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ALTERNATE DISPUTE RESOLUTION IN DIGITAL AGE

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INTRODUCTION

Arbitration is an effective alternative dispute resolution. It is the forum in whichparties by an agreement between them choose a forum other than the court of lawto resolve their disputes. The reason behind the evolution of arbitration is to minimize the burden from the shoulders of the court of law and provide speedy remedy to the parties. Nani Palkhivala observed that there are enormous advantages to arbitral proceedings.

In the words of Nani Palkhiwala, he said *"If the law is not to be a system of tyrannical rigidity, but instead to be the efficient and useful servant of a changing society, it must from time be adapted and parts of it replaced. A court of law is like an ancient castle, constantly under repair. There comes a time when it no longer pays to patch it up and it is better to resort to a new, compact house builton modern lines".*

Arbitration is an effective forum which provides speedy remedy than the judiciary. Matters in arbitration are disposed within 1 year whereas in courts the parties to the dispute have to wait for several years depending upon the complexities of their case.

Arbitration is also preferred by the parties because of the autonomy granted by itand exercised by the parties in determining the course that the proceedings may take.

Characterstics such as party autonomy, flexibility and procedural freedom to tailor the dispute resolution process and appoint arbitrators who are knowledgable in the subject matter of dispute make arbitration an attractive and preferred method of resolving commercial disputes.

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ALTERNATIVE DISPUTE RESOLUTION IN INDIA:

Desire for quick and affordable justice dispensation is universal. In present times, early resolution of a dispute not only saves valuable time and money of the parties to the dispute but also promotes the environment for enforcement ofcontract and ease of doing business.

The traditional mode of dispute resolution i.e. litigation is a lengthy process leading to unnecessary delays in dispensation of justice as well as over- burdening the Judiciary. In such a scenario, Alternative Dispute Resolution (ADR) mechanisms like arbitration, conciliation and mediation etc. offer better and timely solution for resolution of a dispute. These ADR mechanisms are less adversarial and are capable of providing an amicable outcome in comparison toconventional methods of resolving disputes.

HISTORY OF ARBITRATION IN INDIA:

The first formal statute relating to the subject of arbitration in India was the Indian Arbitration Act, 1899, applicable only to Presidency towns of Madras,Bombay and Calcutta.

Subsequently, after the Code of Civil Procedure, 1908 came into force, the Second Schedule of the said code provided for the recourse to arbitration. Subsequently, above laws laid down the comprehensive legislation relating toarbitration i.e. the Arbitration Act, 1940.

The said Act of 1940 was predominantly based on the English Arbitration Actof 1934 and was in force for the next more than half a century.

The Act of 1940, dealt only with domestic arbitrations while the enforcement of foreign awards was dealt with by the Arbitration (Protocol and Convention) Act, 1937 for Geneva Convention Awards and the Foreign Awards (Recognition and Enforcement) Act, 1961 for the New York Convention Awards.

Internationally, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 was adopted on June 21st, 1985, containing 36 Articles. The model law was aimedto create uniformity for arbitration related statues, enacted by the Member Countries.

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The UNCITRAL model law enabled the participating nations to consider the said law while enacting Laws pertaining to domestic arbitration in order to have uniformity across various jurisdictions as far as arbitration is concerned.

There were some key objectives which enabled the enactment of Arbitrationand Conciliation act, 1996 such as:

1. Reducing Court intervention
2. Providing for speedy disposal of the disputes.
3. Amicable, swift and cost-efficient settlement of disputes.
4. Ensuring that arbitration proceedings are conducted in a just, fair and effective manner.
5. Comprehensively dealing with international commercial arbitration andconciliation as also domestic arbitration and conciliation.
6. Facilitating arbitrator to resort to mediation, conciliation or other procedure during the arbitral proceedings to encourage settlement ofdisputes.
7. Provide that every arbitral award is enforced in the same manner as if itwere a decree of the court.
8. To reduce the burden on the litigation process.
9. Providing alternate mode to rely upon in case an issue arises
10. Helps in better functioning to resolve the issues in civil suits.

CHANGING PATTERNS OF ARBITRATION

The international arbitration community has always been focused on improvingthe efficiency and overall quality of arbitration. The different stakeholders in arbitration seek to optimize such factors as the duration and costs of arbitration, as well as the transparency and predictability of these factors. The key questionis now how technology can continue to play a role in achieving these goals.

