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THE CONUNDRUM OF ONLINE DISPUTE RESOLUTION – RELIABILITY OF EVIDENCE

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ABSTRACT

Online Dispute Resolution (ODR) wherein the proceedings of Alternative Dispute Resolution are held on a virtual platform, is an emerging branch of ADR. With the advent of Covid-19, the progress of ODR has become expedite, due to various precautionary restrictions enforced to curb the spread of the Novel Corona Virus and convenience. Hence, more than a desire for the virtual shift, a necessity is the drive for such a transformation from the tangible world to the virtual world. Due to the shift being necessity driven, there arises a necessity to analyse in-depth, the various benefits and issues with regards to virtual dispute resolution. This paper analyses the various benefits and issues with the virtual dispute resolution system, i.e. ODR. The paper emphasises on the issues, especially regarding reliability of evidence –witness credibility, ambiguity in cross-examination, and reliability of documentary evidence. A contrast is drawn between the procedure of deducing evidence in typical courts in India and arbitral tribunals. Furthermore, issues with Online Dispute Resolution, faced uniquely by India, are emphasised upon. Lastly, the paper proposes specific suggestions in order to eliminate the issues faced and render Online Dispute Resolution appropriate, not merely for such an emergency but also to be continued with in the future.

INTRODUCTION

The Covid-19 outbreak has caused a shift from the physical to the virtual world in various respects. One such field is the Alternative Dispute Resolution system (ADR), which has shifted to being the Online Dispute Resolution System (ODR). The ODR system is wherein ADR services are rendered on an online platform, without any physical hearings or examination of witnesses. ODR is that branch of dispute resolution wherein technology is utilised in order to facilitate the resolution of disputes between parties. Primarily it involves Negotiation, Mediation or Arbitration, or a combination of all three. ODR is an equivalent of ADR in this respect.¹The three essential factors of ODR are convenience, trust, and expertise.²Technology has been referred to as the fourth party, the other three being the two parties to the dispute, and the neutral party (negotiator, mediator, or an arbitrator).³ Technology (the fourth party) is utilised as a tool by the neutral party (the third party) in facilitating the online process.⁴Hence, by such a shift of medium, arbitral awards are delivered ‘online’. Though there exist various benefits of such a system, the issues are undeniable and certainly cannot be afforded to be neglected. Issues, especially those with regards to ‘evidence’ – the credibility of witnesses, issues with documentary evidence, and cross-examination, cannot be neglected and need to be taken into intense consideration, as evidence is the vital portion on which the decision in any disputes is based. In case such issues are neglected, the ideal of access to justice will be futile. Hence, such issues need to be analysed deeply and solutions are to be sought out, in order to administer justice without any impediments caused by the shift online.

I. BENEFITS OF ONLINE DISPUTE RESOLUTION

¹ Hon Arthur M Monty Ahalt (ret), ‘What You Should Know About Online Dispute Resolution’ (*Virtual Court House*, March 2009) <www.virtualcourthouse.com/index.cfm/feature/1_7/what-you-should-know-about-online-dispute-resolution.cfm> accessed 26 October 2020.

² Ethan Katsh, ‘Online Dispute Resolution: Some Implications for the Emergence of Law in Cyber Space’ (2006) 10(3) *Lex Electronica* <www.lex-electronica.org/s/892> accessed 26 October 2020.

³ Ethan Katsh and J.Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (1stEdn, Jossey-Bass 2001).

⁴ Ethan Katsh and Leah Wing, ‘Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future’ (2006) 38 *University of Toledo Law Review* 19.

