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Online Dispute Resolution in Environmental Cases

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ABSTRACT

Alternate Dispute Resolution (ADR) mostly denotes a broad range of dispute resolution processes that serves as a means for disagreeing parties to come to a common agreement without resorting to litigation. It collectively refers to the methods in which the parties can settle disputes outside the courts with the help of a third party.

Environmental disputes are extremely complex and hard to resolve due to their extensive effect on the general interests of communities, individuals, organisations etc. Previously, there were only limited ways of dealing with environmental disputes, which mostly involved political action and litigation. However, with ADR being extensively accepted as an effective alternative to resolving disputes, this has begun to change.

Even though environmental law gives rise to a lot of challenges due to the complex nature of problems it produces, ADR offers a widely recognised, accepted, viable and flexible resolution mechanism. The parties involved in any environmental disputes opt for ADR as an alternative to litigation.

ADR is indeed an expeditious mode of dispute settlement than litigation, however, the current dialogue over environment cases running among courts and academia is that the online arbitration mechanism is even more efficient and will be able to solve the matter quickly without causing harm to the environment.

This paper will begin with the general discussion of how environmental issue can be resolved through traditional ADR mechanism, thereafter, this work will illustrate the online dispute resolution (ODR) mechanism, how it is done, benefits and challenges of ODR and understand if ODR method would be an effective mechanism to resolve environment dispute in the future.

I. INTRODUCTION

Environmental law is a dynamic body of law which deals with addressing the effects of human activity on the natural environment. It is that area of law which provides for the framework and tools to respond to the challenges which are posed by the loss of biodiversity, pollution, use and exploitation of natural resources, climate change and planning for sustainable cities. Owing to

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the nature of environmental law, it can have diverse effects on the interests of individuals, communities and nations which adds to the complexities of resolving disputes in this area. However, despite the challenges, there exists significant opportunities to utilise Alternative Dispute Resolution (ADR) mechanism to aid in the resolution of disputes and conflicts.

Today is the time of internet, with everything going virtual from shopping to bill payments to banking etc. Specifically, after the covid-19 pandemic people have started working from home. School, colleges, offices, courts etc everything went virtual. People have adapted to this new world and are comfortable working from their space. Virtual working is also cost and time saving and is environment friendly. However, it is debatable whether virtual working is a compulsion and if it is as efficient as working real-time. ADR method is fast and efficient in comparison to traditional model of litigation, and with the help of internet and technology online mode of alternate dispute resolution is developing.

In this paper researcher aims to discuss the alternate mode of dispute settlement (specifically arbitration and mediation) in environment cases. Further, researcher will ponder on the ODR mechanism as a new mode of dispute settlement and analyse if it is beneficial for the environment.

II. Rise in environmental disputes

Environmental issues have taken all over the world over the last century, as it effects are no respecters of national boundaries. Alterations to the weather patterns, increasing pollution and rising sea levels etc are unprecedented throughout the globe. Disruptions of these kind pose serious threats to many countries as the competition for scarce resources increases and the pace at which these changes take place exceeds out ability to adapt to them. These changes in the environment have accelerated some of the disastrous events that have seriously terrorised the existence of mankind.

Some of the examples of issues arising because of environmental damage could be[2]:

a. Land and water- environmental issues can intensify the disputes related to land and water as the land may become less fertile or infertile or be flooded and it can also lead to water scarcity.

[2] Mikkel Funder, Signe Mari, Cold-Ravnkilde and Ida Peters, 'Addressing Climate Change and Conflict in Development Cooperation- Experiences from Natural Resources Management' (*DIIS Report,* 2012) <https://www.diis.dk/files/media/publications/import/extra/rp2012-04-addressing-climate-change_web.jpg_1.pdf> accessed 28 March 2021.

b. Food security- increasing sea levels and reduced rainfall may lead to a decline in the agricultural production and loss of cultivable land which may lead to civil unrest as the competition for consumption may become the focus.

c. Migration and displacement- struggle for arable land and scarcity of water may lead to migration of a lot of people which in turn would give rise to a wide range of problems. One of the main problems would be the animosity between the host and the migrant as there will be a fight for resources.

d. Increasing inequality and injustice- another major cause for disputes is the gap between the haves and the have nots, and environmental issues further broaden that gap. One of the major reasons could be attributed to the fact that one part of the population is hit the hardest as these changes take place which instils the grievances between the government and the resource users.

