ONLINE DISPUTE RESOLUTION IN INDIA: CURRENT POSITION AND THE WAY AHEAD

Ravitej Chilumuri, Mihika Jalan and Pranjal Agarwal****

Over the last two decades, a gradual shift from traditional litigation formats to various methods of Alternate Dispute Resolution has been visible in India. The onset of the Covid-19 pandemic gave a major boost to these changing patterns of dispute resolution. In this context, the emergence of Online Dispute Resolution can either be seen as a systemic response to the pandemic or inevitable evolution of the classical Alternate Dispute Resolution mechanisms. Tracking the shift from traditional methods of litigation to Alternate Dispute Resolution and eventually to Online Dispute Resolution, this Article attempts to analyse the corresponding developments in the Indian legal framework and the judicial response thereto. The Article posits that even though Online Dispute Resolution is a relatively new phenomenon in India which lacks explicit legal recognition, the judicial system and the legislature are progressively warming up to the idea and recognising its benefits. In this context, this paper shall explore the potential of implementing ODR, particularly e-arbitrations, in India. Part I shall offer a brief introduction to the topic. Part II shall discuss the rules laid down by various arbitral bodies on e-arbitrations. Part III shall lay down the international guidelines and protocols on e-arbitrations. Part IV shall analyse the issues in implementing ODR in India. Part V shall examine solutions to mitigate these issues, and finally. Part VI shall offer concluding remarks.

Keywords: *Online Dispute Resolution ('ODR'), e-arbitration, technology, electronic*

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*Ravitej Chilumuri is a Partner at Khaitan & Co.

** Mihika Jalan is a Senior Associate Khaitan & Co.

*** Pranjal Agarwal is an Associate at Khaitan & Co.

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I. INTRODUCTION

It is widely known that Indian courts are heavily overburdened, which results in litigation being a long-drawn process that can take years and sometimes even decades to conclude. In fact, a study estimated that every judge in India is allocated 1,350 cases, whereas their US counterparts deal with only 388 cases.[1] Another study by India Justice Report (2019) in 21 States and Union Territories revealed that cases in district courts remain pending for five years on an average or more.[2] Against this backdrop, the mechanism of Alternate Dispute Resolutions ("ADR") was introduced. ADR mechanisms are characterised as cost-effective, time-bound, having procedural flexibility, and providing a sufficient amount of autonomy to the parties.[3] Accordingly, in 2002, the Code of Civil Procedure ("CPC"), 1908, was amended to introduce Section 89, which provides that courts can refer disputes which are capable of being settled between parties to alternate dispute resolution. The most popular ADR mechanism is arbitration, which, in India, is governed by the Arbitration and Conciliation Act, 1996("the Act") modelled on the United Nations Commission on International Trade Law ("UNCITRAL") framework. Over time, the use of ADR also started being encouraged by the courts; for instance, in *Salem Advocate Bar Association v. Union of India,*[4] the Court has devised a comprehensive set of rules to give force to ADR under Section 89 of the Civil Procedure Code, 1908 and explained the stages wherein it would be advised to be opted for as opposed to the traditional forms of dispute resolution.[5] Moreover, globalisation has ushered in greater interaction amongst and integration of economies, thus, also increasing trade amongst different entities, cross-border investments and transactions. Naturally, with an increase in commercial activities, conflicts have also escalated, and in order to prevent delays and setbacks in their resolution, there has been a shift from litigation to ADR.[6]

A popular ADR mechanism is mediation, which involves a mutually appointed third party that facilitates a structured negotiation between the parties to a dispute, thus,

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[1]Bhaven Shah, "Online Dispute Resolution-A Possible Cure to the Virus Plaguing the Justice Delivery System", (*Bar and Bench*, 22 March 2020) <https://www.barandbench.com/columns/online-dispute-resolution-a-possible-cure-to-the-virus-plaguing-the-justice-delivery-system> accessed 10 November 2021.

