

Embracing Digital Arbitration: India's Legal and Institutional Shift Toward Technology-Driven Dispute Resolution

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Abstract: *Due to the unprecedented reliance on virtual or digital technologies in 2020, entities across the world, such as multi-national companies, law firms, international arbitration institutions, and lawyers from both civil law countries and common law countries, have started experiencing virtual arbitration practice as cost-effective, convenient, and efficient of course with marginal trepidation on arbitration principles like party autonomy, consent, fair treatment, etc. The judiciary in India has also been transparent in its support for digital technology in its pronouncements. The "NITI Aayog, the apex public policy think tank of the Government of India", has also published the ODR ADR policy plan for India in 2021, reflecting its pro-digital technology status. Also, the legislature's equal support for digital technology has been proved by introducing an amendment in "Section 7 of the Arbitration and Conciliation Act, 1996", in which an online arbitration clause in traditional and e-contracts is valid ("Inserted by Act No. 3 of 2016 dated 31.12.2015)". The article highlights the digitalization of arbitration practice as a dispute resolution mechanism in business management.*

Keywords: digital technology, online arbitration proceedings, legal provisions, challenges, opportunities

1. Introduction

A fundamental concern of online arbitration using digital technology is making the proceedings easy to access and cost-effective while preserving all essential arbitration principles.¹ However, whether we can reap the virtual arbitral proceedings by maintaining the standard of due proceedings arises. Even the Law Commission of India almost ten years back, i.e., in 2014, stated and encouraged the use of technology in arbitral proceedings.² But, due to a lack of technological exposure of arbitrators and parties concerned then, it was not very considerable in India.³ After the 2020 pandemic, virtual arbitration proceedings may no longer be optional but appropriate for adequate access to justice for every individual.⁴ New amendments in the international arbitration institutions' rules have ensured this.⁵ India follows UNCITRAL in arbitration proceedings, so the "UNCITRAL Online Dispute Resolution [ODR] working group's definition

of ODR is essential for us, which says, [...] a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology".⁶

"Technology has become an integral part of our daily lives. It is constantly evolving and has a significant impact on the world.⁷ While the use of new technologies provides many advantages, an unprecedented reliance on innovation-driven technologies also raises doubts and poses threats.⁸" It is worth noting that the interaction between technology and arbitration should not be seen as a question for the future, but rather as something that is happening right now.⁹ "The constant development of new technologies is creating many new challenges. These challenges relate to how technology can be properly integrated to best meet the needs of arbitration.¹⁰ Therefore, such new technologies should provide tools to improve the process of conducting arbitral proceedings.¹¹ It is

¹ <https://mnlumumbai.edu.in/pdf/Virtual%20Arbitration%20in%20India,%20CAR%20MNLU%20Mumbai.pdf>, last visited on 8/5/2024.

² Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996 (2014), P. 13 In the case of *Peak Chemical Corporation Inc. v NALCO*, OMP 160/2005 No dt 7.2.2012 at para 29], "The Commission further notes that a conscious use of technology, like teleconferencing, video-conferencing etc., should also be encouraged and the same can easily replace the need for purely formal sittings and thereby aid in a smoother and more efficient conduct of arbitral proceedings.",

³ <https://mnlumumbai.edu.in/pdf/Virtual%20Arbitration%20in%20India,%20CAR%20MNLU%20Mumbai.pdf>, last visited on 8/5/2024.

⁴ <https://pib.gov.in/PressReleasePage.aspx?PRID=1776202>, last visited 8/5/2024. , NITI Aayog Pushes for Online Dispute Resolution for Speedy Access to Justice Posted On: 29 NOV 2021 6:18PM by PIB Delhi

⁵ <https://brill.com/edcollchap-0a/book/9789004514836/BP000004.xml?language=en&body=fullhtml-60832>, last visited on 8/5/2024. The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the covid-19

Pandemic (adopted on 19 April 2020) (hereinafter referred to as ICC Guidance Note), HKIAC Guidelines for Virtual Hearings (issued on 14 May 2020) (HKIAC Guidelines) and Seoul Protocol on Video Conference in International Arbitration (released on 18 March 2020)²⁵ (hereinafter referred to as Seoul Protocol) were drafted to assist tribunals.

⁶ https://vidhilegalpolicy.in/wp-content/uploads/2020/07/200727_The-future-of-dispute-resolution-in-India_Final-Version.pdf, last visited on 8/5/2024, "United Nations Commission on International Trade Law, 'UNCITRAL Technical Notes on Online Dispute Resolution' (2017) vii".

⁷ Łagiewska, Magdalena. 2023. The New Landscape of Arbitration in View of Digitalization. In *The impact of COVID on International disputes*, eds. Shaheez Lalani, and Steven G. Shapiro. 208–217. Leiden-Boston: Brill.

⁸ Łagiewska, M., Bhatia, V.K. International Arbitration in the Digital World. *Int J Semiot Law* 37, 821–827 (2024).

