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E-ARBITRATION – THE WAY FORWARD?

APRIL 23, 2020

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With technology advancing rapidly and new developments in this field, technology has made inroads into various fields of industry and commerce. The use of technology in judicial processes too has been talked about. While understandably the complete judicial process cannot be digitalized, it is high time that digital facilities are introduced and implemented to reduce time, costs and effort. Especially in a country like India where given the population, the number of cases coupled with an alarming scarcity of judges has given rise to a backlog of cases. This requires an efficient and quick alternative remedy to ensure that the burden on the courts is reduced.

Online Dispute Resolution (ODR) or E-Arbitration can be a response to this problem, at least partially. ODR is a wide class of alternative dispute resolution processes that take advantage of the availability and increasing development of internet technology.[1] In fact, in the wake of the global pandemic of COVID-19, the need for ODR has been recognized and felt more than ever. In this paper, we look at the applicability and the efficacy of electronic arbitration as a form of ODR on India.

BENEFITS OF ELECTRONIC ARBITRATION OVER TRADITIONAL ARBITRATION

While E-Arbitration is principally the same as Traditional Arbitration, being based on the will and consent of two or more contracting parties to resolve their disputes outside of the courts by vesting an arbitrator with the power to make binding awards by adjudicating on the disputes between such parties, it does look to straighten out certain vital creases that have developed in the process of Traditional Arbitration over the years. Some such challenges that Electronic Arbitration seeks to resolve are listed hereunder:

a. ***Costs:*** Arbitration as a remedy forms part of most corporate contracts, but is still inaccessible for commercial contracts between economically weaker parties. One of the major reasons for the same is the sheer cost it entails, including that of the venue and the arbitrator, dragged out over a substantial span of time. A widespread use of internet and technology for the procedure has proven to have reduced the cost element in all jurisdictions Electronic Arbitration is practiced.

b. ***Time*****:** Electronic means for Arbitration cuts out the time constraints, the travelling time, the time spent for physical documentation etc., thereby substantially reducing the time taken in the entire process.

c. ***Contingencies:*** COVID-19 is an eye-opener of the world to contingencies which may affect any kind of physical transaction, including the proceedings before courts and Traditional arbitral tribunals. Electronic Arbitration, on the other hand, is immune to such contingencies and remains unaffected by Force Majeure to a large extent.

PROCEDURAL IMPLEMENTATION OF ELECTRONIC ARBITRATION

It is now relevant to look at Electronic Arbitration as a process and its applicability with respect to the procedure followed for Traditional Arbitration today, under the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**). It is pertinent to note that the akin to the Arbitration Centers for Traditional Arbitration, service providers facilitating the processes for Electronic Arbitration do exist and provide services as on date.[2] However, engaging such centers would be expensive. Therefore, it is important for

[1] Al Nenstiel, "Online Dispute Resolution: A Canada-United States Initiative" (2006) 32 Can.-U.S. L.J. 313.
[2] https://www.arbitrationplace.com/arbitration-place-virtual-ehearings

the parties themselves to understand the nuances of the procedure of Electronic Arbitration before opting for the same:

a. Opting for Electronic Arbitration:

By way of entering into an Arbitration Agreement, the parties to the agreement undertake to renounce their right to approach a court of law, and to submit their disputes to arbitral tribunal. However, arbitration being a product of consent of the parties, there needs to be a specific consensual agreement to refer a dispute to Electronic Arbitration procedure. A predictable challenge to this consensual agreement of parties is standard form contracts, which may be in the form of click wrap agreements or otherwise. Since one of the parties to such a contract does not have an option to negotiate the terms, the question arises as to whether the party in advantage can narrow the scope of dispute resolution down to something as specific as Electronic Arbitration by way of such contracts.

A solution to this challenge can be taking inspiration from the provisions of Section 29B of the Arbitration Act, where parties may agree to refer a dispute to fast track arbitration till the point of appointment of an arbitrator.

