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Arbitration in India: Embracing Technology and Electronic Evidence

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The technological revolution, akin to the industrial revolution, has significantly impacted various industries, including the legal sector. The legal industry has embraced technological advancements such as online case management systems and virtual hearings through video conferencing. The COVID-19 pandemic has further accelerated the adoption of technology in the legal system, with Indian courts transitioning to virtual courts and introducing e-filing. While public forums have readily embraced technology, private dispute resolution mechanisms like arbitration have faced challenges in implementing these advancements. Despite the evident shift in arbitration practices in India, there is still a lack of awareness regarding the full range of technological tools available and the challenges associated with their use. This article aims to examine the intersection of technology and arbitration in India and the use of electronic evidence, taking into consideration the unique framework of the Indian arbitration landscape. The findings of this study aim to provide stakeholders with insights into leveraging technological tools to enhance the efficiency and effectiveness of arbitration proceedings.

Keywords: *arbitration, types of arbitration, technology, electronic evidence, arbitration in India, history of arbitration.*

INTRODUCTION

The shift towards using virtual technology in arbitration is evident, particularly with the increasing use of video conferencing. Initially met with scepticism by some traditionalists, newer and more advanced video technology has addressed concerns about its effectiveness in arbitration hearings. The clear picture and enhanced communication offered by high-definition video conferencing have minimized criticisms about the lack of in-person contact in virtual proceedings. As technology continues to evolve, the possibility of virtual reality headsets replacing video conferences in the future seems promising. These advancements in technology not only simplify complex facts in advocacy but also present a more emotional and realistic approach to presenting evidence. However, as AI begins to play a larger role in decision-making in arbitration, the need for technological aids in advocacy may diminish. Ultimately, the use of technology in arbitration is poised to significantly impact the role of lawyers in the field, potentially leading to a shift in their influence and relevance.

Technology is being utilized in international arbitration and, to some extent, in the Indian arbitration system. However, after more than a year into the pandemic, Indian courts have not encountered any issues related to technology in arbitration. Additionally, there is the impact of COVID-19 on Indian arbitration. Firstly, arbitral tribunals in India may not commonly use technology, thus avoiding issues that could reach the courts. Alternatively, technology might be used in a limited capacity to handle pandemic-related challenges, preventing more complex issues from arising. Lastly, parties may be using technology privately without informing the tribunal, leaving the non-using party unaware of any arising issues. These scenarios highlight a lack of knowledge and research on technology use in Indian arbitrations.

The article aims to assess the level of technology usage in Indian arbitrations, identify issues and legal obstacles in utilizing technology in Indian arbitrations, and bridge the gap between theory and practice in technology use in Indian arbitration, including the use of electronic evidence.

ARBITRATION

Many complaints often arise from petitioners or plaintiffs due to high legal fees, prolonged disputes, and inadequate remedies. However, the emergence of alternative dispute resolution like arbitration has significantly reduced such complaints, especially in resolving commercial

contract disputes. Arbitration has become a popular trend in keeping business relationships intact and efficiently resolving disputes.

What is arbitration?

Arbitration is a type of Alternative Dispute Resolution (ADR) that serves as a private court for parties to resolve their disputes without going to court. This method is commonly used in commercial disputes, especially international transactions, due to its efficiency in terms of time and cost. Parties include an 'Arbitration Clause' in their contracts, appointing a neutral third party, known as an 'Arbitrator' to handle any disputes that arise if the contract terms are violated. This clause continues to be valid even if the contract is terminated. The parties agree on the jurisdiction, language, and applicable laws to ensure fairness. The arbitrator's decision, known as an 'arbitral award,' is final and binding on the parties involved.

HISTORICAL BACKGROUND OF ARBITRATION

Many historical examples of arbitration demonstrate its ancient roots and evolution over time. From King Solomon's resolution of a dispute between two women claiming to be a baby's mother to Philip the Second's use of arbitration in a territorial dispute in 337 BC, it is evident that arbitration has a long history. In Indian history, the enactment of the Arbitration Act of 1899 marked the formal recognition of arbitration, which later expanded to cover more regions under Section 89 of the Code of Civil Procedure, 1908. However, the effectiveness of arbitration was questioned, leading to the enactment of the Arbitration Act in 1940, which aimed to consolidate and improve the existing laws.

