



## IMPACT OF COVID 19 ON ARBITRATION PROCEEDINGS; ONLINE DISPUTE RESOLUTION A WAY FORWARD

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### INTRODUCTION

Coronavirus has been asserted as a global pandemic by the World Health Organization. It has impacted the lives of people all over the globe. In a way, it has put a haul in people's life. The world is staggering under the impact of Covid-19, a global pandemic that has caused lockdowns in many countries. With the outbreak showing absolutely no signs of improving, the worldwide commotion in all aspects of life seems set to continue. The legal system of India is no different including the Alternate Dispute Resolution Mechanism for resolving disputes, which has also been adversely affected. Even post-pandemic the Indian judiciary was overburdened with a mammoth of cases, which let people reevaluate their decision of resolving their disputes via alternate dispute resolution. The process and the idea of resolving disputes were still in the development stage. The process was in the initial stages of gaining the trust of people. Then the pandemic took place. The whole country was in complete lockdown, mandating the social distancing norms, less gathering of people. Even if we keep in mind the current situation of India, it's in the unlocking stage people have to maintain social distance. The Indian courts have started conducting the proceedings through video conferencing in order to avoid people to people contact and taking up only urgent matters. Whereas the arbitral proceeding which is usually known for their cost-effective and speedy resolutions the

ongoing proceedings were abruptly and so was the enforcement of arbitral awards. The basic aim of writing this paper is to express our viewpoints on how this coronavirus pandemic has impacted the arbitral proceeding and evaluating the process of online dispute resolution. A comparative study of arbitration institutions across the globe.

### BACKGROUND

As, discussed previously the number of cases of COVID-19, disease which is caused by the virus named SARS-CoV-2 has been increasing globally. The Indian judiciary as well the alternate dispute resolution methods are not impacted.

The Supreme Court of India, taking suo moto cognizance of the hardships faced by litigants throughout the country, on account of the coronavirus with respect to the period of limitation under diverse laws passed an order dated March 23, 2020. It was held by the apex court that the period of limitation in all proceedings before any Court or any Tribunal would stand extended as per the order of March 15, 2020, until any further orders are passed by the court. This ensured that the ongoing proceedings are not impacted anyhow by the limitation period. The Indian Judiciary started taking up important matters via video conferencing. They even started with e filing methods.

On the other hand, when we talk about ADR proceedings;

The Indian Council of Arbitration (ICA) is an eminent arbitral institution in India directing the conduct of arbitration proceedings including international commercial arbitration. The Indian Council of Arbitration has been set up through the initiatives of the



Government of India in order to handle a variety of arbitration cases. The ICA has framed and embraced the International Commercial Arbitration Rules which administers international commercial arbitration carried out by the ICA and it serves as a model to other arbitral institutions as well.

The pending arbitration proceedings where the strict timeline period is expiring within the lockdown period as mandated by the Government of India may take a resolution to Section 29A for extension of time as and when the courts of law reopen.

Further, as per the direction of the Hon'ble Supreme Court order dated March 23, 2020, which stated that the statutory timelines for filing pleadings as well as the conduct of all other proceedings would be extended and may be raised in the application for an extension being filed. This order is applicable to all Courts and Tribunals which includes also Arbitral Tribunal. Taking in mind the increasing restrictions day by day and complete lockdown in the country, some arbitral proceedings, which are of urgent nature, may be conducted virtually. Section 19 of the Arbitration & Conciliation Act, 1996 states that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 nor the Indian Evidence Act, 1872. We are aware that the parties to the arbitration proceeding or the Arbitral Tribunal may decide on the procedure to be followed in the conduct of such arbitration proceedings it is one of the advantages of the processes of ADR.

While the Arbitration & Conciliation Act, 1996 has no mention for the conduct of arbitration proceedings through video conferencing, Section 19 certainly gives

power to the Arbitral Tribunal to allow the same. The Arbitral Tribunal has the power to direct the parties to the arbitration proceedings to file pleadings through electronic mail and conduct proceedings through the means of video conferences keeping in mind social distancing norms with minimal loss of productivity and conducting the proceedings with efficiency and effectiveness.