<https://doi.org/10.1007/s11196-024-10135-1>, last visited on 9/6/2024.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

worth adding that the international arbitration community has always been very attentive to ways of improving the efficiency of arbitration itself and thus its quality.¹² Indeed, the various stakeholders in international arbitration are taking steps to balance the duration and cost of proceedings with the need to maintain the transparency and predictability of these factors.”¹³

2. Evolving Virtual Dispute Resolution in International Arbitration:

International arbitration institutions have reviewed their rules to deal with remote arbitration not only after COVID-19 but also before it. These regulations have been enacted to take evidence in arbitration proceedings in electronic and telematic form and to conduct hearings online.¹⁴ Accordingly, the “German Arbitration Institute (dis)”¹⁵, the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (ICAC)¹⁶, Singapore International Arbitration Centre (SIAC)¹⁷, World Intellectual Property Organisation (WIPO) arbitration rules 2021” are amended. The “Stockholm Chamber of Commerce (SCC)” has updated¹⁸ its arbitration rules accordingly. In executing the arbitral award in a country governed by the national arbitration law, the government does not have specific regulations for a ‘form of arbitral award’. This means that an electronic form of an arbitral award can be recognized. For example, in the United Kingdom, “Section 52¹⁹ of the Arbitration Act of 1996 provides, *inter alia*, that the parties

are free to agree on the form of an award”.²⁰ In Switzerland, similarly, a “civil law jurisdiction, Article 189(1)²¹, entitled Arbitral Award, provides that the arbitral award shall be rendered according to the procedure and in the form agreed upon by the parties”.²² In the Netherlands, “the Arbitration Act in the Code of Civil Procedure provides in Article 1072(b) (3)²³ that an arbitral award may be made and signed electronically”.²⁴

The COVID-19 pandemic was a major disruptor, significantly affecting online dispute resolution globally.²⁵ We cannot overlook the practice of arbitration before 2020, when “online arbitration was mainly used to resolve cross-border e-commerce B2B disputes, and only a few relied on it to settle traditional cross-border commercial disputes”.²⁶

3. Use of New Technologies in International Arbitration:

“There are three distinct ways in which international arbitration interacts with technology. According to the first, both arbitrators and parties make use of new technologies during the arbitral process.”²⁷ This includes the use of online and electronic tools to support the entire arbitral proceedings.²⁸ “Obviously, this leads to savings in both costs and time through communication based on e-mails and submissions made electronically through special dedicated online platforms. Procedural hearings have also moved into

¹² Ibid.

¹³ Meulemeester, Dirk de. 2018. Foreword. Welcome to the ‘Brave New World of Arbitration. In *Arbitration in the Digital Age. The Brave New World of Arbitration*, eds. Maud Piers, and Christian Aschauer, ix-x. Cambridge: Cambridge University Press.

¹⁴ “Virtual” Dispute Resolution in International Arbitration, *Mapping Its Advantages and Main Caveats in the Face of COVID-19*, Chapter 3, published by Brill, Belen Olmos Giupponi, p. 1, last visited and downloaded from Brill.com 05/08/2024.

¹⁵ Approval DIS eFile for the transmission of electronic documents to the DIS and the use of DIS eFile in arbitration proceedings pursuant to the 2018 DIS Arbitration Rules,

From the moment the parties have agreed on the use of DIS eFile, the upload of documents to the File created for the respective proceedings is another means of electronic transmission approved by the DIS within the meaning of Article 4.1 sentence 1 2018 DIS Arbitration Rules (“DIS Arbitration Rules”)., <https://www.disarb.org/en/tools-for-dis-proceedings/dis-rules>, last visited on 10/05/2024.

¹⁶ Article 30(6) that either party has the right to request to participate in the hearing by means of videoconferencing, i.e. e-hearing. The arbitral tribunal will bear in mind the circumstances of the case, the parties’ position, and its technical feasibility when ruling such request.

¹⁷ Rule 19.1 The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute.

¹⁸ Article 32 Hearings of the Swiss Code on Private International Law (1) A hearing shall be held if requested by a party, or if the Arbitral Tribunal deems it appropriate. (2) After consulting with the parties and having regard to the circumstances, the Arbitral Tribunal shall decide: (i) the date and time of any hearing; and (ii) whether any hearing shall be conducted (a) in person, at a specified location, or (b) remotely, in whole or in part, by videoconference or other appropriate means of communication.

¹⁹ Section 52: Form of award.

(1) The parties are free to agree on the form of an award.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.

(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

(5) The award shall state the seat of the arbitration and the date when the award is made.

²⁰ Online Arbitration in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries, by Ihab Amro (University of Athens)/April 11, 2019.

²¹ Art. 189 (1) The award shall be rendered in conformity with the rules of procedure and in the form agreed upon by the parties. [Swiss Private International Law Act of 18 December 1987 (as in force from 1 January 2021)]

²² Online Arbitration in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries, by Ihab Amro (University of Athens)/April 11, 2019.

²³ The Netherlands, the Arbitration Act contained in the Code of Civil Procedure provides in Article 1072 (b) (3) that an arbitral award may be made and signed electronically.

²⁴ Online Arbitration in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries, by Ihab Amro (University of Athens)/April 11, 2019.

²⁵ “Virtual” Dispute Resolution in International Arbitration, *Mapping Its Advantages and Main Caveats in the Face of COVID-19*, Chapter 3, published by Brill, Belen Olmos Giupponi, p. 1, last visited and downloaded from Brill.com 05/08/2024.