Similarly, for Electronic Arbitration, the consent for referring a dispute to the same may be allowed till such time an arbitrator is appointed, so as to not only ensure that such reference is made with the free will of all parties to the dispute, but to also let the parties determine whether the nature and the amount involved in a particular dispute would warrant e-arbitration.

b. Commencement of Arbitration Proceedings:

Unless otherwise agreed by the parties, arbitration proceedings are said to commence on the date on which the respondent receives a request for referring a dispute to arbitration.[3] In order to implement Electronic Arbitration, such notice can easily be given by way of email, bearing the digital signature of the Claimant, to ascertain identity. Similar electronic notice may be given to the Arbitrator or Arbitral Tribunal. The Information Technology Act, 2000 already recognises the validity of an electronic signature.[4] However, Section 3 of the Arbitration and Reconciliation Act, 1996, requires all written communication to be delivered to the addressee personally or at his place of business, habitual residence or mailing address.

Therefore, there shall be a requirement to harmonise the laws in order to implement this stage of Electronic Arbitration.

c. Statements of Claims and Defences:

Section 23 of the Arbitration Act stipulates the stage of filing of statement of claim and defence, including counter claims, by the parties to an arbitration. While nothing specifically provides for such statements of claim, defence and counter claim to be in a physical form that is the current practice followed in the country.

On the contrary, Article 3(2) of the Rules prescribed by International Chamber of Commerce (**"ICC Rules"**) stipulates written communication, including pleadings and other documents, to be sent to the Secretariat and the arbitral tribunal electronically.

[3] Section 21, Arbitration and Conciliation Act, 1996.

[4] Section 3, Information Technology Act, 2000.

In India, certain courts and tribunals, including the Delhi High Court, have devised procedures for e-filing. However, the same is primitive and in its early stages, since the litigants are additionally required to submit physical copies of the e-filed documents, which are merely scanned copies of the physical documents.

Therefore, a more extensive use of the technology of e-filing, by way of affixing digital signatures, as well as by way of digital notarization of documents, is pertinent in order to implement this stage in the country.

d. Evidence:

Documentary Evidence

While, of course, electronic records have been recognized and considered admissible under Section 65B of the Indian Evidence Act, 1872, rendering physical evidence electronically would carry its own risks and challenges due to the inability of the parties or the arbitral tribunal to ascertain the authenticity of such records.

A solution to this problem today can be depending upon the postal service to send the original copies of documentary evidence the authenticity whereof is in question, to the tribunal for the verification of its authenticity.

Witness Examination

The Supreme Court recognized the benefit of remote conferencing in the matter of *Grid Corporation of Orissa Ltd. vs. AES Corporation [(2002) 7 SCC 736]* and observed as follows:

> *"When an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties".*

Subsequently, not long thereafter, the Supreme Court upheld video conferencing as an acceptable method for recording a witness testimony in the case of *State of Maharashtra v. Dr. Praful B. Desai [(2003) 4 SCC 601]*. Relevant extract of the judgment is reproduced hereunder:

> *"Virtual reality is a state where one is made to feel, hear or imagine what does not really exist. Video-conferencing has nothing to do with virtual reality. Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. This is not virtual reality; it is actual reality. In fact, the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded Court room. They can observe his or her demeanor. In fact the facility to play back would enable better observation of demeanor. They can hear and rehear the deposition of the witness."*

Therefore, as far as recording witness testimony, and the examination and cross examination of a witness is concerned, the Indian legal system has already adapted to the same. Using the same for the advancement of ODR, Electronic Arbitration specifically, should be an easy transition.

e. Hearings and Award:

Section 24 of the Arbitration Act envisages an option with the arbitral tribunal to conduct proceedings with or without an oral hearing. Where the parties or the tribunal are of the opinion that an oral hearing is required during an Electronic Arbitration, video conferencing is an easy and efficient method for the same.

Section 31 of the Arbitration Act requires an award to be in writing, and signed by the arbitrator(s). This requirement can be fulfilled by affixing digital signature to an electronic award by such arbitrator(s), and authenticating the document in terms of the Information Technology Act, 2000.