Arbitral Tribunals in order to keep up with the changing and dynamic technology and the strict statutory timelines enumerated in the Arbitration & Conciliation Act, 1996 may even resort to video conferencing in general circumstances for convenience as well as cost-effectiveness of the proceedings. This method would be a lot more successful in the long run.

#### **THE CONCEPT OF ODR (ONLINE DISPUTE RESOLUTION)**

In late 1990, when people started to use emails and started communicating through the Internet, it is that era when accessing the Internet was becoming easily available. The dispute resolution began through online mode. Online dispute resolution resolves online communication disputes and offline disputes also. ODR has a mechanism for dispute resolution which involves following steps- firstly, one party approaches an ODR firm then next step, the firm reaches out to the other party then if both parties agree to the arbitration rules, an arbiter is appointed. Further, a timestamped information is sent via Email & WhatsApp then the interaction takes place online or through telephonic conversation. Later, a verdict is given within a month.



For assisted online dispute resolution, the parties in dispute are brought together by a mediator to resolve the matter. The mediator communicates mostly through emails and the disputed parties can access each other's statements. The mediator endeavours to reach the acceptable terms for parties by resolving their issue. Communication through videoconferencing has become a lot more convenient these days due to advanced technology.

Online Dispute Resolution, or ODR, it is basically a branch of dispute resolution which performs resolution of disputes using Information and Communication Technology. It is the modern complement of Alternative Dispute Resolution (ADR) mechanisms like mediation, arbitration, negotiation, or a hybrid procedure. This evolving modern approach gives the power to disputing parties to decide how they want their disputes to be resolved, and the use of technology aids the entire process, thus making it convenient, cost-effective, speedy, effective and, efficient.

ODR has wide application and can be used as a mechanism to resolve a wide variety of disputes varying from simple civil disputes to even certain compoundable criminal matters. The use of ODR in India is at an initial stage and is starting to gain reputation day by day. A collaborated reading and interpretation of the Arbitration and Conciliation Act, 1996, Information Technology Act, 2000, and Indian Evidence Act, 1872 does not only make ODR legally and technically practicable, but also helps overpower jurisdictional issues, eradicate geographical barriers, mechanize executive tasks, enrich the efficiency of professionals, promote eco-

friendly processes, and finally, pass a speedy, economical and cost-effective solution to disputes.

Recently, the Supreme Court of India in a suo moto writ petition named 'Expeditious trial of cases under Section 138 of N. I. Act, 1881', took into consideration the observations in *Meters and Instruments Private Limited and anr. v. Kanchan Mehta*,<sup>1</sup> that

*"Use of modern technology needs to be considered not only for paperless courts but also to reduce the overcrowding of courts. There appears to need to consider categories of cases that can be partly or entirely concluded "online" without the physical presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated."*

#### **DISPUTE RESOLUTION METHODS**

Online Dispute Resolution can be seen as an online same as ADR as it majorly involves the use of negotiation, mediation, or arbitration for dispute resolution.

- Synchronous ODR is a method of dispute resolution where the parties exchange dialogues with each other in real-time by using various video-conferencing applications some of which would be discussed below
- The asynchronous form is where communication is not conducted in real-time but via email or other such communication applications in the form of written communications.
- Online Mediation is coming out to be the most used form of dispute resolution. Usually, online mediation commences with

<sup>1</sup> (2018) 1 SCC 560.



an exchange of emails between parties that contain basic information about the proceedings followed by virtual meetings which would be conducted in the chat rooms.

- Electronic Arbitration is an underutilized method of online dispute resolution but it usually cover-up the process up to a certain extent.

Every operable method of ODR is unique and efficient in its own way and the beauty is that it can be customized as per the needs of the parties.