[2]Subrat Das and others, 'India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid' (*Tata Trust* 2019) https://www.tatatrusts.org/upload/pdf/overall-report-single.pdf>accessed 10 November 2021.

[3]MuraliNeelakantan, Conciliation and Alternative Dispute Resolution in India (1998) Lawasia J.

[4] *Salem Advocate Bar Association v. Union of India,* AIR 2005 SC 3353.

[5] ibid.

[6]Vasudha Sunil Betdur, 'The Rising Prominence of ADR Mechanism in Globalization', (2016) 5 Int'l Journal of Marketing, Financial Services & Management Research 6.

helping them arrive at a mutually agreeable settlement.[7]Section 12A of the Commercial Courts Act, 2015 provides for pre-suit mediation and settlement.[8] The recently released Draft Mediation Bill, 2021 in India aims at promoting the use of institutional mediation for the resolution of commercial disputes. Section 6 of the Bill mandates parties to take steps to settle disputes by pre-litigation mediation before filing a suit or proceeding in courts or tribunals, even as it still permits parties to approach courts or tribunals to seek urgent interim reliefs before the commencement of or during the mediation proceedings.[9] Interestingly, the Bill also recognises online mediation through the use of computer networks or applications, either wholly or in part, and stipulates that online mediation shall be governed by regulations as specified by the Council in light of the provisions of the Information Technology Act, 2000.[10] In doing so, it gives a much-needed boost to the implementation of Online Dispute Resolution ("ODR") in India.

Hon. Arthur M. Monty Ahalt (retd.) defined Online Dispute Resolution as *"a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or combination of all three. In this respect it is often seen as being the online equivalent of ADR".[11]*

Before we delve into the crux of this paper, it is pertinent to understand the circumstances in which ODR was introduced in India.

ODR became far more popular during the covid-19 pandemic, which disrupted the functioning of courts, thus necessitating a shift towards ADR. The onset of the pandemic in India, though deeply unfortunate, compelled the Judiciary in India to move to an online set-up, thus, leading to the realisation that the use of advanced technology can facilitate the improvement, better accessibility, and enhanced efficiency of court services. As the pandemic wreaked havoc across the country, several platforms were set up to facilitate ODR, such as the Centre for Alternate Dispute Resolution Excellence ("CADRE"), SAMA, Centre for Online Dispute Resolution ("CODR") and Agami. However, even as ODR began to gain prominence during the pandemic, it is still in a nascent stage in India. Nevertheless, courts are beginning to understand its significance in ushering in a more efficient judicial system in the country. This is evident in the Supreme Court of India's judgment in *Meters and Instruments Private Limited & Anr. v. Kanchan Mehta,[12]* wherein it was observed that the use of modern technology needs to be considered not only to discourage the use of papers but also to reduce overcrowding of courts. It was observed that there is a need to differentiate categories of cases which

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[7]James A. Wall and others, 'Mediation: A Current Review and Theory Development', (2001) 45 The Journal of Conflict Resolution 370.

[8] "*12-A. Pre-Institution Mediation and Settlement.—(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.*
(2) The Central Government may, by notification, authorise the Authorities constituted under the Legal Services Authorities Act, 1987 (39 of 1987), for the purposes of pre-institution mediation."

[9] Draft Mediation Bill (2021), s 6.

[10]Draft Mediation Bill (2021), s 32(2).

[11] Hon. Arthur M. Monty Ahalt (ret.), 'What You Should Know About Online Dispute Resolution '<https://www.virtualcourthouse.com/index.cfm/feature/1_7/what-you-should-know-about-online-disputeresolution.cfm> accessed 9 November 2021.

[12]*Meters and Instruments Private Limited &Anr. v. Kanchan Mehta,* [2017] TaxPub (CL) 0840 (SC).

can be partly or entirely concluded online by simplifying procedures especially where seriously disputed questions are not required to be adjudicated.

