

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 2

2024

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Assessing the Regulatory Landscape of Online Arbitration in India: Delineating the Roadblocks & Way Forward

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ABSTRACT

With the rapid changes in the evolution of technology and innovation in the current times, the fabric of dispute resolution in the country is also experiencing a huge paradigm shift. While the other forms of dispute resolution have embraced it with open arms, arbitration has encountered its own distinct array of advantages and disadvantages while incorporating these changes. This Research paper shall make a scrupulous attempt to analyse the current practices & tools employed by Indian arbitral institutions and the challenges which can crop up from proliferation use of technology like artificial intelligence and blockchain in these institutions either actually or potentially. It then proposes suggestions & recommendations for reforms to ensure a robust and accessible online conflict resolution in arbitral proceedings for legal practitioners in this digital age.

Keywords: *online arbitration, technology, e- agreement, artificial intelligence, blockchain.*

I. INTRODUCTION

Over the past few years, the legal domain in India has embraced technological advancements in a way that our country has never seen before. The use of technology has brought significant changes to arbitration regime and other industries. The demand for more efficient, transparent, and less complex procedures has become the need of the hour and cannot be overlooked in today's time. A report published by renowned arbitral institution ICC on "Leveraging Technology in International Arbitration" disclosed thorough its report that over 93% of the survey participants concurred that the introduction of technology has increased the cost effectiveness and efficiency of the arbitral procedure.³ In International domain, institutions like ICC, LCIA, SIAC etc are also predominantly using online arbitration to resolve commercial disputes effectively. Although the utilization of information technology in the field of

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³ ICC Commission on Arbitration and ADR, *Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings* (Feb. 2022), <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings/>. (last visited on February 16, 2024).

arbitration remains at its nascent stage in India, there is a discernible shift gaining momentum, signifying a promising trajectory for the future of legal proceedings.

(A) Meaning and definition of Online Arbitration

The concept of online form of arbitration varies from the traditional form of arbitration. According to Gary Born, Arbitration is “*a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedure affording the parties an opportunity to be heard.*”⁴

The term "online arbitration" remains undefined within existing statutes in India, leaving room for interpretation based on the key elements that constitute arbitration. Thus, it can be construed that “*Online arbitration is a process by which two parties having mutual consent submit a dispute arising among them to a non-governmental decision maker, appointed by or for the parties for the purpose of rendering a binding, non-binding, or unilaterally binding award. The process shall be conducted online and will settle the dispute in accordance with neutral process that includes due process in line with the party’s agreement or decision of the arbitration tribunal.*”⁵

(B) Need for online arbitration in India

In the last decade, the mechanism of Arbitration has undergone various transformations. With technology being the most prevalent among them, the need for an efficient and accessible method of resolving disputes online becomes increasingly apparent in developing countries. In India, courts have always remained overburdened, and number of pending cases present a daunting picture. In this context, Online Arbitration presents itself as an avenue that not only prevent long delays but also offer a flexible approach to the parties involved. It enables them to actively participate in dispute resolution process without any form of limitation of time and geographical location. Thus, realizing the importance of this framework, NITI Aayog, released a report on “*Designing the future of dispute resolution: The ODR policy plan for India.*” The report aims towards delivering timely and cost-effective justice to the citizens of the country by assessing the roadblocks and challenges that arise in adopting the framework of ODR in India.⁶ The policy clearly outlines the regulatory landscape India needs in ODR processes like

⁴ Gary Born, *I International Commercial Arbitration* 217 (Kluwer Law International, 3rd edn., 2009).

⁵ M.S. Abdel Wahab, E. Katsh, *et.al.*, *I Online Dispute Resolution: Theory and Practice- a Treatise on Technology and Dispute Resolution* (Eleven International Publishing, Hague, 2nd edn., 2021).

