



CYBER ARBITRATION: THE ROAD AHEAD AND CHALLENGES

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This paper endeavours an attempt to analyse the progress and challenges relating to cyber arbitration in the Indian scenario.

Keywords: Cyber Arbitration, Indian Arbitration, ODR, Judicial Analysis.

*“At all events, arbitration is more rational, just, and humane than the resort to sword”
-Richard Cobden*

The advent and rapid advancement in information technology has contributed to a transformation in the conventional arbitration practices. This has resulted in an escalation of creation and conclusion of arbitration agreements over the internet and thus has made popular, the emerging concept of cyber arbitration. Cyber arbitration is a mechanism that employs technology to facilitate disputes between the parties to a dispute. It is also known as virtual or online arbitration. However, cyber arbitration is still in the budding stage in India and not many segments of the population are aware of the undeniable advantages and benefits of online arbitration to the participating parties in the dispute.

Therefore the focus of this paper will be:

1. The advent of cyber arbitration in India
2. The analysis of the Indian legal framework and comparison at a global level
3. The arbitral proceedings in the online system of arbitration
4. Challenges to Cyber Arbitration
5. Judicial Precedents
6. Conclusion
7. Suggestions

1. THE ADVENT OF CYBER ARBITRATION IN INDIA

Technological development is significantly overhauling the traditional methods of dispute settlement and electronic media to sort out disputes are rising and will become the future of dispute settlement-if it is channeled in a proper manner. Technological advancements have enabled us to tackle many disputes in the past and cyberspace with its endless possibilities has brought in a new dimension to the regime of international commercial arbitration.¹

1.1. Definition:

Online Dispute Resolution (ODR) “refers to a wide class of alternate dispute resolution processes that take advantage of the availability and increasing development of internet technology.”² Farah defined ‘Online Dispute Resolution’ to mean utilizing information technology to carry out alternative dispute resolution³ Zondag and Lodder defined online dispute resolution as using internet for alternative dispute

¹K. Lynch, “*The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*”, Kluwer law International, pg. 345 (2003).

²Al Nensiel, “Online Dispute Resolution: A Canada-United States Initiative” (2006) 32 Can.-U.S. L.J. 313.

³ Farah C, Critical analysis of online dispute resolution, Computer Telecommunications Law Review, 11(4), 123-128.



resolution, constructing computer assisted dispute resolution system by developing generic language to analyse information exchange in conflict discourse.⁴

Schiavetta explained that the online dispute resolution comprises of a process to resolve dispute exclusively online and also other dispute resolution process that use internet.⁵ According to Katsh and Rifkin, the three important factors, namely convenience, trust and expertise forms the essence of ODR.

1.2. Background & Characteristics:

According to the E Bay Census Guide, 2009, India has experienced a broad shift in e-commerce activity and online shopping has gained wide acceptance. The rising complexities in nature of disputes at a far greater pace than ever before, due to their cross-border and cross-culture character is a result of inter alia, the increasing use of internet worldwide. Hence, the global arena is witnessing a departure from traditional methods of dispute resolution to Online Dispute Resolution (hereinafter "ODR") in its various flavors. It is also a positive judicial reform.

A number of arbitration institutes like WIPO (World Intellectual Property Organization), ICC, American Arbitration Institute already provide a platform for arbitration proceedings to be carried out online. Others exploring the potential for the same are for e.g. Virtual Court, Online Resolution, e-

courts etc. In India, National Internet Exchange of India (NIXI), Perry4law and PTLB provide world reputed services in ADR and ODR (especially in domain name resolution).⁶

With the advent of information technology, momentous changes can be seen in the conventional arbitral procedures. In this phase of significant transformation, there is an escalation in the number of arbitration agreements concluded over the internet and the procedures conducted with the help of VoIP (Voice over Internet Protocol) or video-conferencing. The cost-effectiveness and time-efficiency of online or cyber arbitration is undeniable, which is why international arbitrators want to conduct proceedings and issue arbitral awards, in an electronic form. To serve this purpose many arbitration institutions are already providing the requisite platform to perform such proceedings.