There exist numerous benefits of the online mode of Alternate Dispute Resolution, i.e. ODR. The vitality of such benefits acts as an incentive for the progress of ODR is gaining momentum. Some of the crucial benefits of rendering the services of ADR on an online platform are:

1. **TIME MANAGEMENT:** Due to the scope to avoid travelling, the most crucial aspect of life, which is 'time' is saved on. In a world which is in a race to meet deadlines, such a system wherein ADR services are rendered in the comfort of everyone's homes, is an attraction, and is sure to gain momentum.
2. **COST MANAGEMENT:** As a result of the avoidance of travelling, travel cost is saved on, which is a very crucial benefit of acting as an incentive for the progress of ODR.
3. **FLEXIBILITY AND INFORMALITY:** As stated earlier, ODR services are rendered in the comfort of everyone's homes, thus making it even more flexible and informal when compared to ADR. This makes the process simpler for clients.
4. **GREATER AND EASIER ACCESS TO JUSTICE:** Due to time and cost management; the simplicity of the process by not being subject to the prescribed procedure to be followed by typical courts, which is the reason for the delay in pronouncement of judgements, the process of ODR provides greater access to justice when compared to the typical court system and traditional ADR.
5. **AVOIDANCE OF IMPULSIVE COMMUNICATION:** Impulsive statements at the spur of the moment caused by in-person mediation proceedings are avoided, due to the asynchronous nature of online communication.
6. **VIDEO CONFERENCE:** Video conferencing facilitates face-to-face communication, despite the absence of in-person proceedings, thus increasing the transparency and ease of conducting the proceedings.
7. **DIGITAL STORAGE OF DATA:** Storage of documents in a tangible form is a significant issue faced in the typical court system. In contrast, ODR decreases this burden by storage of the intangible form of documents, thus securing their recovery and easy transmission.
8. **ECO-FRIENDLY PROCESS:** As a consequence of intangible communication, there is nearly nil use of paper, rendering ODR eco-friendly, hence protecting the environment.
9. **INCREASED EFFICIENCY AND PRODUCTIVITY OF ADR PROFESSIONALS:**
As a result of the expedient resolution of disputes, the productivity of ADR professionals

increases, thus increasing their efficiency. This leads to greater and better access to justice in the long run.

II. ISSUES WITH ONLINE DISPUTE RESOLUTION

Despite the existence of numerous benefits of the virtual dispute resolution system, the issues and challenges faced in the implementation and practicalities, are of such a nature which cannot be looked. Unless the issues with ODR are analysed and solved, ODR will act as an undesired bane, and not a boon to ADR. The crucial issues faced with respect to ODR are as follows:

1. **AMBIGUITY REGARDING PLACE OF PROCEEDINGS:** Since every stage of the proceedings is conducted virtually, there exists an ambiguity as to the place of proceedings, thus causing issues with regards to the legal implications of such proceedings. In contrast, in-person ADR proceedings possess no ambiguity in this regard, as there exists a specific place of proceedings.⁵
2. **AMBIGUITY REGARDING JURISDICTION:** ODR invites ambiguity as to the question of the applicable substantive law.
3. **MINIMISATION OF VITAL PRE-TRIAL STAGE PROCESSES:** ODR not being a typical litigation procedure, does not adhere to the strict rules of evidence and other procedural rules. Hence, in some disputes this may lead to the non-finding of the correct state of facts, leading to justice being taken further away from the aggrieved party. Such issues with regards to evidence are elaborately presented in subsequent sections of this paper.
4. **INEQUALITY CAUSED BY TECHNOLOGICAL DISPARITIES:** Difference in access to technology causes a threat to the due process as laid down in Section 18 of the Arbitration and Conciliation Act, 1996, as parties' right to a fair hearing may be infringed upon, due to their not having equal access to the same quality of technology and internet.
5. **CONFIDENTIALITY:** The entire ODR process being conducted virtually poses a threat to the legally mandated⁶ confidentiality of arbitration proceedings, as the platform on

⁵ Daniel Girsberger and Dorothee Schramm, 'Cyber-Arbitration' (2002) 3(3) European Business Organization Law Review 611 <<https://doi.org/10.1017/S156675290001075>> accessed 26 October 2020.

⁶ The Arbitration and Conciliation Act, Section 42A.

which the proceedings are conducted may be hacked, due to which vital information regarding the dispute will be inadvertently disclosed.