CHALLENGES

ODR as a concept is not entirely unheard-of in the Indian legal system. For instance, under the Banking Ombudsman Scheme, 2006, issued by the Reserve Bank of India, complaints are allowed to be made to the Banking Ombudsman online. However, the system is not free of challenges and drawbacks in itself, which need to be addressed in order to consider whether Electronic Arbitration is, in fact, a better process than the Traditional Arbitration.

a. Confidentiality

Confidentiality is one of the primary reasons why parties across the world choose to opt for ADR, especially in commercial matters. In fact, in the Arbitration Act, through a recent amendment, now specifically stipulates for confidentiality of information in an arbitration proceeding, unless disclosure is required for the enforcement of an award.[5]

However, with Electronic Arbitration and its vast reliance on technology, there is always a threat of breach of such confidentiality. Cyber criminals may employ techniques to intercept data and communications between parties and any information flowing through internet network could be stored or misused by such criminals without authorization/ consent of the parties. Use of cookies can also breach the privacy of individuals and raise security concerns. In this regard, sophisticated techniques for enhancing internet security such as use of digital signatures, electronic signatures are being used to conduct ODR process. Use technology to combat any loopholes in internet security will strengthen ODR process.

Penalty may be imposed as a deterrent effect to prevent the same, however, the effectiveness of the same is arguable. The French Programming Act[6] provides for a criminal liability up to one year of imprisonment and a fine of €15,000 which can be incurred for a breach of confidentiality, as per article 226-13 of the French Criminal Code.

b. Determining the seat

The seat of an arbitration refers to the jurisdiction, the laws of which govern the e law of contract determining the substantive rights of the parties. Such seat of arbitration is not necessarily same as the venue or physical place of the arbitration, and the parties are at liberty to choose a convenient geographical location to hold the hearings while being subjected to a completely different jurisdiction in the form of seat of the arbitration proceedings.[7]

[5] Section 42A, Arbitration and Conciliation Act, 1996.

[6] The 2018-2022 French Programming Act for Justice, adopted by the Parliament on 19th February 2019

[7] Bharat Aluminium Company Ltd. & Ors. vs. Kaiser Aluminium Technical Service, Inc. & Ors. [(2012) 9 SCC 552]

One illustration of an arbitration agreement bearing a specific clause regarding the seat of arbitration can be the click wrap agreement stipulated by Microsoft on their website.[8] It is pertinent to mention that a perusal of this Agreement is relevant here since the same bears provisions for arbitration-on-call. The relevant provision in the said agreement is reproduced hereunder:

> *"Arbitration Procedure*
>
> *You may request a telephonic or in-person hearing by following the American Arbitration Association ("AAA") rules. In a dispute involving $10,000 or less, any hearing will be telephonic unless the arbitrator finds good cause to hold an in-person hearing instead. The arbitrator may award the same damages to you individually as a court could. The arbitrator may award declaratory or injunctive relief only to you individually, and only to the extent required to satisfy your individual claim."*

In the above-said Arbitration clause, the seat for arbitration is abundantly clear. Similar clauses have also been provided by Amazon[9] and Alibaba[10].

Where the parties do not specify a specific seat for arbitration in their Arbitration Agreement, in the course of a Traditional Arbitration, the same is generally determined by the conduct of the parties, including the jurisdiction specified in the substantive contract, the jurisdiction arising out the location of the transaction etc. The principle could be applied in the event of Electronic Arbitration as well, in the event the parties to such Arbitration Agreement do not specify a seat of the arbitration.

Even in the case where the transaction between the parties has been carried out online and there is no specific place of such transaction, the governing law of the substantive contract can be considered the seat of the arbitration.

In the worst-case scenario where even by conduct there is no determinable seat of arbitration, the location of parties may be considered for determining the same. It would then mean that the court where one of the parties approach first shall be conferred with the exclusive jurisdiction over any dispute arising out of such arbitration.[11]

In some situations, however, the facilitator for online arbitration themselves retain the power to decide the seat of an arbitration in the event the parties have not decided the same,[12] which, in the opinion of the author, is excess power in the hands of a third party administrator and should not be allowed.

