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Chapter 1: Introduction

CHALLENGES OF COMMERCIAL ELECTRONIC ARBITRATION IN E-COMMERCE

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ABSTRACT

This paper talks about E-Commercial Arbitration and how online dispute resolution methods and in the world of E-commerce today that people purchase things it plays a very important role. This paper also talks about how the consumer should be aware of the facts regarding the process and his rights and remedies. E-Commercial contracts have become a major part in everyone's life or just say it is unavoidable as the public today prefer to purchase majority through online and do their shopping online as it is very easy and home delivery is also provided. The services provided by such e-commerce chains are also subject to certain terms and conditions. The e-commerce may not always have a proper jurisdiction as the supply place and the recipient place may not be the same and basically both parties wouldn't like to travel for such disputes. In all this case the online arbitration plays a great role and also it is easier, less time consuming and keeps in mind interest of both the parties while making an award. The submission of evidences is also easier in such cases. Online Dispute Resolution has become a important part of the ADR system in today's fast pace of life.

Keywords: Online arbitration, virtual arbitration, electronic means of communication, New York Convention of 1958, UNCITRAL Model Law on International Commercial Arbitration, seat of arbitration, agreement in writing

1.1. Introduction

International Commercial Arbitration basically means to resolving dispute arising under International Commercial Contracts. It is used as an alternative to litigation and is controlled primarily by the terms previously agreed upon by the contracting parties, rather than by national legislation or procedural rules.

Nowadays, technology as part of globalisation and the knowledge economy, plays a very important role in the global economy, including the digital economy. The Internet has become a manifold resource for most people around the world, including academics, researchers, students, consumers, traders, and companies. In cross-border commercial transactions, the Internet is a major tool (means) for both consumers and businesses, as businesses can use the Internet for marketing and selling their products, while consumers can shop and buy low-cost products online. The Internet has stimulated small, medium and large companies to contribute to free cross-border trade, and to secure places in global markets, including online 'digital' markets. Apart from that, the Internet helps parties, either businesses or consumers, settle any dispute that may arise out of or in connection with their commercial transactions online.

1.2. Background

Because of the increasing importance of information technology in the global economy over the last two decades generally and the Internet in particular, a hybrid system that consists of alternative dispute resolution techniques ("ADR") and information technology has been created, known as, online dispute resolution ("ODR"), which relates directly to online markets. ODR, which is also known as Internet Justice, is the most effective and flexible method for solving e-commerce disputes, including those pertaining to the consumer as the weaker party. The ODR

system, which includes e-negotiation, e-mediation and e-arbitration techniques, goes a step farther than the ADR system. ODR is mainly used in the resolution of cross-border electronic commerce disputes. However, ODR techniques can also be used in the resolution of traditional cross-border commercial disputes, if the parties agree in their contract to settle any dispute that may arise through one of the ODR techniques, particularly online arbitration.

Online Arbitration, also known as e-arbitration, is a major component of ODR in which parties can also avail themselves of the provisions of international commercial arbitration such as the UNCITRAL Model Law on International Commercial Arbitration of 1985 as Amended in 2006, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("The NYC"), because no specific rules regulating online arbitration have been promulgated yet. Parties may, of course, rely on the UNCITRAL Model Law on Electronic Commerce of 1996, the UNCITRAL Model Law on Electronic Signatures of 2001, and the UNIDROIT Principles on International Commercial Contracts of 2010 as Amended in 2016. In e-arbitration, arbitrators conduct the process by e-mail exchanges and videoconferencing. They rely on documentary evidence to be sent via electronic means (e-documents). In this kind of arbitration, arbitrators may or may not find e-hearing to be conducive.

1.3. Rational Scope of Study:

This study explores the issues seen with practicing electronic arbitration for E-commerce problems. The study also aims to understand the digital market where e-commerce transactions take place.

1.4. Objective of Study:

This study aims to analyse the challenges posed by electronic arbitration for E-commerce transactions.

1.5. Research Question:

What are the challenges of commercial electronic arbitration in E-commerce contracts and transactions in the digital market?

1.6. Research Methodology:

The research is conducted in a doctrinal and in an analytical manner. A comparative approach is also utilised. The primary sources used for this study include case laws. The secondary sources are the journal articles and other doctrinal research works.

Chapter 2: Preface to the key concepts

2.1. What constitutes the digital market or the E-Commerce arena?

The term 'Digital Economy' was termed by Don Tapscott in his "The Digital Economy: Promise and Peril in the Age of Networked Intelligence" (1995).²¹⁸¹ He explained the importance of online resources to expand the market and create an economy. The digital economy is a wide term used to describe markets that focus on digital technology platforms. It typically involves the marketing of products or services using technologies, mainly on the Internet, but also including mobile phones, display advertising, and any other digital medium. With the expansion of this arena there has been substantial economic growth in the last two decades around the world and this technological shift has had effects on the markets that go much further than the digital space alone. Furthermore, the accessibility and the use of internet has increased over the years owing to smart technological devices like mobile and tablet devices. Consequently, the increasing internet usage has led to the flourishing of the digital economy and an outburst growth of this sector.

