The Role of Online Dispute Resolution (ODR) in Indian Legal Framework: Analyzing the Impact of the Arbitration and Conciliation (Amendment) Act, 2021

Abstract

The future of justice consists in abandoning the traditional, location-based courtrooms in which the dispute resolution activity takes place, and adopting a service-oriented consideration of justice, where it is argued to be a dependable, accessible, and result-oriented service. This move is based on increasing leeway for technology in crafting the settlement of disputes, at the instance of which the example is the rise of ODR or Online Dispute Resolution. ODR, first initiated in response to the increase in Internet transactions during the 1990s, has developed from the simple tools based on communication through e-mails and video conferencing into integrated systems using advanced services of algorithms and machine learning to support dispute resolution.

On a global level, ODR initiatives have helped redefine the dispute resolution landscape in a manner from which valuable insights can be drawn by jurisdictions. Development of ODR goes side by side with the changes by the justice systems toward the case where the delivery of justice can be more equitable, inclusive, and take into account the needs of the digital world. The future of justice will rest on its capability to adapt to such technological developments, with a manner of transformation from a location-based service to one geared towards effective and fair outcomes for all.

Key Words: dispute, resolution, technology, justice, equitable

Conceptualising the Future of Justice

The future of justice has to be conceptualised outside the traditional brick-and-mortar courtrooms. Courts need no longer be visualised as places but as services that are accessible, formidable, comprehensible, and robust. Thereafter it is a question of shifting reform from outcome-oriented to process-oriented. What is more important is that such service need not be provided by courts alone. It is, therefore, already incrementally being pushed through the emergence of Alternative

Dispute Resolution, which becomes very significant for recalibration as we move further in a new global dispute resolution era.

The COVID-19 pandemic has, therefore, caused an acceleration of the global trend towards ODR, driven this time by the adoption of remote technologies in courts and private dispute resolution centers. In other words, the presence of the disputants in person is traditionally considered a pre-requisite for assuring the efficacy of dispute resolution; the possibilities of ODR bringing in more ease and less time consumption, as compared to traditional techniques of dispute resolution, have picked up because of this trend.

ODR presents a number of advantages in terms of being cheap to afford, accessible, and dispute resolution processes being able to be tailor-made with respect to the parties concerned. Without the time factor consumed by travel and a reduction in the complexity of legal procedures, ODR is best angled to answer the other problem that has been rife in court systems: the problem of delays and backlogs. More importantly, the flexibility of ODR permits the creation of hybrid dispute resolution processes, like, for example, med-arb and arb-med-arb, which take various aspects of both mediation and arbitration to deliver customized solutions.

Basically, there are three types of ODR platforms: government-run platforms, court-annexed platforms, and private sector platforms. Government-run platforms deal with disputes arising in certain regulated industries. Court-annexed platforms decrease the burden on courts by decreasing the number of cases that go to court. Private sector platforms, however, cut across a wide array of disputes, such as those arising from e-commerce, with the goal of offering an effective and quick resolution process for business enterprises and consumers alike.

Impact of Technology on Dispute Resolution

We are witnessing today, more than ever before, an extraordinary and gigantic transformation in the global dispute resolution ecosystem; it is mainly driven by technology. Conventionally, dispute resolution performed face-to-face and place-based communication by verbal and non-verbal cues in a physical space. This assumption has, however, been destroyed by the Information and Communication Technology demise and access to the internet across the world. This situation was further accelerated by the outbreak of COVID-19, which saw the need for people to change and adapt to new and innovative ways of dispute resolution. This saw Courts and private dispute resolution centers across the world embracing technology and issuing various guidelines on how to remotely participate in hearings through video conferencing.

<u>Alters the Scheme of the 1996 Act</u>

The over-cautious approach under the Arbitration Act, 1940, where the imprimatur of the Court was a pre-requisite to the enforcement of an award, was done away with by the 1996 Act. Indeed, the 1996 Act went a step ahead even of the UNCITRAL Model Law in providing for direct enforceability by providing the award-debtor with a right to resist the award at two successive stages: first, on the date of challenge itself in Article 34; and secondly, on the enforcement or recognition stage in Article 36. At the very outset, it is clear that the trajectory of this trend Is undermined by the 2021 Amendment.

Under the 2021 Amendment, the fact that a Section 36 application had been disposed of by the court would, in almost all cases, require it to be of a prima facie opinion that there was no fraud or corruption involved in securing the contract or in making the award. The fact that such a finding will, nonetheless, be subject to the ultimate decision in the Section 34 application does not lessen the hurdle since, in any event, such proceedings, including appeals to the Supreme Court of India, may be expected to take something like six years on an average (See Paragraph 3 of the HCC Case[1]). Thus, the 2021 Amendment revives the impediment to enforcement (in cases of alleged fraud or corruption), rendering it a reversal in arbitration's regime.