Recently, Justice Bobde recognised the need to have international arbitration and artificial intelligence as an alternative to the current status quo,[13] and Justice Ramana opined that ODR can be effectively used to resolve consumer, family, business and commercial disputes.[14]

Further, in his dissenting opinion in *Santhini v. Vijaya Venketesh,*[15] Justice Chandrachud observed in the context of the Family Courts Act, 1984 that it was enacted when technology to enable persons separated by physical distance to communicate with each other face to face was not developed. However, in light of the modern times, to impose an absolute requirement of physical presence and exclusion of technological tools such as video conferencing was considered by the Court to result in denial of justice.

Moreover, in *Re: Guidelines for Court Functioning Through Video Conferencing During Covid-19 Pandemic* ("SC Guidelines"),[16]the Supreme Court devised rules to digitise the process of dispute resolution in light of the physical distancing norms during the Covid-19 pandemic.[17] It was directed that all measures taken by the apex court and by the High Courts to reduce the need for the physical presence of all stakeholders within the court premises & involving use of videoconferencing technologies would be lawful. The rules also stated that the Courts shall make available the facilities for videoconferencing for such litigants who do not have the means to do so. It was also cautious in its approach as it clarified that until appropriate rules are framed by the High Courts, video conferencing shall be mainly employed for hearing arguments at the trial and appellate stage and mutual consent of both the parties is required for evidence to be recorded by videoconferencing.

In addition, even the NITI Aayog has deliberated on the conceptualisation of ODR and described it in its "Handbook on ODR**"** as using of communication technologies such as audio-visual tools ranging from telephones and smart phones to LED screens, spreadsheets, e-mail and messaging applications, with the crux of it being to enable dispute resolution without physical congregation of the parties.[18]

Therefore, even though ODR is a relatively new phenomenon in India and currently lacks explicit mention in the law or a regulatory framework governing it, the judicial system and the legislature seem to be gradually inclining towards it and acknowledging its advantages.

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[13]K. Amitabh, S. Desh, 'Online dispute resolution could help make justice delivery efficient, affordable, and accessible', *(The Times of India*, 7 July 2020)<https://timesofindia.indiatimes.com/blogs/voices/online-dispute-resolution-could-help-make-justice-delivery-efficient-affordable-and-accessible/>accessed 13 November 2021.

[14]'Justice Ramana outlines ways to reverse pendency', (*The Hindu,* March 19 2021) <https://www.thehindu.com/news/cities/Delhi/justice-ramana-outlines-ways-to-reverse-pendency/article34103758.ece> accessed 14 November 2021.

[15]*Santhini v. VijayaVenketesh***,** Transfer Petition (Civil) No.1278 of 2016.

[16] *In Re: Guidelines for Court Functioning Through Video Conferencing During Covid-19 Pandemic* 2020 SCC OnLine SC 355.

[17] Ibid.

[18]NitiAayog and others, 'Online Dispute Resolution Handbook', 14 April 2021.

II. SCOPE OF IMPLEMENTING ODRS IN INDIA

The Act is silent on whether arbitration proceedings can be conducted through video conferencing and other electronic means. Hence the question regarding the validity of an e-agreement for arbitration and e-arbitrations arises. In this part, we seek to analyse the validity of e-agreement for e-arbitration, also known commonly as 'ODR'.

A. E-ARBITRATION AGREEMENTS

The validity of e-arbitration agreements is long-established. Section 7 of the Act recognises that an arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegrams, or other means of telecommunication, including communication through electronic means, which provide a record of the agreement. The Supreme Court of India ("Supreme Court") in *Shakti Bhog v. Kola Shipping*[19]noted that it is clear from the provisions made under Section 7 of the Act that the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement. Similarly, in *Trimex International v. Vedanta Aluminium Ltd.,*[20] the Supreme Court affirmed that arbitration agreements would be considered valid even if they are exchanged through fax, emails, or other means of telecommunications.