²⁶ Ibid

²⁷ Łagiewska, M., Bhatia, V.K. International Arbitration in the Digital World. *Int J Semiot Law* 37, 821–827 (2024). <https://doi.org/10.1007/s11196-024-10135-1>, last visited on 9/6/2024.

²⁸ Ibid.

the digital world.²⁹ As such, they have been held either by telephone or by videoconference. “On the other hand, hearings of witnesses or hearings on the merits are conducted in the traditional way, mostly physically.”³⁰

“With regard to the second interaction, the development of technologies in arbitration is in full swing.³¹ For example, it is common to see the emergence of online dispute resolution (ODR) platforms to facilitate the dispute resolution process. They provide services in a simple, fast, flexible and also efficient way.³² However, it should be noted that there are some challenges associated with ODR, such as how to guarantee the basic principles of dispute resolution. Despite such concerns, ODR platforms are widely used for low-value transactions.³³ In addition, ODR platforms also offer interesting services, including three stages of the process: negotiation, facilitated settlement and a third/final stage with an adjudication.”³⁴

The final, third interaction between arbitration and technology relates to the use of artificial intelligence (AI) in arbitration. Data mining has become the new normal and has even entered the field of law.³⁵ Indeed, AI may have an impact on international arbitration itself. This raises the question of whether we would make a distinction between AI and human arbitration when drafting an arbitration clause.³⁶ It is worth adding, however, that technology should not be seen as a threat to arbitration.³⁷

4. Online Arbitration

Magdalena Łagiewska in her paper entitled “New Technologies in International Arbitration: A Game-Changer in Dispute Resolution?” focuses on the development and rapid advancement of innovation-driven technologies in international dispute resolution. On the one hand, these technologies offer cost-effective and time-efficient solutions through online case filing, e-evidence, and remote hearings. On the other hand, they may also raise new challenges, such as e-arbitration agreements, e-awards, cybersecurity, and data protection.³⁸ In light of this, it prompts reflection on the potentially transformative impact of these technologies on the

dispute resolution landscape.³⁹ It also raises the question of whether these new technologies will revolutionise the field of dispute resolution.⁴⁰ This analysis suggests that the emergence of new technologies should be seen as an opportunity to establish a lasting new standard for international arbitration.⁴¹

In the next contribution, entitled “Advocacy for Online Proceedings: Features of the digital world and their role in shaping communication in remote international arbitration”, Juan Pablo Gómez-Moreno points out that the outbreak of Covid-19 pandemic disrupted traditional face-to-face dispute resolution proceedings.⁴² As a result of the pandemic, there has been a rapid shift from traditional procedures to the use of digital technologies to conduct remote hearings in international arbitration. On the one hand, this shift has opened up new possibilities for improving procedures and efficiency. On the other hand, it has also raised concerns about the transparency and authenticity of virtual proceedings.⁴³ This study examines the impact of digital technologies on legal semiotics and communication in international arbitration. It therefore examines the interactions between such innovations and persuasion.⁴⁴ The research takes a practice-oriented approach by examining a practice that is widely used in international arbitration, namely remote hearings.⁴⁵ It therefore focuses on cognitive processes such as memory and attention and their impact on the behaviour of counsel, arbitrators, and witnesses during remote hearings. The study highlights key issues, findings, barriers, and future avenues for research arising from the integration of such digital technologies in the field of international arbitration. It also considers how participants in virtual hearings are affected by the characteristics of the digital environment.⁴⁶

The exclusive feature of virtual arbitration proceedings is that “they are conducted either entirely online by e-means and methods of communication or partially online by a combination of online and other means”.⁴⁷ In entirely online arbitration, the whole arbitration process is conducted online through email, live video conferencing, or web-based services for communication.⁴⁸ “Partly, online arbitration is undertaken using a combination of the communication mentioned above

²⁹ Ibid.

³⁰ Meulemeester, Dirk de. 2018. Foreword. Welcome to the ‘Brave New World of Arbitration. In *Arbitration in the Digital Age. The Brave New World of Arbitration*, eds. Maud Piers, and Christian Aschauer, ix-x. Cambridge: Cambridge University Press.

³¹ Łagiewska, M., Bhatia, V.K. International Arbitration in the Digital World. *Int J Semiot Law* 37, 821–827 (2024). <https://doi.org/10.1007/s11196-024-10135-1>, last visited on 9/6/2024.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Meulemeester, Dirk de. 2018. Foreword. Welcome to the ‘Brave New World of Arbitration. In *Arbitration in the Digital Age. The Brave New World of Arbitration*, eds. Maud Piers, and Christian Aschauer, ix-x. Cambridge: Cambridge University Press..

³⁸ Łagiewska, Magdalena. 2023. New technologies in International Arbitration: A Game-Changer in Dispute Resolution? *International Journal for the Semiotics of Law*. <https://doi.org/10.1007/s11196-023-10070-7>, last visited on 9/6/2024.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Łagiewska, Magdalena. 2023. New technologies in International Arbitration: A Game-Changer in Dispute Resolution? *International Journal for the Semiotics of Law*. <https://doi.org/10.1007/s11196-023-10070-7>, last visited on 9/6/2024.