2. THE ANALYSIS OF THE INDIAN LEGAL FRAMEWORK AND COMPARISON AT A GLOBAL LEVEL

The majority of legal studies on online arbitration agree that, neither law, nor arbitral principles, prevent arbitration from taking place online. Arbitration being a contractual agreement should be carried out within a regulatory framework to avoid challenges for the weaker parties. This, therefore, necessitates a legal examination of multiple layers of regulations including international conventions, bilateral treaties,

⁴ International Review of Law, Computer and Technology, 21(2), 191-205.

⁵Article 6 of European Convention of Human Rights pursuant to case law of European Court of Human Rights, Journal of Information Law and Technology, 2004 (1) JILT.

⁶ <https://www.lawteacher.net/free-law-essays/commercial-law/cyber-arbitration-and-effective-dispute-resolution-commercial-law-essay.php#ftn5>.



“soft” or model laws and national arbitration law.

The basic idea is to facilitate dispute settlement rather than executing and enforcing an overarching international legal order. One major reason for this character of international adjudication is the lack of authority granted to international courts reflected in the most meagre and rare submission of states to jurisdiction according to Article 36(2) of the ICJ Statute. No enforcement of judgments against the will of the judgment debtor may be expected. The other major reason is that international law’s incoherent structure is more apt and ready to settle disputes than to enforce coherent doctrines rarely endorsed by the states as the ultimate standard of their international behaviour.

ADR is now a growing and accepted tool of reform in dispute management in American and European commercial communities. ADR can be considered as a co-operative problem-solving system. ADR is an alternative to adjudication, for example, court annexed arbitration or court annexed conciliation, but it may be complementary to the court procedures. There was a time when civil litigation was considered to be time consuming and costly method of dispensing justice and commercial people preferred to resort to arbitration. Now ADR has become popular and desirable in USA, UK, Canada, Hong Kong and Australia as it is effective, cost efficient and speedy form of dispute resolution. It has been observed that ADR is able to produce better outcomes than the traditional courts because firstly different kinds of disputes may require different kind of approaches which may perhaps be not available in the courts. Second factor for resorting ADR techniques to resolve the

disputes is direct involvement and intensive participation by the parties in the negotiation to arrive at a settlement. Third advantage of accepting ADR is the intervention of a skilled neutral Adviser which is always very helpful in arriving at a settlement.

The increasing growth of global trade and the delay in disposal of cases in courts under the normal system in several countries made it imperative to have the perception of an Alternative Dispute Resolution System (ADRS), more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the UNCITRAL Model Law of International Commercial Arbitration and since then a number of countries has given recognition to that model in their respective Legislative systems. An important feature of the said model is that it has harmonized the concept of arbitration and conciliation in order to designate it for universal application.

2.1. Treaties And Conventions:

- Geneva Protocol on Arbitration Clauses, 1923
- Geneva Convention on the Execution of Foreign Arbitral Awards, 1927
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958
- Recommendation regarding Interpretation of Article II (2) and Article VII (1) of the New York Convention, 2006
- European Convention on International Commercial Arbitration (Geneva Convention), 1961
- Agreement relating on Application of the European Convention on International



Commercial Arbitration (Paris Agreement), 1962

- Convention on the Settlement of Investment Disputes Between States And Nationals of Other States (Washington or ICSID Convention), 1965
- Convention Providing a Uniform Law on Arbitration (Strasbourg Convention), 1966
- Convention on the Settlement by Arbitration of Civil Law Disputes resulting from Relations of Economic And Scientific Technical Cooperation (Moscow Convention), 1972
- Inter- American Convention on International Commercial Arbitration (Panama Convention), 1975
- UNCITRAL Arbitration Rules, 1976
- UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use, 2002.

2.2. Techno Legal Online Dispute Resolution (ODR) Centre Of India

Therefore, the Indian Legal Framework has drawn various inspiration from the already existing global level conventions and therefore recently come up with Techno Legal Online Dispute Resolution (ODR) Centre Of India (TLCEODRI) to promote and use Online Dispute Resolution (ODR) in India for various dispute resolution purposes. TLCEODRI has also drafted an "ODR Clause" that they can use in their agreements, contracts, etc. We have also launched a dedicated blog for ODR training along with an ODR discussion forum where techno legal aspects would be discussed for the first time in ODR's history. ODR experts and specialists wishing to enroll with TLCEODRI can also see the empanelment procedure in this regard. Above all, TLCEODRI has launched the first ever

techno legal ODR portal of India that is covering vast dispute resolution fields. The portal is known as Online Disputes Resolution & Cyber Arbitration Portal of TLCEODRI where ODR is used to resolve dispute of national and international stakeholders.