B. E-SERVICE OF NOTICES, SUMMONS, PLEADINGS ETC.

In *Tata Sons Limited &Ors. v. John Doe(s),*[21] the Delhi High Court recognised the right to serve summons to the defendant via WhatsApp texts and emails. Pertinently, in 2018, the Bombay High Court set a precedent by serving a summons over WhatsApp in a copyright infringement case, after repeated failed attempts to serve the summons on the defendants.[22] The Court upheld the validity of service of summons through WhatsApp for the purposes of service of Notice under Order XXI Rule 22 of the CPC as the icon indicators confirmed that the message and its attachment were delivered to the respondent's number and also opened by them.[23]

Moreover, the Supreme Court in its order dated 10 July 2020,[24] acknowledging the difficulties caused by the lockdown and the pandemic in the physical delivery of summons, allowed the service of notices, summons and pleadings etc. via email, FAX, tele-messenger services such as WhatsApp, Telegram, Signal, etc. The Supreme Court further held that the party who is effecting service via instant messaging services must also do so by email, simultaneously on the same date.

C. E-CONDUCT OF ARBITRATION PROCEEDINGS

<u>*Electronic record*</u>

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[19] *Shakti Bhog v. Kola Shipping* (2009) 2 SCC 134.
[20] *Trimex International v Vedanta Aluminium Ltd* (2010) 3 SCC 1.
[21] *Tata Sons Limited &Ors. v. John Doe(s) &Ors.,* (2017) SCC OnLine Del 8335.
[22] *SBI Cards and Payments Services Pvt. Ltd. v. RohidasJadhav*, (2018) SCC OnLineBom 1262.
[23] ibid.
[24]Suo Motu Writ Petition (C) No. 3/2020.

Section 4[25] of Information Technology Act, 2000 **("IT Act")** recognises electronic records and section 5[26] of the IT Act recognises electronic signatures. By recognising written text in electronic form and signed electronically, the said provisions facilitate and render valid e-record filed with the arbitral tribunal. Further, Section 65B of the Indian Evidence Act, 1872 **("IEA")**[27] recognises electronic records.

Place of arbitration

Section 20(3) of the Act enables the arbitration tribunal to meet at any place it considers appropriate for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property, unless otherwise agreed by the parties. Hence, if the parties agree and the tribunal deems it fit and proper, the place (as the venue) of arbitration may also be a digital space.

Procedure of arbitration

Section 18[28] lays down the essential components of due process: (a) equal treatment of parties; and (b) full opportunity to each party to present its case. As long as these requirements are met with, arguably, electronic procedure and tools employed to conduct oral hearings (in the context of ODR), the validity of e-arbitrations stands.

The preliminary hearings for setting timelines and framing issues may be held via video conference. The arbitral tribunal can decide to hold oral hearings or to conduct a documents' only arbitration (the Act mandating the tribunal to hold oral hearings upon a party's application) unless the parties have otherwise agreed. However, the only question that remains is with reference to the recording of evidence electronically.

Recording evidence using electronic means

In the *State of Maharashtra v. Praful B. Desai*,[29] the Supreme Court of India observed that in a video conference, both the parties are in the presence of each other, and therefore, recording of the evidence using such electronic means, and in the virtual presence of the accused is in compliance with the requirement that the evidence must be taken in the presence of the accused.

Noting that the use of technology found judicial recognition in *Praful Desai*[30]wherein it was held that the term 'evidence' includes electronic evidence and that video conferencing may be used to record evidence, the Supreme Court, by its order dated 6 April 2020, issued guidelines for court functioning through video conferencing during Covid-19 pandemic.[31] However, the guidelines note that "*video conferencing*

[25] Information Technology Act 2000, s 4.
[26] Information Technology Act 2000, s 5.
[27] Indian Evidence Act 1872, s 65B.
[28] Arbitration and Conciliation Act, 1996, s 18:
18. Equal treatment of parties. —
The parties shall be treated with equality and each party shall be given a full opportunity to present his case.
[29] *State of Maharashtra v. Praful B. Desai* (2003) SCC Online SC 447
[30]Ibid.
[31] In Re: Guidelines For Court Functioning Through Video Conferencing During Covid-19 Pandemic, Suo Moto (Civil) Writ No. 5 of 2020, Order dated 6 April 2020.

shall be mainly employed for hearing arguments whether at the trial stage or at the appellate stage" and in "*no case shall evidence be recorded without the mutual consent of both the parties by video conferencing*".

