

Online Arbitration: An overview

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Introduction

Unheard and unidentified was the internet until past 2 decades and now plays the most vital role in the lives of people providing them an uninterrupted platform to exchange information, goods and services . Internet and its use and purpose have grown rapidly in today's globalized world of swelling commerce, trade and communication. The significance of cross borders and overseas distance has diminished. Often, we see transactions between unknown and stranger buyers and sellers, which in turn coupled with other factors, have led to the number of disputes. This increase in conflicts and need in efficient redressal i.e. speedy, inexpensive and effective has paved the way for alternative dispute resolution mechanism. Due to major setbacks of court proceedings, the commercial world began to prefer arbitration as an approach to settle disputes. In general terms, arbitration is a process whereby the parties mutually appoint an arbitrator or a group of arbitrators to settle the disputes, decision of which is binding upon the parties. It is an alternative dispute resolution mechanism to court proceedings. In addition to this, the parties decide which law shall be applicable to the arbitration proceedings.

With liberalization, globalization, privatization and increase in the use of internet, there has been an advent of a growing field to settle disputes that is the online dispute resolution. Online dispute resolution is the use of electronic means of communication in order to conduct arbitration proceedings. The arbitrator listens to the arguments and gives his decision on an online platform. This category of arbitration is convenient, has greater access to justice, promotes confidence in electronic commerce transactions and highly quick and cost effective because there exist no meeting cost, transport costs etc. Online arbitration is successful in B2B commerce.

This article aims at addressing legal issues relating to agreement, seat of arbitration and arbitral awards in online arbitration as a mode of dispute settlement.

Online Arbitration Agreement

Similar to the traditional offline arbitration, online arbitration involves three stages that are the arbitration agreement, proceedings and award. The parties resort to online arbitration in the following circumstances:

- Clause in written contract or online Contract
- Reference to dispute after conflict has arisen mutually by parties

Typically , no disagreement occurs with regards to online arbitration clauses in written contracts because they are in consonance with Article 7(2) of the UNCITRAL model law¹ on arbitration stating that “the arbitration agreement shall be in writing” and Article II of New York Convention² which enumerates that “ each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship” , which serve as a basis for legislations for both foreign and domestic arbitrations .Any ambiguity pertaining to online arbitration clauses in e-contracts is removed by Model Law on Electronic Commerce which provides for functional equivalence approach and Article 7(4) of the UNCITRAL model law ,”the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference ;”electronic communication “means any communication that the parties make by means of data messages;”data message” means information generated ,sent, received or stored by electronic, magnetic ,optical or similar means ,including ,but not limited to, electronic data interchange ,e-mail, telegram ,telex or teletype.

In the Indian context, the arbitration agreement shall be signed by the parties and intention should be of settlement of disputes and be binding by the decision of the arbitral tribunal. Section 7 of the Indian Arbitration & Conciliation Act, 1996 parallel to the UNCITRAL Model Law lays down the definition of the arbitration agreement and makes it mandatory for it to be in writing and includes ‘exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement ‘apart from ‘a document signed by the parties ‘and ‘an exchange of statements of claim & defence.’

For the purpose of online arbitration in e-contracts, it is important to consider section 4 of information technology act, 2008 which reads as, “where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is –

¹ Adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985

² Convention on the recognition and enforcement of foreign arbitral awards,1958

- a. Rendered or made available in an electronic form
- b. Accessible so as to be usable for a subsequent reference

Therefore, it is comprehensible that online arbitration clauses in e-contracts and other arbitration agreements are admissible in India. The Supreme Court of India in *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.*³ affirmed this view and held that arbitration clause in a contract entered by email is valid.

Place of arbitration

The place of arbitration is of paramount significance providing for legally binding force of an arbitral award in the country i.e. the country where award is made. In addition to this, it determines the arbitration procedure and local court's involvement in aiding or in recognition or enforcement of the award rendered through arbitration. The agreement of the disputed parties is accomplished in the form of place of arbitration mentioned in the arbitration agreement. The parties are free to choose the place of arbitration by mutual consent. The New York convention defines the seat of the arbitration where arbitration is conducted or where the award was rendered. The problem arises where in an arbitration proceeding, the users of arbitration belong to different countries and the seat of arbitration is not designated by prior agreement. The parties shall not fail to do so to avoid the jurisdictional issues with regard to the enforcement of the award. It's difficult to fix the seat of arbitration in absence of prior consent as it is not accurately possible to determine location of the parties or the arbitrator who has made the award through an online platform. Hence, it's indispensable for the parties to decide on the seat of arbitration in case on online arbitration to ensure enforcement and fulfilment of purpose.