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[8] https://www.microsoft.com/en-us/legal/arbitration/office2013.aspx
[9] https://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=508088&ref_=footer_cou
[10] https://rule.alibaba.com/rule/detail/2054.htm?spm=a271m.8038972.1999288231.2.d4d26d82H2nGBo
[11] Section 42, Arbitration and Conciliation Act, 1996.
[12] Article 15, JAMS International Arbitration Rules & Procedure: https://www.jamsadr.com/international-arbitration-rules/english#International-Arbitration-Rules

c. Lack of personal interaction

Certain critics such as Drake and Moberg[13] and Wilson, Aleman and Leatham[14] have expressed an apprehension that lack of personal interaction between the parties to a dispute reduces the chances of resolving disputes.

d. Using a third party facilitator

Third party arbitration facilitators are much more necessary in the Electronic Arbitration regime as compared to the Traditional Arbitration. The complexity of requirements and the general unawareness of the parties to the arbitration, their counsel, and the arbitrator himself, makes it imperative for an expert in conducting online proceedings to be present for a smooth functioning of the process.

However, the same poses certain fatal risks, including the increased possibility of breach of confidentiality and the potential conflict of interest. The same may be addressed through iron clad penal and indemnity clauses in the service agreement with the facilitator.

e. Human error

While there is no doubt the process of Electronic Arbitration is faster and more convenient, a large part of the same is still dependent on a human arbitrator, thereby making it prone to human error. It would therefore be relevant to explore Artificial Intelligence as a possible method to reduce such human dependence further.

ARTIFICIAL INTELLIGENCE

While there is no reportable use of Artificial Intelligence (**"AI"**) in the current scenario, researchers contemplate the use of Natural Language Processing and Machine Learning for passing of arbitration award independently through an AI software.

The world is currently at a stage where AI is close to being equipped enough to replace humans as judges. An algorithm developed by Kleinberg has been able to predict which bail applicants were likely to commit a crime upon release. When the AI based application was set to the same release rate as the judges, the algorithm's choices of applicants to release on bail committed 24.7% fewer crimes than those selected by the judges. The computer program only relied on the defendants' age and charges in making its judgment, while the judges engaged with the defendants in open court.[15]

In 2016, a team of academics at the University of London developed a bot fluent in AI that could predict judgments made in the European Court of Human Rights with a fairly respectable 79% accuracy rate.[16]

In Argentina, AI is being used to assist district attorneys in writing decisions in less complex cases such as taxi licence disputes that presiding judges can either approve, reject or rewrite. Using the district attorneys' digital library of 2,000 rulings from 2016 to 2017, the AI program matches cases to the most

[13] Drake, B. H., & Moberg, D. J. 1986. Communicating influence attempts in dyads: Linguistic sedatives and palliatives. Academy of Management Review, 11:567–584.

[14] Wilson, S. R., Aleman, C. G., & Leatham, G. B. 1998 Human Communication Research, 25(1): 64– 96.

[15] Jon Kleinberg & Himabindu Lakkaraju & Jure Leskovec & Jens Ludwig & Sendhil Mullainathan, 2018. "Human Decisions and Machine Predictions," The Quarterly Journal of Economics, Oxford University Press, vol. 133(1), pages 237-293.

[16] Aletras N, Tsarapatsanis D, Preoţiuc-Pietro D, Lampos V. 2016. Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective. *PeerJ Computer Science* 2:e93 https://doi.org/10.7717/peerj-cs.93

relevant decisions in the database, which enables it to guess how the court will rule. Thus far, judges have approved all of the suggested rulings—33 in total.[17]

Despite said trends, reluctance to replace humans as judges with machines has been rampant. The French Programming Act, in an attempt to address the issue of whether robots would ever replace judges, provides an answer through the regulation of online arbitration: it forbids entirely automated decision-making, thus unsurprisingly endorsing the broader philosophical conception that justice can only be human-made. However, the said Act remains unclear as regards the exact extent and role of artificial intelligence tools and use of algorithms in the arbitral process.

