

Dimensions Of Online Arbitration In India

Abstract

The rapid expansion of commercial transactions and globalization has given rise to spiraling growth in arbitration at the national as well as international stages. Arbitration is one of the modern techniques of alternative dispute resolution (ADR) that has gained a lot of prominence due to the freedom it offers to the disputants. Online Arbitration is a mixture of conventional Arbitration under Arbitration & Conciliation Act 1996, combined with technological features requiring application of Information Technology Act 2000. This paper looks at the dimensions of online arbitration in India along with the difficulties, advantages and legal complexities that this form of dispute resolution entails. The future of arbitration is online arbitration if India wants to cut down on its ever increasing backlog of cases and this form of alternative dispute resolution would allow quick settlements to international as well as domestic business entities.

Introduction

The rapid expansion of commercial transactions and globalization has given rise to spiraling growth in arbitration at the national as well as international stages. The disputes arising out of the huge volumes of business transactions need solutions by various forms of settlement. Arbitration is one of the modern techniques of alternative dispute resolution (ADR) that has gained a lot of prominence due to the freedom it offers to the disputants. Arbitration is the procedure by which disputant parties agree to submit their disputes to an independent neutral third party, known as arbitrator, who listens to the arguments and considers the evidence submitted before declaring a final award which is binding upon the disputant parties.

The formal legal system is ill-equipped to handle the insurmountable arrears of disputes that continue to plague the legal system in India. The idea of arbitration was to ease the process of access to justice as reported by several expert bodies¹. The first instance of arbitration in India was *The Bengal Regulation Act, 1772* that introduced the role of arbitrators in dispute resolution. Since then arbitration has undergone a lot of developments in India with the introduction of the *The Arbitration Act, 1940* which repealed the *Arbitration Act 1899* and finally the formation of the *Arbitration and Conciliation Act, 1996*. Today, arbitration has developed further and a new form of arbitration has come to the fore which is known as online arbitration.

The Indian judicial system is marred by delays and the backlog of cases is continuing to surmount even with the various methods of ADR existing under the given legal system in India. Online dispute resolution seems to be the only alternative left to cut down the huge arrears of cases and this form of dispute resolution has been used effectively by the National Internet Exchange of India (NIXI) for domain name dispute resolution². Online Arbitration is a mixture of conventional Arbitration under Arbitration & Conciliation Act 1996, combined with technological features requiring application of Information Technology Act 2000. It is similar to traditional arbitration but the only difference is that it is conducted over the internet. The development and wide spread acceptance of online arbitration proceedings can be attributed to its cost-effectiveness and quickness. This is made possible because online dispute resolution by using internet and the parties autonomy, makes the proceedings quick

¹ Report of the Committee on Legal Aid (1971).

Report of the Expert Committee on Legal Aid: Processual Justice to the People, (1973), Government of India, Ministry of Law, Justice and Company Affairs.

Report on National Juridicare Equal Justice – Social Justice, (1977), Ministry of Law, Justice and Company Affairs.

² Anurag K. Agarwal. *Is India Ready For Online Dispute Resolution?* IIMA. W.P. No.2006-10-03.

and free from outside interference³. Online arbitration in India has to face difficulties of digital inclusion and widespread acceptance of the dispute resolution method via internet but India can definitely improve its technology infrastructure and develop institutional facilities to make Online Arbitration successful in India.

Key Features of Online Arbitration in India

Online arbitration in India follows the *Information Technology Act 2000* as well as the *Arbitration and Conciliation Act 1996*. Under the Information Technology Act, Sections 4 & 5 read with Section 65-B clearly enumerates that electronic records and signatures can be introduced as evidence and given legal recognition under the Indian legal system. Submitting a dispute to online arbitration can occur when there is an e-contract containing an online arbitration clause, or when there is normal written agreement with a clause mentioning reference to online arbitration or when the dispute arises the parties agree to resolve the matter via online resolution. Arbitration and Online Arbitration comprises mainly of the arbitration agreement, nature of arbitral proceedings, the arbitral award and the method of enforcement of the arbitral award.

Arbitration agreement entered into by exchange of emails has been accepted as a valid form of agreement in India by the Hon'ble Supreme Court in the cases of *Shakti Bhog*⁴ and *Trimex*⁵. In *Trimex*, the Hon'ble Supreme Court held that if the intention of the parties to arbitrate any dispute has arisen in the offer and acceptance thereof, the dispute is to be settled through arbitration. The only requirement of the arbitration agreement is that the parties must clearly spell out the technology to be used in settlement of disputes, the place of arbitration, laws governing the contract entered into between the two parties, jurisdiction of courts and

³ Ibrahim Al Swelmiyeen. *Online Arbitration and Defamation in Social Networks*. BILETTA 26th Annual Conference. Manchester Metropolitan University. School of Law.

⁴ *Shakti Bhog Foods Ltd. V. Kola Shipping Ltd.*, AIR 2009 SC 12

⁵ *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.* (2010) 3 SCC 1

whether it is going to be ad-hoc arbitration or institutional arbitration. The Online arbitration agreement is the most important document of the arbitration and since the parties do not meet personally but rather virtually, it is pertinent that the agreement clearly defines all particulars of the dispute resolution mechanism. There must be meeting of minds and the agreement must be according to Section 7 of the Arbitration and Conciliation Act 1996.