⁶ NITI Ayog Expert Committee, *Designing the future of the dispute resolution: The ODR Policy Plan for India*, 2 (2021), <https://www.niti.gov.in/sites/default/files/2023-03/Designing-The-Future-of-Dispute-Resolution-The-ODR-Policy-Plan-for-India.pdf>. (last visited on February 17, 2024)

arbitration to successfully align with the global standards and become of commercial arbitration. Some regulatory bodies like SEBI have successfully adopted online dispute resolution portal for resolving disputes by conciliation or arbitration, arising within the Indian security market. The portal shall strive to settle the dispute between companies, investors etc within a prescribed time limit.⁷

II. CURRENT LEGAL FRAMEWORK FOR ONLINE ARBITRATION IN INDIA

The Digital Age is a fast-paced era marked by transactions and disputes that take place beyond the physical boundaries. However, in some countries like India, the existing framework still lacks dedicated legislations towards online dispute resolution. Instead, it relies on major statutes such as Arbitration and Conciliation Act of 1996 and Information Technology Act of 2000. In 2014, a report was also published highlighting the need of use of online platforms and other tools to increase the efficiency of dispute resolution in the country.⁸

An Overview of the legislative framework of online arbitration provides that provisions such as Sections 4 and 5 of the Information and Technology Act, 2000, confer the legal validity to digital records and digital signatures. And when juxtaposed with Section 65-B of the Evidence Act, it becomes evident that electronic evidence is admissible and can be presented to the court of law in India. The newly introduced Bhartiya Sakshya Adhinyam Act of 2023, which has replaced the Indian Evidence Act, 1872, also recognises the significance of digital records. It expressly categorizes electronic evidence as primary evidence.⁹ Moreover, it becomes imperative to examine the Arbitration and Conciliation Act, 1996 in context of online arbitration to demarcate and understand the key features of online arbitration in the digital realm. They are as follows:

(a) Formulation of e-arbitration agreements

Hitherto, mutual consent has stood as the fundamental principle of traditional arbitration. It plays a major role in validating the entire arbitration procedure. The term “e- agreement” refers to an agreement in which parties undertake to submit their dispute or disputes to arbitration, executed through the medium of technology. In India, the existing guiding principle concerning agreements is their requirement to be in “writing.” There were no express provisions stating whether electronic agreements could be deemed valid in arbitration or not. However, an

⁷ The Security and Exchange board of India, Circular on ODR in the Indian market, (2023), https://www.sebi.gov.in/legal/master-circulars/dec-2023/master-circular-for-online-resolution-of-disputes-in-the-indian-securities-market_80236.html.

⁸ Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (August 2014)

⁹ The Bhartiya Sakshya Adhinyam Act, 2023, s.57

arbitration agreement formed through email exchange in the realm of online arbitration soon got recognition by the Hon'ble Supreme Court of India in the case **Shakti Bhog vs. Kola Shipping**.¹⁰ The apex court, while interpreting Section 7 of the Arbitration and Conciliation Act of 1996, held that a valid agreement can be found in a document signed by the parties, or an inference can be made from the telex, exchange of letters, email, or fax as well.

In **Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.**¹¹, the Hon'ble Supreme Court asserted that the meeting of minds of the parties is essential for the formation of an agreement through online arbitration. It should duly comply with all the requisites of Section 7 of the Arbitration and Conciliation Act, 1996 to be a valid agreement.

Further, an amendment was made to Section 7 of the Arbitration and Conciliation Act, 1996, in the year 2015 to bring Indian laws at par with UNICITRAL Model Laws on International Commercial Arbitration.¹² This amendment provides that if two parties enter into an agreement containing an arbitral clause through electronic means, it shall be considered as a valid agreement. Thus, the parties can conclude agreement even without being physically present with mutual intention being the important prerequisite to it.

(b) Jurisdictions of seat of online arbitration

The determination of seat of arbitration is a crucial facet of online arbitration, although various practitioners still challenge its relevance. The issues with respect to it persist due to lack of presence of any geographical location where usually the award is made. In India, Article 20 of the Arbitration Act and Conciliation, 1996, provides that determination of seat is a matter of subject to the mutual consent of both the parties. However, if there is no prior agreement, the arbitration tribunal shall determine the seat of arbitration by closely considering the place and nature of the contract. Like International legislations, the Indian laws are also silent as to the determination of jurisdiction in online arbitration in absence of mutual consent between the parties. Thus, it is suggested that in such cases that aspects such as the jurisdiction where the servers are located physically can be taken into account or where the computer of the arbitrator is based, and all the electronic communications are sent¹³. In a nutshell, the edifice of seat of jurisdiction shall remain constant challenge unless a legislative enactment is made in this regard

¹⁰ (2009) SC 12.