III. Alternative dispute resolution (ADR) and environmental law disputes

Environmental law disputes comprise of wide and unrelated topics ranging from sociology, science, economics, history, culture, legal, property rights and regulatory constraints. These issues often involve diverse range of parties, which may range from private individuals to general public and may take place in multiple jurisdictions both nationally and internationally.[3] One person's environmental issue maybe another person's industrial dispute, commercial dispute, health issue, lands right dispute or sacred site or a dispute having an impact on a nation's sovereignty.[4]

The unique nature of environmental law and the sheer breadth of issues involved add another dimension of complexity to the disputes. This particular area of law oversees and addressed issues that may be categorised as "value problems" and unlike pure technical issues, there are no road maps for managing these kinds of intractable disputes.[5] When disputes rise to the level that they become a concern for public, they can become emotionally charged and may push the stakeholders towards rigid positions thereby making it more difficult to negotiate.[6]

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[3] Dan Swecker, *Applying Alternative Dispute Resolution to Environmental Problems,* (July 2006) https://www.mediate.com/articles/sweckerD1.cfm?nl=108>.accessed 29th March 2021

[4] Peter Adler, 'Mediating Public Disputes' (Paper presented at the International Conference on Environmental Law, Sydney, 14-18 June 1989), http://classic.austlii.edu.au/au/journals/AdelLawRw/1993/4.pdf, accessed 29th March 2021

[5] Hal Wooten, 'Environmental Disputation: The Common Law and the Environment', (1993) 15 ADEL LR 33-77.

[6] Ibid.

Old methods of resolving these disputes by means of litigation and political action comes with its own disadvantages. On the contrary, some of the often-cited advantages of ADR are as follows:

a. More opportunities for the parties to put forth their side of the story;

b. Less costly and quicker process;

c. More informal and less adversarial;

d. There is more flexibility to meet the needs of the parties;

e. There is a greater opportunity to preserve relationships by encouraging cooperation;

f. There are more options for a resolution;

g. It is a confidential process;

h. It has self-determined outcomes.

However, it has been argued that ADR in environmental law has two major limitations. The first concern relates to ADR acting as an obstacle to the positive outcomes of a valuable debate such as a statutory reform and generating essential legal precedence. Without these value conflicts, ADR acts a major obstacle to the positive and democratically important attributes of value conflicts.[7] The second concern ponders upon the question as to whether environmental law, which is one of the essential areas of public policy and affects everyone fundamentally- should be permitted to be negotiated amongst few identifiable affected and interested parties.[8] The private nature of the process of ADR defeats any potential that could create precedents that may substantially improve the community welfare, greater national interests and public policy.[9]

It is true that ADR has its limitations, however these concerns may not hold true in the longer run. The overarching concern that ADR processes hinder statutory reforms may be unfounded. It cannot be ignored that ADR has developed and is still developing as a credible and valuable approach in resolving disputes in the area of environmental law in national and international jurisdictions.

ADR can be used as an attractive substitute to avoid the costs of litigation and political action. ADR mechanisms such as mediation have been used to solve environmental disputes for more than two decades now. It is mostly used to solve site-specific environmental disputes and in

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[7] Lyster, Rosemary, 'Should We Mediate Environmental Conflict: A Justification for Negotiated Rulemaking' [1998] SydLawRw 25; (1998) 20 (4) Sydney Law Review 579.

[8] Ibid.

[9] Boulle, L, "ADR Applications in Administrative Law" in *Administrative L Reform* (1993) at 141.

regulatory negotiations in formulating policies.[10] The practice of environmental ADR and consensus building takes on from principles, theories and guidelines from different disciplines such as law, industrial relations, applied psychology, planning, public health, communications, public administration. Mediation and facilitation are rigorous and robust practices; however, they still remain more an art than a science. Practice strategies should be implicit, improvisational and reflexive.[11]

One of the main benefits of using ADR mechanism to solve disputes is dealing with the dissatisfaction related with the conventional non-ADR methods of solving environmental disputes and removing the power of decision-making from political spheres altogether. The transfer of final decisions from government to the quasi-judicial bodies or courts frees the environmental issues from the wheels of bureaucracy.