*In the case, **Shakti Bhog Food Ltd. v. Kola Shipping Ltd.**<sup>2</sup>, it was held that communication and acceptance by telex, telegram and other modes of communication have been accepted as valid for communication.*

### **ODR PLATFORMS**

There has been a shift in the pattern of resolving disputes which can be established as more and more ODR platforms have become possible in the country facilitating different kinds of dispute resolution for various national and international companies. These ODR platforms accustomed to an easy process of dispute resolution by conjoining the already existing process of ADR with dynamic technology, making the process altogether feasible and time convenient.

- **Centre for Alternate Dispute Resolution Excellence** is a website based platform formed in order to conduct online dispute resolution. The basic process is First, one party approaches the platform which then in return contacts the opposite party. If both the parties acquiesce then an arbitrator is appointed and time-stamped indications are sent via e-mails or WhatsApp. Usually, in this process, the parties do not meet face to

face keeping in mind the social distancing norms but they make contact electronically via video calls. The decisions/awards that are issued are legally binding given within 20-25 days of time.

- **SAMA** is another ODR platform that provides easy access to high-quality ADR service providers and gives assistance to people in order to resolve their disputes online.
- **Centre for Online Dispute Resolution** stands itself as an institution that would administer cases online end to end.
- **AGAMI** is a non-profit ODR conducting platform that seeks to form an improved system of law and justice by providing time-efficient and feasible dispute resolution methods.

### **KEY CONSIDERATIONS FOR VIRTUAL HEARINGS**

*1. Developing best methods for a **virtual hearing**:* If managed and implemented properly and inappropriate disputes, virtual hearings can save a great amount of time and costs. As a matter of practicality and proper planning, stakeholders might think to consider the following factors while opting for virtual hearings:

- a. Achievability to organize a virtual hearing – evaluating the number of participants, the participants' access to technology, time-zone differences, and the parties' ability and likeliness to present their case virtually;
- b. Whether any directives or procedures (including security measures) are to be embraced;
- c. Whether there are any concerns relating to data privacy;
- d. Whether any specific communication procedure has to be followed;

<sup>2</sup> (2009) 2 SCC 134.





- e. The procedure for the choosing of an online platform;
- f. Revisiting the appropriate timeline of the oral hearing;
- g. The order of presentation and time management between the parties;
- h. The speaking decorum (for example, identifying oneself before speaking and exploring means to ensure that participants do not talk over one another for the successful conduct of the proceedings);
- i. The proper format for e-bundles (Submissions);
- j. Whether a third-party is needed to host documents;
- k. Predetermining the mode for taking of evidence and how objections may be made;
- l. Planning for session breaks;
- m. Whether any sort of additional services such as transcription and translation is required;
- n. Whether the hearing would be recorded or not;
- o. Planning for substitute hearing and communication arrangements in order to avoid any sort of technical issues;

*In the case, State of Maharashtra v. Dr Praful Desai,<sup>3</sup> the Supreme Court held that evidence of witness can be recorded by video conferencing and said that physical presence is not necessary.*

2. *The practice round:* Various service providers allow arbitral participants to organize and participate in “dry runs” before the hearing day so that the users can accustom themselves with the relevant technology. A well-organized dry run will work to ensure that participants have an experience without any interruptions on the hearing day. Parties for undertaking ODR should take particular note of the following features:

- a. The audio and video quality and the tribunal’s clarity (in various hearings where factual witnesses are present the arbitrators may require an unhindered view of the witness’ location and any documents that they might be referring to);
- b. Understanding and implementation of the “break-out rooms”, common and private chat features, and understanding how and when these will be used appropriately;
- c. How parties and the tribunal will review the e-documents;
- d. Communication procedure with the moderators or third-party vendors.;
- e. Parties and the tribunal should consider the capability of their IT infrastructure.;
- f. Directing of communication to ensure that participants do not speak over each other; and
- g. Lastly, the tribunal and the parties may take into consideration where situations of one or more participants (including witnesses) get disconnected from the virtual platform. If such situations arise, the tribunal may have to consider alternate resolutions such as a short break until the participant re-connects in the virtual proceedings.