¹¹ (2010) 3 SCC 1.

¹² UNICITRAL Model Laws on International Commercial Arbitration, Article 7(2), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf.

¹³ Cemre Kadugli, Sadaff Habib, *Virtual hearings to the rescue, let's pause for the seat*, KLUWER ARBITRATION BLOG (2020), <https://arbitrationblog.kluwerarbitration.com/2020/07/13/virtual-hearings-to-the-rescue-lets-pause-for-the-seat/>.

to protect the interests of the party involved in the entire process.

(c) Online Arbitration Proceedings.

Arbitration proceedings in India are governed by Section 21 of the Arbitration & Conciliation Act, 1996. This section outlines the rules for the commencement of proceedings, affording the parties the flexibility to mutually agree upon the date on which arbitration proceedings shall commence. However, if they fail to do so, the proceedings shall commence from the date the respondent receives the notice of dispute referred to arbitration by the other party. In the case of online arbitration, the proceedings typically commence with the submission of an electronic request for arbitration and include various electronic elements throughout the process, such as e-hearings (conducted through audio and/or video conferencing), e-submissions, electronic production of documents and evidence, e-deliberations, as well as e-communications between parties, tribunals, or both.¹⁴ Documents such as a statement of claim or defence, which usually require physical copies, can also be transmitted electronically. The parties in arbitration can send these documents via email by attaching PDF files. Thus, it aligns with section 4 and 5¹⁵ of the IT Act, read in conjunction with Section 65B of the Evidence Act,¹⁶ thereby ensuring that pleadings in online arbitration do not lose legal recognition.

Yet, the primary concern of parties revolves around digital correspondence and its confidentiality. Section 72A of the Information and Technology Act serves as a safeguard by punishing the act of breach of a lawful contract if a person or intermediary discloses the information to which they have access without the consent of the parties.¹⁷ The Digital Personal Data Protection Bill, 2023, which has received presidential assent in August 2023, is also one of the major strides of India towards the protection of digital data of users. This standalone legislation on data privacy shall ensure that any data that is collected through online or offline mode, is digitised, and used without the consent of the parties will be liable for penalties if the act does not fall under the ambit of the “Legitimate uses.”¹⁸ Moreover, the concern of the evidentiary value of these arbitration proceedings was further clarified in the case of **Arjun Panditrao Khotkar v. Kailash Kishanrao**,¹⁹ where the Apex court, while dealing with the admissibility of digital evidence held that the presentation of certificate authenticating the electronic record is required only when it has to be introduced as secondary evidence. If the

¹⁴ Supra note 3 at 1.

¹⁵ Information Technology Act, 2000(Act 21 of 2000), s.4, 5.

¹⁶ The Indian Evidence Act, 1872, s.65B.

¹⁷ The Information and Technology Act, 2000, s.72A- Punishment for Disclosure in Breach of Lawful Act.

¹⁸ The Digital Personal Data Protection Act,2023 (Act no 22 of 2023), s.7.

¹⁹ (2020) 7 SCC 1.

original electronic records are present as primary evidence, then the submission of a certificate (electronic) is not necessary.

(d) Enforcement of Arbitral awards.

Enforcement of arbitral award plays a vital role as it is last step in ensuring effective resolution of disputes. There is no accepted definition provided for arbitral awards in national or international arbitration legislation. The Enforcement & Execution of awards in India is primarily regulated by Arbitration & Conciliation act, 1996 and Code of Civil Procedure, 1908 respectively. Together, these legislations ensure that there is seamless execution and enforcement of the award as a decree of the court.²⁰ In case of online arbitrations there are many speculations raised with respect to its legal sanctity. Under the ambit of Arbitration and conciliation act, 1996, for an arbitral award to be valid, it must duly follow the procedural needs of section 31 of the Arbitration act.²¹ Moreover, Section 15 read with section 4 of the Information and Technology Rules, 2000 provides for authenticity of digital signatures. Affixing of e- signature in an electronic agreement raises valid presumption as to electronic agreement under section 85A, thereby making it admissible in accordance with Indian evidence act.²²

In essence, the enforcement of arbitral award in online arbitration does not differ from traditional offline mode of arbitration. It requires incorporation of “lex arbitri” and “lex excutionis” principle to preclude challenges of enforcement of electronic awards.

