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Enforceability, Advantages, and Disadvantages of Online Arbitration

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Today, a large part of the population is online meaning that most activities are being performed via the digital platform. However, the revolution of technology has been long due in the legal sphere and the Covid19 pandemic has made this possible with the online platform becoming highly the need of the hour for conducting virtual hearings. With the various restrictions and hurdles that the courts are having to navigate to function and dispose-off cases effectually, the online medium of dispute resolution seems to be the only way out in these testing times. There is much development required for the online medium to be completely accessible to everyone which might only happen with time. It is an advancement that has taken place in lieu of the scenario of a world crisis disallowing functioning of general court proceedings, however in due course of time there is a possibility of the online mode of dispute resolution being considered an option for the future even once the pandemic is over, restrictions are removed and life goes back to normal.

Keywords: *arbitration, enforceability, online arbitration.*

INTRODUCTION

Arbitration is a method to settle disputes by way of appointing a neutral third party. The parties can acquire a final binding decision on their dispute through an independent

professional and expert of their own choice. The expression 'online' signifies communicating through the electric mode particularly on the internet. Online arbitration resembles traditional arbitration in as much as both follow almost the same procedure with just an addition of the scope of technology in the online arbitration sphere. The dispute can be referred to as online arbitration by the e-contract inculcated with an online arbitration clause or the same thing in a written format or by way of referring to it after the dispute has come up. Online arbitrations have the capability of conducting hearings via video conferencing, but most simply need the parties to upload the evidential documents online, answer the questions asked by the arbitrator, and then they would be given a decision by the arbitrator. Online arbitration is still an evolving sphere and therefore has many disadvantages it needs to navigate through. This paper will essentially delve into the enforceability, advantages, and disadvantages of online arbitration. Further, the paper will try to analyze whether online arbitration is necessary in today's world and whether the advantages can overshadow the disadvantages to make this method of dispute resolution the first-hand option for parties.

ENFORCEABILITY

(A) The scenario in India:

Under section 31, arbitration agreements require the arbitral award to be in writing and to be signed by members of the arbitral tribunal.¹ But the Information Technology Act, 2000 under section 4 states that written documents can be equated to information available in electronic form and under section 5, it further states that digital signatures have the same effect as the paper signature.² Thus, the award can very well be sent via email by way of sending scanned and signed copies. An example of this is the cases of *Shakti Bhog*³ and *Trimex*⁴ where the court upheld that exchange of mails is a valid form of communicating and thus held the arbitral agreement to be valid without any written documents.

¹ Arbitration and Conciliation Act 1996, s 31

² Information Technology Act 2000, s 4 & s 5

³ *Shakti Bhog Food Ltd v Kola Shipping Ltd* AIR 2009 SC 12

⁴ *Trimex International FZE Ltd v Vedanta Aluminum Ltd* (2010) 3 SCC 1

Furthermore, for enforcing the award either the original-signed copy or the awards sent digitally with the signatures could be filed in front of the courts. The approach might vary in other countries.

(B) The International scenario:

The New York Convention under article 2 requires every contracting state to recognize an agreement in writing.⁵ This term 'agreement in writing' must include a clause of arbitration in a contract or the agreement with signatures of the parties or the agreement contained in the form of exchange of telegrams or letters. What this essentially means is that the Convention does not mention or discuss electronic transmission to be like a feasible medium for concluding an arbitral agreement. The UNCITRAL Model Law on International Commercial Arbitration under Article 7(2) on the other hand provides a wide scope in as much as it says that any medium of communication could be given due consideration as a record of the agreement, making the list non-exhaustive, unlike the NYC.⁶ But as the name suggests, it is a Model Law and is not binding. States have the option open to incorporate it in their domestic law. Thus, this can pose serious enforceability problems of online arbitration in certain countries that are contracting states of NYC and have not incorporated any domestic law recognizing online arbitral awards specifically.

ADVANTAGES

(A) Some basic advantages:

Online arbitration is a tool that is especially suitable and efficient when the parties to the dispute are located at a distance. This would help save the travel costs along with the additional accommodation and food expenses. Speed and cost-effectiveness are the most obvious advantages that make online arbitration a much more desired means of dispute settlement than traditional arbitration or litigation. It is also preferred by many as it is a much

⁵ P Sanders, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 6 Netherlands International Law Review

⁶ Aron Broches, 'Commentary on the UNCITRAL Model Law on International Commercial Arbitration by Aron Broches' (1991) 7 Arbitration International

more informal and flexible way of resolving disputes as many people have the fear of physically being in front of the court or even arbitrator as they might find it intimidating. It is the easiest way of dispute resolution as it can be done anywhere anytime when there is the availability of the internet as per whatever is convenient to the parties at dispute with them choosing the laws that would be applicable doing away with the jurisdiction issue as well. A significant and practical advantage comes with the fact that there is no problem of document storage that is faced when the arbitration is conducted online and moreover, it also helps save wastage of paper as parties can submit all documents through the online platform itself.