IV. Modes of Alternative Dispute Resolution

There are various modes of alternative dispute resolution like mediation, conciliation, negotiation and arbitration, however the most popular amongst them are mediation and arbitration.

Arbitration

The process of arbitration bears a resemblance to a much-simplified version of a trial with the application of limited rules of evidence. However, the process of arbitration cannot be set in motion without the existence of a valid arbitration agreement or any other agreement which is inclusive of an arbitration clause prior to the emergence of the dispute. When a dispute arises between the parties, they refer it to one or more persons known as the "arbitrator". The parties must abide by the decision of the arbitrator which is called the "arbitral award". The main objective of arbitration is fair and expedite settlement of disputes. The disputants are not bound to opt for lawyers as arbitrators, they can choose people from any other field who in their opinion are best suitable for resolving the dispute. For instance, if the disputants are involved in a building construction dispute, then they may choose an arbitrator from an engineering background. The parties can appoint a sole arbitrator consensually, however, if no consensus is reached, then each disputant selects one arbitrator and then those two arbitrators thereafter elect a third arbitrator.

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[10] Bingham, G and Haygood, L, "Environmental Dispute Resolution: The First Ten Years" (1986) in *The Arbitration Journal* at 3–14.

[11] Ibid.

Mediation

Mediation is also a widely used method of ADR and offer an alternative to litigation. Under this, a neutral party assists the disputants with the intention of arriving to a consensual agreement. It is a simplified negotiation process wherein a third party acts a mediator for an amicable settlement of disputes by means of effective and appropriate communication and negotiation. The parties decide for themselves, and the mediator merely facilitates the process and cannot impose his views upon the parties. The process is confidential and non-binding in nature. Privacy is one of the major advantages of mediation. However, in this process, the impartiality of the mediator is of utmost importance and at the same time, it is essential that the mediator utilizes his abilities to draw out a dialogue leading to a constructive solution between the parties.

V. Arbitration in Environmental Disputes

Arbitration can be the most favourable option for dispute resolution in environment related cases for the reason it gives the parties a chance to select the arbitrator. The parties according to the nature of dispute can select the arbitrator with specific scientific, legal or environmental expertise. Secondly, the arbitration has the ability to expedite proceedings and apply interim and conservatory measures particularly in cases involving potentially irreversible damage to the environment. Third, in arbitration proceedings specific governing or applicable law, environmental law can be applied by the arbitrator while adjudicating the matter. Fourth, arbitration proceedings unlike the traditional mechanism is more confidential, however at the same time it can be made transparent depending on the nature of the case and the interest of public involved. Last, arbitration is more lucrative in environment cases because the arbitration rules are flexible enough to be applied in any type of cases, environment matters are complicated involving various stakeholders like industries, individuals, and community etc. thus, a flexible mode of dispute settlement would best suit in these type of cases[12].

In India, mainstream judiciary and National Green Tribunal are primary authorities taking care of the environment cases. We have plethora of constitutional, legislative provisions and statutes protecting the environment, however, factors such as pendency of cases, slow judicial process, inappropriate implementation of policies, lack of technical know-how, loopholes in the legislative framework are still areas of concern.

The government of India established National green tribunal in 2010, a separate body for

[12] Sonali, 'Arbitrating environmental disputes: A critical analysis' (June 5, 2021) <https://blog.ipleaders.in/arbitrating-environmental-disputes-a-critical>accessed 6th June 2021

expeditious disposal of environment cases. This step is indeed a way forward to protect the environment, a serious need of an hour, however, the jurisdiction of NGT is limited to only 7 statutes which act as a barrier for taking up environmental matters which do not fall within these statutes. Second, the assortment of members in the tribunal bench is not proper and also lacks diversity. It does not include stakeholders from various fields. The existing strength of the tribunal is just six apart from the chairman, whereas the NCT Act mandates the appointment of 20 members (10 judicial and 10 experts) for the 10 benches in five zones with two courts in each zone. The fact is the premier institutions which is required to deal with the environmental issues that cannot be countenance never had full strength[13].