III. TOOLS USED FOR CONDUCTING ONLINE ARBITRATION

The online arbitration landscape has drastically changed over the past few years in the country. Technology is one of the essential elements contributing to the constant state of flux in domain of dispute resolution. While most of technologies proved to be a bane to the arbitration mechanism, some of them attracted lots of criticism and were not well comprehended by the practitioners.

1. Video Conferencing Tools.

The usage of video conferencing tools has become increasingly significant in post pandemic era. It refers to integration of technology with arbitration wherein the parties can participate in the proceeding remotely. The parties can easily eliminate the option of attending proceedings in physical mode. These platforms ensure that efficiency is increased and there are substantial

²⁰ The Arbitration and Conciliation Act,1996, s.2(e).

²¹ The Arbitration and Conciliation Act,1996, s.31.

²² The Indian Evidence Act,1882, s.85A.

savings to costs incurred. In the judgement given in **Grid Corporation of Orissa Ltd. V. AES Corporation**,²³ even the court considered electronic methods like videoconferencing as a viable tool for recording of evidence and testimonies.

Cisco Webex, Blue Jeans, Microsoft Teams, and Zoom are some of the widely used and familiar platforms used by parties of online arbitration around the world. However, the parties also have the option to hire third-party managerial services. these services help streamline the arbitration proceedings, ensuring a fair and efficient dispute resolution process. CADRE and SAMA are some of the organizations which provide holistic services in this domain²⁴. Likewise, Bangalore Mediation, Arbitration, and Conciliation Centre & Mumbai Centre for International Arbitration also facilitate online arbitration by providing video conferencing services to the parties to the arbitration.

2. Artificial Intelligence in Arbitration

The term “artificial intelligence” was given by the professor of Stanford, John McCarthy in the year 1955. He defined artificial intelligence as “*the science and engineering of making intelligent machines.*”²⁵ It represents a revolution that has transformed numerous industries, and within this landscape, arbitration has emerged with notable significance in recent years. With the help of AI tools, arbitrators can easily collect and analyse data and predict the best outcome on the basis of the data variables present. These tools can easily calculate the average cost and time to be taken in a case based upon past data, thereby allowing parties to plan their course of action accordingly. Kira is a Canada- Based AI system that is developed for contract analysis. It uses machine learning to review and examine the clauses of the contract with higher accuracy. Similarly, Ross Intelligence is also an artificial intelligence-based app used by the arbitrators to analyse the case laws and documents of the case leading to higher efficiency and lower costs. However, a significant question arises as to whether the AI model can take place of arbitrator in proceedings. The solution to this complex question lies in the fundamental principle of arbitration, i.e., Party autonomy. Article V(1)(d) of the New York Convention provides that enforcement and recognition of awards may be refused if the composition of authority or arbitral procedure is not in accordance with the agreement of the parties.²⁶

²³ (2002) 7 SCC 736.

²⁴ Centre for Arbitration & Research, *Virtual Arbitration in India: A Practical Guide*, MNLU MUMBAI (2020), <https://mnlumumbai.edu.in/pdf/Virtual>. (last visited on February 23, 2024)

²⁵ Artificial Intelligence Definitions, <https://hai.stanford.edu/sites/default/files/2020-09/AI-Definitions-HAI.pdf>. (last visited on February 23, 2024).

²⁶ UNCITRAL Model Law on International Commercial Arbitration, United Nations Commission on International Trade Law, June 21, 1985, Article V (1) (d).