The launch of the Arbitration and Conciliation Act in 1996 was intended to streamline dispute resolution, addressing both domestic and international arbitration issues. Despite these efforts, criticisms arose regarding high costs, undefined timeframes for arbitration awards, and excessive court interference. The subsequent Arbitration and Conciliation (Amendment) Acts of 2015 and 2019 aimed to address these concerns, with the latter specifically focusing on reforms suggested by the Justice B.N. Srikrishna committee.¹ The establishment of the Arbitration

¹ ET Bureau, 'Justice Srikrishna committee submits report on data protection. Here're its top 10 suggestions' *The Economic Times* (28 July 2018) <<https://m.economictimes.com/news/politics-and-nation/justice-bn-srikrishna-committee-submits-report-on-data-protection-herere-the-highlights/articleshow/65164663.cms>> accessed 14 December 2024

Council of India in 2019 aimed to enhance alternative dispute resolution (ADR) mechanisms and evaluate arbitral institutions and arbitrators in the country.

The recent Arbitration and Conciliation (Amendment) Ordinance 2020 brought significant changes, allowing for the unconditional stay of enforcement of arbitration awards in cases of fraud or undue influence. Additionally, the qualifications and experience requirements for arbitrators, previously listed in the Eighth Schedule of the Act, were removed after thorough deliberation.

ARBITRATION IN INDIA

Arbitration in India is governed by the Arbitration and Conciliation Act of 1996, which is based on the United Nations Commission on International Trade Law (UNCITRAL)² Model Law. In 2015, the Act was amended to enhance the arbitration process in the country. The amendments aimed to expedite the resolution of disputes, ensure quick enforcement of contracts and facilitate the recovery of monetary claims. The formation of the New Delhi International Arbitration Centre in 2019 further enhanced the institutional arbitration infrastructure in India. Additionally, the International Centre for Alternative Dispute Resolution, established in 1995, promotes ADR techniques for the early resolution of disputes and reducing court backlogs.

Types of Arbitration that are Practiced in India: In India, there are two main types of arbitration:

- Ad-hoc arbitration and
- Institutional arbitration.

Ad-hoc arbitration involves a tribunal conducting arbitration under agreed or tribunal-laid rules in the absence of a prior agreement between the parties. It offers flexibility and cost-effectiveness but may lack administrative support, leading to potential delays in enforcing awards and doubts about arbitrator selection.

On the other hand, Institutional arbitration is managed by an institution according to specific rules, offering structured processes, quality arbitrator assurance, and easier enforcement of

² 'UNCITRAL Arbitration Rules' (*United Nations*)

<<https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>> accessed 14 December 2024

awards. However, it comes with higher costs, less party control in arbitrator selection, and a more formal and less flexible approach.

THE USE OF ‘VIRTUAL’ TECHNOLOGY IN ARBITRATION:

The use of video conferencing technology in arbitration has sparked a debate among arbitrators and counsels. While traditionalists question the effectiveness of examining witnesses remotely, supporters believe that it can streamline the arbitration process and reduce costs. Initially, criticisms of video conferencing were valid due to technological limitations, but advancements have made it a viable option for hearings with participants in different locations. Despite this progress, some practitioners still prefer in-person interactions, citing the loss of personal contact in virtual proceedings.

As technology continues to evolve, the possibility of more immersive virtual reality technology in arbitration looms. Companies like Google, Facebook, and Microsoft are developing virtual reality headsets that could revolutionize the way hearings are conducted. These headsets could soon replace video conferencing, offering a more realistic and interactive experience. While some may still prefer face-to-face interactions, the convenience and potential cost savings of virtual hearings may outweigh this preference.

In the current landscape, technology is primarily used in advocacy in arbitration, with computer-generated graphics and videos helping to simplify complex information and make cases more compelling. However, as AI becomes more involved in the evaluation of evidence, the role of technological aids in advocacy may diminish.

Overall, the integration of technology in arbitration presents challenges and opportunities for lawyers. While technology can enhance advocacy and decision-making in the short term, the rapid pace of technological advancement may eventually render certain roles redundant.

PERFORMANCE OF MACHINES VS HUMANS IN ARBITRATION

Even though technology has advanced rapidly, Machine Learning Systems (MLS) still struggle with understanding and processing emotions accurately. This lack of emotional intelligence is a significant disadvantage for machine arbitrators. Emotions play a crucial role in human decision-making and understanding, which machines currently cannot replicate due to their

inability to recognize and interpret emotional cues. This limitation affects the ability of machines to fully comprehend disputes and make informed judgments.

