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Study on Efficient Promotion of Arbitration in India by using Technology with Reference to COVID-19

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ABSTRACT

Technological revolution is the next big phenomena since the industrial revolution. In this digital era, technological advancements have virtually transformed various industries. Naturally, the legal industry has not been a stranger to such technological revolution. From using online case management systems to holding virtual hearings through video conferencing, the legal landscape has changed drastically from the use of technology and for better. With the advent of COVID-19, our legal system has been compelled to introduce more and more technological advancements into the dispute resolution game. Indian courts have moved from physical courts to virtual courts and have introduced concepts like e-filing etc. While public forums have been welcoming technology with open arms, private adjudicative mechanisms like arbitration have had their own set of experiences and challenges in adopting these technological advancements, at least, as a necessity to deal with COVID- related circumstances. While many are aware of this obvious change in the functioning of Indian arbitrations, many are still oblivious of the extent of technological advancements available for use in arbitration and the consequential challenges arising from such usage. One point to be noted here is that any literature available on the subject tends to compare India with the position prevailing globally without taking into account the unique framework of Indian arbitration landscape. This study aims to make a comprehensive enquiry into the interplay of technology and arbitration in India. This paper takes into account the ground realities of Indian arbitration regime and aims to produce findings relevant for stakeholders to adopt more technological tools as a means to effectively and efficiently conduct arbitration proceedings.

Keywords: *technology, advancement, arbitration, hearings, video conferencing, e- filing.*

I. INTRODUCTION

(A) Statement of Problem: Technology is being used in international arbitration and at least to a limited extent in the Indian arbitration regime. However, with more than one year into the

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pandemic, the Indian courts have by and large, not come across any issue arising from the use of technology in arbitration. Moreover any literature available on the subject is either under the garb of online dispute resolution or deals in hypothetical possibilities with regards to use of technology in India. This lack of literature and jurisprudence on the use of technology in arbitration can be indicative of three possible scenarios. The first one could be that the arbitral tribunals seated in India are not routinely using technology and thus, there are no issues arising from the use of such technology that could possibly reach Indian courts. The second scenario could be that the arbitral tribunals are using technology in a very limited sense and only to the extent that such usage is necessary to deal with the pandemic related exigencies and hence, more sophisticated issues do not arise for adjudication by the Indian courts. Lastly, the technology may be used by the parties privately without disclosing the same to the arbitral tribunal and hence, the non-user party may not be aware of any issues arising out of use of such technology. In any case, the existence of these three scenarios in itself indicates that there is no available knowledge or research pertaining to the use of technology in Indian arbitrations.

(B) Research Objectives: The research aims to achieve the following objectives:

- a. To compare global practices with respect to the use of technology in arbitration with the use of technology in Indian arbitration regime.
- b. To identify the degree of usage and proliferation of technology in India seated arbitrations.
- c. To examine the impact of COVID pandemic on the use of technology in Indian arbitration regime.
- d. To identify the issues and legal impediments in use of technology in Indian arbitration regime.
- e. To suggest solutions for the better use of technology in Indian arbitration.

(C) Scope and Limitation: The scope of this paper is limited to examining the use of technology in domestic arbitrations in India and international commercial arbitrations seated in India. A major part of the paper is centred on the concept of virtual arbitration as the same is assumed to be the most popular technological tool used by Indian arbitrations. Furthermore, this paper does not make any comment on the utility and problems in the use of technology in arbitration generally.

(D) Research Methodology: The researcher has broadly adopted a doctrinal and analytical study of the research topic. Since the advent of technology in arbitration is a fairly new topic

for the global arbitration community and more so for the Indian arbitral community, much of the data is secondary data except for limited case laws and statutory provisions. Since confidentiality of arbitration proceedings is a general rule and much jurisprudence regarding the research topic has not reached Indian courts, the researcher has also undertaken few consultations with some practitioners and subject experts regarding their experience with technology in India.