Similarly, the principle is also reflected in UNICITRAL Model Laws and International Chamber of Commerce, wherein the parties can appoint the best arbitrators by agreement, including the option of selecting an A.I arbitrator.

While the implementation of AI in the Indian Arbitration Regime is still pending, there have been some notable steps taken in the legal sector. The Supreme Court has started utilizing Supreme Court Vidhik Anuvaad software (**SUVAS**), an AI powered tool, to translate papers written in English to vernacular languages or vice versa. The Apex Court has also introduced the Supreme Court Portal for Assistance in Court Efficiency (**SUPACE**) to ensure complete digitization of the process of the court. However, due to a lack of proper mechanism, dependence on AI can lead to various challenges on account of its limited reliability, compliance, and data security.²⁷

3. Blockchain Technology

Blockchain is an advanced technological mechanism that records blocks of information in such a way that it becomes impossible to make changes to the information. Such blocks have within themselves time stamps and the link to the previous block. Blockchain, in the past decade has been one of the most deliberated topics around the world. The ubiquitous presence of Artificial intelligence in every domain has posed a major concern about the privacy of data for every individual. Thus, blockchain can be said to be viable solution as it brings the notion of “trust” into the landscape of technological dispute resolution. In India, it emerged into spotlight in the year 2009, when Bitcoin was introduced as a cryptocurrency. The concept of blockchain technology is distinct from arbitration, yet they are connected in a way that, if used together, can render potentially advantageous benefits. However, in the world of ODRs, blockchain arbitration is based upon the foundation of “Smart contracts.” These contracts facilitate automated transactions and function without third- party intervention. At the time of dispute resolution, these contracts can store and verify the terms of the contract and enforce automated execution upon its breach.²⁸ However, the question arises: does the Indian arbitration framework support smart contracts as per Section 7 of the Arbitration and Conciliation Act, 1996? Construing the provision, it can be said that for an arbitration agreement to be valid, it

²⁷ Vikrant Rana, Avik Gopal, Nihit Nagpal, *Harnessing the power of artificial intelligence in arbitration: A comprehensive analysis of Indian jurisprudence*, BAR & BENCH (2021), <https://www.barandbench.com/law-firms/view-point/artificial-intelligence-arbitration-analysis-indian-jurisprudence> (last visited on February 25, 2024)

²⁸ Sharath Mulia & Romi Kumari, *Blockchain Arbitration*, FOXMANDAL ADVOCATES & SOLICITORS, (2021), <https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/> (last visited on March 1, 2024).

must be in writing and can be communicated through electronic means.²⁹ Section 10A of the IT Act,³⁰ also validates electronic contracts, thereby paving way for smart contracts in the course of arbitration in the country.

IV. ISSUES IN ONLINE ARBITRATION

Though online arbitration holds huge potential to provide prompt and efficient dispute resolution, its successful implementation in India suffers through various roadblocks and challenges. Some of them are as follows-

1. Jurisdictional issues.

Determination of seat of arbitration in the online arbitration is the key issue due to lack of geographical location. The place of arbitration is important because it determines the nationality of enforcement of awards and jurisdiction of the local courts in case of challenging the awards. Absence of a clear legislative framework with respect to online arbitration makes jurisdictional selection difficult in a scenario when the parties do not mutually agree upon it.

2. Data privacy and Confidentiality.

Data security and Confidentiality are the most important consideration in today's technology-based dispute resolutions as data breaches occurs almost on daily basis. Since, confidentiality acts as a fundamental principle of arbitration processes, ensuring safer transmission of data through electronic means assumes more significance. Higher usage of third-party online platforms and technology may pose a gargantuan risk of cybersecurity concerns. It includes digital identity theft, breach of confidentiality by sharing of documents and tampering of evidence. Moreover, these incidences result in decreased notion of trust among the members and practitioners of arbitration domain.

3. Unequal Treatment.

In course of Online arbitration proceeding, situations might emerge where the parties feel that they do not stand on equal footing, feeling disadvantaged in comparison to the other party. Section 18 of the Arbitration and Conciliation Act,1996 enunciates that the parties should be treated equally. Technical glitches like disruptions, low network bandwidth, poor voice quality, or dropped connections impact the quality of proceedings significantly.³¹ Thus, it becomes a

²⁹ Chitranjali Negi, *Conceptual analysis of online arbitration*, (2016), <https://ssrn.com/abstract=2715684> (last visited on February 28, 2024).

