

## Cyber arbitration through lenses of Indian legal system: An analysis

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### Abstract

Remarkable development in information and technology has drastically changed the mode of business, nature of disputes and manner of settlement of these disputes. The traditional mode of arbitration, wherein all the parties to disputes and arbitrators sit across the table and resolve their differences, has slowly been replaced by online/cyber arbitration. The added flexibility and expeditious nature of cyber arbitration over traditional form of arbitration, has started attracting parties to dispute opt for same. Though cyber arbitration gaining popularity, it too suffers from many issues.

This research article is an attempt to analyse the need and issues involved in cyber arbitration. Researcher has also made brief analysis of process of cyber arbitration in the light of relevant provisions of Indian laws.

**Keywords:** Cyber, Arbitration, Laws

### Introduction

#### Conceptual understanding of cyber arbitration

#### Cyber

The word Cyber is derived from word 'Cybernetics' which originates from Greek word 'Kubernetes' which means 'pilot or steersman'. With inceptions of computers, the term associated with it as it controls/steers many control systems.

#### Arbitration

Various institutions have defined arbitration in following words;

#### Halsbury's laws of England

"...the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by application of law by one or more persons (the arbitral tribunal) instead of by a court of law <sup>[1]</sup>."

#### International Law Commission

"...the procedure for the settlement of disputes between the states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted <sup>[2]</sup>."

From above definitions it can be concluded that, arbitration is that mode of settlement of disputes wherein, the parties at dispute settle the same amicably with the help of third person who is an expert in relevant area. The result of this process of amicable settlement is arbitration award which is final and binding on the parties to arbitration agreement.

#### Cyber/Online/ Electronic/Virtual Arbitration

In light of above definitions of Arbitration it can be stated that, cyber arbitration is nothing but a process of arbitration carried on with the help of computer and internet, wherein only virtual presence of parties is required (not the physical presence). For ex. First party resides in USA, Second in India and the arbitrator is a NRI residing in USA. In cyber arbitration, parties can participate in arbitration proceedings from their place of residence or the place of work through virtual participation. As

the physical presence is not required, it will save both time and money.

#### Need for Cyber Arbitration

Following factors have contributed towards advent and extensive recognition of Cyber/Online Arbitration;

- Overburdened, time consuming traditional court system.
- Specialization, speed and flexibility available in Cyber Arbitration <sup>[3]</sup>.
- Advent of newer, faster technology and its legal recognition.
- Simultaneous translation software facilitates dialogue between parties' speaking different languages. It saves money as translator need not be appointed.
- Non requirement of physical presence, saving the time and money (especially in case of trans-border disputes)
- Current traditional practice of international arbitration is mainly restricted to resolving the commercial disputes. With Cyber arbitration, all forms of civil disputes between transnational peoples/entities can be easily resolved.
- Storage, transportation of bulky data has become easier and cost saving. Numerous data can be stored in a CD-DVD.

#### Arbitration clause

A clause in contract/e-contract, providing for cyber arbitration in case of dispute, is a valid clause u/s 7 of the Arbitration and Conciliation Act of 1996. Cyber arbitration may also arise out of standard form of contracts containing term of reference to cyber arbitration <sup>[4]</sup>. The e-commerce laws and regulations have legitimized the cyber arbitrations.

Article 7(2) of the UNCITRAL Model Law and Article 1 (2) of the Geneva Convention allow electronic arbitration agreement provided the evidence of such an agreement be provided.

#### Seat of Arbitration

In case of Cyber Arbitration, the biggest problem is to find out seat of arbitration. The jurisdictional issue in case of traditional offline arbitration (especially in case of International

Commercial Arbitration) becomes compound in case of Cyber Arbitration. The only solution in this case is unanimous choice of seat by the parties<sup>[5]</sup>. Failing to this, the arbitral tribunal/arbitrator has to decide seat with due regard to the *circumstance of the case and the convenience of the parties*<sup>[6]</sup>. According to one thought,<sup>[7]</sup> the parties to an *online arbitration* usually “involuntarily choose” the location of a given arbitration institution as the place of arbitration.

### Procedure

As per the territorial principle and generally accepted practice, procedural law will be that of the seat of arbitration. Subject to the parties' agreement, the arbitrators may collect online evidence and substitute an oral testimony by written evidence in order to shorten the proceedings<sup>[8]</sup>.

### Award under Cyber Arbitration

Section 31 of the Arbitration and Conciliation Act requires every arbitration award to be in writing. However, whether an award in form of a video (by arbitrator), or in any other electronic form will amount to an award in writing or not is not clear.

Section 31 (5) requires every award to be signed by each party. An electronic signature is legally recognized in India<sup>[9]</sup>.

Sec. 5 of the IT Act 2000 is relevant here which provides that, Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government.

The UNCITRAL Model Law on Electronic Commerce<sup>[10]</sup> has given consideration to the possibility of dealing with impediments to the use of electronic commerce posed by such requirements in national laws by way of an extension of the scope of such notions as "writing", "signature" and "original", with a view to encompassing computer-based techniques<sup>[11]</sup>. This Model Law stresses on "functional equivalent approach", which is based on an analysis of how the purposes or functions of the traditional paper-based requirements could be fulfilled with the use of electronic techniques<sup>[12]</sup>.