6. **UNFAMILIARITY OF CLIENTS WITH TECHNOLOGY:** Situations wherein the clients are not well-versed with technology, they may be sceptical regarding its reliability and may at times even hamper the proceedings or be unable to cope with the use of technology in the proceedings, which may cause them more inconvenience.
7. **DIFFERENCE IN TIME-ZONES IN INTERNATIONAL ODR:** International ODR provides access to high-quality ODR service by experienced and efficient professionals. However, in International ODR where the professionals, clients, and witnesses may be at different places, a conflict of time zones occurs, causing inconvenience to the parties.

III. EVIDENCE IN THE ONLINE DISPUTE RESOLUTION SYSTEM

There exists a significant difference between the rules of evidence to be adhered to in litigation and those to be adhered to in Alternative Dispute Resolution, the primary difference being the former is considerably stringent and leaves no scope for leniency of the Judge. Furthermore, despite the rules of evidence in ADR/ODR being of a lenient nature, significant issues are faced in the process of deducing evidence in ODR, such as deciphering the demeanour of the witness and witness credibility, due to the nature of the dispute resolution system being virtual.

A contrast between the rules of evidence in litigation and those in ADR/ODR are analysed in detail below. Further, the issues faced in deducing evidence in the Online Dispute Resolution System are also emphasised upon below.

i. RULES OF EVIDENCE IN LITIGATION AND ODR/ADR IN INDIA – A COMPARISON:

The rules of evidence prescribed in The Indian Evidence Act, 1872, which are to be adhered to in litigation are not binding on the Alternative Dispute Resolution system, so as to ensure expedient resolution of disputes and greater access to justice. The Court system in India being overburdened with cases, makes the country feel the necessity of ADR, and the necessity to render ADR liberal and get rid of time-consuming processes which comprise the formalities to be conformed with by the typical court system, such as the rules of evidence is felt.

Giving effect to such reasoning, Article 1 of the Indian Evidence Act, 1872 expressly exempts arbitral tribunals from its purview. Reinforcing and affirming the liberty granted to Arbitration, Article 19 of the Arbitration and Conciliation Act, 1996, expressly exempts the arbitral Tribunal from the purview of the Civil Procedure Code, 1908 and The Indian Evidence Act, 1872. Furthermore, the parties to the dispute are allowed to have a consensus as to the procedure which is to be followed by the Tribunal in conducting the proceedings,⁷ failing which the proceedings may be conducted in the manner which the Tribunal considers appropriate.⁸The Tribunal is also empowered to determine the admissibility, relevance, materiality and weight of any evidence.⁹ By thus empowering the arbitral Tribunal and rendering the process of Arbitration lenient, by not subjecting the process to the complicated rules of evidence laid down in the Indian Evidence Act, 2020 expedient resolution of disputes is ensured hence ensuring quicker access to justice.

In contrast, the Indian Evidence Act, 1872, hereinafter referred to as the Act, envisages robustly strict rules of relevancy, admissibility, and probative value of the evidence, thus determining the relevancy and admissibility of any evidence. Section 5-55 of the Act lay down the rules regarding the relevancy of evidence. Evidence is allowed only of facts in issue and relevant facts.¹⁰ Subsequent sections of the Act lay down facts which are relevant, such as facts which are part of the same transaction¹¹, those facts which are the occasion of facts in issue or the relevant facts¹², facts which are the cause or effect of the latter¹³, facts which exhibit the motive of the accused behind the commission of the act¹⁴, the conduct of a party which influences or is influenced by the fact in issue or relevant fact¹⁵, facts which exhibit the state of mind such as good-will or ill-will, negligence and rashness.¹⁶ Likewise, rules determining the relevancy of facts in litigation are very stringent, and binding on the Court, thus conferring little or no power on the court to leniently decide the relevancy of facts.

⁷ The Arbitration and Conciliation Act 1996, sec 19(2).

⁸ *ibid* sec 19(3).

⁹ *ibid* sec 19(4).

¹⁰ The Indian Evidence Act 1872, sec 5.

¹¹ *ibid* sec 6.

¹² *ibid* sec 7.

¹³ *ibid*.

¹⁴ *ibid* sec 8.

¹⁵ *ibid*.

¹⁶ *ibid* sec 14.