Therefore, in such a situation, mode of alternate dispute resolution is the best option for a fast and efficient result.

International Environment Scenario

The Commission on Arbitration and ADR of the International Chamber of Commerce (the "ICC") published a report in November 2019. The report examines the role of ADR in the resolution of environment related disputes. The report mentions the powers of the parties to choose the arbitrator with specific environmental expertise and competence. Parties can also call the ICC before appointing the arbitrator and can challenge the appointment of arbitrators can be on grounds of lack of impartiality or independence or otherwise[14].

The Report notes that the arbitration benefits from the New York Convention, which allows proper enforcement of arbitral awards and cross-border recognition. The Report underlines various specific procedural features of arbitration that will work best in resolving environment dispute. First, is the well-equipped arbitrator having knowledge of the subject will handle the case, second, there are recourse to solve early and urgent disputes as environment matters are sensitive and need an urgent attention, delay in such matters would surpass the purpose of the case. Arbitration procedure further allows the involvement of state authorities along with the vested interest of the people to improve the transparency in the mechanism. Report further addressed the joinder of additional parties and consolidation of compatible proceedings i.e. the persons other than the ones who are the disputants could be allowed to take part in these

[13] Alpesh Yadav, *Arbitrating Climate change in India,* (June 5 2021), <https://www.thearbitrationworkshop.com/post/arbitrating-climate-change-in-india> accessed 29th March 2021

[14] Arbitration and ADR Commission, Report on resolving climate change related disputes through arbitration and ADR (26th November 2019) < https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/#:~:text=The%20Report%20first%20defines%20climate,that%20potentially%20enhance%20the%20existig> accessed 21st April 2021

proceedings, such as those citizens who are affected, non-governmental and intergovernmental organizations, thus making the arbitration procedure fair, just and accessible to all.

VI. Mediation in environment disputes

Mediation provides a chance for thoughtful solutions to the dispute which are highly catastrophic and sudden in nature. It generally deals with problems that are high on emotionality. Mediation allows the parties to explore “win-win” situations in which all of them are in much better condition than they would have been if they had chosen the option of litigating in the court. As far as environmental disputes are concerned, there are multiple stakeholders and a conventional legal process in this situation, would make the process more tedious. Furthermore, the issue of the costs of proceedings, the arduous nature and unpredictability of the final outcomes make the traditional methods of adjudication an impractical approach to resolve disputes in a timely manner[15].

Mediation is a mode where parties can directly communicate, therefore it can reduce the risk of creating fractures between parties the way litigation tends to. It gives the parties a chance to observe and analyse a viewpoint of other parties leading to a more peaceful settlement. Additionally, individuals who are skilled in specific sectors or materials can act as mediators and this may ensure a fair and substantive result.

Online Dispute Resolution

The term “Online Dispute Resolution (ODR)” is used worldwide for various forms of online dispute settlement by making use of ADR methods. Online dispute resolution mechanism adds to the existing ADR methods on the assumption that some disputes preferably e-disputes can be expeditiously and suitably resolved with the help of the Internet. Thus, ODR can be described as the utilization of computer networks and applications for solving disputes by means of ADR.

Popularly, there are four types of ODR systems:

a. Online settlement: automatic settlement of financial disputes using an expert system.

b. Online arbitration: settlement of disputes with the help of qualified arbitrators by means of a website.

c. Online mediation: settlement of disputes with the help of qualified mediators by means of a website.

[15] Dhruv Shekhar, Mediation for environmental disputes in India, (Aug 23, 2017), <http://mediationblog.kluwerarbitration.com/2017/08/23/mediation-environmental-disputes-india/>accessed 2nd April 2021

d. Online resolution of consumer complaints: handling of certain types of consumer complaints by means of e-mail.

However, most of these methods are not fully developed. But, with technological advancements they can be used to resolve both e-disputes as well as brick and mortar disputes.