Article 6(1) of the Law provides also a new definition of “in writing” by stating that “[w]here the law required information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference”

Hence, an award in electronic form bearing electronic/digital signature of all the parties may be deemed to be an award in writing, thus enforceable under laws in India.

### Enforcement of Cyber award

The New York Convention has described enforceability of arbitral award as “the single most important pillar on which the edifice of international arbitration rests<sup>[13]</sup>” in case of Cyber Arbitration, place of enforcement will depend upon the nature of the dispute. Place or seat will have no role to play. Its enforceability will depend on adherence to the principle of party autonomy.

### Issues involved in Cyber Arbitration

Apart from above issues, parties and arbitrator to cyber arbitration has to face following issues/challenges;

- Cost incurred and expertise required in arranging equipments for cyber arbitration.
- Absence of faster, interruption free network facilities (which is often a problem in developing and underdeveloped countries).
- Data protection and high cost involved for protection of same. Almost all the web communications done through open networks, which makes them vulnerable to ever-growing data security threats.
- Confidentiality of proceedings, documents, evidences etc. (Personal Data Protection Bill 2006 failed to become a law and there is no proper comprehensive legislation governing data protection (only law in India in this regard is Sec. 72 of IT Act, 2000)).
- In case of electronic standard form of contract containing Cyber arbitration clause, party may be forced to go for cyber arbitration (in case of dispute) just by click on ‘I accept.’ This may go against basic principle of arbitration i.e. *consensus ad idem*<sup>[14]</sup>.
- Cyber arbitration requires the parties to be technologically sound and literate. Failing to this may lead to violation of Sec. 18 of the Arbitration and Conciliation Act and Art. 18 of UNICITRAL Model Law (equal treatment principle) as the party not good at technology may fail to represent itself properly.

### Suggestions

- Promotion and development of institutional cyber arbitration.
- Developing the curriculum and training involving techno-legal aspects cyber arbitration.
- Cyber threats and cyber security awareness
- Promoting faster, affordable and interruption free web services.
- Enacting a comprehensive national as well as international data protection statute.

### Conclusion

The combine effect of IT Act 2000 and Arbitration and Conciliation Act, 1996 gives legal recognition to the Cyber/Online Arbitration in India. The emergence of cyber arbitration is no doubt more expeditious and useful than traditional arbitration practice. However, as pointed herein above, it too faces some techno-legal issues. In order to make cyber arbitration a primary mode of amicable settlement of disputes, these issues needs to be addressed by the state authorities, business entities and arbitral institutions.

### References

1. See D Rautray. Master Guide to Arbitration in India', (Wolters Kluwer (India) Pvt. Ltd, New Delhi, 2008, 19.
2. Report of the ILC concerning the work of its Tenth Session, 1958, GAOR, 13<sup>th</sup> session, Supp. No. 9 [A (3859)].
3. Generally, it is expected that the online disputes should be resolved within maximum period of ten to thirty days; see, [www.intellicourt.com/procedures.html](http://www.intellicourt.com/procedures.html)

4. Most often the user has to fill out a standard form agreement or complete a few blank fields, whereas an arbitration clause remains “buried” among numerous other general terms and conditions. Hill argued that this is analogous to the transmission that takes place when an e-mail or fax is sent, the only difference being that the recipient initiates the transmission in the case of the website, whereas the sender initiates the transmission in the case of e-mail or fax. He concluded that this difference has no impact on the validity of the exchange. See, R. Hill, *On-line Arbitration: Issues and Solutions*, 1999. Int’l. 199, available on: <http://www.umass.edu/dispute/hill.htm>
5. Sec. 20 (1), the Arbitration and Conciliation Act, 1996
6. <sup>1</sup> Sec. 20 (2), the Arbitration and Conciliation Act, 1996
7. H Yu, M Nasir. Can Online Arbitration Exist Within the Traditional Arbitration Framework? 20 J. Int’l Arb. 455 at, 2003, 463
8. Yu H, Nasir M. Can Online Arbitration Exist Within the Traditional Arbitration Framework? Journal of International Arbitration, 2003; 20(5):463.
9. Sec. 15, Information Technology Act, 2000.
10. adopted by the General Assembly Resolution 51/162 of 16 December 1996, and amended in 1998; complete text available at, <http://www.uncitral.org/en-index.htm>
11. Section 15, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, available at, <http://www.uncitral.org/en-index.htm>
12. Ibid., Section 16
13. J Wetter. The Present Status of the International Court of Arbitration of the ICC: An Appraisal, 1990. 1 Amer. Rev. of Int’l Arb. 91 at 93.
14. In each case, the absence of a “clear and conspicuous reference” to an arbitration clause could lead to objections concerning the validity of the arbitration agreement “on the basis of lack of informed consent by the buyer”- see supra note 4