Three ways of interaction between arbitration and technology aredistinguished here.
The first one is the most comprehensible, i.e. whereby parties and arbi- trators make use of technology, e.g. online and electronic tools, in support of the procedure. Costs and time are saved by communicating solely by way of email and filing submissions and exhibits on an online platform or ‘drop box’, the access to which is provided by the arbitral institution or the arbitrator. Moreover, over the last few years, procedural hearings have been increasingly held

by telephone or video-conference. In contrast, witness hearings or hearings on the merits today largely remain physical encounters which have to be planned well in advance and which have an important impact on the arbitration costs. How much longer will it take before an arbitrator, counsel and parties, all in the comfort of their own office, log in to a virtual hearing room wearing their virtual reality glasses, instead of flying out to some major capital for a weeklong witness hearing. There can be little doubt that this evolution adds to the efficiency of the arbitral process. The question is of course whether this does not pose a threat to the principles of fairness and due process. We believe that this should not be the case, provided that the tools are available to cover the issue of security.

The second interaction is in full development: the creation and use of platforms for Online Dispute Resolution (ODR) to facilitate dispute reso- lution. ODR platforms exist in all shapes and sizes and can serve different purposes, but they all aim at resolving a dispute in a simple, fast, flexible and efficient way. The main question surrounding ODR is how to guar- antee that the fundamental principles of dispute resolution are preserved. An ODR system should meet the principles of fairness, due process, trans-parency, accountability, independence, impartiality, efficiency and effec- tiveness. Until now, the main focus of ODR is to get disputes regarding low- value transactions away from traditional judicial systems. To that end, an ODR system will try not to impose costs, delays or burdens that are disproportionate to the economic value at stake. ODR can also be a rele- vant solution when traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes. The ODR platform created by the European Union in 2015 tries to meet that goal, although it would appear it is primarily a way for consumers to (try to) interact with traders when a dispute has arisen.

One of the most interesting features of ODR platforms is that they usually offer different ways or levels to resolve a dispute. In general, an ODR process will have three stages: negotiation, facilitated settlement and a third/final stage with some kind of adjudication. An ODR process will startup with a notice of claim through an ODR platform, whereby the ODR administrator will notify the respondent. After that, a technology- enabled negotiation stage will start. Known forms are, e.g. double-blind bidding or visual-blind bidding, whereby an algorithm will either gen- erate suggestions or automatically settle a monetary claim if the parties' proposals/offers fall within the range (zone of agreement) set or accepted by them. One could state that it is an automated, and perhaps more pre- cise, form of baseball

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arbitration, whereby parties are encouraged to be reasonable.

In any case, a result should be obtained within a certain timeframe after which the ODR system will move to the next stage, the facilitated settle- ment. Here, the ODR administrator will appoint a neutral intermediary who will communicate with the parties in an attempt to reach a settlement. If that fails, the parties will move to the third and final stage which is a dispute resolution through arbitration, third-party binding decision, expert determination, etc. Therefore, in the end, it all comes back to classic adjudication by a judge, an arbitrator or an expert, who as a human will weigh the elements of the dispute at hand and make a final decision.

This brings us to the third way that technology will interact with arbi- tration, i.e. the ever-growing science of artificial intelligence. Data mining is gradually finding its way into the field of law. Systems exist whereby case law and doctrine are selected out of huge databases in order to generate a first opinion on a question of law. And just around the corner are systems which learn and therefore create such opinions themselves in order to solve legal issues.

We no longer ask ourselves the question how can bolts most efficiently be screwed into a car: by a robot or by a human being? Soon we may not even reflect anymore upon the question who is more efficient at coming up with relevant case law and doctrine for a certain legal issue: a paralegal or a computer? How far are we from asking the same question when it comes to suggesting a solution for a legal issue, i.e. whether it is more efficient to hire an associate at the firm or to order some form of advanced computer software? And finally, at what point in time will we rely on the decision taken by such a software as opposed to an arbitrator or state judge? When drafting an arbitral clause, will we soon make the distinction between arti- ficial intelligence (AI) arbitration and human arbitration, instead of the choice between institutional and ad hoc arbitration as we do today?

