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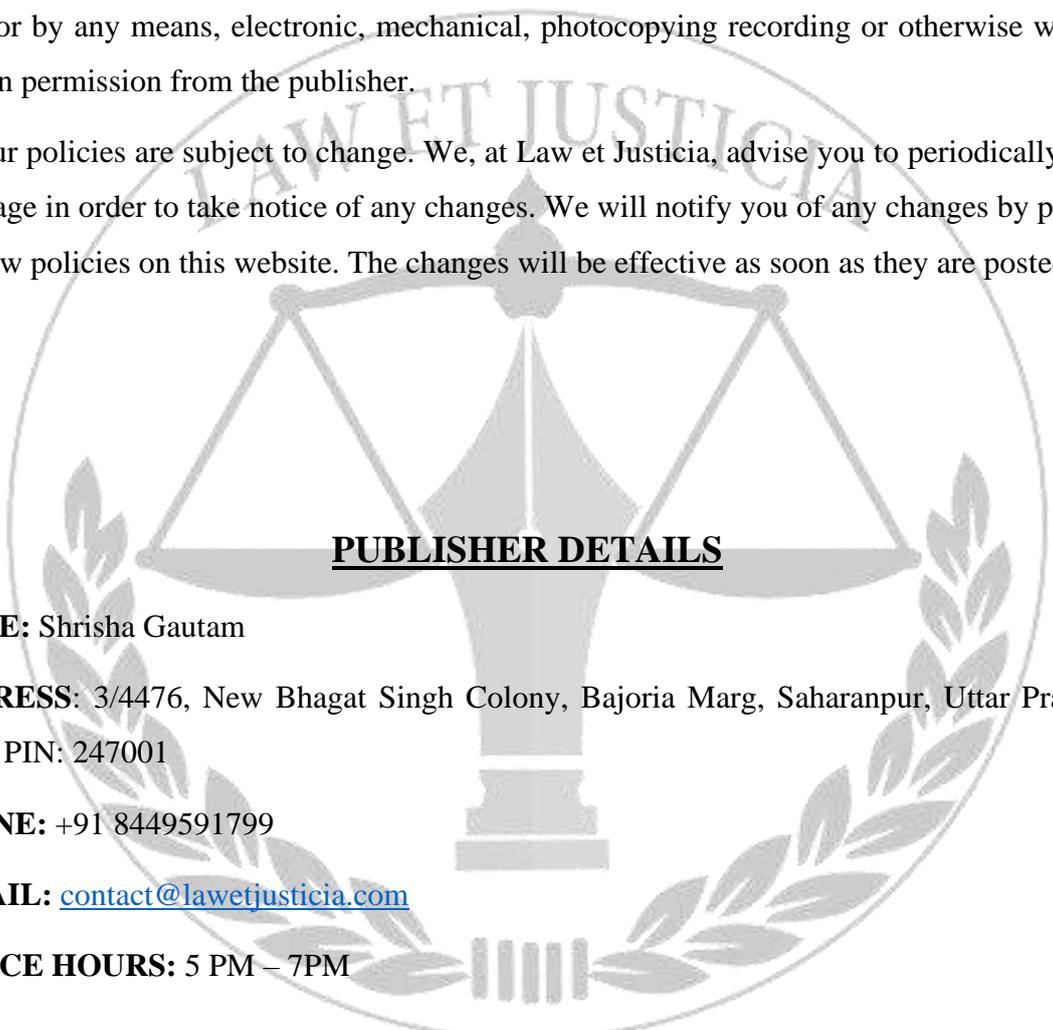
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“DIGITAL DISPUTE RESOLUTION: EMERGING BRANCH OF ADR ”

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ABSTRACT

It is not the first time when the world is experiencing a wrath of pandemic but indeed it is the first time when the world is fighting the pandemic together. The global information co-operation is leading new summits and that is possible because of use of technological advancements. This is an age of information technology and justice being an essential infrastructure cannot be secluded from application of Information technology. Halting the operations of justice delivery will result in chaos and tyranny, this is indeed a hurdle but that is when Alternate dispute resolution shines like a silver lining. The judiciary across the globe are bound by the statutes and procedural limitations, on the other hand arbitration, mediation knows no such boundaries. Therefore, it is moderately easier than courts to apply technology for ADR.