(E) Review of Literature

- **David Bateson, Virtual Arbitration: The Impact of COVID-19**, 9 INDIAN JOURNAL OF ARBITRATION LAW 159 (2020): This paper is a note that comments upon the various concerns surrounding virtual arbitration in light of COVID-19. This paper takes into account the current practices employed by popular arbitral institutions around the globe and what challenges can crop up from use of technology in arbitration either actually or potentially.

- **2018 International Arbitration Survey: The Evolution of International Arbitration**, QUEEN'S MARY UNIVERSITY OF LONDON (2018), <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-InternationalArbitration-Survey-report.pdf>: Globally, this survey is considered the most authoritative empirical source to measure the efficacy and popularity of international arbitration. At the time of literature review, only the 2018 survey results were available in public domain and hence, they were used as a starting point to understand the proliferation of technology in international arbitration.

- **ARBITRATION IN INDIA (Dushyant Dave et al. eds., Kluwer Arbitration, 2021)**: This is one of the most recent publications concerning arbitration in India. This book features essays from various arbitrators and counsel specializing in Indian arbitration. Therefore, this book provided useful insights regarding prevailing arbitration practices along with relevant statutory and case law review prevalent in India.

- **Niti Aayog Expert Committee on ODR, Designing the Future of Dispute Resolution: The ODR Policy Plan for India**, NITI AAYOG 87 (Oct. 2020), https://niti.gov.in/sites/default/files/2020-10/Draft-ODR-Report-_NITI Aayog Committee. pdf:

II. USE OF TECHNOLOGY IN INTERNATIONAL ARBITRATION

Even before the advent of COVID-19 pandemic, international arbitration lawyers have been using technological tools for various purposes. Technological tools are used simply because they are more efficient, arguably cost effective, but most importantly these are time saving. Thus, these advantages prompt the usage of technology in international arbitration. Another

motivating factor is necessity i.e. the pandemic.

(A) Available Technological Tools: Technology can be used for various purposes at various stages of arbitration. These can be classified into four broad categories, namely, online tools, algorithm based softwares, assistive technological tools and app based tools.

- 1. Online Conduct of Arbitration Proceedings:** This is the most common use of technology in arbitration these days. It involves conduct of arbitral proceedings over a virtual platform and includes sending of documents via e-mail. Similarly, virtual arbitration hearings have been routinely used for case management conferences and preliminary hearings to set up a schedule and timelines for various stages of arbitration. To facilitate virtual hearings and online arbitration, many popular arbitral institutions like Singapore International Arbitration Centre have offered a one stop solution by collaborating with various service providers.
- 2. Algorithm based software:** Algorithm based software or Artificial Intelligence (hereinafter 'AI') technologies have been the most remarkable contemporary technological tool in the arbitration landscape. AI tools have opened up new opportunities by providing services like data analytics softwares etc. Lawyers are already employing AI to conduct low level legal tasks such as reviewing contracts, researching case laws and reducing due diligence tasks by screening evidence and eliminating unnecessary documents.
- 3. Assistive technologies:** In the current scenario, cutting edge technologies like speech recognition which assist in translation, interpretations etc. have made human translators, secretaries etc. a thing of the past. Although limited human intervention is required to supervise and ensure the accuracy of the data, yet it has greatly improved the efficiency of arbitration proceedings. Another point to note here is that unlike courtroom litigation, arbitration allows for procedural flexibility in making submissions and presenting arguments.
- 4. App Based Technologies:** With the emergence of smart phones and android operating systems, portable phones have become fully functional computers available on the go. Today, all of our daily activities are done through apps. Thus, arbitration has not fallen behind and it too has adapted itself to suit the busy life of a lawyer. However, at the outset, it is necessary to mention here that apps have not been very popular in the international arbitral community when compared with other technological tools. Many of the technological are also available in form of an app.

