties can maximize their interests and achieve the goal of win-win.

Arbitration means equality and negotiation, which is not very solemn, but respectful. Instead of classifying high or low seats and regardless of social position, the procedure and rules of arbitration advocate equal exchanges. It brings the parties not only a harmonious and relaxed atmosphere, but also a spirit of equality, independence and dialogue, which is the core value of arbitration culture.

Arbitration is not confrontation, but tolerance, reconciliation and harmony. Incorporating the spirit of harmony into arbitration, especially international arbitration, can help settle disputes based on informal dialogues, which is humane and flexible. It also cares about the feelings of the parties, so that they will demonstrate more sincerity and trust, and promote the successful settlement of international commercial disputes.

### **Acknowledgments**

This article is sponsored by The National Social Science Fund of China for The Youth Scholars (Grant No. 21CFX087).

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