⁴² Łagiewska, M., Bhatia, V.K. International Arbitration in the Digital World. *Int J Semiot Law* 37, 821–827 (2024). <https://doi.org/10.1007/s11196-024-10135-1>, last visited on 9/6/2024.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Gómez-Moreno, Juan Pablo. 2023. Advocacy for Online Proceedings: Features of the Digital World and Their Role in How Communication is Shaped in Remote International Arbitration. *International Journal for the Semiotics of Law*. <https://doi.org/10.1007/s11196-023-10041-y>, last visited on 9/6/2024.

⁴⁷ Online Arbitration Definition and Its Distinctive Features authored by Farzaneh Badiei, P.87

⁴⁸ Ibid.

and offline features such as live in-person hearings and telex-fax and post for the submission of evidence, communication between the arbitrators, and deliberation of the award”.⁴⁹ Indian arbitrations happen *ad hoc* in the vast majority, i.e. without institutional support.⁵⁰ Let us understand the essential stages of virtual arbitration, irrespective of ad-hoc and institutional. Online arbitration proceedings, in general, are alike and do not differ very much from in-person proceedings. The procedures involved in a virtual arbitration can be completed electronically. These procedures “include submitting a request for arbitration, choosing and appointing arbitrators, organising case management conferences, holding arbitrator discussions, etc”.⁵¹ In other words, the arbitral process, with the oral hearing, is conducted online and with e-submissions of documents. Such a process includes “an e-file administered by the online service provider”. This “e-file consists of all notifications and communications between the parties and the arbitrator(s) and the e-documents submitted by the parties to the arbitral tribunal”. However, in traditional arbitration, “parties may likewise agree to hold hearings online as permitted, either by national laws or by the arbitral institution’s rules”.⁵² The issue is that “the parties and the arbitral tribunal may be sceptical about holding virtual hearings, especially at the evidence stage, witness examinations, cross-examinations, and final hearings”. Sometimes, “online hearings may pose other issues, such as confidentiality and technological interruptions”.⁵³

Online arbitration has become increasingly popular. In addition, globalisation has made international commercial disputes increasingly complicated by the involvement of third parties.⁵⁴ Interestingly, according to arbitration institutions worldwide, approximately 40% of arbitration cases now involve more than two parties.⁵⁵ On the one hand, the growing prevalence of multi-party arbitrations has become more

significant. On the other hand, both digitalisation and globalisation have facilitated multi-party projects. In addition, many new risks arise in multi-party disputes. Although arbitration is widely recognised as business-friendly, its consensual nature does not easily lend itself to multi-party disputes.⁵⁶ Similarly, the efficiencies brought about by digitalisation and the consequent increased accessibility to the resolution of multi-party commercial disputes still leave a gap in the case of the fundamental requirement of party consent in arbitration.⁵⁷ This study examines the joinder mechanism in international commercial arbitration and its significance in digitalisation by examining its interaction with traditional arbitration theories and principles, focusing on the rules of leading arbitral institutions such as the ICC, LCIA, HKIAC and SCAI.⁵⁸

5. Prospect of Virtual Arbitration Practice in India

In the case of “*Videocon Industries Ltd. V. Union of India*, Section 20(3)”,⁵⁹ the “Act allows the Tribunal to meet at any place it considers appropriate for consultation.”⁶⁰ Similarly, “a switch from the “physical venue” to the “online virtual venue” can also be done if necessary”.⁶¹ In “*Adani Ennore Container Terminal (P) Ltd. V. Kamarajar Port Ltd.*, the Madras High Court ordered the parties to the dispute to have a Zoom meeting to see if there was any scope for mediation between them”.⁶² “Section 24⁶³ of the Arbitration and Conciliation Act of 1996 allows documentary or oral hearings and does not mandate in-person hearings”. This means that it can be conducted virtually if the parties so desire.⁶⁴ And if arbitration is conducted almost, electronic evidence can be accepted by the arbitral tribunal relying on “Section 3 of the

⁴⁹ Ibid.

⁵⁰ “Virtual” Dispute Resolution in International Arbitration, *Mapping Its Advantages and Main Caveats in the Face of COVID-19*, Chapter 3, published by Brill, Belen Olmos Giupponi, p. 1, last visited and downloaded from Brill.com 05/08/2024.

⁵¹ Virtual Hearings in arbitrations in India, authored by Krrishan Singhania, Srishti Singhania and Alok Vajpeyi and published by Singhania & Co, July 8 2020. <https://www.lexology.com/library/detail.aspx?g=1c85d10b-e340-4dc7-8dfa-72ec3832bd04>, last visited on 8/5/2024.

⁵² Online Arbitration in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries, by Ihab Amro (University of Athens), 2019.

⁵³ Virtual Hearings in arbitrations in India, authored by Krrishan Singhania, Srishti Singhania and Alok Vajpeyi and published by Singhania & Co, July 8 2020. <https://www.lexology.com/library/detail.aspx?g=1c85d10b-e340-4dc7-8dfa-72ec3832bd04>, last visited on 8/5/2024.

⁵⁴ Łągiewska, M., Bhatia, V.K. International Arbitration in the Digital World. *Int J Semiot Law* 37, 821–827 (2024). <https://doi.org/10.1007/s11196-024-10135-1>, last visited on 9/6/2024.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Wang, Jiawen. 2023. Joinder Mechanism in International Commercial Arbitration: A Trend in the Digital Age? *International Journal for the Semiotics of Law*. <https://doi.org/10.1007/s11196-023-10068-1>. Return to ref 10 in article, last visited on 9/6/2024.