5. Global Key Developments: Given the abundance of available technological tools, the next question that arises is that how popular are these tools in the international arbitration landscape. Globally, there have been some key developments with respect to use of technology in arbitration. Of course some of these are in the aftermath of the pandemic, nevertheless, all these trends point to an increasing trend of using technology in arbitration.

(B) Initiatives by Arbitral Institutions: In response to the pandemic, many arbitral institutions issued guidance notes for the use of video conferencing which are compatible with their institutional rules. Apart from this, almost all arbitral institutions are encouraging dialogue on the subject through webinars, conferences etc. to increase awareness and encourage use of technology in arbitration.

(C) Initiatives by States: Mere amendment of institutional arbitral rules is not enough to legitimize the use of technology in arbitration. Since arbitration is a seat-centric concept, the use of technology cannot be permitted unless and until the seat (or the enforcing) state recognizes such arbitration proceedings. Apart from the legislative efforts, judiciary around the globe has also been pro-active in encouraging the use of technology in arbitration. It is imperative to mention here that courts have not expressly ruled with regards to any other issue arising out of the use of technology in arbitration. However, the courts have also encouraged the use of technology in ordinary court proceedings.

(D) Research suggesting increase in the use of technology: The 2018 Queen's Mary survey had indicated that 60% of the answering respondents had "always" or "frequently" used videoconferencing room technologies in their arbitration.¹ Moreover, the 2021 version of the survey has indicated an increase in the use of AI technologies in arbitration.² Interestingly, this survey has also indicated that the degree of use of video conferencing and hearing rooms has more or less remained the same implying that the use of such technologies has already reached the saturation point and has already become the industry norm in the international arbitration community.

III. CHALLENGES

It has been identified and affirmed that India is not regularly using technology in arbitration when compared with international standards. This is because of various problems and concerns associated with the use of technology.

(A) Legal Concerns: It is pertinent to mention here that till date Indian courts have not frequently confronted any legal issue arising solely because of use of technology or virtual hearing in arbitration. On the other hand, it has been seen that courts around the globe have increasingly been facing such concerns and therefore, it would be useful to identify and comment upon possible legal objections that may arise from use of technology in India seated arbitrations.

- **Unequal Treatment of Parties:** Some concerns have been raised with regards to the impact of technology on the equal treatment of parties. Sec. 18 of the Act states that parties to the dispute have to be treated equally. A white paper had noted that this issue may arise due to the use of different audio and video equipment by the parties or where one party may be present in person and one party may be present virtually.
- **Fair & Reasonable Opportunity to present one's case:** It has been seen that conducting virtual hearings is the only viable option left before the arbitral tribunals to proceed with the arbitration during the pandemic.
- **Lack of Clarity on Confidentiality:** Confidentiality is a hallmark benefit of arbitration. However, Indian law did not expressly provide for confidentiality of arbitral proceedings.

(B) Practical Concerns: As important as legal concerns appear to be, nevertheless, they tend to disappear when more and more technology is actually being used. Therefore, it becomes imperative to identify the ground realities which have hindered the adoption of technology in the contemporary Indian arbitration landscape.

- **Reluctance from Arbitral Community:** During consultations with various practitioners and experts, it was found that a lack of awareness regarding the use of technology amongst the Indian arbitral community is the primary hindrance to the use of technology in India. This is because most senior practitioners, judges and arbitrators have spent their careers in a physical arbitration environment and hence, there is a passive and involuntary reluctance from the arbitral community to employ technology in arbitration.
- **Untrained Arbitrators:** As a corollary to the previous challenge, one reason that may explain the reluctance of Indian arbitrators is unfamiliarity with prevailing technologies. It is only natural to assume, that many readers would be coming across these tools for the first time and even those who are familiar

with such technologies would testify to the fact that the use of such technologies requires a certain degree of training.