In addition to emotions, machines also lack empathy, the ability to understand and anticipate others' intentions and emotions. This empathy is essential in arbitration, where arbitrators need to put themselves in the parties' shoes to understand their perspectives completely. Moreover, machines are unable to explain their judgments, leading to potential issues in legal proceedings where transparency and accountability are crucial.

Despite these limitations, AI is not expected to replace human arbitrators anytime soon, especially in complex international disputes that require a nuanced understanding of various legal traditions and cultural nuances. Human arbitrators bring unique experiences and judgment to the table, which are critical in resolving such disputes effectively.

While AI may be suitable for simpler cases, the true value of arbitration lies in the diverse backgrounds and experiences of the individuals involved in the process. Human judgment, empathy, and cultural understanding play a vital role in reaching fair and just resolutions in complex disputes.

The use of technology in arbitration raises several questions and challenges, such as parties' acceptance of AI-based decisions, arbitrators' duty to use technology, and the impact on witness testimony. Despite these challenges, technology is becoming increasingly integrated into arbitration practices, signaling its long-term presence in the field.

WHAT IS INTERNATIONAL ARBITRATION?

International arbitration is a method of resolving disputes that involves private adjudicators known as 'arbitrators' and operates beyond national borders. Unlike traditional court litigation, it is consensual, neutral, binding, and enforceable, offering a more efficient and faster resolution process. International arbitration allows parties from different cultural, linguistic and legal backgrounds to come together and resolve their conflicts/ issues.

Using international arbitration can be voluntary, or it may be made obligatory through a 'mandatory arbitration clause.' Parties typically establish 'arbitration agreements' in advance.

According to Article II (1) of the New York Convention, such an agreement is defined as a written commitment to resolve all disputes related to a specific legal relationship through arbitration.

In summary, international arbitration serves as a neutral dispute resolution option for businesses engaged in global transactions.

ADVANTAGES OF ARBITRATION

- It is a cost-effective proceeding.
- Arbitration is a faster process.
- Parties have Control of the proceeding.
- It has a binding decision over a dispute.
- It involves mutual consent of the parties.
- Parties are free to choose the arbitrator and conduct of the proceeding.
- It involves a simple procedure.
- Confidential.

DISADVANTAGES OF ARBITRATION

- The disadvantages of arbitration are limited because it involves the consent of the parties to resolve the dispute.
- Arbitration doesn't have an option for appeal.
- Proceedings are rules of evidence that are too easy.

ELECTRONIC EVIDENCE

The term 'Electronic Evidence' refers to evidence produced through mechanical or electronic processes, crucial for proving or disproving facts in court. This evidence, also known as Digital Evidence, can be retrieved and examined by forensics experts or Electronic Evidence Examiners, making it admissible in legal proceedings. However, due to the susceptibility of electronic records to tampering or alteration, there are concerns about the legitimacy and admissibility of such evidence in court. To address this, amendments to various laws, including the Information Technology Act 2000³, have been made to establish a legal framework for electronic

³ Information and Technology Act 2000

transactions. This article delves into the analysis of electronic evidence examiners and relevant statutory provisions governing the admissibility of electronic evidence.

EXAMINER OF ELECTRONIC EVIDENCE

The Information Technology Act 2000 introduced Section 79A⁴ to establish the role of the Examiner of Electronic Evidence, addressing the need for specialized expertise in handling electronic evidence in legal proceedings. This provision empowers the Central Government to designate a department, body, or agency to provide expert opinions on electronic evidence before courts or other authorities.

The definition of 'Electronic Form Evidence' includes various types of digital information like computer data, digital audio, video, and more, which can be used as evidence in civil or criminal cases upon court approval.

The increasing digitization of society has led to a growing reliance on e-evidence in legal matters, but Indian courts have been cautious about its admissibility due to concerns about tampering. Despite the prevalence of e-evidence in daily court proceedings, including data from devices like mobile phones or emails, there remains scepticism around its reliability in the Indian legal system.

E- EVIDENCE UNDER THE INDIAN EVIDENCE ACT

The Indian Evidence Act 1872 has been amended to include electronic records as valid evidence in court. Sections 65A⁵ and 65B⁶ were introduced to make electronic evidence admissible. Section 65B specifically outlines the conditions under which electronic records are admissible in court without the need for further proof of originality. The issue of the necessity of an electronic certificate for admissibility is a point of debate.