³⁰ The Information and Technology Act,2000, Section 10A.

³¹ Kim, Kevin, John Bang, and Mino Han. *Advocacy in Virtual Hearings*. GLOBAL ARBITRATION REVIEW (2021), <https://globalarbitrationreview.com/guide/the-guide-advocacy/ffth-edition/article/advocacy-in-virtual-hearings>. (last visited on March 3, 2024).

matter of concern for either of the parties, placing them at a disadvantageous position. Remote proceedings also affect the dynamics of witness examination, introducing the possibility of improper contact with witnesses, thereby raising ethical and fairness concerns in the proceedings.³²

4. Obscure legal procedures.

A key challenge towards realising the full potential of online arbitration in India is presence of archaic legal process. In **Garware Walls Ropes Ltd. v Coastal Marine Constructions & Engineering Ltd.**,³³ the Hon'ble Supreme Court of India, laid down that the arbitration agreement would not be enforceable unless the parties pay the required stamp duty. While the Central Government has streamlined the stamp duty payment process through e-Stamps, some state governments regulations still mandate parties to provide a copy of the e-Stamp certificate as evidence of fulfilling the stamp duty payment.

5. Online Arbitration -An Expensive affair.

The issue of excessive costs remains persistent with online arbitration on account of higher utilization of technology and tools in the process. This reduces the inclination of parties towards this domain. The major factors which add to the expense of the process are Technological infrastructures and hiring trained and skilled professionals.

6. Lack of Confidence regarding the Concept

The problem of absence of confidence proves to be major roadblock in adoption of this practice by the legal community and individuals. Due to lesser usage and awareness, it faces cynicism on the grounds of interaction of technology with arbitration disputes and its legal enforceability. Thus, it is essentially required that transition takes place with continuous usage and delivery of quality services.

7. Shortage of Skilled Professionals

Online arbitration is still in its budding stage. The number of professionals who are well versed with this concept and technology are very less in number. Thus, lack of training institutions & programmes restricts the arbitrators in participating in the process, hindering smooth delivery of justice to end users.

³² Juan Pablo Gómez Moreno, *Advocacy for Online Proceeding's*, Int J Semiotics of Law (2023), https://www.academia.edu/108522762/Advocacy_for_Online_Proceedings_Features_of_the_Digital_World_and_Their_Role_in_How_Communication_is_Shaped_in_Remote_International_Arbitration (last visited on March 4, 2024).

³³ 2019 SC 515.

V. CONCLUSION & SUGGESTIONS

The surge of technology and innovation in the arbitration comes as no surprise. Especially in country like India, where the judicial system has always faced significant strain due to considerable number of pending cases, it becomes the need of the hour to adopt a mechanism for effective and speedily resolution of disputes. Online Arbitration comes as one such fitting solution in this digital era, which shall radically change the conduct of arbitration proceedings in near future. India has a foundation in place for the acknowledging and implementing the arbitral awards, and its legal framework, while not explicitly designed for online arbitration, provides a basis for its conduct. There's potential for further refinement and enactment of specific legislation distinct from traditional arbitration to better accommodate the intricacies of online arbitration. The shift towards digital environment exposes parties to various challenges like breach of privacy, security, and confidentiality of data. However, to mitigate the cybersecurity risks arising out of online arbitrations, the ODR platforms should embody multifactor authentication system, encryption to ensure a safer environment for data of the parties. Proper sanctions must be imposed on the parties for such an attempt. Further, the legal processes like stamping and notarisation should be digitized completely to provide seamless online resolution of disputes. The government should collaborate with Arbitral institutions and design a wholesome training programme for neutrals to abridge the digital gap between various practitioners. Moreover, Initiatives should be taken by the government to increase access to digital infrastructure and literacy among the citizens to make the avenue of online arbitration indispensable in the coming technological era for resolution of disputes.