(B) Advantages of Online Arbitration in Business to Consumer and Consumer to Consumer disputes:

Online arbitration can be made use of for both disputes emerging offline and those leading from online transactions. However, it is the most appropriate for e-commercial disputes wherein it is most sensible to use the same medium i.e. the internet for resolving disputes. Thinking rationally, it can be presumed that in the absence of efficacious remedies in the 'borderless marketplace' there might be a feeling created where businesses and consumers might take the decision of not transacting. However, the presence of the medium of online arbitration might enhance the confidence of the consumer at a more instinctive level. Katsh⁷ and Rule⁸ who have founded the medium of Online Dispute Resolution, have advanced the doctrine that "dispute resolution processes have a double role, firstly of settling disputes and secondly of building trust. Thus, most concerned with getting users attracted to some of the other online activity for either commerce or various things have the realization that their users need to be given some course of safety and trust apart from cost benefits and convenience.

There is an aggravation of the situation in cases of Consumer to Consumer sites- platforms wherein there is a direct trade between consumers instead of the ordinary and regular commercial business/consumer relation. Few examples of these websites are sites such as OLX eBay which are basically online auction sites where customers interact with each other on a

⁷ Ethan Katsh, 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace1' (2007) 21 *International Review of Law, Computers & Technology*

⁸ Colin Rule, *Online Dispute Resolution for Business* (Jossey-Bass 2002)

one-on-one basis directly. C2C is also inclusive of peer-peer exchange of funds now for example- GooglePay.

Standard conventional businesses have various incentives in the form of consumer trust and public relations for resolving disputes that may come up however, it can be argued that one-off consumer traders on sites such as OLX and eBay do not have these kinds of constraints and further do not even possess corporate resources for investigating, policing or even engaging with complaints.⁹ Consumers carrying out these one-on-one transactions do not have a previous or existing continuing relationship of trust or a reason to trust each other, thus making these sites highly prone to potential disputes. These Consumer to Consumer platforms on their own as a rule not only assert that they do not have the capacity to handle and manage the patterns and behaviors of their multiple clients, but also that there is no legally binding obligation considering their position as 'neutral intermediaries'. Therefore, these websites require efficacious dispute settlement procedures that are realistically accessible and can be permissibly used by consumers.

The reason why e-commerce customers do not approach courts can be anticipated by practically evaluating the scenario. Firstly, it is due to consumers' indifference and lack of interest in legal remedies. Secondly, due to the prices of the articles that are in dispute which is typically very low, and thirdly due to the contrastingly soaring high costs of access to legal advice and resolving disputes judicially.

In the online Business to Consumer issues on the other hand, additionally, the transactions are as likely to be cross-border as not. What this means is that it might seem that certain websites are of a particular country of national origin in one state by for e.g. language cues, but in reality, are managed by another state's headquarters. To the customer, this most likely would not be transparent. Furthermore, it is undeniable that unsettled and problematic situations related to jurisdiction, enforcement, and the choice of law would come up on a regular basis if the e-commerce disputes are to be litigated conventionally. Consumers might also be bothered

⁹ Farzaneh Badiie, 'Using Online Arbitration in E-Commerce Disputes' (2015) 2 International Journal on Online Dispute Resolution

to indulge in litigation in cross-border disputes due to language problems, non-access to free or priced legal advice, fear, and most importantly, xenophobia with regards to the success of the proceeding. Thus due to these reasons, online arbitration can be seen as an efficient, cheap, unthreatening, and fast method of resolving disputes with parties having the flexibility to choose their arbitrator and the country whose laws will be applicable.

(C) Coronavirus and the advantages and expansive use of the online mode of arbitration:

The present Pandemic has compelled us to assess multiple things with a lot more significance than the interruptions to our daily working lives specifically for those people who have not lost their careers in the short term, at least. However, these careers need to go on where they can. The Commercial activity needs to be successfully continued and is crucial for the minimization of losses that we would be left with even when the pandemic is over. In the context of arbitration, maintaining a just, equitable, and efficient process of dispute resolution influences the commercial potential of the party and in turn their own supply chains and employees. Thus it can be inferred that there are always vital gains of a dispute settlement system that functions well. In the present crisis with the coronavirus pandemic, a failed dispute settlement has the potential of adding up to the already strained economy and the economic damage caused by the pandemic. Online Arbitration is one of the types of Online dispute resolution which has been emerging as a good way to solve disputes and keeping the businesses going with the disputes being solved efficiently preventing further disruption to economic damage.