Indian courts have had to grapple with the admissibility of electronic evidence in various cases, leading to conflicting judgments. High courts have differed in their opinions on the validity of electronic evidence such as video CDs and emails. The Supreme Court, in the case of Anvar P.V

⁴ Information and Technology Act 2000, s 79A

⁵ Indian Evidence Act 1872, s 65A

⁶ Indian Evidence Act 1872, s 65B

v P.K. Basheer⁷, emphasized the mandatory nature of complying with Section 65B for electronic records to be admissible in court. This decision aimed to bring clarity to the admissibility of electronic evidence.

ADMISSIBILITY OF EVIDENCE UNDER THE EVIDENCE ACT

Section 65 of the Indian Evidence Act defines the admissibility of evidence, which are as follows:

- Reliability of the source;
- Limiting the source;
- Authorization of the source, etc.

SUGGESTIONS

This research article has shown that India still has a way to go to reach the global standards of technology use. This part of the article provides suggestions categorized as immediate, short-term, and long-term for bridging this gap. Immediate suggestions are quick fixes to be implemented promptly, while short-term ones should be put in place within a year. Long-term solutions involve ongoing practices to be embraced by all involved in promoting technology in Indian arbitration. Some recommendations may be accomplished sooner than classified, but the timeframes mentioned aim to outline ideal achievement targets.

Immediate Suggestions: The immediate suggestions include the procedural guidelines by the Supreme Court of India, addressing the due process concerns by amendment of the Arbitration clause, incentives from arbitral institutions and incorporating NDAs and data protection clauses with service providers.

Short-term Suggestions: The short-term suggestions to improve the use of technology in arbitration, virtual hearings and online dispute resolution include:

- Increasing the number of Indian service providers of technology and funders.
- By Enactment of the Arbitration Council of India (ACI) as a training agency.
- Through Legislative Amendments to recognize technological tools in arbitration.
- Enactment of Online Dispute Resolution Specific Provisions or Policies.

⁷ *Anvar P V v P K Basheer* (2014) 10 SCC 473

- By reimagining the role of court-annexed arbitral institutions.
- Enacting the Data Protection Law, etc.

Long-Term Suggestions:

- Increasing the utilization of technology is a straightforward solution to tackling high costs in the legal system. By allowing market forces to operate freely, competition would increase, leading to lower costs as technology becomes more prevalent in the industry. There are two main ways to coordinate between courts and arbitral tribunals regarding technology. Firstly, the Arbitration Council of India (ACI) can learn from the Supreme Court's experience in implementing technology in court proceedings, such as e-filing and virtual courts. Secondly, as technology becomes more widespread, courts must ensure that their decisions support arbitration and technology, as mandated by Section 5 of the Act.
- Additionally, arbitral institutions need to keep innovating with digital tools to attract parties to their platforms. Arbitral institutions and service providers must develop new technologies continuously. While global arbitral institutions have made significant advancements in this area, Indian institutions must also strive to keep pace.
- It is important that all stakeholders collectively work towards promoting technology use in arbitration; however, arbitral institutions play a key role in this endeavor.
- Accessing high-speed internet and necessary devices like computers and smartphones is essential for utilizing technology effectively, and it is the government's responsibility to ensure these resources are readily available without interruption.
- Building digital infrastructure can further help in long-term benefits.

CONCLUSION

This article examined the current use of technology in Indian arbitration, and electronic evidence, and concludes that while the Indian arbitration community has started utilizing technology in response to the pandemic, it still lags behind international arbitration in terms of technological adoption. The article identified obstacles to technology use in arbitration and suggests a comprehensive plan involving all stakeholders to promote its use in Indian arbitration, etc.

Despite the Law Commission of India recommending the use of teleconferencing and videoconferencing in arbitration back in 2014, it took a global health crisis like COVID-19 for Indian arbitrators to utilize these alternatives. It is evident that with proper implementation, technology can revolutionize Indian arbitration, and failure to embrace technological advancements may hinder India's prospects of becoming a global arbitration hub.

The article emphasized that in the adoption of technology in Indian arbitrations, electronic evidence should align Indian procedure standards with international practices. It advocates for a methodical approach to integrating technology in arbitration that suits the unique landscape of Indian arbitration. Resistance to technological advancements in arbitration could impede India's chances of being chosen as an arbitration seat in the global arena.