Despite the requirement of mutual consent in the Supreme Court guidelines for recording evidence, the foregoing have given great impetus to evidence being recorded electronically. Since then, the majority of high courts across the country have been consistently using e-platforms such as Zoom, WhatsApp, Cisco Webex, Vidyo and Skype, amongst others for hearing pending urgent cases.[32] In view of this, arbitrations also are (and hopefully will continue) to be conducted in the digital space, meeting all requirements of due process (as laid down in Section 18 of the Act). Further, the service of live transcription is likely to assist the process of recording cross-examination being held virtually.

Additionally, according to Indian law, for the execution and implementation of a domestic award, the award must be duly stamped. In accordance with Section 35 of Indian Stamp Act, 1899,[33] an unstamped or insufficiently stamped arbitral award is inadmissible before a court of law. In order to facilitate swift execution of electronically passed arbitral awards, the Stockholding Corporation of India Limited **("SHCIL")** was set up to provide e-stamp services for certain states. Similarly, Maharashtra developed its own e-stamping facility, *i.e.,* Electronic Secure Bank and Treasury Receipt **("e-SBTR")**. Thus, mechanisms to implement ODR do exist and continue to improve in India.

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[32]Sonal Kumar Singh and others, 'Covid-19 and E-Arbitrations: An India Perspective', (*Lexology*, 30 July 2020) <https://www.lexology.com/library/detail.aspx?g=40e5193a-22d0-411c-97e7-222dc434c285> accessed 13 November 2021.

[33] Indian Stamp Act 1899, s 35:

35. Instruments not duly stamped inadmissible in evidence, etc.—No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped: Provided that—

(a) any such instrument[65] [shall], be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of[66] [the[67] [Government]] or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act.

III. FUNCTIONING OF ODRS: RULES LAID DOWN BY INTERNATIONAL ARBITRAL BODIES

A. *INTERNATIONAL CHAMBER OF COMMERCE (ICC)*

The ICC has issued a guidance note[34] on possible measures that may be taken in order to mitigate the adverse effects of the Covid-19 pandemic on ICC arbitrations through enhanced efficiency. It also throws light on how conferences and hearings may be organised in light of the Covid-19 situation, including via audio conference, video conference, or other similar means of communication as envisaged in Article 24(4) of the ICC Rules of Arbitration.[35] The mechanisms suggested by the ICC Guidance Note include bifurcating the proceedings, identifying issues that can be resolved based on documents, determining un-meritorious claims/defences, and proceedings where live testimony of a witness or an expert is not necessary for deciding the dispute.[36]

B. SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

As per Rule 19.1 of the SIAC Rules 2016,[37] 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. Further, Rules 7[38] and 8[39] of Schedule 1 provide rules for Emergency Arbitrator and empower the arbitrator to opt for a video conferencing facility to hear the disputing parties as an alternative to in-person hearings, including passing orders or awarding interim relief. Additionally, SIAC has also stated on its website that where in-person hearings are impossible or impracticable, parties should discuss with the tribunal other options to an in-person hearing, such as proceeding with the hearing virtually or via

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[34]ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/> accessed on 14 November 2021.

[35] The ICC Rules of Arbitration 2021, art 24(4): *"Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative."*

[36]Indian Stamp Act 1899, s 35.