Online Settlement

Online settlement of financial claims is already developed and functioning in the US. However, it is not a method of online dispute resolution which is specially connected with e-disputes, but it is the most developed form of online dispute resolution in a strict sense. One of the first websites to offer online settlement of financial claims was Cybersettle[16] in US followed by Clicknsettle[17]. Cybersettle makes use of a technology administered process where an automated algorithm evaluates bids from the parties and settles the case if the offers fall within a prescribed range[18]. For instance, it offers online settlement of insurance claims by using an expert system. Clicknsettle on the other hand offers a possibility of reaching a settlement to the parties in any kind of monetary disputes with the help of an expert system. The system has formulated in a manner that the parties are unaware of the amounts asked for and offered by each other. The expert system matches these double-blind offers and demands and ensures that the process is completely confidential. Moreover, even if no settlement is reached, still the parties will be in a position to negotiate without any prejudice as they will be unaware of the amounts demanded and offered during the process of e-settlement. These websites help in shortening the duration of a negotiation or mediation process as well as the expenses endured by the parties involved. Likewise, a similar mechanism can be developed and used to settle environmental disputes between parties.

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[16] Cybersettles patented web-based negotiation technology facilitates settling monetary disputes - securely and confidentially - between two or more parties. Cybersettles automates the manual, time consuming, and inefficient settlement process and makes it easier for organizations to settle financial disputes, <www.cybersettle.com>accesed 24th April 2021

[17]ClickNsettle is wholly-owned by NAM (National Arbitration and Mediation). NAM is a full-service provider of Alternative Dispute Resolution (ADR) services – supporting clients throughout the U.S. and in major cities around the world through a highly secure suite of onsite, virtual and hybrid forums. NAM is recognized for its superb customer service, market-leading technology, and an exceptional panel of arbitrators and mediators with deep experience across a wide range of practice areas. Throughout NAM's 30+ year history, the company has consistently earned prominent awards and recognitions. NAM ranks at the top of the ADR and Continuing Legal Education categories in numerous industry rankings, including the most recent surveys by the National Law Journal, New York Law Journal, and Corporate Counsel – a testament to the depth and breadth of knowledge, information and thought leadership provided by NAM to the ADR community at large. NAM works with more than 10,000 commercial entities, including virtually all major insurance carriers that utilize ADR, leading law firms (both plaintiff and defense firms) and more than 50 percent of the Fortune 100, <www.clicknsettle.com>accessed 18th April 2021

[18] Gabuthy, Yannick and Deffains, Bruno, 'Efficiency of Online Dispute Resolution: A Case Study' (2005). <https://ssrn.com/abstract=891062>accessed 2nd April 2021

Online Arbitration

Online Arbitration is different from a traditional arbitration. The generic idea that online arbitration is a combination of online mechanisms and traditional arbitration methods is not true. Online arbitration is different not only because it is held partly or wholly online but also because the elements of its definitions also vary from those of a traditional arbitration. Naturally, there is a lot of similarity between them, but at the same time there are significant differences in the details of the component elements[19].

For a process to be recognised as an arbitration, it should constitute the following elements:

a. Mutual consent
b. Choice of arbitrators
c. Due Process
d. Binding decision

a. Mutual consent is considered as a fundamental element of traditional arbitration and it is a crucial element in the legitimization of the process.[20] For an arbitration agreement to exist, there should be due consideration, valid offer and acceptance and an intention to create legal obligations.[21] It is a well-established principle that the parties should not be forced to arbitrate unless they have freely agreed to do that mode of dispute resolution.[22] However, entering into an online arbitration agreement may not be always consensual as in some circumstances the parties may be forced to consent to an arbitration clause indirectly. Some commentators also believe that the concept of freely consenting party is a legal fiction.[23]

In some cases, the weaker party has no choice but to choose between entering into an arbitration agreement or to forgo the contract.[24] Therefore, due to power imbalance in some cases, the parties may have been indirectly forced to enter into an arbitration agreement. However, what is more relevant here is to understand whether the non-existence of a free consent to arbitrate would invalidate the arbitration clause or not. Some academicians have argued that, where there