3. *Usage of reliable technology:* Usually, most of the service providers offer a technical guide on the planning of a virtual hearing. The following checklist gives out factors that participants may consider in case they opt to hold a hearing without a service provider’s assistance:

- (a) assortment of a quiet location with enough lighting;
- (b) good internet connectivity;
- (c) usage of earphones with microphones for the purpose of audio clarity;
- (d) muting microphones when a participant is not speaking and minimizing competing sounds such as typing as they may create issues with transcriptions and avoiding any sort of

<sup>3</sup> 2003 SCC 601.



disturbance; (e) analysis all the devices; and (f) moulding for troubleshooting processes.

### **ANALYSIS**

ODR is a relaxed, mouldable, and an extremely creative tool for dispute resolution which is not bound by strict rules and procedures. So it allows parties to formulate the process of participation as per their comfort. All civil and commercial online disputes are resolved through ODR these days. There are paperless digitized proceedings. Online mediation is in its primitive stage of development, gradually due to advanced technology it will become a constructive mechanism for resolving disputes. It has become very important to introduce an efficient method for resolving online disputes as traditional methods i.e. litigation is expensive, time-consuming, and has jurisdiction problems. This form is cost-efficient as it requires a minimal cost to be paid by both parties as compared to litigation. ODR allows participation of such parties who could not attend meetings held in person due to some disability. Also, it is convenient for parties who stay in different time zones, as the online mediator allocates time to one party as per their needs without wasting the time of the other party. It is time-saving as the time spent on travel for any arbitration, mediation, or conciliation proceeding is not wasted. The technological revolution has become a part of life in the 21st century.

There are also few drawbacks to this technologically advanced mechanism. The ODR mechanism is impersonal and requires high-speed Internet connectivity for videoconferencing. It is potentially inaccessible to some individuals as some individuals are not highly computer literate. ODR is not appropriate for someone who is not comfortable with technology. The face to

face interactions is better than online interactions as it eases a bond which is not facilitated online. ODR also poses a problem because it does not have any method for correction or make changes after the dispute has been resolved.

### **RELATIONSHIP WITH E-COMMERCE**

E-commerce has given a variety of choices to Indian customers and consumers. However, E-commerce in India has given rise to disputes by consumers purchasing from e-commerce websites. E-commerce disputes arise due to misappropriate product information, defective products, and unsecured website. These problems can be avoided by spreading more digital awareness. Moreover, every customer has constitutional rights to approach the courts to resolve disputes and enforce their rights. Thus, due to the number of pending cases in the traditional court system, the customers are being deprived of their access to justice. Therefore, to satisfy the needs of consumers in the e-commerce market, ODR as a new approach to resolving online disputes has been introduced. ODR makes the law more accessible to consumers in e-commerce disputes which results in building the trust of consumers in e-commerce transactions.

### **RECCOMENDATIONS**

- With the constantly evolving law, and its procedures there should be specific guidelines and protocol for conducting online dispute resolution
- Awareness should be an integral part of conducting such methods
- It is a more substantial and cost effective tool which might have a good run in future if promoted and used appropriately



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**CONCLUSION**

Presently, the country is facing the COVID-19 crisis due to which states are under lockdown. This situation has impacted the lifestyle and the working approach of individuals. People have started working online due to which comes online disputes, as more and more people are connected with the advanced technology. Therefore, with the new growth of e-commerce and global transactions of consumers through the Internet, many disputes occur which involves parties from different jurisdictions. To resolve such disputes mechanisms like ODR uses techniques like arbitration, mediation, and other such methods that can be useful. The legislation related to online dispute resolution can be amended further to provide a successful ODR system, encouraging e-commerce and providing timely dispute resolution for an online consumer. Online Dispute Resolution in India is at its early stages and is gaining acceptance day-by-day.

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