[37] SIAC Arbitration Rules, 2016, art 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.*"

[38] SIAC Arbitration Rules, 2016, sch 1 r 7: "*The Emergency Arbitrator shall, as soon as possible but, in any event, within two days of his appointment, establish a schedule for consideration of the application for emergency interim relief. Such schedule shall provide a reasonable opportunity for the parties to be heard but may provide for proceedings by telephone or video conference or on written submissions as alternatives to a hearing in person. The Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction, without prejudice to the Tribunal's determination.*"

[39] SIAC Arbitration Rules, 2016, sch 1 r 8: "*The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary, including preliminary orders that may be made pending any hearing, telephone or video conference or written submissions by the parties. The Emergency Arbitrator shall give summary reasons for his decision in writing. The Emergency Arbitrator may modify or vacate the preliminary order, the interim order or Award for good cause.*"

teleconferencing.[40] Notably, the SIAC allows the tribunal to exercise discretion in deciding the protocol and procedure for holding virtual hearings in consultation with the parties.[41]

C. LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)

The LCIA Arbitration Rules[42] explicitly refer to the use of video conferencing during arbitral proceedings. Article 19.2 of the LCIA Arbitration Rules[43] permits hearings at any appropriate stage of the arbitration to "take place by video or telephone conference or in-person (or a combination of all three)". However, the LCIA is yet to frame any guidelines for hearing matters virtually. Nonetheless the online filing service available at their website allows electronic filing of requests for arbitration, responses, applications for expedited formation of the tribunal, applications for expedited appointment of a replacement arbitrator, and applications for the appointment of an Emergency Arbitrator, submission of documents electronically, online fee payment etc.

IV. VIRTUAL ARBITRATIONS: INTERNATIONAL GUIDELINES AND PROTOCOLS

A. SEOUL PROTOCOL ON VIDEOCONFERENCING IN INTERNATIONAL ARBITRATIONS ("SEOUL PROTOCOL")

The Seoul Protocol[44] sets out best practices with respect to conducting video conferences in international arbitrations. For instance, Article 2 of the Protocol lays down the minimum standards for a venue, such as the requirement of adequate means to ensure smooth and aligned transmission of video and sound and the presence of at least one on-call individual with the requisite technical knowledge to assist with e-conference, among others.[45] Article 1.2 states that the video conferencing system must show a reasonable part of the room where the witness is located while retaining sufficient proximity to depict the witness clearly.[46] Similarly, Article 3 mandates the submission of identities of participants in the proceedings by the parties and further places the onus of verification of the same at the beginning of the e-hearing on the

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[40] SIAC Covid-19 Frequently Asked Questions (FAQ), <https://www.siac.org.sg/faqs/siac-covid-19-faqs> accessed 14 November 2021.

[41] *Ibid.*

[42] LCIA Arbitration Rules 2020, <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> accessed 13 November 2021.

[43] LCIA Arbitration Rules art 19.2:

"The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form). As to content, the Arbitral Tribunal may require the parties to address specific questions or issues arising from the parties' dispute. The Arbitral Tribunal may also limit the extent to which questions or issues are to be addressed."

[44] Seoul Protocol on Video Conferencing in International Arbitration, <https://www.viac.eu/images/COVID19/Seoul_Protocol_on_Video_Conferencing_in_International_Arbitration.pdf>accessed 14 November 2021.

[45] ibid.

[46] ibid.

tribunal.[47] The Seoul Protocol also stipulates certain guidelines to ensure due process: the power of the tribunal to terminate the video conference at any time if it is of the opinion that the conference is so unsatisfactory that it is unfair to either party to continue;[48] an arbitration venue that provides fair, equal and reasonable right of access to the parties and their related persons,[49] etc. Finally, Article 8 requires that the video conferencing be recorded only with prior approval of the tribunal and the record to be circulated to the tribunal and parties within 24 hours of the end of the videoconferencing.[50]