3. THE ARBITRAL PROCEEDINGS IN ONLINE SYSTEM OF ARBITRATION

Online arbitration is a branch of dispute resolution, which uses technology to facilitate the resolution of disputes between the parties. Online arbitration is also termed as cyber-arbitration, cybitration, cyberspace arbitration, virtual arbitration, electronic arbitration or arbitration online techniques. The following are its components of importance:

- (i) Arbitration Agreement
- (ii) Arbitration Proceedings
- (iii) Arbitration Award.

(i) Arbitration Agreement:

The UNCITRAL Model Law ("MAL"), the New York Convention on Recognition and Enforcement of arbitral Award ("New York Convention"), the European Convention and the Turkish International Arbitration Law all require the agreement to be in writing, however, they do not have a restriction as to the form of arbitration agreement. A step further has been taken under Article 4 of the Turkish International Arbitration Law by validating the arbitration agreement executed by electronic means.⁷

⁷Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York [1958] art II(2); European Convention on International Commercial Arbitration [1961] I(2).



In India, Arbitration and Conciliation Act, 1996 which is drafted on the lines of the "MAL", does not exclude technological developments. It thus becomes important that an online arbitration clause must pass the test of Section 7 of the Act to be valid. Under Section 7, an agreement shall be in writing if it is contained in exchange of letters, telex, telegrams or "other means of telecommunication" which should signify an active assent by both parties. It can be argued convincingly that an exchange of email can be equated to an exchange of telegram. Despite the existence of certain important technical distinctions between telegrams and e-mails, it is not impossible to replicate the critical features of an exchange of telegrams through an appropriate use of e-mail. It was held by the Hon'ble Supreme Court of India that electronic communication provides a required record of the agreement.

This uncertainty can now be securely departed with, after the enactment of the Information Technology Act. Section 4 of the Information Technology Act, 2000 renders legal recognition of electronic transfer of communication which is admissible as evidence. Using electronic signatures in an arbitration agreement can further help protect the parties. The Information Technology Act, 2000, under Section 5, identifies electronic records and digital signatures.⁸

⁸Section 4: Legal recognition of electronic records.- Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

To conclude, under the existing legal framework, an arbitration agreement accomplished by electronic communication is admissible and can be fully effective if it is meticulously drafted within the structure of the necessary legal guidelines.

(ii)Arbitral Proceeding:

Traditionally, arbitration relied on meetings of arbitrators and parties appearing in person or through duly authorized representatives. Now, that the Internet encourages remote dispute resolution, and physical meetings are more and more often eliminated, or more accurately replaced by diverse electronic exchange.

The parties to an arbitral proceeding are empowered to determine the rules of procedure. They also have the right to decide on the seat of arbitration and the date of commencement of the proceedings. On the basis of that fundamental principle of arbitration law, it is possible to "adapt the procedure to the electronic arena". Even so, such an online proceeding has to be according to the general principles of arbitral law i.e. the parties have to be treated equally and they should be given full opportunity to present their case. For example if one of the parties lacks the technical know-how of computers and the internet, it would be wrong to conduct an online arbitration.

(iii)Arbitral Award:

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- (a) rendered or made available in an electronic form; and
 - (b) accessible so as to be usable for a subsequent reference.



The issues with regard to awards if an award issued online after conducting an online arbitration can be enforced by national courts within the existing legislative framework was a discussion in the NYC, which implied that it merely requires a party seeking enforcement to furnish the duly authenticated original award or a duly certified copy thereof. The question is whether requirement for 'an original' can be satisfied by an electronic file as it would be difficult to define the original of such an electronic file and also considering the fact that it is easy to replicate it. The answer to this question can be found in Article 8 of the UNCITRAL Model Law on Electronic Commerce, which explicitly states that a requirement to present information in its original form can be met by an electronic data message.