Furthermore, Section 136 of the Act practicalizes the rules determining the relevancy of facts laid down in sections 5-55, by laying down that only those facts which are relevant (according to sections 5-55 of the Act) are admissible by the court. Further, since relevancy of facts broadly depends upon and comprises materiality and probative value or weight of evidence, the Act governs them also. Hence, there is no scope for leniency by the court, as all the aspects of evidence are strictly governed by the Act. There exists little, or no scope for the court go beyond the rules and prescriptions of the Act and use its discretion in admitting evidence which may not be legally relevant (according to the Act) but maybe logically relevant.

However, such stringent rules are not applicable to the arbitral Tribunal, thus rendering Arbitration more lenient, and conferring upon the Tribunal greater powers to utilise its discretion in deciding as to the relevancy, admissibility, materiality, and probative value of evidence. Despite the Indian Evidence Act, 1872 being inapplicable to arbitration proceedings, the proceedings are bound by the principles of natural justice, which are to be strictly adhered to by the Arbitral Tribunal.¹⁷The principles such as those of natural justice, fair play, and equal opportunity to the parties cannot be overlooked.¹⁸The arbitrators must not consider themselves as the agents of the parties to the dispute, so as to avoid partiality, as it is their duty to decide impartially.¹⁹Furthermore, the principles underlying the provisions of the Indian Evidence Act, 1872 are to be followed by the Tribunal. As, in the case of *Bharat Heavy Electricals Limited v. Aarti Steel Ltd. (Steel and Power)*,²⁰ the Court emphasising on the applicability of the principle underlying section 23 of the Indian Evidence Act, 1872, held that the issue to be examined was whether the 'substratal rational' of the section was disregarded by the Tribunal. Despite the Arbitral Tribunal not being bound by section 23 of the Act (exclusion of privileged communications from evidence) the principle underlying the provision, i.e. the principle of privileged communication, is to be followed by the Tribunal. Hence, the Indian Evidence Act, 1872 is a guiding principle for the arbitral Tribunal, albeit not being a set of binding principles. The Andhra Pradesh High Court in the case *Hindustan Shipyard Limited v. Essar Oil Limited*

¹⁷*SoceiteAninminaLucchesse Oil v. GorakhamGolakchand* AIR 1964 Mad 532; *Vinayak Vishnu Sahasrabudhe v. B G Gadre and Ors* AIR 1959 Bom 39.

¹⁸*Sahyadri Earthmovers v. L and T Finance Limited and Ors.* (2011) 4 MhLj 200 [7].

¹⁹*SoceiteAninminaLucchesse Oil v. GorakhamGolakchand* AIR 1964 Mad 532 [15].

²⁰ OMP 427 of 2015; IA Nos 6351-6352 of 2016.

*and Ors.*²¹, held that where the parties to a dispute have not agreed upon the procedure to be followed by the Arbitral Tribunal, the latter is bound to weigh all the evidence on record properly and arrive at a just conclusion within the parameters of the dispute. Since the Arbitral Tribunal is not a court, any drawback in the procedure followed does not render the award ineffective, provided there is no breach of the principles of natural justice, equity or fair play.²²The arbitrator is not to receive evidence from one party in the absence of the other, without providing the latter with the opportunity to meet and answer it.²³

The informal nature of Arbitration is also evident from the power vested in the arbitrator to judge upon the relevance, admissibility, and weight of the evidence, and all other related aspects, thus allowing him to exercise his sole discretion in deciding whether evidence can be produced at a later stage of the proceedings.²⁴Similarly, Order 7 Rule 14(3) CPC does not allow the production of documentary evidence which was not produced at an earlier stage of the proceedings, to be produced at a later stage without the leave of the court. However, such discretionary power vested in the court must be exercised sparingly and for some overpowering reason and not as a matter of routine.²⁵

Hence, the stringent rules and conditions laid down in the Indian Evidence Act, 1872 and the Code of Civil Procedure, 1908 are not applicable to arbitration proceedings. However, this does not mean that the arbitrator can act unjustly, unreasonably, or in an unjustified manner. All the principles on which the Indian Evidence Act, 1872 and the Code of Civil Procedure, 1908 are based, ought to be followed by the Arbitral Tribunal.²⁶ As long as the decision of the Arbitral Tribunal to allow a party to produce evidence at a later stage does not prejudice the other party, the Tribunal is permitted to exercise the power of discretion vested in it. The procedure adopted by the Arbitral Tribunal is correct, provided the other party is provided full opportunity to contest the veracity of such evidence.²⁷

ii. THE RELIABILITY OF EVIDENCE - ADVERSELY AFFECTED BY ODR:

²¹ 2005 (1) ALD 421.