B. CHARTERED INSTITUTE OF ARBITRATORS: GUIDANCE NOTE ON REMOTE DISPUTE RESOLUTION PROCEEDINGS ("RDRP GUIDANCE")

The Chartered Institute of Arbitrators **("CIArb")**, in response to Covid-19, issued the RDRP Guidance Note[51] in April 2020 to facilitate proceedings in any circumstance where parties to the dispute are unable to meet physically. Article 1.6 of the Guidance Note provides that if one party is compelled to appear remotely, the other party should also preferably appear remotely before the tribunal. Further, Article 3.1 provides for simultaneous access to the documents through screen sharing. Article 3.3. also recommends providing separate virtual breakout rooms for tribunal deliberations and caucusing by parties. Moreover, Article 5 lays down that the digital platform required for transmission and storage of documentation for remote proceedings should be agreed upon by the parties before the proceedings begin, and all such electronic documents should be made available to all parties in digital form. The Guidance Note (Part 2)[52] also advises parties to establish a formal agreement, specifically providing that electronic means shall be used to conduct arbitral proceedings.

V. ISSUES IN IMPLEMENTING E-ARBITRATIONS IN INDIA

The primary issue in implementing ODR in India is the lack of clear legal provisions mandating the same. Notably, the Act was implemented at a time when legislators could not fathom the development of technology to an extent where in-person hearings would not be required anymore. As a result, the Act mandates a written arbitration agreement and requires a written arbitral award duly signed by the arbitral tribunal. By doing so, it has, in a way, remained, at best, silent on the existence of online arbitration.

Secondly, confidentiality and security are significant concerns associated with online arbitrations owing to uncertainty as to whether the shared data can be prevented from being tampered with or read by a third party. Confidentiality of proceedings, data and/or documents is one of the primary reasons for the popularity of arbitration for commercial disputes, and in the absence of this, the very purpose of arbitrations gets

[47] ibid.
[48]ibid Art 1.7
[49]ibid Art 2.1(c)
[50] ibid.
[51]Guidance Note on Remote Dispute Resolution Proceedings, <https://www.ciarb.org/media/9013/remote-hearings-guidance-note_final_140420.pdf> accessed 24 March 2022.
[52] ibid.

defeated. The frequent instances of hacking and data leaks have only further added to the apprehension surrounding ODR.

Thirdly, India hasn't yet reached the stage where technology is fully developed, as is the case with several other countries, and most people are still apprehensive about using technology for dispute resolution. The mental block of people in India towards digital processes and their lack of familiarity with the same are major roadblocks to a full tech-transition. Moreover, bad internet speed, other than in tier-one cities, and bandwidth issues further compound the issue.

Additionally, an important issue that arises regarding the examination of witnesses is that there is no way to confirm if the witness, at the time of testifying, is alone or is being assisted or directed by someone else while answering questions posed to them.

Lastly, while there is a huge amount of costs associated with conducting physical arbitrations, and it is being proclaimed by advocates of ODR that e-arbitrations are likely to be more cost-effective, there are significant costs related to internet, arranging for virtual data-rooms and video-conferencing platforms, a translator (if required), and appropriate hardware, such as high-quality cameras as well. Having said that, once the ODR mode is regularly used, the requirements to facilitate the same will be more easily available to all.

VI. SOLUTIONS TO MITIGATING ISSUES RELATING TO IMPLEMENTATION OF ODR IN INDIA

While one of the most significant hurdles in the implementation of ODR in India is the lack of clear legal provisions mandating the same, as discussed above, Sections 4 and 5 of the IT Act recognise the validity of digital signatures, and thus, under these provisions, the arbitration agreement, and the arbitral award both can be signed digitally by the parties and the arbitrator respectively. Therefore, the provisions in the 1996 Act should be read harmoniously with the provisions of the Act. Additionally, even an amendment may be inserted allowing parties the option to electronically send the statement of claims and defence through emails.

