

Online Arbitration in India: Issues and Challenges

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INTRODUCTION

With the expansion of business due to globalization, there arise massive commercial disputes that need to be addressed. Alternative Dispute resolution (hereinafter, ADR) have come to rescue courts from massive pendency of cases. With the success of ADR across almost every Sector, dispute resolution needs to become more feasible to satisfy the needs demanded in the current scenario, which requires a faster and more flexible way of dispute resolution. Online Dispute resolution (hereinafter, ODR) aims to satisfy all such requirements. Countries like China have established institutions to settle E-commerce dispute online. The question arises whether or not India is ready to embrace such changes in dispute resolution.

ONLINE ARBITRATION

Online arbitration or E-Arbitration both the terms can be used interchangeably. Online arbitration is a hybrid of arbitration and technology. With the constantly changing lifestyle and the urge of humans to do better every day, the concept of online arbitration evolved. Online arbitration provides the parties to settle their disputes with ease. The disputes are resolved with the help of a neutral third party same as in the case of offline arbitration; the only difference lies in the way the disputes are resolved, that is, disputes are resolved virtually. In Online arbitration, the dispute is either wholly or partially resolved with the help of technology. It is mandatory for the parties, arbitrator and witnesses to take the use of an electronic device in an online arbitration.

Some people criticise online arbitration as in an online proceeding; much fraud can take place which can do more harm than good. However, on the other hand, fraud can be committed in an offline arbitration too relating to documentation, producing witnesses etc. this is not a very convincing point to discourage the practice of online arbitration as a whole.

ESSENTIALS OF AN E-ARBITRATION

1. E-agreement

Formation of the agreement is the first step towards submitting any dispute to online arbitration. The agreement must be exact and states all the details of the arbitration process. The UNCITRAL Model Law on

International Commercial Arbitration Article 7 (2)¹ recognises an arbitration agreement to be in the form of e-mail or letters communicated online but must provide for the record of the agreement.

The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards has witnessed worldwide success, Article II² of the convention, if interpreted liberally incorporates the exchange of E-mails as a valid arbitration agreement.

The Geneva Convention of 1961 also known as European Convention on International Commercial Arbitration, in Article 1.2(a) provides a broader meaning to the term arbitration agreement, and it can be ascertained that exchange of E-mails falls under the category of a valid arbitration agreement.

Article 6, 7 and 12 of the UNCITRAL Model Law on Electronic Commerce and Electronic Signatures³ focuses on the importance and the validity of the digital signature and further provides that digital signature will bear the same consequences as a hand-written signature.

From the above mention laws, it can be ascertained that the laws are provided to uphold the validity of electronic arbitration agreement.

Does this mean that by clicking on 'I Agree' that pops up on any website makes the person a party to the contract entered into between the website owner and the person clicking on it? The answer to the same has been provided by the US Court in the case of I. Lan Systems, Inc. v. Netscout Service Level Corp 2002, the judge strictly applied the basic rules of contract law and said if I Agree is clicked after an offer is given, then it implies that such an offer is accepted by the customer and therefore bound by the terms of the contract. However, the 'I Agree' button must be visible, and the terms containing Arbitral Clause must be highlighted for an agreement to be considered valid as held in Specht v. Netscape Communications Corp, 2001 and Lieschke, Jackson & Simon v. Real networks Inc., 2000 respectively.

2. Seat of Arbitration

It is a prerequisite to deciding a seat of arbitration as in online arbitration the parties only meet virtually, making it challenging to decide the seat. It is crucial to decide which laws will govern the agreement and also, the application of setting aside an award can be made only if it is made on some land, that is why it becomes necessary to decide the seat of arbitration. Article V 1(d) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, empowers the court to refuse the enforcement and recognition of the award if the arbitral procedure is not per the law of the country where the arbitration took place, thus making it mandatory to elect a seat of arbitration.

3. Electronic proceedings:

¹ https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf at P.3

² <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> at P.8

³ <https://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>

Two principles must be strictly adhered to in the e-arbitration proceedings, that is, due processes of law and maintaining confidentiality. Due processes of law refer to equal treatment of both the parties. Equal access to the document and equal chance of presenting the arguments must be given to both the parties. Confidentiality is an indispensable factor that is considered while opting for arbitration as a dispute resolution process. Arbitral award and the proceedings must not be available to any third party without the express consent of the parties.

The UNCITRAL Arbitration rules empower the Arbitrator under Article 24 and 25⁴ to administer evidence and organization of the proceedings. The validity of electronic evidence must be kept at par with hardcopy evidence as laid out in Article 5 of the UNCITRAL model law on electronic commerce⁵. The trustworthiness of any digital signature certificate, provided by the certification Authority, can be assessed by the arbitrator using the non-exhaustive list laid out in Article 10 of Model Law on Electronic Signatures.