Digital dispute resolution (DDR) is “an idea that enables the ADR professionals across the globe to gather, process, scrutinise and store the information, evidence and conduct relevant arguments, testimony and proceedings electronically.” Countries like India, United states etc. have special laws relating to use of technology in adjudication. Thus, framing global standards

will be beneficial for conducting digital dispute resolution in a safe and confidential manner. The arbitrations were conducted for speedy adjudication but in the wake of a pandemic applying the idea of DDR will help preserve the very purpose of arbitrations and mediations. DDR is in need of time as the court and government are not yet ready with the adequate infrastructure for facilitating justice electronically. The DDR will prove to be “saviour of justice” and will pave a path to the new era of awarding justice.

INTRODUCTION

It is not the first time when the world is experiencing the wrath of a pandemic but indeed it is the first time when the world is fighting the pandemic together. Global information cooperation is leading to new summits and that is possible because of the use of technological advancements. The judiciary across the globe are bound by the statutes and procedural limitations, on the other hand arbitration, mediation knows no such boundaries. Therefore, it is moderately easier than courts to apply technology for ADR. Over the period of time disputes are no longer simple and with the sector specific growth, the complicated disputes seek for expert aid for resolution. The dispute has changed its face as contracts and agreements are no longer executed in the traditional way. Inclusion of various new click based contracts made it possible to connect business activities globally and not restrict it to any particular court’s jurisdiction. The jurisdictional issue of a court becomes more complicated when digital contracts are entered into by parties across borders. This practical difficulty can be removed by implementing compulsory or implied ADR clauses for all electronic and digital agreements.

IMPORTANCE OF DIGITAL DISPUTE RESOLUTION IN CROSS BORDER ARBITRATION

Digital dispute resolution (DDR) is “Arbitration and other ADR blended with the technology for achieving the goal of quick, Economical and informed justice”.

It becomes relevant to consider that the judicial system in India and across the globe is marred by delay and burdened with an ample backlog. Even after Implementing various ADR, cases and disputes keep surmounting in the long awaited backlog to be dealt with. The idea of

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arbitration was to ease the process of access to justice as reported by several expert bodies¹. Therefore, the global justice system seeks new avenues to deal with commercial disputes with ease and in a cost efficient manner. This mode of distance arbitration becomes particularly important during times like this global pandemic. Use of online means of dispute resolution will help the offline machinery to focus on matters that require complicated comprehension of dispute and will assist the ADR tribunal.²

ADR is particularly convenient and efficient where the parties are located at a distance, as distance communication obviates the need for travelling. In principle, ADR can be used for both disputes arising from online interactions and transactions and from disputes arising offline. However it is particularly apt for e-commerce disputes, where it is logical to use the same medium (the Internet) for the resolution of disputes and where the parties are frequently located far from each other.³ This kind of Dispute resolution mechanism improves agility of information and evidence on which the arbitral tribunal must have to rely upon for delivering order.

Article II of the New York Convention specifies that the arbitration is valid only when agreement is in writing and the subject matter is capable of arbitration by domestic jurisdiction⁴. Article II remains silent for explanation whether the term 'agreement in writing' includes electronic agreements or not but considering the need of time, various countries have adopted a wide definition of agreement in writing and approved electronic agreement as legal method of transaction. This upholds the validity of electronic agreement as per New York convention, 1958.

It is a vital fact to understand that in the age of computers the information flows through various nodes and servers physically located at various locations pan globe. Therefore, it becomes complicated to ascertain exact location of cause of action to raise dispute and application of

¹ GOVERNMENT OF INDIA, Report of the Committee on Legal Aid (1971).

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

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

² E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (John Wiley & Sons Inc., 2001).

³ Julia Hörnle, *Online Dispute Resolution-The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration*, <https://egov.ufsc.br/portal/sites/default/files/anexos/18561-18562-1-PB.pdf>

⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), <https://www.newyorkconvention.org/new+york+convention+texts>

lex fori. Apart from that it shall be understood that cost is a very big factor of the current justice system. The additional burden of massive geographical distances will defy all the efforts of the global community for making justice available for everyone. Digital Dispute resolution is a simple way of administering justice to every aggrieved person. Thus the Multilateral treaties like New York Convention and UNCITRAL Model laws shall provide for Mandatory arbitration clause for all cross border agreement and in absence of it the Implied clause of arbitration is to be assumed by treaty. This action will give relief as there will be no jurisdiction question involved.