⁵⁹ 20. Place of arbitration.

(1)The parties are free to agree on the place of arbitration.(2)Failing any agreement referred to in subsection (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.(3)Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

⁶⁰ *Videocon Industries Ltd. v. Union of India*, (2011) 6 SCC 161, In line with this, the venue of arbitration was changed from Kuala Lumpur, Malaysia to London, due to the breakout of the Severe Acute Respiratory Syndrome (SARS) virus, which was designated as a mere physical change., <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 10/05/2024.

⁶¹ Ibid.

⁶² 2020 SCC Online Mad 2708.

⁶³ Section 24: Hearings and written proceedings.

24. (1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials:

⁶⁴ <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 10/05/2024. Yvonne Mak, Do Virtual Hearings Without Parties’ Agreement Contravene Due Process? The View from Singapore (8-7-2020, 7.15 p.m.), Do Virtual Hearings Without Parties’ Agreement Contravene Due Process? The View from Singapore — Kluwer Arbitration Blog.

Evidence Act, 1872⁶⁵, Section 2(t) of the Information Technology Act, 2000⁶⁶, Section 22-A⁶⁷ of the Evidence Act, 1872, Section 65 B of the Evidence Act, 1872⁶⁸. Further, in the case of “*Union of India v. Reliance Industries Ltd.*”⁶⁹, the court said that the electronic discovery of documents is permissible, and the scope of the discovery can be limited to what is strictly necessary. This is useful when conducting virtual arbitrations⁷⁰. This is useful when “conducting virtual arbitrations and is a widely accepted practice”⁷¹.

6. Legitimacy of Online Arbitration Institutional Provisions and Practice

There are many jurisdictions where issues like “cyber protection & security, efficient conduct of cross-examination, data security, confidentiality, and breaches of due process were shared”⁷². However, regarding the validity of these provisions, some were adopted as “technical notes” or “protocols” more as alternative-provisional solutions rather than as new rules.⁷³ Thus, the continuity of the rules in time might be subject to further endorsement.⁷⁴ The present rules assume that the different stages of the arbitral proceedings may take place online if the parties or the arbitral tribunal decide. However, the point is whether it includes the main-final hearing.⁷⁵ “UNCITRAL rule 17(3)”⁷⁶ says that if any party requests a hearing, by maintaining equality, the tribunal may confirm a hearing”. The question arises when there is no consent from either of the parties to conduct the hearing

remotely.⁷⁷ The arbitral tribunal is obliged to proceed with the virtual hearing in the situation. It should adequately balance the rights of the parties. This right of an in-person [offline] hearing is taken away when arbitration proceedings are conducted virtually or online.⁷⁸ “This right to an offline hearing is entrenched in the right to be heard coupled with equal treatment, which is, in turn, engrained in the human right to a fair trial”⁷⁹. Another issue concerns oral hearings and the right to address the witnesses directly.⁸⁰ A vital difference between offline and online hearings is the tribunal’s average attention span.⁸¹ “Online arbitration may raise concerns about anything limiting the parties’ freedom to design their arbitration procedure”⁸². “The 2010 amended version of UNCITRAL narrowed this by stating that each party should be allowed to present its case at an appropriate proceeding stage. Despite apparent differences, the divide between civil and common law traditions regarding online arbitration has dissolved”⁸³.

7. Due Process and Virtual Witness Testaments

One predominant due process concern is that witnesses. Witnesses may be coached during virtual witness testimony.⁸⁴ So, the “credibility of virtual testimony, particularly in cross-examinations, has been questioned”. Another issue is that “Virtual hearings may be more time-consuming in cases requiring bulky documents to cross-

⁶⁵ Section 3 (2) "Evidence" - "Evidence" means and includes - [all documents including electronic records produced for the inspection of the Court] [Substituted by Act 21 of 2000, Section 92 and Sch.II, for the all documents produced for the inspection of the Court.]; such document are called documentary evidence.

⁶⁶ Section 2(t) of the Information Technology Act, 2000 “electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer-generated micro fiche.

⁶⁷ 22-A. When oral admission as to contents of electronic records are relevant: Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question. [Inserted by Act 21 of 2000, Section 92 and Sch.II (w.e.f. 17.10.2000).]

⁶⁸ 65B. Admissibility of electronic records. (1) Notwithstanding anything contained in this Act, any records, information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

⁶⁹ 2018 SCC Online Del 130

⁷⁰ <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 10/05/2024.

⁷¹ *Pyrho Investments Ltd. v. MWB Property Ltd.*, 2016 EWHC 256; *Da Silva Moore v. Publicis Groupe SA*, 11 Civ 1279 (ALC) (AJP) (SDNY 2012) Judge Peck; *Irish Bank Resolution Corpn. v. Quinn*, 2015 IECH 175. <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 10/05/2024.

⁷² “Virtual” Dispute Resolution in International Arbitration *Mapping Its Advantages and Main Caveats in the Face of covid- 19* by Belen Olmos Giupponi, Chapter 3, published by Brill, p. 64

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Article 17 1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.