The Arbitration and Conciliation Act, 1996 requires an award to be in writing and to be signed by the arbitral tribunal. A combined reading of section 3, 5 and 15 of the Information Technology Act, 2000 is sufficient to suggest that 'digital signatures' can provide for both authenticity and integrity, they can serve the purpose of a handwritten signature.

Section 89 of the Code of Civil Procedure (the Code), in its original form related to arbitration proceedings which was annulled with the enactment of the Arbitration Act, 1940. The new Section 89 and the related rules have now been introduced in the CPC (Amendment) Act, 1999. The said section illustrates that wherever, in the opinion of the court, there exists an element of settlement between the parties, the court

shall refer the same for various forms of ADR.⁹

A number of arbitration institutions have already opened the possibility to perform arbitral proceedings online. They have made an effort to either acclimatize their existing arbitration rules to the online environment, or to set up new sets of rules for online arbitration. The legal framework for online arbitration requires multiple layers of regulation at different level. The international commercial arbitration not only encompasses the institutional rules of arbitration and private contractual agreements but also international conventions, bilateral treaties, model laws (such as UNCITRAL model laws) and national arbitration laws. All these aspects need to be taken care of even in online arbitration.

4. CHALLENGES TO CYBER ARBITRATION

Every system has its own advantages and disadvantages. Though cyber arbitration has facilitated smooth and prompt resolution of disputes between parties across nations, it has its own cons.

Both the parties sitting together with a neutral person acting as their arbitrator sometimes proves beneficial as the parties will be able to understand each other in a much clearer manner which may not be possible in cyberspace, even though both the parties are sitting opposite each other. Another disadvantage is accessibility of online arbitration when in many countries;

⁹*Grid Corpn. of Orissa Ltd. V. AES Corpn* 2006 134 CompCas 305 Orissa



use of Internet is banned or is highly restricted.¹⁰

One more glaring disadvantage is that even though online arbitration can reduce the overall cost of the process, but the up-front and continuing fees or the initiation fees is very high. The cost to start an online proceeding can be high and sometimes when a lot of disturbance occurs in cyberspace, then highly intricate and complex machines have to be purchased which in no way can reduce the cost of the arbitration.¹¹

5. JUDICIAL PRECEDENTS

In the leading case of *State of Maharashtra v. Dr.Praful B. Desai*¹², Hon'ble Supreme Court held that video-conferencing could be resorted to for the purpose of taking evidence of a witness.

The arbitration agreement entered into between the parties by exchange of emails through no formal agreement in writing signed by the parties is valid and enforceable as the validity of such agreements is upheld by Hon'ble Supreme Court of India in the matter of "*Shakti Bhog Foods Ltd. Vs. Kola Shipping Ltd.*"¹³ and "*Trimex International FZE Ltd. Vs. Vedanta Aluminum Ltd.*"

In *Grid Corporation of Orissa Ltd. vs. AES Corporation*¹⁴, the Supreme Court held- "when an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that

the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties".

6. CONCLUSION

The combined effect of IT Act 2000 and Arbitration and Conciliation Act, 1996 gives legal recognition to the Cyber/Online Arbitration in India. The emergence of cyber arbitration is no doubt more expeditious and useful than traditional arbitration practice. However, as pointed herein above, it too faces some techno-legal issues. In order to make cyber arbitration a primary mode of amicable settlement of disputes, these issues need to be addressed by the state authorities, business entities and arbitral institutions.

7. SUGGESTIONS

- Promotion and development of institutional cyber arbitration.
- Developing the curriculum and training involving techno- legal aspects of cyber arbitration.
- Cyber threats and cyber security awareness.
- Promoting faster, affordable and interruption free web services.
- Enacting a comprehensive national as well as international data protection statute.

¹⁰ Ponte, Lucille M. & Cavenagh, Thomas D., "*Cyberjustice: Online Dispute Resolution (ODR) for E-commerce*", (2005).

¹¹ Public citizen, protecting health, safety and democracy, www.citizen.org, last accessed on September 27, 2015.

¹² (2003) 4 SCC, 601.

¹³ AIR 2009 SC 12; (2010) 3 SCC 1.

¹⁴ AIR 2002 SC 3435