Online Arbitral Awards

In this section, we consider discussing two issues pertaining to online arbitration, namely admissibility of award and enforcement of award. It is important to know here that arbitral award is defined neither in the New York convention nor in the UNCITRAL model law. In general sense, they are decisions that conclusively determine the disputes between the parties and is given after the proceedings are conducted by an arbitrator who has the authority to adjudicate upon the dispute.

³ 3 SCC 1(2010)

Article IV of the New York convention enumerates the conditions for the recognition and enforcement of the arbitral award as

- a. The duly authenticated original award or a duly certified copy thereof
 - b. The original agreement referred to in article II or duly certified copy thereof
- the New York convention doesn't need the arbitral award to be in writing or signed.

In case the arbitral award is provided for in written form in online arbitration proceedings no ambiguity in relation to its authenticity arises. However the online arbitral awards, in majority, are rendered in an electronic form and no such thing as copy / original exists. It is important to settle on whether online arbitral awards lay within the definition of "original". Herein we rely on the functional equivalence approach under the UNCITRAL model law on electronic commerce, 1996 which focuses on how the requirements of being original such as signature can be fulfilled in electronic commerce documents, here being the electronic arbitral award.⁴

The electronic award can be called original only after its authenticity can be guaranteed. It is important to read article 8 of the UNCITRAL model law on electronic commerce, 1996 to clarify further. It states: "Information to be presented or retained in its original form , that requirement is met by a data message if:

- a. There exists a reliable assurance as to the integrity of the information from the time when I was first generated in its form, as a data message or otherwise; and
- b. Where it is required that information be presented ,that information is capable of being displayed to the person to whom it is to be presented"⁵.therefore , online awards can be recognized and enforced."

Another important issue to deal with is place of arbitration during enforceability. Article I of the New York convention lays down that the convention shall apply to the recognition and enforcement of arbitral award made in the territory of the state other than the state where the recognition and enforcement of such awards are sought. In cases where the seat of the arbitration is not designated because of the nature of online arbitration, there exists no

⁴ Online <<http://www.uncitral.org/en-index.htm>>

⁵ UNCITRAL MODEL LAW ON ELCTRONIC COMMERCE WITH GUIDE TO ENACTMENT ,ONLINE: <<http://www.uncitral.org/en-index.htm>>

territory where the online arbitral can said to be made. Hence, the New York convention is not applicable in such circumstances and the award made is not enforceable.

In the Indian context, section 31 of the Indian arbitration and conciliation act, 1996 shall be read in reference to the admissibility of an arbitral award. Provision of section 31 lays down the content and forms of an arbitral award as –

- a. An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal”
- b. After an arbitral awards has been made, a signed copy shall be delivered to each party.
- c. The arbitral award shall state the reasons upon which it is based
- d. the arbitral award shall state its date and the place of arbitration

As mentioned earlier, it's difficult to decide on a seat of arbitration in online contracts. Article 20 of the Indian arbitration and conciliation act, 1996 requires the parties to determine a place of arbitration, failing which, the arbitral tribunal decides it. Consequently if in an online arbitration proceeding, no place of arbitration is cited, any award made cannot be enforced under the act.

In a case where the place of arbitration has been decided, there is ambiguity in fulfilment of conditions mentioned in section 31 of Indian arbitration and conciliation act,1996 , the one requiring the arbitral award to be in writing and signed by the arbitrator. In order to remove this doubt, section 4 and 15 of the information technology act, 2000 shall be discussed .According to section 4 of the said act, electronic documents so fulfil the criteria of being in writing. Sec 15 of the information technology act,2000 explains secure electronic signature .e-signatures encrypt and secure a message or document in such a manner which stops the alteration of its contents without previous decryption and subsequent re-encryption.as a result, they carry the same power as handwritten documents with regards to authenticity and integrity. An electronic signature helps in recognizing the sole user of the document. Therefore, it can be concluded that even if an award is digitally or electronically signed by the arbitrator, it is said to be signed by him within the meaning of section 31 of the arbitration and conciliation act, 1996.

Conclusion

Online dispute resolution (ODR) is a breakthrough in technology and offers an edge over the traditional arbitration method. Online arbitration can prove to be an apt and efficient means of settlement of disputes between all in the commercial world. However various issues still exist in the practice of ODR which is hampering the success, growth and trustworthiness in the method. Prominent issues that have arisen are regarding the validity of online agreements for arbitration, designation of place of arbitration, enforcement of arbitral awards that are authentic and original have been discussed in previously in the article. To conclude, to make Online Dispute resolution as a powerful force in Alternative Dispute settlement mechanism, there is a need to lay down clear guidelines in case of failure to designate the seat of arbitration by parties and adopt speedy methods of enforcement of arbitral awards such as transfer by PayPal. The ODR is at a developing stage and the agreement shall be very meticulously drafted in order to make it successful in the present scenario. ODR has the capacity to revolutionize alternative dispute resolution in the future.

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