⁷⁷ “Virtual” Dispute Resolution in International Arbitration *Mapping Its Advantages and Main Caveats in the Face of covid- 19* by Belen Olmos Giupponi, Chapter 3, published by Brill, p. 65

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Advocacy in Virtual Hearings, by Kap-You (Kevin) Kim, John P Bang and Mino Han, August 2023.

<https://globalarbitrationreview.com/guide/the-guide-advocacy/sixth-edition/article/advocacy-in-virtual-hearings>, last visited on 10/05/2024.

⁸² “Virtual” Dispute Resolution in International Arbitration *Mapping Its Advantages and Main Caveats in the Face of covid- 19* by Belen Olmos Giupponi, Chapter 3, p. 66

⁸³ Ihab Amro, “Online Arbitration in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries,” Kluwer Arbitration Blog, April 11, 2019, <http://arbitrationblog.kluwerarbitration.com/2019/04/11/online-arbitration-in-theory-and-in-practice-a-comparative-study-in-common-law-and-civil-law-countries/>.

⁸⁴ Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective, by Saniya Mirani, November 17, 2020, Kluwer Arbitration.

examine”.⁸⁵ Furthermore, if there is a disruption in communication during a cross-examination, it might affect the right to be heard. In addition, virtual cross-examination might not be beneficial when there are time delays, visual freezing, or audio/video distortions.⁸⁶ In addition, when one side gives testimony and is personally cross-examined while the other is asked to conduct a virtual hearing to gather evidence, issues with equitable treatment may surface.⁸⁷

8. Virtual Witness Examination [India]

“India is not completely amiss of the merits of virtual examinations and has allowed them in the past.”⁸⁸ It has been stated that videoconferencing would allow the witness to be seen better, observe their demeanour, and replay or rehearse their deposition and testimony.⁸⁹ Witness statements and their examination must be sought during the live meeting, under oath and in the presence of the learned arbitrator and relevant court officers, after seeking proof of the witness's identity.” All relevant exhibits and documents used in the examination process must also be provided to the opposing party before the commencement or shared at the hearing with the opposing party⁹⁰ and to the witness for their perusal.⁹¹ “If questions are put to the witness and their answers are typed by a stenographer and made visible on the screen, it will ensure transparency in the process.⁹² The counsel must be given reasonable opportunity to object to questions and statements put to their witnesses. The Tribunal must not conduct the witness examination or allow the adduction of evidence in the absence of parties unless the parties have otherwise chosen to remain absent despite proper notice.⁹³ Despite the concerns surrounding virtual arbitrations, they work to eliminate visual, behavioural and verbal bias created in the mind of the Tribunal and put the spotlight solely on the testimony presented.”

In the case of the “*State of Maharashtra v. Dr Praful Desai*, the Supreme Court stated that while the legislation is silent on video-conferencing, the recording of witness testimony

through video-conferencing has been permitted where the presence of the witness is required”. Still, the witness cannot appear without unreasonable delay, expense or inconvenience. Accordingly, “testimonies have been taken through videoconferences in cases where witnesses have had poor health conditions or financial burdens, were aged or resided abroad”.⁹⁴ At the same time, “the courts have given directions for conducting a videoconferencing examination, including (i) proper identification of witnesses, (ii) the appointment of a technical coordinator, (iii) ensuring access of documents to witnesses, and (iv) presence of an officer to ensure witness is not coached”. “The Court has further caveated that the cross-examinations should be finished in one go, without granting adjournments”. However, “High Courts have also noted the unsuitability of virtual cross-examination where there are voluminous documents”.⁹⁵ More recently, “the Delhi High Court, in the case of *Rategain Travel Technologies Private Limited v. Ujjwal Suri*”, recognizing the possibility of conducting virtual arbitral proceedings, stated, *the arbitral tribunal may consider conducting the hearings and recording of evidence by video-conferencing if considered feasible*”.⁹⁷ From the trend of the judiciary in India, it can be said that the Indian courts may remain optimistic about video testimonies in arbitration.⁹⁸ “The representative of an institution or the counterparty may be present in the same room as the witness, drawing inspiration from the judgements above to further reduce the possibility of witness coaching”. Besides, it should be encouraged for the parties to conduct the virtual cross-examinations in a single session and to keep them concise.⁹⁹

9. Witnesses coaching

To ensure that the witness is not coached/prompted, a party may require its duly empowered legal representative to be present at the witness's location upon seeking permission from the Tribunal. “For a witness outside India, an officer of the Indian Consulate/Embassy may be placed in the room

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ International Planned Parenthood Federation v. Madhu Bala Nath, 2016 SCC OnLine Del 85; also see Twentieth Century Fox Film Corp. v. NRI Film Production Associates (P) Ltd., 2003 SCC OnLine Kar 22., <https://www.scconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 9/6/2024.

⁸⁹ World Intellectual Property Organization, WIPO eADR Practices (1 July, 4.41 p.m.), WIPO eADR Practices at paras 19 and 20., <https://www.scconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 9/6/2024.

⁹⁰ Special Correspondent at The Hindu, E-Court Launched at Income-Tax Appellate Tribunal in Chennai, (1 July, 7.21 p.m.), E-Court Launched at Income-Tax Appellate Tribunal in Chennai — The Hindu; Hogan Lovells, Art. 3.2(b), p. 7., <https://www.scconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 9/6/2024.