Key challenges to replacing human arbitrators entirely with AI software include the following:

a. AI shall be largely unable to make humane exceptions to the data sample fed to it. As a result, any injustice done in the past, shall continue without check. Any absence of precedents will render the AI judge paralyzed with respect to particular questions of law and fact. Therefore, human intervention cannot be discounted in such eventualities.

b. The use of AI can affect the values on which the law is founded and lead to breaches of fundamental rights, including the rights to freedom of expression, freedom of assembly, human dignity, non-discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, as applicable in certain domains, protection of personal data and private life, or the right to an effective judicial remedy and a fair trial, as well as consumer protection. These risks might result from flaws in the overall design of AI systems (including as regards human oversight) or from the use of data without correcting possible bias (e.g. the system is trained using only or mainly data from men leading to suboptimal results in relation to women).[18]
For instance, a 2016 investigation by ProPublica revealed that a number of US cities and states used an algorithm to assist with making bail decisions that was twice as likely to falsely label black prisoners as being at high-risk of re-offending than white prisoners.[19]

The words of Chief Justice of India, Justice S.A. Bobde, sum up the possible uses of AI in the Indian judicial system.[20] While he advocates the use of AI for purpose of ensuring that undue delay is prevented in the delivery of justice, he categorically denied any possibility of AI replacing human judges and their discretion.

In light of the above, while the dependence on a human arbitrator cannot be discounted out, AI could still be used for legal assistance to the arbitrators, helping expedite the process of arbitration, in the following manner:

a. Court Reporting
An AI platform would be able to record the hearing via microphones and provide a real-time transcript with speaker identification for all concerned.

[17] Patrick Gillespie, "When AI writes the Court Ruling" (29 October 2018), Bloomberg Businessweek.
[18] European Commission, White Paper On Artificial Intelligence - A European approach to excellence and trust, Brussels, 19.2.2020 https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf
[19] Jeremy Kahn, "Accenture Unveils Tool to Help Companies Insure Their AI Is Fair" (13 June 2018), Bloomberg, online: https://www.bloomberg.com/news/articles/2018-06-13/accenture-unveils-tool-to-help-companies-insure-their-ai-is-fair
[20] Business Standard, "CJI Bobde bats for AI-based system to prevent delay in justice" (January 11, 2020) https://www.businesstoday.in/current/economy-politics/cji-bobde-bats-for-ai-based-system-to-prevent-delay-in-justice/story/393633.html?utm_source=recengine&utm_medium=WEB&referral_sourceid=392738&referral_cat=Corporate

b. Translation

AI is capable of translating thousands of documents in seconds with very high accuracy, including scanned, hand-written or annotated documents, which would prove highly beneficial for cross-border disputes.

c. Deliberation and Research

AI assisted deliberation and research could help the arbitrators reach a thoroughly informed conclusion. In fact, even the challenges to the authenticity of an evidence and the statement of a witness can be adjudged using an AI software. AI will also be able to handle repetitive tasks of increasing complexity, especially in data extraction, which will require new systems to be built to extract value out of new kinds of data.

CONCLUSION

The Indian government is not alien to the efficacy and the effectiveness of ODR, and has in fact been issuing advisories to promote the same.[21] However, we are still far from implementation of the same in practicality.

Given the sheer population of the country, the need for speedy redressal of issues, and the desperation for relieving the judiciary of unnecessary and unwarranted burden, it is pertinent that India do a lot more than mere exploration in this field, and a lot faster than it is doing today.

Arbitration, largely being a process run by the consent and will of the parties to it, it is not even necessary to wait for the government to promote the same. Mere inclusion of possibility of Electronic Arbitration in the Arbitration Agreements would be a great start in taking the country in the right direction.

When the government does decide to bring an amendment specifically allowing such Electronic Arbitration in the country, the recommendation would be to consider avenues like e-commerce where this process would be more popular than others while framing the legislation, but to not limit the same to such avenues only.

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[Assisted by Rashveen Chawla]

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[21] https://doj.gov.in/page/online-dispute-resolution-through-mediation-arbitration-conciliation-etc