[19] Derric Yeoh (Schellenberg Wittmer), Is Online Dispute Resolution The Future of Alternative Dispute Resolution? March 29, 2018, https://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/
[20] Byrnes, J., Pollman, E. 'Arbitration, Consent and Contractual Theory: The Implications of EEOC v. Waffle House', 8Harv. Negot. L. Rev 290 (2003).
[21] Jeremy, K, 'Untipping the Scales: Using State Contracts Law to Protect At-Will Employee from Unfair Arbitration Agreements', 74 UMKC L. Rev 297, 299 (2005)
[22] Domke, M.: *Commercial Arbitration,* Ann.Surv.Am.L 291 (1973)
[23] Mayer, J., Seitz, 'T.Recognizing and Understanding Consent Issues. In: Arbitration' 79 MIBJ 505 (2000)
[24] Kaufmann-Kohler, G., Schultz, T., 'Online Dispute Resolution: Challenges for Contemporary Justice', Kluwer Law International, The Hague, 169 (2004)

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is lack of choice, it is more desirable to accept that the consent to arbitrate does not exist, but rather other requirements such as fairness might have reasonably replaced it with free consent.[25]

Thus, it is immaterial to place emphasis on the existence of true consent in arbitration agreements, rather the focus should be on the formulation of the contract and the fairness of the process should be asserted. Therefore, it can be concluded that wherever there is power imbalance between the parties, it is not wrong to presume that the weaker party may have not consented to the arbitration agreement, however that shall not invalidate the arbitration agreement if other requirements such as fairness and an inexpensive arbitral procedure are favourably met.

b. Arbitrators in a traditional arbitration are not representatives of a government.[26] They are neither state judges nor are they funded by any private means.[27] The decision makers in arbitration are either generally chosen by the parties or on their behalf.[28] The arbitrators should be impartial and independent.[29] The term independence here is defined as "one which measures the relationship between the arbitrator and the parties personal, social and financial relation". The closer the relationship between any of these spheres, the less independent the arbitrator would be from the party.[30] Impartiality is a subjective notion which refers to the absence of bias resulting from a privileged relationship with regard to the matter to be decided.[31] The independence of an arbitrator can be assured prior to the arbitration proceedings by means of an objective test to determine whether or not the arbitrator can independently arbitrate between the parties or not. Online arbitration is also an adjudicatory process and therefore impartiality and independence are pivotal elements in the proceedings. Arbitrators cannot be representatives of the parties as they have to remain neutral otherwise, they cannot adjudicate with full legal authority between the parties. Thus, for an online arbitration to be characterized as a true arbitration, the neutrality of the arbitrators should not be compromised unless otherwise agreed between the parties.

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[25] Ibid.

[26] Born, G., 'International Arbitration and Forum Selection Agreements: Drafting and Enforcing', 3rd ed. Kluwer Law Arbitration, The Netherlands, p.2 (2010)

[27] Moses, M., 'The Principles and Practice of International Commercial Arbitration', Cambridge University Press (2008)

[28] Witkin, N., 'Consensus Arbitration: A Negotiation-Based Decision-Making Process for Arbitrators', 26, Negotiation Journal pp. 309 – 310 (2010)

[29] Supra Note 21.

[30] Donahey. S., 'The Independence and The Neutrality of Arbitrators', Journal of International Arbitration, 4, 32 (1992)

[31] Poudret, J., Besson, S. '*Comparative Law of International Arbitration*', 2nd ed., Sweet and Maxwell London, p. 348 (2007)

c. Due process is a vital component of any arbitration procedure and therefore any process which may lack due process, may not be recognised as an arbitration.[32] Due process in an arbitration proceeding is related to the right to be treated equally, the right to adversary proceedings and the right to be heard.[33] However, if in online arbitration the requirements of due process are fully complied with then it may adversely affect the speed and cost effectiveness of the process.[34] Speed and cost effectiveness are two of the main assets which make online arbitration more advantageous than litigation or traditional arbitration. Therefore, even though due process is a requisite element, the degree of compliance may vary.[35] Some academicians argue that due process is a flexible principle and it can be contingent upon the case or the category of cases and vary accordingly. Thus, the arbitration institute may adjust the degree of compliance in line with the nature of disputes.[36]

d. The binding nature of the decision in a traditional arbitration is one of the key elements in constituting an arbitration proceeding and it distinguishes it from other dispute resolution procedures. However, the decisions in an online arbitration may not always be binding. The arbitral award may be non-binding for either of the parties or it may unilaterally bind one of the parties. If an arbitral award does not bind either of the parties then, it is unlike a judgement as the arbitrator does not discharge any judicial role. However, when the binding nature is contingent upon the intentions of the parties, then the process may be regarded as true arbitration if the parties admit that the award shall have a binding effect after it is issued.[37] While some systems explicitly allow the parties to have conditionally binding arbitral awards, others recognise conditionally binding arbitration as a true one only if the procedural norms applicable to arbitration have been complied with.[38]