4. Electronic award

The award so given by the arbitrator can be considered as original by applying his digital signature, and the same will be attested by certifying authority taking the guarantee of its authenticity. It would be absurd not to accept this document as an original electronic award. UNCITRAL Model Law on arbitration, make no indication of an original award, but simply require that the award must be in writing and that it be signed by the arbitrators.

WHY OPT FOR ONLINE ARBITRATION?

- Easy procedure: the preference is given to ADR is since it offers a simple procedure for adjudication of disputes. On the other hand, the court procedures are lengthy and tiring.
- Quick resolution of disputes: the dispute resolution through online means is self-paced, and therefore the outcome of the disagreement can be obtained quickly and easily.
- Inexpensive: ODR is cheaper than any other method because of non-requirement of the parties to meet in which saves time as well as the expenses of organizing a meeting and travelling to some other place to conduct the proceedings. The cost of the proceedings is shared by both the party or as specified in the agreement. When a matter is submitted to online arbitration, the significant cost involving dispute resolution is the arbitrator fees as there are no other expenses like that of involved in offline arbitration.

⁴ <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>

⁵ https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf at P.5

- Control over the process: online arbitration offers the parties a great deal of control over the process as the parties can decide the timing to conduct the meeting. Also, the laws that will govern the terms of the contract, who will adjudicate the matter, court jurisdiction etc. are also decided by the parties.
- Transparency: just like the party wants to know the reasoning of the judgement; it is self-evident that the parties seek transparency in the dispute resolution process. In Online Arbitration, every proceeding take place according to the party's suitability makes the proceeding more transparent to the parties.

HISTORY AND DEVELOPMENT OF ARBITRATION IN INDIA

Arbitration existed in India in an unintentional way when disputes were settled by panchayats. The first arbitration act, the Indian Arbitration Act, 1899, came into the picture during the British rule, which was only applicable to the presidency towns of the country. With the advent of time, new laws came the Arbitration Act, 1940, which consolidated the older laws. To deal with foreign awards, different legislations were enacted, i.e., the Arbitration (Protocol) and Convention) Act, 1937 (dealing with awards under the Geneva Protocol and Convention), and the Foreign Awards (Recognition and Enforcement) Act, 1961 (dealing with foreign awards under the New York Convention).

With the passage of time and the new Economic policy took over, the government felt the need to amend the arbitration laws, that is when, in 1996, arbitration and conciliation act was introduced. The act was sculpted following the UNCITRAL Model Law on International Commercial Arbitration to encourage ADR in India and to reduce judicial intervention. With increasing arbitration in the country, the problem of judicial intervention could not be dodged which lead to delays in proceedings, finally two decades later, the arbitration amendment act, 2015 came which seeks to address the lacuna in the earlier enacted law. The amendment was introduced with the motive to emerge as an arbitration-friendly jurisdiction, and judicial intervention was reduced to minimal, courts were granted powers to provide interim measures, but the amendment failed to ease the process for Ad-hoc arbitration as compared to institutional-based arbitration.

To address the issues in the arbitration amendment act, 2015, ministry of law and justice set up a high-level committee to look into the matter. After the submission of the report by the committee, new regulations were introduced in the Arbitration and conciliation amendment act, 2019. It was further provided that 2019 Amendments will apply only to arbitral proceedings which commence after October 23, 2015 (the date of coming into effect of the 2015 Amendments), and to court proceedings arising from such arbitral proceedings.

In the case of BCCI V. Kochi⁶, the interpretation of section 26 of the arbitration and conciliation Amendment Act, 2015 was in question whether the act would apply prospectively, i.e., after October 23, 2015. Later, 2019

⁶ (2018) 6 SCC287

amendment act cleared the air of confusion and struck down section 26 and upheld Section 87 of the 2019 amendment act which provided that (unless the parties agreed otherwise) the 2015 Amendments would apply prospectively to all arbitral and court proceedings commenced after October 23, 2015, and not otherwise.

Later in the case of Hindustan Construction Company v. Union of India⁷, section 87 was struck down by the supreme court as being arbitrary and unconstitutional. The situation is that the BCCI rule will continue to apply in proceedings initiated after October 23, 2015.

ONLINE ARBITRATION IN INDIA

With the outbreak of COVID-19 pandemic, even the court proceedings have been shifted to be conducted online. The idea of virtual courts has become the new normal. Similarly, for private matters that were earlier being resolved by arbitration have started using technology for the dispute settlement. In India, online arbitration to marks its place in the Indian legal market requires the backing of both arbitration and conciliation act, 1996 and information Technology act, 2000 (hereinafter, IT Act) which means that both the acts have to be interpreted together. Platforms such as a center for Centre for Alternate Dispute Resolution Excellence (CADRE), Sama, center for online dispute resolution (CODR), presolv360 etc. have come up to assist parties in resolving disputes online.