<u>Reverts the position prior to the 2015 Amendment[2]</u>

It is an undoing that the 2021 Amendment does even in regard to proceedings under Section 36.

Illustration of a prime facie case under the 2021 Amendment Act would entitle the party to secure an "unconditional" stay, doing away with discretion to balance the competing equities which would nevertheless differ from the case to case, in staying enforcement of an arbitral award. To that extent, the 2021 Amendment reintroduces the stultification of judicial discretion resulting in 'paper awards' that had led to the 2015 Amendment in the first place.

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1 (Hindustan Construction Company … vs Union of India on 27 November, 2019) https://indiankanoon.org/doc/102230863/ accessed 19 August 2024

2 Colin Rule, Online Dispute Resolution for Business (Jossey-Bass 2002) 32–35.

Further, the 2021 Amendment includes grounds including 'fraud' and 'corruption' which are not explicitly contemplated under the CPC for staying a decree. These additional grounds now pertain solely to the arbitral proceeding thereby putting clear and manifest distrust in the arbitral proceeding and that amounts to the creation of inexplicable discrimination between the civil proceedings and the arbitral proceeding.

Standards are Vague and Arbitrary

With the addition of further grounds for resisting enforcement of awards, parties who are not satisfied with the outcome of the arbitral proceedings can, henceforth, be expected to exhaust every argument that their contract or the award is vitiated by fraud or corruption.

In Swiss Timing Ltd. V. Commonwealth Games[3], the Supreme Court held that allegations of fraud in the contract would not vitiate the arbitration agreement and that a conjoint reading of Section 15 and 16 of the 1996 Act showed "all matters including the issue as to whether the main contract was void/voidable can be referred to arbitration". Similarly, in both A. Ayyasamy v. A. In Paramasivam[4] and Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd,[5] the Supreme Court observed that "fraud simpliciter" and "serious allegations of fraud" which permeates the very basis of the contract, impacting communities at large, are very serious in nature.

It seems that the 2021 Amendment too did not address such complexities and stopped short of identifying which specific claims falling within this nebulous concept of 'fraud' will cross the threshold to merit the grant of an 'unconditional stay' of an arbitral award. Similar questions are likely to arise in the case of corruption as well:

The extent to which the findings in the award may be reviewed or differed from; and The consequence of failure to make such allegations before the arbitral tribunal or in Court proceedings.

[3] Swiss Timing Ltd vs Organizing Committee Commonwealth , AIR 2014 SUPREME COURT 3723

[4] A. Ayyasamy vs A. Paramasivam & Ors ,AIR 2016 SUPREME COURT 4675

[5] Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd, 2020 SC 691

There may be procedural complications as well. It is settled law that Section 34 is in the form of a summary procedure, where the Court is not to reappreciate evidence, record new evidence,etc. Whereas no prima facie case of fraud can be made out if material evidence to substantiate the allegations in the pleadings is not shown (see Svenska Handelsbanken v. Indian Charge Chrome[6]). Discussing the changed Section 36, it notes that "it is difficult to fathom how any prima facie case can be made out under the amended Section 36 without offending the standards or impinging the jurisdiction under Section 34." It adds that "not to speak of the conflict with the vested rights, flurry of petitions, and the farcical predicament awaiting the appellate forum.

The BCCI Case -Is to the effect that the amendments to Section 34, in altering the basis available for setting aside an arbitral award, relate to the substantive rights and could not be applied in a retrospective application to Section 34 applications made before the Cut-Off Date. In contrast, insofar as Section 36 was concerned, the Court held that the "execution of a decree pertains to the realm of procedure" and no vested right "to resist enforcement" under the unamended Section 36 can be claimed by a party. Accordingly, the Court applied the amended Section 36 even in relation to Section 34 applications filed prior to the Cut-Off Date.

The 2021 Amendment, on the other hand, does alter some of the enforceability of the award, contrary to a right to resist enforcement. Specifically, while the 2015 Amendment had an adverse bearing on the right of the award-debtor due to the removal of the Automatic Stay, the 2021 Amendment affects the rights of the award-holder himself, considering that an award is not enforceable without any security. In that sense, the 2021 Amendment resurrects the "clog" in the right of the award-holder, and in that regard, it is not just procedural but touches and affects the substantive rights of an award holder.

In view of such a far-reaching change in the scheme of the Arbitration Act, a mere restatement of the provisions of the 2021 Amendment in the Statement of Objects and Reasons does not cut ice. It will appear that the ways of these problems have not been fully grasped by the Parliament.

As William Gibson famously said, "The future has already arrived; it is just not evenly distributed." This is now perhaps most evident in the field of conflict resolution, where institutions

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[6] (Svenska Handelsbanken vs indian charge chrome ltd on 24 ...) https://indiankanoon.org/doc/1659628 accessed 19 August 2024

are truly grappling with this challenge: how to use technology to effect a more equal distribution of justice.