⁹¹ See Covid-19, Kluwer Arbitration Blog (26-6-2021, 12.05 p.m.), COVID-19 Archives — Kluwer Arbitration Blog; Hogan Lovells at Para 5(g), p. 9., <https://www.scconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 9/6/2024.

⁹² Same protocol followed by the Bombay High Court in videoconferencing in Taher Fakhruddin Saheb v. Mufaddal

Burhanuddin Saifuddin, 2020 SCC OnLine Bom 7551; also see White & Case, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, accessed at Para E(iv)., <https://www.scconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 9/6/2024.

⁹³ Rudramuni Devaru v. Shrimad Maharaj Niranjan Jagadguru, 2005 SCC OnLine Kar 173., <https://www.scconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 9/6/2024.

⁹⁴ Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective, by Saniya Mirani, November 17, 2020, Kluwer Arbitration. The State of Maharashtra v. Chandrabhan Sudam Sanap, 2018 SCC OnLine Bom 6576, Zaishu Xie & Another v. The Oriental Insurance Company Ltd. & Others, 2014 (207) DLT 289; Amitabh Bagchi v. Ena Bagchi, 2004 SCC OnLine Cal 93.

⁹⁵ R Shridharan v. R Sukanya, 2011 (2) MWN (Civil) 324.)

⁹⁶ O.M.P (MISC) 14/2020, May 11, 2020.)

⁹⁷ Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective, by Saniya Mirani, November 17, 2020, Kluwer Arbitration. Rategain Travel Technologies Private Limited v. Ujjwal Suri, High Court Of Delhi, O.M.P (MISC) 14/2020, May 11, 2020.

⁹⁸ Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective, by Saniya Mirani, November 17, 2020, Kluwer Arbitration.

⁹⁹ Ibid.

with the witness.¹⁰⁰ Moreover, the witness may be asked to show his surroundings via camera to prove that no one else is present with him.¹⁰¹ He should not be allowed to confer with his counsel,¹⁰² use virtual backgrounds or use electronic devices other than the computer during the hearing.”¹⁰³

10. Challenge to procedure for arbitral awards

Suppose awards pronounced by virtual arbitrations are confronted under the garb of unfair treatment of parties or the umbrella of public policy. In that case, “the credibility of such arbitrations is thrown out the window”.¹⁰⁴ “A workaround can be for parties to agree not to challenge the award or seek its annulment because the proceedings were not held in person. Moreover, parties are estopped from challenging a mutually decided procedure”.¹⁰⁵ A strict interpretation of public policy will render¹⁰⁶ Such challenges infructuous in the court of appeal. Furthermore, “even the Supreme e-Committee draft rules suggest that video conferencing proceedings are judicial”.¹⁰⁷

11. Emerging New Paradigm

a) *Place of Arbitration* [“S. 20 of the Indian Arbitration and Conciliation Act, 1996 (IACA)”]: The “choice of the place of arbitration” has legal consequences. Since the “terrestrial location of the proceedings” cannot be determined when they are held “entirely electronically with the parties in different locations”. In principle, it doesn't seem easy to assess the place of the arbitral

proceedings unless there is an explicit agreement between the parties.¹⁰⁸

- b) *Confidentiality and Access to Justice* [“Section 42A of the Arbitration and Conciliation Act, 1996”]: “Data Security” and “Confidentiality” are some of the principal concerns for parties engaging in online proceedings, and they must be elevated and addressed in the first case-management meeting in arbitration proceedings.¹⁰⁹ In an extensive sense, access to justice is simplified due to the exclusion of territorial barriers. However, possible difficulties arise from inadequate access to connectivity and familiarity with the virtual environment. Electronic arbitration may carry confidentiality challenges due to potential cyber security outbreaks and attacks.¹¹⁰
- c) *Remote Arbitration* [Definition of an arbitration clause]: Arbitration “proceedings became more supple, and the arbitral rules were accustomed to responding to the challenges of several government limitations”.¹¹¹ Compared with “stiff court procedures or even traditional arbitration, remote arbitration encourages a more alert resolution of disputes in a less formal manner”.¹¹²
- d) *“Virtual discovery”*: “Virtual discoveries or electronic production of documents is a common practice internationally that hasn't yet gained popularity in India”.¹¹³ Generally, “virtual discovery is independent of the need to conduct virtual hearings”.¹¹⁴ However, “due to the restrictions during the ongoing pandemic, they were dealing with a time when the production of physical documents was impossible and, therefore, may have to be conducted electronically”.¹¹⁵

¹⁰⁰ See Covid-19, Kluwer Arbitration Blog (26-6-2021, 12.05 p.m.), COVID-19 Archives — Kluwer Arbitration Blog at Paras 5(i) and (iii), p. 10., <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 9/6/2024.

¹⁰¹ See Covid-19, Kluwer Arbitration Blog (26-6-2021, 12.05 p.m.), COVID-19 Archives — Kluwer Arbitration Blog at Para 5(d)(iii), p. 9., <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 9/6/2024.

¹⁰² Africa Arbitration Academy, Africa Arbitration Academy Protocol on Virtual Hearings in Africa, Para 2.1.4, p. 7, April 2020 accessed at (africaarbitrationacademy.org), <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/> visited on 9/6/2024.