The opportunity to ask ourselves the question whether we want this evolution to take place is long gone. The remaining question is how we want it, in order to avoid a society strictly run by logic, by ways of formu- las and equations, as described in the 1921 dystopian novel *We* by Yevgeny Zamyatin. So it is time to get to work. It is time to think or rethink any and all aspects of arbitration, from the appointment of an arbitrator right up to the final award, and identify how the process can be made more efficient through interaction with technology.

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The field lays wide open and the academic world, the arbitral institutions and the users of arbitration all have a role to play. Undoubtedly it will be a step-by-step process, in which this book forms an important part, but we should heighten our pace.

Technology is not a menace to arbitration. It can and should be used to enhance the aspects for which arbitration is criticized today. Our strength is that dispute resolution in commercial disputes, in many jurisdictions around the world, is not and has never been the monopoly of State judicial systems. To the contrary, in international commercial relationships, alternative ways to resolve disputes remain increasingly popular. The interna- tional arbitration community has grown and is still growing in strength at avery high pace. We should use this strength to stay on top of our game and applaud any initiative taken in the direction of further increasing it,whatever angle taken.

Dispute resolution is a very serious matter and it has been so ever since thefirst dispute arose. Over centuries, mankind has identified the standards for fair adjudication. Technology, on the other hand, is an equally serious matter. The staggering pace of technological development causes last year'sinventions to be outdated today. Justice and technology have now met; they have started to interact; and they will interact more and more, faster thanwe can all believe or even imagine.

This remarkable book not only identifies the different challenges before us,it also directs us to find the answers.

Strengthening Institutional Arbitration in India

Standardization of Procedures: Institutional arbitration provides standardized rules and procedures that ensure consistency and fairness in the arbitration process. This reduces the risk of ad hoc arrangements that may be perceived as biased or inefficient. Standardization also simplifies the process for parties unfamiliar with arbitration, promoting greater participation.

Professionalism and Expertise: Established arbitration institutions maintain panels of experienced arbitrators with expertise in various fields. This ensures that disputes are adjudicated by qualified professionals, enhancing the quality and credibility of the decisions.

Enforcement of Arbitral Awards: One of the critical factors influencing investor confidence is

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the enforceability of arbitral awards. Institutional arbitration enhances the enforceability of awards by ensuring compliance with international standards and best practices. The involvement of reputable institutions also increases the likelihood of recognition and enforcement of awards in foreign jurisdictions.

Cost-Effectiveness and Efficiency: Institutional arbitration can be more cost-effective and efficient compared to ad hoc arbitration. Institutions offer administrative support, logistical assistance, and pre-established fee structures, reducing uncertainties and potential delays.

Enhancing Access to Justice and Investor Confidence

The integration of technology and institutional arbitration significantly enhances access to justice and instills investor confidence in India's legal framework. By streamlining case management, facilitating remote hearings, and leveraging AI-driven tools, ADR processes become more accessible, transparent, and efficient.

For investors, a robust and reliable ADR framework is a crucial factor in decision-making. The ability to resolve disputes swiftly and fairly without resorting to lengthy litigation processes reduces the risk associated with investments. This, in turn, fosters a favorable business environment and attracts foreign investment.

ODR:

The term ODR is ever evolving and will continue to remodel itself based on new technological innovations. That said, Online Dispute Resolution in simpleterms is the use of technology to resolve disputes outside of the public court system. However, rudimentary integration of technology in the dispute resolution processes does not qualify as ODR. ODR is also more than just e- ADR for it can include the resolution of disputes through AI/ML tools and hasno determined set of procedures.

UNDERSTANDING ODR AND ITS BENEFITS

In its most basic sense, ODR is the use of technology to 'resolve' disputes. It is not just any form of technology integration (such as electronically scheduling a session), but its active use to help resolve the dispute (such as video conferencing for hearings or electronic document sharing for filing). Though derived from ADR, ODR's benefit extends beyond just e-ADR or ADR that is enabled through technology. ODR can use technology tools that are powered by

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AI/ML in the form of automated dispute resolution, script-based solution and curated platforms that cater to specific categories of disputes. ODR's benefits are also manifold. It is cost effective, convenient, efficient, allows for customizable processes to be developed and can limit unconscious bias that results from human interactions. In terms of layers of justice, ODR can help in dispute avoidance, dispute containment and dispute resolution. Its widespread use can improve the legal health of the society, ensure increased enforcement of contracts and thereby improve the Ease of Doing Business Ranking for India.