Understanding Online Dispute Resolution (ODR)

ODR is still an emerging concept. Earlier, the term ODR had been described as a process of settling disputes of the parties with the use of tools of information and communication technologies, which involved simple to complex communication technologies like e-mail, cell phones, video conferencing, messaging apps, etc. These tools were designed to facilitate dispute resolution without requiring parties to be physically present.

In the early days, the ODR shared its foundational principles with ADR methods of mediation, arbitration, and negotiation. However, ODR cannot reduce to the simple digitization of ADR processes. Understanding[7] the challenges and opportunities of ODR today requires that the very origins be traced back. The development of ODR can be traced to when the internet was introduce" in the 1990s; with a rise in online transactions came a corresponding increase in online disputes. At large, one finds that the evolution of ODR benefited from subsequent innovations in ICT and can be generally divided into three phases.

Advantages of ODR

The incorporation of information and communication technology into the process of dispute resolution presents various advantages, chief among them the ability to surmount most of the challenges that face traditional courts and ADR systems. Some of the main advantages of ODR are outlined below[8]:

- Cost-Effectiveness

High costs of dispute resolution have often been a barrier to justice access. ODR offers cost-effectiveness in that the parties do not travel or need to rent spaces physically for the process of dispute resolution[9]. Moreover, ODR considerably saves legal costs through the speedier process and by avoiding the requirement of legal counsel in most cases. The indirect costs due to reduced

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[7]Pablo Cortés, Online Dispute Resolution for Consumers in the European Union (Routledge 2011) 63–66.
[8]UNCITRAL, Technical Notes on Online Dispute Resolution (United Nations 2017) para 10–15
[9] NITI Aayog, Designing the Future of Dispute Resolution: The ODR Policy Plan for India (2021) 22–24.

productivity and loss of investor confidence are also saved by the business enterprises by avoiding time-consuming legal procedures.

- Accessibility and Speed

Pending cases have been one of the major issues that the Indian justice system is grappling with. According to the 2019 India Justice Report, the pendency in district courts is normally for five years due to factors such as staff vacancies, excessive adjournments, and complex procedures.

- Customization of Processes

Over the last couple of years, most ADR methods have gone beyond simple mediation and arbitration. Even more so, ODR allows for further customization of dispute resolution processes to suit the particular requirements of the parties at hand. This now includes hybrid variants such as med-arb mediation-arbitration, and arb-med-arb – arbitration-mediation-arbitration, which are becoming more frequent[10].

Conclusion: The Future of Justice as a Service

The future of justice lies in changing it from a place-based system to a service-oriented one. ODR is another quantum jump in that direction, much more easily accessible, efficient, and adaptable for dispute resolution. The methods of delivery of justice are bound to change further as technology advances. The development of ODR can be traced to when the internet was introduce" in the 1990s; with a rise in online transactions came a corresponding increase in online disputes. At large, one finds that the evolution of ODR benefited from subsequent innovations in ICT and can be generally divided into three phases. Over the last couple of years, most ADR methods have gone beyond simple mediation and arbitration. Even more so, ODR allows for further customization of dispute resolution processes to suit the particular requirements of the parties at hand. This now includes hybrid variants such as med-arb mediation-arbitration, and arb-med-arb – arbitration-mediation-arbitration, which are becoming more frequent.

[10] Ethan Katsh and Orna Rabinovich-Einy, Digital Justice: Technology and the Internet of Disputes (Oxford University Press 2017) 45–48.

It then becomes quite necessary that institutions are abreast with the happenings. Ultimately aimed at should be a justice system that is not only fair and effective but truly equitable and inclusive.

References

1. (Hindustan Construction Company … vs Union of India on 27 November, 2019) https://indiankanoon.org/doc/102230863/ accessed 19 August 2024

2. 'The Arbitration and Conciliation (Amendment) Bill, 2015' (PRS Legislative Research, 19 August 2024) https://prsindia.org/billtrack/the-arbitration-and-conciliation-amendment-bill-2015 accessed 20 August 2024

3. (Avitel Post Studioz Limited and Ors. VS HSBC Pi Holding (mauritius) limited on 19 August, 2020) https://indiankanoon.org/doc/92854857/ accessed 19 August 2024

4. (Svenska Handelsbanken vs indian charge chrome ltd on 24 …) https://indiankanoon.org/doc/1659628 accessed 19 August 2024

5. Centre VM, 'Latest News' (Strengths and Challenges in Online Dispute Resolution System | VIA Mediation Centre) https://viamediationcentre.org/readnews/MTA2Nw==/Strengths-and-Challenges-in-Online-Dispute-Resolution-System#:~:text=ODR%20eliminates%20the%20need%20to,versatility%2C%20and%20more%20innovative%20solutions. Accessed 20 August 2024

6. 'Unpacking the Future of Dispute Resolution' (Artha Global) https://artha.global/blog/unpacking-the-future-of-dispute-resolution/ accessed 20 August 2024