Further, implementing the concept of Advance Ruling in the case of E-commerce transactions may prove an important step in maintaining ease of doing business. Global markets are now accessible through digital medium but fear of complex legal actions and sluggish decision delivery mechanism is keeping business away from shores. Implementing advance ruling through DDR where an arbitral tribunal can be constituted only on apprehension of dispute will save time. This constituted tribunals will be able to deliver the verdict which is to be enforced on happening on conditions specified therein.

INDIAN PERSPECTIVE OF DDR

India is a developing country and India is making strong efforts to build the force of judiciary more efficient and stronger. Despite several challenges, the Indian government managed to aid the judiciary with State-of-the-art case management systems. Still undecided disputes are proving to be a hurdle in achieving justice in quicker ways. The Country is making all possible efforts to implement ADR and technology to efficiently deliver justice and resolve disputes.

In Aug. 2014, Law commission of India submitted a report ⁵ which suggested that the technology shall prove a useful instrument if used wisely in delivering justice. For implementing it in formal court technology must pass various rigorous tests of integrity but as flexibility is a prime feature of arbitration such ethical exploitation of Information technology means shall be encouraged. As the limitations were obvious due to lack of infrastructure these

⁵ GOVERNMENT OF INDIA | LAW COMMISSION OF INDIA | Report No. 246 | Amendments to the Arbitration and Conciliation Act 1996 | August, 2014 | URL <https://lawcommissionofindia.nic.in/reports/Report246.pdf>

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suggestions were ignored. But those suggestions of implementing IT in Arbitration proves relevant in today's time where justice delivery is halted for indefinite time.

Indian laws evolved from time to time and recognise new trends in resolving disputes. In India arbitration is governed by the Arbitration and Conciliation act which is in conformity with international law. Section 7 of above-mentioned statute⁶ provides that the arbitration agreement must be in written form. If this provision is read with Section 4 and 5 of the Information Technology act, 2000⁷ then any agreement entered into via electronic media is valid and thus all arbitration agreements entered into electronically becomes binding. Further while conducting proceedings Evidence law of India recognises electronic records as evidence by virtue of Sec. 65B, which means if arbitration proceedings conducted electronically and award is announced digitally by authenticating digitally then such arbitration is recognised in Indian Legal regime.

In the case of *Timex*⁸, 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 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 1996⁹.

India is heading slowly towards achieving a new summit of use of IT in dispute resolution. India has established a NIXI^[10] for¹¹ resolution of Domain related dispute by online medium. This signifies that India along with all the countries around the globe has found a way to combat the problem of huge numbers of pending cases. Recently in India the institutional arbitrations

⁶ THE ARBITRATION AND CONCILIATION ACT, 1996, § 7, No. 26 Acts of Parliament, 1996(India), https://www.indiacode.nic.in/bitstream/123456789/1978/1/AAA1996_26.pdf

⁷ THE INFORMATION TECHNOLOGY ACT, 2000, § 4 & 5, No. 21 Acts of Parliament, 2000(India) https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf

⁸ *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.*, MANU/SC/0057/2010 see also *Shakti Bhog Foods Ltd. V. Kola Shipping Ltd.*, AIR 2009 SC 12 ;

⁹ *Supra* 6 at 3;

¹⁰ URL <https://www.nixi.in/>

¹¹ Anurag K. Agarwal. *Is India Ready For Online Dispute Resolution?* IIMA. W.P. No.2006-10-03. ;

fastened its grip over the arbitration. Amid COVID-19 catastrophe The Indian Council of Arbitration issued a notice for commencing the online arbitrations¹². This is a reformative step in the world of ADR.

CHALLENGES AND ETHICAL CONCERNS IN DDR

Cyber security is a leading concern in this era of information. The wounds of global ransomware attack are not healed yet and we are forced to use critical infrastructure via online medium. This raises serious concern about whether we shall use the online modes of communications for resolution of real-life disputes? The commercial disputes tend to involve very sensitive business information like Patents, Accounts etc. Sharing this information with an arbitrator is important in analysing the dispute, thus use of online media brings out the threat of hacking and other unauthorised access to this information. It is the duty of an arbitrator to maintain confidentiality of the information related to the subject matter of dispute. Experts in information technology are assessing the threat and narrowing down the possible remedies for the arbitration.