²² *Sahyadri Earthmovers v. L and T Finance Limited and Ors* (2011) 4 MhLj 200 [9].

²³ *Banwari Lal v. Jagannath Prasad and Anr* AIR 1958 All 717.

²⁴ *R.S Bachawat J, Law of Arbitration & Conciliation* (6th edn, Lexis Nexis 2017) vol 1, 1419.

²⁵ *Haldiram (India) Pvt Ltd v. Haldiram Bhujawala* (2009) ILR 5 Delhi 503 [21].

²⁶ *Pradyuman Kumar Sharma and Ors v. Jaysagar M. Sancheti and Ors* 2013 (5) MhLj 86.

²⁷ *Glencore International AG v. Dalmia Cement (Bharat) Limited* 2017 (4) ARB LR 228.

Despite the existence of the possibility of conducting a majority of the steps in Arbitration, virtually, the main issue arises at the stage of deducing evidence. The virtual platform poses a plethora of threats to the credibility of witnesses, reliability of documentary evidence, and cross-examination of witnesses. Threats caused to the stages of such crucial nature causes an impact on the outcome of the dispute, which fails the purpose of Arbitration – quick and easy access to justice. Such issues with regards to evidence are as follows:

1. **ANALYSING THE WITNESS DURING CROSS-EXAMINATION:** ODR poses a significant threat to witness testimony, as the party cross-examining the witness may not be able to decipher the body language and demeanour of the witness. Where the evidence of a witness is decisive, it may be to the disadvantage of the cross-examining party for him and the witness to not be in the same room, as not only the answers of the witness to the questions posed by the cross-examining party are to be deciphered, but the body language associated with such answers are to be analysed to great depths, which is not possible in a virtual environment. Also, intuition and instinct is depended on, which can only succeed in a real environment, rather than a virtual environment. Furthermore, this threat increases with the fluctuations in the internet speed, as the testimony of witnesses will be hampered by the speed of internet fluctuating, since in ODR the medium through which and the only reason for the possibility of conducting the proceedings is the 'internet'.
2. **CREDIBILITY OF WITNESSES:** There exists another major threat to the reliability of evidence, which is to 'credibility of witnesses.' Since in ODR the Arbitral Tribunal cannot inspect the isolation of the witness and his not being assisted by his counsel, there exists a significant drawback of witnesses being coached and assisted during their examination. Issues with respect to the most crucial stages of the ODR process causes an adverse effect on the service aimed to be rendered by the ODR system.

Such issues are a threat to the due process, which is the main foundation on which justice is based. Thus, such issues are required to be solved without delay so as not to hamper the delivery of justice, and not cause any inconvenience to clients and witnesses.

IV. **ISSUES FACED IN IMPLEMENTING ODR IN INDIA**

There are specific challenges faced uniquely by India, in the implementation of the Online Dispute Resolution system, in addition to those faced all over the world.

1. **WANT OF AWARENESS:** Lack of awareness regarding ODR among the people is a significant challenge which is to be overcome in order to implement the Online Dispute Resolution mechanism in India successfully. Such lack of knowledge undermines the flourishing of ODR in India, thus people not having access to justice as aimed for.
2. **WANT OF TECHNOLOGY:** The lack of technology such as, a stable internet connection and devices, is another major hurdle in the implementation of ODR as technology is the medium through which ODR proceedings are conducted; hence, ODR cannot exist without proper technology. Furthermore, despite the cities having access to a certain proper standard of technology, the poor of India in the villages do not have access to the minimum standard of technology, thus having to step into the stressful whirlpool of litigation which may not get resolved for many future generations.
3. **MINIMAL KNOWLEDGE OF THE ENGLISH LANGUAGE:** Despite people possessing knowledge of the English language, a majority of the people who require the ODR mechanism, i.e. the poor, do not possess any knowledge of the language, hence failing to acquire the benefits of ODR/ADR as English is the medium through which the proceedings are conducted.
4. **MINIMAL LEGISLATIVE RECOGNITION:** Legislation in India is based on in-person proceedings, hence leaving certain grey areas in the practicalities of the virtual dispute resolution system. Hence, the need is felt to incorporate the Online Dispute Resolution system in the legislation, so that no drawbacks exist leaving scope for the non-implementation of ODR.