Arbitration and online arbitration differ mainly on the ground that all the processes in an online arbitration take place virtually, from signing a contract to getting the arbitral award. The legal recognition to entering in a contract virtually was given by the Hon'ble Supreme Court in the case of Trimex International FZE Ltd V. Vedanta aluminum Ltd.⁸; it was held that if the intention of the parties to arbitrate any dispute can be assessed from the offer and acceptance, the only essential is that the parties must specify the technology to be used in dispute resolution, the seat of arbitration, laws governing the contract, court jurisdiction and the type of arbitration, ad-hoc or institutional. The online arbitration agreement is a prerequisite for online dispute settlement as the parties do not meet personally, every detail of the arbitration must be mentioned, without any ambiguity, in the agreement and must conform to the requirement set out under section 7 of the Arbitration Act.

The Arbitration proceedings are conducted virtually, and therefore, the witnesses and evidence are also produced online. The Indian legal system is well provided with the laws that recognise electronic documents and signatures as evidence as provided under section 4 and 5 of the IT act,2000 and section 65B of the Indian Evidence Act, 1872.

⁷ (2019) SCC Online SC1520

⁸(2010) 3 SCC 1

Finally, an arbitral award can be rendered to the party using digital signature of the arbitrator which is a requirement of a valid arbitral agreement and can be mailed to the parties or later be sent via post to the parties.

CHALLENGES IN THE GROWTH OF ONLINE ARBITRATION IN INDIA

India is backed by strong laws that govern all the aspect of Online Arbitration; still, it is not considered as a preferred method of dispute resolution; it is because of the following reasons:

Lack of awareness: people in rural areas do not even know that there are alternative methods of dispute resolution rather than knocking the door of courts. They do not know the meaning of ADR; petty disputes are being solved by the Sarpanch of the village, so they do practice ADR at a smaller level, but they do not have the knowledge that the same could be practised at a broader level.

Lack of Trust and Confidence: people those who know ADR are hesitant to try this technique of dispute resolution because they fear the authenticity of the process. People still believe that disputes cannot be solved without the parties seeing each other physically.

Lack of Infrastructure: there are very few institutions that provide a platform for ODR. This is a significant backdrop of the development of ODR in the country because even if people choose to opt for ODR, there are very fewer platforms to seek help from. Also, the institutional rules are required for amicable settlement of disputes.

Lack of Access to technology: there is the unavailability of technology in many rural areas of the country, this is because of the uneven distribution of technological development.

Present laws do not suffice: the laws which India has today are enough to administer an online arbitration proceeding but are not enough to protect the data of the clients as the very primary reason for opting arbitration is maintaining confidentiality.

SUGGESTIONS FOR THE PROMOTION OF ONLINE ARBITRATION

46% of the cases in India involve government bodies or department, the department of justice has gathered data of all the platforms available to settle disputes outside the court, thus encouraging alternative dispute resolution mechanisms⁹. This proves that even the matters of government are favoured to be resolved through ODR. On June 6, 2020, NITI Ayog, in collaboration with Agami and Omidyar network India held a virtual meeting with all its significant stakeholders to promote the concept of online dispute resolution in India.

⁹ <https://doj.gov.in/page/online-dispute-resolution-through-mediation-arbitration-conciliation-etc>

The process of dispute resolution outside the court must be made mandatory and not voluntary. This will reduce the pendency of cases in courts, and also the parties would be able to seek justice quickly and in an inexpensive way.

India is in dire need to enact a data protection act that must aim to strike a balance between the privacy of the citizens and boosting ODR in the country.

Awareness programs must be conducted in order to spread the effectiveness involved in ODR and to encourage people to opt for this.

FUTURE OF ONLINE ARBITRATION IN INDIA

ODR and Online Arbitration have a great deal of essentialness in the current existence where innovation drives pretty much every second of our lives. With the occurrence of the pandemic, people were bound to accept these technological changes and have also embraced it. The first step towards accepting online arbitration as a mode of ODR has already been taken by the citizens and the government, as discussed above. With more online businesses flourishing in India, online resolution of disputes is the need of the hour due to its faster and cheaper process. Not only ODR will help in quicker dispute settlement but also relieve the court of it being tarnished with a plethora of cases. Although in India, there is a scarcity to necessary and reasonable access to technology and internet which shapes the foundation of any online dispute mechanism, the number of internet users has risen tremendously in India which shows that now many people have access to the technology. The day is not far away when India will accept ODR as an ordinary first-hand way of resolving disputes.

CONCLUSION

Humans have inculcated technology as an integral part of their lives. One such technological advancement is ODR which will also be accepted and practised by the people in a similar way. ODR gives the parties full control over the process of dispute resolution, which is a crucial point for this method to emerge as a successful means of dispute resolution.

Even though the Indian legal system is sufficient with laws that govern all the aspects of online arbitration, still online arbitration is not very prevalent in India. It is also because of the fact that people still believe in the idea that justice will only be provided through the court. Various steps must be taken to promote Online arbitration as a technique for dispute resolution one most crucial step is to spread awareness amongst people for alternative dispute resolution as it all boils down to one thing only, those who do not adapt themselves to the changes are usually left behind.