DISADVANTAGES

(A) Some basic disadvantages:

There are several disadvantages that come up with online arbitration. First and foremost, it requires that all the parties to the dispute have the necessary technology to take part in the process. This is not a very viable option as many parties come from backward classes and poor backgrounds having no access to the technology required. Secondly, though the internet provides a convenient method of communication, this needs to be contrasted with the

impersonal nature, it carries with it. The issue with emails and written messages is that they cannot in many instances express the tone, personality, pitch, and volume, or any other form of non-verbal cues. Why the tone is important is because it helps assess the opposite party's emotions leading to empathy and the establishment of confidence while making agreements. Thirdly, though the Information Technology Act along with the Indian Evidence Act does contain provisions for the validity of digital signatures, however, there could be other problems that might arise such as the failure of the link, failure of the system or failure of electricity, etc. that also needs to be taken into account.

Furthermore, according to a forensic psychologist at UBC Okanagan- Michale Woodworth, lying online is easier because- when human beings are talking face to face, there occurs what is said 'motivational impairment effect' according to which our body gives off certain clues when we become nervous.¹⁰ Whereas, in the online mode the exact opposite happens. When the stakes of deception are higher, the clues given out are more. It can be easily figured that one is lying due to the pressure of being caught and the pressure of the surroundings.¹¹ However, in the online mode, the pressure is less than it is in physical presence and it is easier for parties, especially witnesses to deceive.

(B) Privacy concerns:

Even though cutting-edge security and encryption technologies continually develop, the Internet can still be porous when it comes to the security of data transmitted electronically.¹² The zoom data breach in April 2020 is an example of how these videoconferencing apps can be troublesome.¹³ Many high-profile cases contain sensitive data that can at no cost be in reach of members other than the parties to the dispute. There are many business secrets that cannot be

¹⁰ Raina Ducklow and Bud Mortenson, 'Why People are Better at Lying Online than telling a Lie Face-to-Face' (*Science Daily*, 2009) <<https://www.sciencedaily.com/releases/2009/05/090503203738.htm>> accessed 18 August 2021

¹¹ *Ibid*

¹² 'The Future of ODR: The Promise of Advancing Technology' (*Mttlr*, 2015) <<https://mttlr.org/2015/10/the-future-of-odr-the-promise-of-advancing-technology/>> accessed 18 August 2021

¹³ Mohit Khanna, 'Zoom Data Breach: Over 5 Lakh Zoom Login Data Being Sold on Dark Web for Less than Rupee' (*India Times*, 2020) <<https://www.indiatimes.com/technology/news/zoom-data-breach-over-5-lakh-zoom-user-login-data-is-being-sold-on-dark-web-512407.html>> accessed 19 August 2021

compromised and the Zoom data breach which led to the hacking of login details about 5 lakh zoom users gives us a sign as to why these apps are not a good way to proceed in cases. Emails are also very vulnerable to hacking by way of malware, keyloggers, viruses, etc.

(C) Due process concerns in virtual witness testimonies:

Examination and cross-examination of witnesses over the online platform could pose many obstacles, most importantly that of confidentiality. With the insertion of section 42a by the amendment Act of 2019¹⁴, it became mandatory that the confidentiality of the arbitral proceedings is to be maintained by the arbitrator and parties. Conducting the proceedings through video conferencing applications poses innate threats like the recording of the proceedings with the intention of publicly making it available, hacking, and so on. These inherent possibilities can cause anxiousness in the minds of witnesses who might then be not willing to depose especially when the matter is sensitive.

Secondly, the issue of witness tutoring becomes more prominent as it is very easy for advocates to prompt answers with the chatbox option or by sitting in close proximity of the witness and giving them answers making the sanctity of the process ineffective.

Lastly and most importantly, the credibility of deposition has its connection to the analysis of the witnesses' demeanor by the arbitrator. The court has the power under Order 18 Rule 12 of the CPC to take those remarks into account which it sees as 'material' with respect to the demeanor of the witness being examined. Viewing the witness by the virtual eye might make this power given by law to the arbitrator non-effectual if not completely improbable.

CONCLUSION

Though there are certain problems of privacy and technology and other disadvantages, online arbitration can definitely be seen as a viable option in today's developing world. With the number of increasing cases along with the already existent backlog of cases, this option seems the most sensible one along with being cost-effective and more convenient. The pandemic has

¹⁴ Arbitration and Conciliation (Amendment) Act 2019, s 42 A

increased the use of this mode of resolution and given an insight into its advantages and how it can be used more widely with some technological developments. The crisis has opened everyone's eyes as to how things can change with conventional processes not being functional anymore. It has led everyone to practically consider online arbitration and adopt it continually even in the post-pandemic world. Its use has always been important in online disputes where the medium is the same and it is only practical and effectual when the same mode is used for the resolution as well. But since it has been brought into the forefront now and used for other disputes as well, it can be viewed as a first-hand option for all disputes due to the characteristics it has.