Over time, the benefits of ODR and Digital Courts (technology in the public court system) together can transform the legal paradigm as a whole. A comprehensive detailing of the definition of ODR, its origins, its benefits can be found in Chapter I. Its immediate benefits can be harnessed during this current COVID-19 crises, which is likely to lead to an upsurge in the number of cases before the judiciary. For instance, consumer, tenancy and labour disputes are likely to see a rise in numbers. ODR can help reduce the burden on the courts by leveraging the capacity of the private sector, which has already seen some innovation and capacity building in the last few years. In the long term, ODR can be the preferred mode of solution for, though not limited to, all low-value high-volume disputes such as those involving e-commerce transactions.

ODR IN INDIA

In the context of India, fortunately, the current ecosystem and preparedness has been very promising. For instance, the judiciary has been unequivocal in its support for ODR both in terms of judges vocally recognizing its potential and in terms of the judicial decisions that have set the foundation for future ODR integration (such as the recognition of online arbitration or electronic records as evidence). The Executive, in the form of Government Departments and Ministries have also been leading the way. For instance, the RBI released an ODR policy for digital payments, the MSME sector saw the introduction of the SAMADHAAN portal and the Department of Legal Affairs is in the process of collating the details of ODR service providers across the country. Another aspect that makes India ODR ready is its legislative preparedness. Though in a piecemeal fashion, there are numerous support legislations which provide legislative backing for the ADR aspect of ODR (such as the Arbitration and Conciliation Act, 1996 or the Code of Civil Procedure, 1908) as well as the technology aspect of ODR (such as the Indian Evidence Act, 1972 and the Information and Technology Act, 2000). Further, India has also brought into force. the United Nations

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Convention on International Settlement Agreements Resulting from Mediation, 2018 this year. A detailed explanation of India's ODR readiness can be found in Chapter IV of this report. While the future is indeed promising, there are still a lot of challenges that have to be overcome along the way. The challenges that have been identified in Chapter V include – structural challenges (such as lack of digital literacy and digital infrastructure), behavioural challenges (such as lack of awareness, lack of trust in ODR and reluctance on part of the Government to use ODR) and operational challenges (such as difficulty in enforcing ODR outcomes, archaic legal processes and shortage of competent Neutrals). Chapter VI of the report identifies some initiatives that can help resolve these seemingly big issues with innovative solutions. The following section provides these details.

GETTING INDIA ODR READY

If ODR is indeed to be mainstreamed and broad-based in India, sufficient capacity and infrastructure will have to be developed in the country. For instance, one of the pre-requisites for ODR in India is greater access to technology. This access is both in terms of the physical access to infrastructure as well as increase in levels of digital literacy. It is also recommended that targeted initiatives be introduced to increase access among people that are oftenplaced on the margins. Fortunately, some initiatives taken by the Government are already working towards making this a reality. Apart from infrastructure, even the current capacity of the ecosystem has to be maximized and then progressively increased for the future. For instance, through collaborative and systematic efforts from various stakeholders, the number of trained and qualified ODR professionals can be increased. To expand capacity while ensuring quality, the kinds of institutions that can provide training can be widened and uniform training standards can be mandated. Such training should include practical experience and simulations training on ethics and best practices. Increase in human resource capacity should not be understood to mean just an increase in the number of Neutrals. There are various other actors who can range from paralegal volunteers (who can assist litigants to use ODR), to the Court Registry officials (who can encourage potential litigants to use ODR and implement the procedure laid down for enforcement of ODR settlements/awards) and judicial officers (who can refer cases to ODR). It is important to impart curated training for each of the above actors at a large scale.Finally, it is important that the private sector be encouraged to innovate and grow in the years to come so that both the dispute resolution ecosystem and the Government can benefit in the long run. To this end, targeted initiatives such as setting up of legal tech hubs and tax incentives can be introduced. However, to give a boost to ODR in

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India, the Government and the judiciary must lead by example. For instance, adopting ODR for Government litigation will increase the trust that people place in ODR processes. ODR can also be integrated within some Government Departments such as the Department of Consumer Affairs orhelp resolve disputes under the Insolvency and Bankruptcy Code, 2016. The judiciary and the Governments, on the other hand, can collaborate to integrate ODR into the workings of the court annexed centres. These centres can especially benefit from the use of AI/ML which can help resolve disputes that have limited question of law and fact.