Due to the rise in modern technological advancements, the information exchange is no longer easy. Sniffer programmes can access the information by intercepting the Mails, and other communications. Apart from that if no sufficient authentication protocols are in force then even video meetings may be intercepted by hackers to steal and abuse the sensitive data. Such interception of information is a serious and intolerable threat therefore aid from Experts in cyber security must be sought. The risk to arbitration is not just from the online crooks but also from local machines which may prove fatal and cause data loss which might result in delay of proceedings. Therefore, the need to secure the arbitration is divided into two factors- one is online protection and another is protection of local machines and servers. Next factor of cyber security is building a strategy against corporate cyber espionage. Giant corporations thrive on information and seek to know competitors at all costs. Therefore, deployment of serious asymmetric cryptography and levels to access that data on a need-to-know basis becomes very important in arbitration. Also, it will be important that the link is of sufficient quality. This means in particular that the connection avoids delays and interruptions and that the witness can be clearly seen and heard. The physical demeanour and tone of voice should be easily

¹² INDIAN COUNCIL OF ARBITRATION, Notice For Online arbitration, <http://www.icaindia.co.in/Notice-for-ICA.pdf> ;

detectable to assess the credibility of that witness and of the parties.¹³ It is necessary for governments and Institutions to come together and form standard guidelines and stringent provisions to avoid such malpractice in arbitrations to maintain the sanctity of ADR.

The risk of having misplaced documents, witness turning hostile, manipulation of evidence are existent even with physical arbitration also but it is important to know that DDR being uncharted waters for arbitrations calls for immense caution. Parties are supposed to seek expert advice while deciding the procedure of arbitration.¹⁴ In Click and wrap contracts it is possible that parties may plead that they were unaware of the arbitration clause as the contract is drafted in such a way that such clause will go unnoticed. This type of defence may curtail the idea of arbitration and thus it is important to note that the arbitration clause once signed shall remain binding on both parties irrespective of validity of agreements.¹⁵

SUGGESTION FOR SMOOTHER DDR

GLOBAL ARBITRATION AID PORTAL

The world is going through an era of digitalization. Days are long past When the trade, commerce and other activities were taking place on a face to face basis. The computer and availability of connectivity through the high speed internet has broken boundaries across the world. Right from beginning to end everything is taking place on the internet. Thus it can be said that both successful and disputable deals take place on the internet. Focusing on the disputable ones, the digital era offers digital solutions in the form of DDR. The countries across the world have drafted their laws in respect of arbitration. Some of the countries also have made efforts to document the DDR related laws. It is indeed true that there is no bar of jurisdiction in arbitration matters. Arbitration of dispute between any two parties can occur at

¹³ Supra 3 at 2;

¹⁴ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW | UNCITRAL Model Law on International Commercial Arbitration, Article 19 ,https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf ;

¹⁵ 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 ;

any place and further it may also be done through anyone as an arbitrator, according to the will and wish of the parties.¹⁶ This at certain points lacks uniformity, especially while considering DDR. For instance, if there is a deal as to the purchase of coal between a tradesman from India and Zambia and a dispute arises as to the conveyance of Coal. Having a DDR clause in the agreement they referred this agreement to Arbitration. The person appointed as arbitrator is from India. Now the arbitrator may not be conversant with the arbitration standard of Zambia at par with standards of arbitration In his own country. As a result the decision given by him may cause injustice to the tradesman from Zambia. This will entirely defy the purpose of DDR. So what needs to be done is to make an effort to build a common Global Arbitration Aid portal which will give sight on arbitration standards and arbitration laws followed over the entire world. This will help the arbitrator dispersed over the world to bind on one note. They can access the world arbitration laws and standards at one single click. This raises the success rate of DDR to a much higher level. Also the parties may not opt for institutional arbitration as it may not repose complete trust in those institutions. In such instances arbitrators find it difficult to obtain administrative help. Global aid portal with initiative of various government and arbitration agencies like American Arbitration Association, The ICC International Court of Arbitration, the London Court of International Arbitration, The Hong Kong International Arbitration Centre and the WIPO Arbitration and Mediation Centre will prove effective even for private arbitrations.