VII. TOWARDS A GREENER ENVIRONMENTAL ARBITRATION

According to a case study on medium-sized international arbitration which was done by Campaign's Steering Committee supported by a team from Dechert LLP, to determine

[32] Gaillard, E., Savage, J., 'Fouchard Gaillard Goldman on International Commercial Arbitration', (eds.), Kluwer Law International, The Hague, p. 1638 (1999)

[33] Schultz, T., 'Information Technology and Arbitration – A Practitioner's Guide', Kluwer Law International, Alphen aan den Rijn, p.108 (2006)

[34] Ware, S., 'Domain-Name Arbitration in the Arbitration-Law Context: Consent to and Fairness', UDRP 6 JSMBL 179 (2002).

[35] Supra note 19.

[36] Supra note 19.

[37] Harris, B., Planterose, R., Tecks, J., "*The Arbitration Act 1996: A Commentary*", 3rd ed., Blackwell Publishing Oxford p.279 (2003)

[38] . Kaufmann-Kohler, G., 'Online Dispute Resolution and its Significance For International Commercial Arbitration', Global Reflections on International Commerce And Dispute Resolution, ICC Publishing, Paris, p. 443 (2005)

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individual carbon footprint, and it was acknowledged that carbon emissions from one such arbitration is around 4.2 lakh kg Co2e and to offset its effect approximately 2 lakh trees need to planted.[39] The study was inclusive of printing of hearing bundle, courier, the long and short flight hauls, hotel stays etc. moreover, the technicalities of the disputes require more parties like experts, witnesses, etc to be present there which in turn increase the carbon emissions.

However, the covid-19 scenario has been of help because of the introduction of virtual hearings. The arbitration community has accepted this virtualization of proceedings and is not hesitant to even cross-examine online and from the point of view of environmental law, this should continue post covid as well so as to reduce travel for hearings or site visits. This could very well address the concern of carbon emissions as it is possible for anyone to witness and appear in the proceedings from anywhere in the world.

The campaign for Greener Arbitrations is an initiative to address the carbon footprint of international arbitrations and mediations. This campaign began as a "Green Pledge" which was initiated by an International Arbitrator, Lucy Greenwood, when she noticed the arbitral community left significant carbon footprints.[40] This Pledge is premised upon the personal commitment by clients, counsels and arbitrators to ensure that there is minimal impact of each arbitration and mediation on the environment. Accordingly, nine micro level changes were identified in the Pledge:

a. to consider whether there is a need to fly at all times during an arbitration;
b. to consider corresponding through electronic means unless the circumstances require otherwise;
c. to request for electronic copies of documents instead of hard copies;
d. to discourage the use of hard copy bundles in the hearing rooms;
e. to opt for witnesses giving evidence through video-conferencing instead of attending oral hearings in person, when appropriate;
f. to be mindful of the fact that emails also leave behind carbon footprints;
g. to avoid unnecessary travel for deliberating with arbitrators/mediators, instead use the screen sharing option or video technology for this;

[39] Lucy Greenwood and Kabir A.N. Duggal, 'The Green Pledge: No talk, More Action'(Kluwer Arbitration Blog, March 20, 2020) < https://arbitrationblog.kluwerarbitration.com/2020/03/20/the-green-pledge-no-talk-more-action/> accessed 21st April 2021
[40] Ibid.

h. to avoid unnecessary travel for conducting fact finding or other interviews with witnesses instead, use the screen sharing option or video technology;
i. to be obligated towards offsetting the carbon emissions of any flights taken for arbitration or mediation.