- **High Cost:** Costs associated with the use of technology is a problem which has continuously plagued arbitration. Even the most sophisticated and repeat players are consistently worried about the costs incurred due to the use of technological tools in arbitration. Therefore, it is only natural that Indian parties belonging to a developing country would be more worried about the costs.
- **Lack of E-Stamping Facilities:** Under Indian law, an award is to be sufficiently stamped before it can be enforced as a decree of the court. At the outset, it is clarified here that stamping is important for the enforcement of an award and not for making of an award. This is because Sec. 31 of the Act provides conditions for making an award. These conditions do not enumerate stamping of the award.

(C) Technological Concerns: A shift from pen and paper arbitration regime to a tech- savvy regime is bound to bring its own unique set of challenges which need to be identified before technological tools are adopted.

- **Concerns Regarding Witness Coaching:** A common issue that emerged during consultations with practitioners is that of witness coaching. There is a real possibility that a witness may open a chat service or a document on his screen during the cross-examination or there may be other person present in the room feeding answers to the witness.
- **Cybersecurity Concerns:** With arbitration being a highly confidential affair, the need to ensure integrity of data on third party platforms assumes high significance. More use of technology would naturally lead to a higher risk of hacking and other cybersecurity concerns.
- **Data Protection Concerns:** With the emergence of global information economy, personal data is the new gold. Behavioural tagging, data profiling etc. are some of the reasons which has led to the development of data protection law. While most of the literature concerning data protection and arbitration is aimed at ensuring compliance with existing laws, failure to establish a data protection protocol can have adverse consequences.

IV. SUGGESTIONS

The research has revealed that there is a long road ahead before India can match international best practices regarding the use of technology. To cover this distance, this chapter offers suggestions which have been classified into three categories namely immediate, short term and long term suggestions.

(A) Immediate Suggestions:

1. Procedural Guidelines should be provided by the Supreme Court.
2. Addressing due process concerns
3. Amendment of Arbitration Clauses
4. Incentives from arbitral institutions
5. Incorporating data protection clauses with service providers

(B) Short Term Suggestions:

1. Incorporation of more Indian service providers of technology and funders
2. Legislative Amendments to recognize technological tools in arbitration
3. Enactment of Online Dispute Resolution specific Provisions/Policies
4. Reimagining the role of Court Annexed arbitral institutions
5. Enacting the Data Protection Law

(C) Long Term Suggestions:

1. More use of technology
2. Co-ordination between Courts and Arbitral Tribunals
3. Continued innovation by arbitral institutions
4. Developing Infrastructure

V. CONCLUSION

This paper has drawn out the existing use of technology in Indian arbitration landscape. The paper has affirmed the fact that contemporary Indian arbitral community uses technology as a response to the pandemic and does not stand at par with international arbitration in terms of technological proliferation and comfort whilst using technology. The paper has then enumerated hindrances in the use of such technology and finally, proposed a comprehensive plan involving all stakeholders to promote the use of technology in Indian arbitration. On one end, international

arbitral community has been rampantly adopting technology at all fronts. Current innovations and technological best practices are the result of international discussion and initiative. On the other hand, India has been playing catch up and it has barely scratched the potential benefits that can be derived from the use of technology in arbitration. Lack of use of technology in arbitration is the reason why the legal jurisprudence pertaining to the same is almost non-existent in India. The Law Commission of India in 2014 had suggested use of tele-conferencing and video-conferencing in arbitration. After 6 years, Indian arbitrators had to resort to this alternative albeit because of COVID. Practitioners have noted that although the use of technology was due to COVID, parties have recognized the advantages of the same especially in terms of cost and time saving. With respect to other technologies, India should not wait for another pandemic. It is amply clear that if used properly and rationally, technology can change the face of Indian arbitration. Furthermore, COVID-19 cannot be seen as an end but only as the beginning of use of technology in India seated arbitrations. Keeping true to its objective, this paper has advocated for a methodology to incorporate technology in arbitration keeping in mind the unique arbitral landscape of India.

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