V. **CONCLUSION**

The Online Dispute Resolution mechanism is rampantly progressing due to the Covid-19 outbreak. However, such a system of dispute resolution seems to continue even beyond the prevailing of the disease, for matters of convenience. Hence, since ODR is to continue, the issues with the system are to be solved with diligence and fervour in order to implement the mechanism successfully and derive the best out of it. The main issues, those with evidence are to be solved in order to ensure that the purpose of providing quick and easy access to justice is met.

1. Equality in technology must be achieved so as to ensure equality of justice to all people in India. The speed and quality of the internet must be increased so as to be uniform in all areas of the country, in order to ensure every citizen has access to the internet, despite their location. Economic equality must be established, in order to achieve the goal of equity, thereby consequently ensuring access to technology to all people.
2. Technological infrastructure must be provided to everyone. A specific place of office which houses the entire technological set up required for ODR must be established every few kilometres so as to ensure equal access to technology. Hence, even the poor and deprived, and people of rural areas will have access to technological infrastructure and high-quality internet. Furthermore, an official must be appointed at the office so as to assist the clients with any technological difficulties faced by them. However, it must be ensured that such official acts neutrally, in fact, he can inspect on the clients and witnesses in order to ensure that they are not assisted in testifying. This can mitigate the issue of witness credibility.
3. All citizens must be made aware of the ODR mechanism and be encouraged to resort to it in order to have quick and easy access to justice. Furthermore, awareness of technology must be practicalized so as to ensure that lack of technological awareness does not become a barrier for everyone to utilise the ODR mechanism and so that all people can derive the best out of the novel dispute resolution mechanism.
4. As high-quality internet is secured, the process of cross-examination is rendered transparent, as the cross-examining party will be able to analyse the body language and demeanour of the party being cross-examined, hence mitigating the issues with cross-examination, to a certain extent. Furthermore, in case the cross-examining party cannot decipher the demeanour of the party being cross-examined completely, the proceeding must be recorded and watched by the arbitrators and the cross-examining party so as to completely decipher and understand such demeanour.
5. English language skills must be emphasised on and taught from the nascent stage of schooling so that no one faces the hurdle of communication in availing access to justice. The mere reason for ignorance of a specific language must not be allowed to render the ODR mechanism futile.

6. Issues of confidentiality can be solved by the utilisation of privacy-enhancing techniques and more robust security mechanisms, such as privacy design methods, privacy engineering, and privacy self-synchronisation. Further, in order to ensure optimum confidentiality, a customised application for the purpose of ODR can be created.
7. ODR must be incorporated in the legislation, so as to ensure the laws contains provisions governing this mechanism, wholly. This will mitigate all the existing drawbacks, and ensure the ODR mechanism fit to be continued with in the future.

The primary purpose of the Alternate Dispute Resolution mechanism is to free the courts from the burden of numerous cases to be decided, and to ensure to all people, quicker and easier access to justice. The Online Dispute Resolution mechanism must not become a hurdle in achieving the purpose of ADR. It should act as a pillar and a step to achieve the purpose of ensuring justice and equity to all people, in a more convenient manner than ADR. Measures must be adopted in order to ensure that the benefits of ODR not only out-number the drawbacks, but the drawbacks are entirely mitigated. Only if the drawbacks are mitigated, will the survival of the convenience-friendly Online Dispute Resolution System be ensured beyond the prevalence of the global pandemic Covid-19, in the future.