Regarding the confidentiality and data privacy issue, it must be noted that the 2019 amendment to the Act had introduced Section 42A, which imposes data confidentiality obligations on both the arbitrator and the parties.[53] While there are few drawbacks of Section 42A: (i) it is not wide enough to include within its ambit witnesses, assistants providing technical support, law clerks, transcribers and other relevant persons participating in an arbitration proceeding and (ii) it does not provide for a clear and specific penalty for its violation,[54] nonetheless the same does assuage certain concerns of confidentiality. In any event, the protection offered by the said section and the risks associated therewith are the same irrespective of e-arbitration or physical

[53]Arbitration and Conciliation Act 1996, s 42A:
"42A. Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award."
[54]NitiAayog and others, *Online Dispute Resolution Handbook*, 14 April 2021.

arbitration proceedings. It would however be incorrect to argue that physical arbitrations have an upper hand in guaranteeing confidentiality as opposed to e-arbitrations. Thus, the solution lies in both parties agreeing to participate in arbitration proceedings in a manner that is fair and protects the sanctity of arbitral proceedings.

Further, while concerns relating to tampering of witnesses are valid, the same can be addressed using wide-angle, 360-degree cameras. Even in case of apprehensions regarding the widespread use of technology in India, it is worth noting that technology in India is growing at a rapid rate, and in any case, arbitrations are generally opted for by parties that have access to the internet. Moreover, even Hon'ble Justice Chandrachud in *Santhini v. Vijaya Venkatesh*,[55] emphasised the importance of using technology for maximising innovation and ensuring that everyone has access to legal services and justice. Parties and tribunal can consider opting for solutions as provided in the RDRP Guidance - the physical rooms occupied by participants in a remote proceeding (including those in special hearing venues) may be separate from non-participants to the remote proceeding, soundproofed where possible, have sufficient visibility to eliminate the possibility of the presence of undisclosed non-participating individuals, and consider obtaining an affirmation of privacy from the participants.

VII. CONCLUSION

In the Indian context, there is a dire need for guidelines towards encouraging remote arbitration proceedings considering the pendency of over 40 million cases in our judicial system.[56] The issue is further exacerbated by lack of access to courts and representation, linguistic challenges, etc. Further, even though ADR has advantages over litigation, it is also replete with several shortcomings, for instance, the high costs and paperwork involved. As such ODR was introduced as an attempt to mitigate these issues. Hence, wider use of online dispute resolution in India has the potential to transform the Indian judicial system making it more efficient and accessible. This has also been affirmed by a study by Dalberg carried out in collaboration with Agami, NITI Aayog, ICICI, Trilegal and Ashoka, among others, which aimed at determining whether widespread adoption of ODR in India could be beneficial in making dispute resolution more cost-effective, fair and time-saving.[57] The study concluded that the use of technology shall expedite the dispute resolution process, and consequently, significantly reduce costs and delays involved in the process.[58] Further, e-Lok Adalats conducted in several states such as Chhattisgarh, Karnataka, Rajasthan and Gujarat, which involved resolution of disputes over WhatsApp audio/video calls is a great example of how the use of technology can be used to make the judicial system more equitable, fair and accessible to all.

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[55]*Santhini v. VijayaVenkatesh,* (2018) 1 SCC 1.
[56]Satwik Mishra and DeshSekhri, 'India needs more online dispute resolution', (*The Financial Express,* October 31 2020) <https://www.financialexpress.com/opinion/india-needs-more-online-dispute-resolution/2117658/, accessed on 13 November 2021.
[57] Aditi Singh and others, 'Accelerating the Adoption of ODR in India Could Transform How Disputes Are Resolved in an Overburdened System', (*Dalberg*, April 8 2021) <https://dalberg.com/our-ideas/accelerating-the-adoption-of-odr-in-india-could-transform-how-disputes-are-resolved-in-an-overburdened-system/,> accessed on 28th November, 2021.
[58] ibid.

Lastly, it is worth noting that the current situation is indeed a great opportunity to integrate technology into arbitration practice in India and work out the intricacies of IT usage in this regard. Given the roadblocks in the implementation of online arbitrations, solutions must be discovered to implement this mechanism in India. In the words of Justice Chandrachud, *"the question today is not whether we should adopt technology but how well do we adopt technology"*.[59]

[59]Draft Mediation Bill (2021), s 6.