The arbitral proceedings in online arbitration are conducted virtually and all the claims and defenses are presented in electronic form. The International Chamber of Commerce (ICC) has formulated certain guidelines to maintain standards in online arbitration proceedings. Some of the rules state:

- a) File names should always be given a unique name/identifier for each electronic document so as to identify the originator, class of document and place of arbitration.
- b) The same form of file naming system should be used throughout the arbitration for all electronic documents.
- c) The file name and the date of the original document (e.g. the date shown on a letter that is submitted as evidence) shall appear on the first page of the electronic document, either at the top right corner or at the bottom.
- d) If data loss occurs and the affected participant cannot itself reconstitute the lost electronic documents, the other participants shall help to reconstitute the electronic file(s) by providing copies of the pertinent files that they control.
- e) A uniform method of mode of transmission and storage of emails should be practiced.
- f) Whether any confirmation of receipt of email has to be given should be mentioned beforehand.
- g) File format for sending attachments, like. PDF, Doc, HTML, ASCII should be generally followed unless specifically mentioned otherwise.

For audio and video conferencing during online arbitration ICC has stated that the arbitral tribunal, in consultation with the parties, will issue directions giving details for the conference, such as:

- i) day and hour and applicable time zone;
- ii) places where a conference front-end is required;
- iii) who shall participate and number of persons at each front-end;
- iv) special requirements, such as visualization of documents;
- v) any other requirements.

The arbitration proceedings should adhere by these rules and every detail must be clearly mentioned in the arbitration agreement. The arbitrators must always try to maintain equality and impartiality during the proceedings and comply with Sections 12 and 18 of the *Arbitration and Conciliation Act 1996*.

Finally, once the arbitral award has been formulated it can be exchanged between the parties via email and signed by the arbitrators as enumerated under Section 31 of the *Arbitration and Conciliation Act 1996*. Scanned copies of the award can be sent via email while the original documents can be sent via post at a later date for reference. This would complete the arbitration proceedings. The arbitral award can be enforced according to the law and there should not be any difficulty arising out of the award.

Around the world, there are several ODR providers who offer services by using their owned IT software technology. However, in India a lot of development is required before ODR providers are accepted by the general public. Arbitration via internet is still in its nascent stage though the law is well established regarding the validity of such proceedings.

Pros and Cons of ODR

There are several benefits arising out of online arbitration in India. Online arbitration encompasses the use of Internet, email, streaming media, websites, web chat sessions and various other technological features which are part of the online dispute resolution proceedings. Business community, government and ADR institutions have emphasized on the importance of online arbitration because it would supplement offline dispute resolution mechanisms⁶. The most important benefit arising out of online arbitration is speed of process. Business entities need smooth functioning of their commercial transactions and to end their disputes speedily they would definitely accept online arbitration. Further, online arbitration provides ease of access and convenience to the disputants. Internet availability is a key part of online arbitration and though the spread of internet connectivity has not reached remote villages but for the business community online arbitration is definitely a source of efficient time management cost savings. Lastly, online arbitration cuts down geographical barriers and it also provide immense storage space for storing documents. Most courts in India do not have place to store the immense amount of papers and several court files are destroyed each year. However, online storage space used in online arbitration can definitely help in storing innumerable documents and records.

The problems with online arbitration in India are the lack of infrastructure and human institutions who are well versed with arbitration proceedings. Trust and confidence must be instilled in the litigant public who generally prefer courts to arbitration since they are not aware of arbitration proceedings. Technology gap between the old and the young generation should be shortened to further develop online arbitration. Lawyers should be instructed to not engage in frivolous litigation and encourage clients to settle their disputes amicably via online arbitration proceedings. Education barrier and lack of access to technology is another main drawback behind implementation of online arbitration in India. Online arbitration may

⁶ E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (John Wiley & Sons Inc., 2001).

not be suitable for resolving all sorts of disputes such as criminal matters and matrimonial disputes which do need other forums for access to justice. However, in spite of the drawbacks linked with online arbitration, it remains one of the most significant methods of resolving Business to Business (B2B) and Business to Consumer (B2C) disputes in the current era.

Future of Online Arbitration in India

Online Dispute Resolution (ODR) and Online Arbitration have a lot of significance in the present world where technology drives almost every moment of our lives. However, in India, there is paucity of access to simple, affordable and appropriate computers or internet connections which forms the backbone of any online arbitration. The development of technology has not been evenly distributed around the globe so there is the risk that India would suffer tremendously if online arbitration becomes an important feature of dispute resolution in India. Though online arbitration is most frequently utilized to resolve disputes between e-commerce Business to Consumer (B2C) disputes but there are certain developing countries where individuals frequently engage in online businesses and thereby disputes do arise which needs amicable solutions. India, for instance, engages in a lot of online transactions but the number of online users is miniscule compared to the population of the country. Under such circumstance, technological readiness is the key to help individuals who get embroiled in online disputes.

Online arbitration may present several difficulties but in essence it is not different compared to normal arbitration. Entering into arbitration agreements in certain online settings may conflict with the basic principle of international arbitration law that the consent of the parties is a *conditio sine qua non* to validly agree on arbitration because under certain situations the parties might state that they had not read the agreement carefully before accepting it by a

single click of a mouse⁷. However, if the online arbitration agreement has been meticulously formulated then there should be no reason to deny validity to the arbitral award arising out of such proceedings.

Digital inclusion is the need of the hour and socio-cultural change can only help India to cut down its ever increasing backlog of cases. People who are skeptical about the online environment must be trained to gain trust in online arbitration. The international community is under an obligation to assist developing countries such as India to achieve global digital inclusion. Developing human and institutional capacities to address online arbitration issues is also the need of the hour. With time, India would definitely embrace online arbitration and it has already set out on the course to achieve it.

⁷ A. Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Deventer: Kluwer, 1990) at 38; J. Coe, *International Commercial Arbitration: American Principles and Practice in a Global Context* (New York: Transnational Juris, 1997) at 55; B. Poznanski, "The Nature and Extent of Arbitration Powers in International Commercial Arbitration" (1987) 4 J. Int'l Arb. 71 at 71; A. van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (Antwerp: Kluwer, 1981) at 173.