MANDATORY REGISTRATION OF DIGITAL SIGNATURE

“Digital signature” means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3. Further as per section 3 of Information Technology Act, 2000 the digital signature containing a public key and private key, together is used to authenticate the electronic record by the subscriber of the signature. The method used for authentication is the asymmetric crypto function. The digital signature has converted the unique Identity signature into electronic signature. It offers more safety and ensures authenticity of the document submitted. As any change made in the document after digital signature invalidates the document and prevents data tampering and loss of information. Thus while considering the concept of DDR it is notable that various documents are required to submit electronically. The authentication of these documents is required for a

¹⁶ Ibrahim Al Swelmiyeen. *Online Arbitration and Defamation in Social Networks*. BILETTA 26th Annual Conference. Manchester Metropolitan University. School of Law.

successful resolution of dispute digitally. Digital signature is one of the measures which offer such authenticity and hence the compulsory use of digital signature can make the Efforts of DDR successful. Also Digital signature offers more confidence in evidence.

MINIMUM STANDARDS FOR DDR

It is important to have the same jargon in all the arbitration guides across the world. About DDR to confirm uniformity across the globe. It is important for elite institutions and Cyber experts to brainstorm and set standards for ensuring minimum uniformity in proceedings across the world. The Following are some of the suggested standards.

1. The subject matter of arbitration should be classified into two categories, one is matters which are to be decided by only written communication and where no videoconferencing is required i.e. matters of price bargaining, bidding process, limitation period, eviction of tenant etc., another category is of matters which are of more complicated nature i.e. disputes in mergers, disputes about acquisition of properties. In latter case only the Video conferencing tools are to be deployed and expert aid shall be taken. This classification will speed up small causes proceedings.
2. Use of Specific File format for communication i.e. PDF for documents, Use of XBRL for financial data etc. This will confirm that even though an arbitrator is in a different continent they may never require to learn additional software and the person will be able to focus more on the subject matter of dispute than that of administrative compliance.
3. Standard as to storage of Confidential data must be established as it contains commercial secrets which a party learns by spending millions in research and development. Also after delivery of award there should be protocol to erase all the electronic information including sensitive information as it may prove fatal if fallen into wrong hands.
4. Awards must be signed digitally irrespective of mode of arbitration this will help to digitally verify awards irrespective of seat of tribunal.
5. Standardisation of administrative help. There are various players in the market who provide services of videoconferencing, Cloud Storage, Transcription, online translator but few countries have no access to those providers. Thus, standardising the providers of these services by disclosing lists on web portals will prove helpful.

6. Code of conduct shall be drafted for parties to DDR and stringent provisions shall be imposed for violations.
7. Ensure that parties and witnesses get equal access to technology by establishing facilitations centres.

And any other necessary standards shall be drafted in consultation with experts of Digital world and Experienced Arbitrators which will ensure smooth proceedings across the globe and shall bear flawless uniformity.

CYBER AWARENESS PROGRAM

Cyber awareness program is the need of the hour as the world witnessed massive cyber threats over the digital world. Mostly people who are not aware of cyberspace fall prey to the hackers in the cyber community. In order to avoid victimisation of arbitration proceeding an orientation for all the arbitrators and parties shall be organised from time to time. In this awareness program training about securing the personal computers and corporate systems is to be given to avoid any breach from the end of parties and witnesses. This program will also help in improving cyber literacy. This program is intended for laymen. Thus, it shall cover all the aspects from using strong passwords to use of SSL and HTTPS connection while interacting with arbitration tribunal and other parties. This will significantly reduce the accidents by negligence.

CONCLUSION

This is an age of information technology and justice being an essential infrastructure cannot be secluded from application of Information technology. Halting the operations of justice delivery will result in chaos, this is indeed a hurdle but that is when Alternate dispute resolution shines like a silver lining. Countries like India, United states etc. have special laws relating to use of technology in adjudication. Thus, framing global standards will be beneficial for conducting digital dispute resolution in a safe and confidential manner. The arbitrations were conducted for speedy adjudication but in the wake of a pandemic applying the idea of DDR will help preserve the very purpose of arbitrations and mediations. DDR is in need of time as the court and government are not yet ready with the adequate infrastructure for facilitating justice electronically. The DDR will prove to be “saviour of justice” and will pave a path to the new era of awarding justice.