¹⁰³ Kanwal Nain Singh Mokha v. Rekha Khurana, CC No. 1924 of 2016, decided on 26-6-2021 (Delhi District Court), <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 9/6/2024.

¹⁰⁴ The Information Technology Act, 2000, S. 4; also see World Intellectual Property Organisation, WIPO eADR Practices (1 July, 4.41 p.m.), WIPO eADR Practices at Art. 2.10, p. 5. <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 11/05/2024.

¹⁰⁵ Jagjeet Singh Lyallpuri v. Unitop Apartments and Builders Ltd., (2020) 2 SCC 279, <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 11/05/2024.

¹⁰⁶ Govt. of India v. Vedanta Ltd., (2020) 10 SCC 1; also see Ssangyong Engg. and Construction Co. Ltd. v. National Highways Authority of India, (2019) 15 SCC 131; also see Associate Builders v. DDA, (2015) 3 SCC 49, <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>, last visited on 11/05/2024.

¹⁰⁷ E-Committee of the Supreme Court of India, Draft Video Conferencing Rules, Para 3(ii) (1-7-2021, 6.20 p.m.) accessed at (s3waas.gov.in), <https://www.sconline.com/blog/post/2021/10/28/virtual-hearings-in-arbitration/>.

¹⁰⁸ “Virtual” Dispute Resolution in International Arbitration Mapping Its Advantages and Main Caveats in the Face of covid- 19 by Belen Olmos Giupponi, published by Brill, P. 82

¹⁰⁹ “Virtual” Dispute Resolution in International Arbitration Mapping Its Advantages and Main Caveats in the Face of covid- 19 by Belen Olmos Giupponi, published by Brill, P. 82

¹¹⁰ ICCA-NYC-CPR Protocol Cybersecurity in International Arbitration, Principle 10, Virtual arbitration in India, A practical guide, published by Centre for Arbitration and Research, Maharashtra National Law University, Mumbai, Maharashtra National Law University Mumbai, Researched and Written by, Aditya Gupta, Research Associate, Centre for Arbitration and Research, MNLU Mumbai, Natasha Kavalakkat, Research Associate, Centre for Arbitration and Research, MNLU Mumbai, 2020.

¹¹¹ Ibid.

¹¹² Ibid.

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¹¹⁵ Ibid.

- e) *Equal treatment [Section 18 of the Arbitration and Conciliation Act, 1996]*: “Section 18 of the IACA states that ‘the parties shall be treated equally’. The right to equal treatment ensures that both are on an equal footing. Neither party is disadvantaged vis-à-vis the other party during the proceeding”. Inequality in the available technology (internet connection, camera quality, etc.) “is an objection to virtual hearings that has been raised for many years”.¹¹⁶ “Concerns are legitimate since the poor audio and video quality during the proceedings would be a disadvantage and violate the equality of the parties”.¹¹⁷ Would a party’s right to equal treatment be affected if it cannot appear in person while the other party can? There are no impediments to a party’s ability to present its case during virtual hearings. Therefore, “there should be no inequality if one party is present physically while the other participates over video conferencing”.¹¹⁸
- f) *Data protection*: Complex data protection issues arise when there is an excessive data exchange. A “virtual arbitration includes sharing names, addresses and email addresses, recording video calls, maintaining a record of the proceedings, exchanging and storing documents, and much more”.¹¹⁹ “It can be found in the Hong Kong International Arbitration Centre (HKIAC) 2018 Administered Arbitration Rules, where Article 3.1(e) mandates explicitly the uploading of files ‘to any secured online repository that the parties have agreed to use’ as a recognised means of communication. Another example is the London Court of International Arbitration (LCIA) 2020 Arbitration Rules, which incorporate new provisions on data protection, cybersecurity, and regulatory issues”. “Specifically, Article 30A provides that “at an early stage of the arbitration, the Arbitral Tribunal shall...consider whether it is appropriate to adopt”.¹²⁰“(i) any specific information security measures to protect the physical and electronic information shared in the arbitration; and (ii) any means to address the processing of personal data produced or exchanged in the arbitration in light of applicable data protection or equivalent legislation.”
- g) *Transparency*: Any arbitration process that takes place must be transparent to all data principals.¹²¹ Members, parties and tribunals must be aware of “what data” is being processed and “how” it is being processed. For instance, “all participants must know if they are being recorded, where such footage is stored, and when it will be deleted”.¹²²

12. Conclusion

Online arbitration is not merely the amalgamation of traditional arbitration and online means of communication. There are considerable variances between online and offline arbitration's core elements. These differences directly affect the definition of “online arbitration”. The definition of “online arbitration” is not the same as “conventional arbitration”. It is essential to emphasize the existence of some elements in online arbitration, such as “impartiality and independence of arbitrators”, whilst it may not be necessary for other components to exist in online arbitration. This, however, may not hinder the effectiveness of such a process in determining disputes. Online arbitration can provide a flexible means of dispute resolution that can be “tailor-made” to parties' needs and recognized as a legally valid process.

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¹¹⁸ Ibid.

¹¹⁹ Ibid.

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¹²¹ Personal Data Protection Bill, 2018, s. 23; *Committee Report on Draft Data Protection Bill*, 2018, p. 58.,

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