The Green Pledge required the participants to engage with the commitments to dispute resolution against the potential carbon impact that it may have in a thoughtful manner. One arbitrator's attempt through the Green Pledge campaign to encourage small changes in arbitration proceedings led to the beginning of a global discourse and with the growing momentum it is becoming more inclusive to include diverse stakeholders such as law firms, arbitral institutions, hearing centres and e-providers of arbitration services.[41]

Online Mediation

Mediation as discussed above is the easy, informal and quick process to settle the problem, this process can be further developed with the use of internet i.e. mediation done in cyberspace. There are various benefits and challenges to the process of online mediation.

Online mediation can be a big benefit to small entities doing business and consequently they cannot afford traditional mechanisms. Internet removes all geographical barriers and it can benefit parties to settle disputes without incurring travelling, hotel cost etc. which will save lot of time and money. Some mediators believe that mediation foster enhanced communication among participants and reduce the emotional temperature of disputes.[42]

The difference between real face to face and online mediation is that in the former parties are required to make on the spot judgment calls and decisions. However, online parties can opt for a delay. This delay can be used for consultation with others, research or just to contemplate the situation. The mediators themselves can also benefit by being able to give more consideration to the submission of the parties B perhaps better assessing their positions and needs. Online mediation allows for flexibility in this regard. Mediators can either talk to the parties about reframing their arguments before the other party receives the communication, or the parties can arrange that all communications must be approved by the mediator. The mediator can caucus with each party simultaneously while the mediation is happening. Essentially the joint session is one side of the screen, while the mediator can have private communications with parties on the other side of the screen. This process can be confusing but an expert mediator can handle

[41] Ibid.

[42] Joel B. Eisen, 'Are We Ready for Mediation in Cyberspace?', 1998 BYU L. Rev. 1305 (1998)

the case with the help of this technology.

However, as discussed above that mediation is the informal process and the job of mediation is to help the parties talk. The process has traditionally involved techniques such as active listening, impartiality, summarizing, reframing and agreement writing. The meditative process is broken down into units such as introductions, joint sessions, caucuses, and private sessions. Taken as a whole, mediation is extremely sensitive to communication. The communication must be effective enough to facilitate understanding, and this understanding is essential to a mutually acceptable resolution. Whether communicating online constitutes communication for mediation purposes is the issue[43].

Environment disputes are not geographically intact, the disputes are generally over climate change, river sharing, carbon emissions and are between different states of one country or different countries. The environment matters need a quick redressal for the reason that once the harm is caused then no remedy can restore the loss occurred. Generally, in environment disputes a political angle is attached as state are the parties. A peaceful and informal mode would definitely protect the states or countries from intolerance.

VIII. Conclusion

"The environmental disputes concern conflicts over the quality of life itself, the way in which we resolve these disputes will determine the future".[44]

The primary objective of environment law is to protect, preserve the environment and keep it in the best state. There are several treaties, conventions, agreements entered between nations worldwide to protect the environment. It is generally believed that the fourth world war will be for water, clean air and to stop it we need to have an amicable solution to solve this fight for clean air and water.

Humans with their scientific developments have always harmed the environment, now we have a chance to protect the environment with the humanly developed technology. If we virtualise the whole dispute resolution mechanism it will save lot of energy as the carbon footprint of the arbitral community poses a serious concern.

If world community choses online dispute resolution it has the responsibility to enhance the technical awareness and support of the officials. In addition, increased measurement and study

[43] Gurinder Bains and Kevin Andrade, The potential for mediating online < https://www.cfcj-fcjc.org/sites/default/files/docs/hosted/17436-mediating_disputes_online.pdf> accessed 14th April, 2021

[44] Jane McCarthy, *Negotiating Settlements: A Guide to Environmental mediation* (American Arbitration Association 1984)

can help fine-tune the best applications of ODR and also reduce the reluctance among some government officials to broaden the use of ODR. Other tools to increase the use of ODR is education and training, tailored selection of mediators and arbitrators on a case-by- case basis, internal policy directives and performance goals, and upfront investment in ODR programs and personnel.[45]

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[45] Joseph A. Siegel, 'Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use', 24 Pace Envtl. L. Rev. 187 (2007)

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