Digital markets are dynamic and foundationally different from other sectors and markets. Digital services have unique feature of network, which allows and translates to mean that a product or

²¹⁸¹ Kosha Gada, The Digital Economy In 5 Minutes, Forbes (Jun. 16, 2016), <https://www.forbes.com/sites/koshagada/2016/06/16/what-is-the-digital-economy/#1d2103f17628>

service in the digital arena gains additional value as more people use it. This not only promotes the concentration of markets and products and services in that market, but at the same time it brings about multiple routes through which digital services can be delivered to the consumer more efficiently.²¹⁸² For example, news can be accessed not just by the TV or radio, but through any device that connects online. An update on current affairs or just any information regarding anything can be conveyed so quickly that the networking and circulation has created a web of its own in the digital space. This implies that new entrants to the market can challenge market power and competition more easily and fast.

Internet-based businesses with other online marketing creates a new part of the economy that is characterised by high levels of innovation, low marginal cost, increasing returns and most importantly network effects. Direct “network effects” arise where a user’s perks from a product or service is increased with the number of others that use the same on that network.²¹⁸³ For instance, the advantage of being on Facebook or WhatsApp, for instance, correlates with the number of friends and family who use that service. The more the users, the better appealing it becomes as well. In contrast to this, the use of having only an email address, limited to closed networks, seems less useful than direct mass networking. However, this has become possible due to the compatibility standards in email protocols. Network effects are particularly essential in such two-waved markets where users on each side of the market derive an advantageous effect from the increase of users on the other side. Another example is in the digital taxi service business, wherein people who use taxi aggregation platforms like Ola and Uber will logically be inclined to a service that has a large number of drivers and their availability on its network and

that also yields a lower waiting time. This is unlike before where people had to not only wait substantially for a taxi but had to pre-book the service among the high levels of demand and scarce supply. The same is true and can be applied for the drivers working with these platforms as well. The drivers can make more money and can reach people much faster than the old methods. With the use of the latest technology, the cost of establishing and maintaining the marketplace has dropped to near zero levels. The marginal cost of a transaction also in the digital arena has gone to near-zero levels.²¹⁸⁴ But this gives a unique set of problems where technological innovation that yields cost reductions can bring about questions of competition law and anti-trust laws especially with regards to the existing market and the inter-connection of this market with the digital market.

E-Commerce, that is a part of the digital market economy, with this two waved markets have turned to electronic arbitration as an alternate dispute resolution.

Chapter 3: The Electronic Commerce Contracts in Comparison to Traditional Commercial Contracts

The formation of a traditional commercial contract is based on an offer made by one of the parties and an acceptance by the other party. Likewise, an electronic commercial contract has the same legal requirements applicable to a traditional commercial contract, including formation of a contract, obligations of parties to a contract, and termination of a contract. In an e-commerce contract, however, the form requirement is unimportant if the electronic document sufficiently defines and sets up clear signs which can be read in the future, provided that the manner in which the e-document was generated, stored or communicated is reliable, as we will see below in detail. Moreover, e-commerce contracts

²¹⁸² Mohindroo A and Mohindroo R, “DIGITAL ECONOMY & COMPETITION LAW: A CONUNDRUM” (2018) 3 INDIAN COMPETITION LAW REVIEW

²¹⁸³ Ibid

²¹⁸⁴ Parsheera S, Shah A and Bose A, “Competition Issues in India’s Online Economy” [2017] National Institute of Public Finance and Policy

differ from traditional commercial contracts in other aspects, including time and place of conclusion of an e-contract, proof of an e-contract and of an e-signature, means of payment relating to an e-contract, and the applicable law and jurisdiction of e-contracts. In e-commerce contracts, parties may agree when they conclude their contract to settle any future e-commerce dispute by arbitration. Alternatively, they may agree to settle their dispute by e-arbitration after concluding their e-commerce contract because of their exchange of letters or telecommunications, including e-mail communications.

E-commerce contracts encompass, inter alia, ("B2B") e-commerce contracts, ("B2C") e-commerce contracts, consumer to business ("C2B") e-commerce contracts, consumer to consumer ("C2C") e-commerce contracts, government to consumer ("G2C") e-commerce contracts, and government to business ("G2B") e-commerce contracts. Finally, e-commerce contracts differ from smart contracts, which are defined as follows:

"smart contracts are software codes that embed the terms and conditions of a contract and that run on a network leading to a partial or fully automated self-execution and self-enforcement of the contract".

Chapter 4: The Need for Increased Consumer Education and Disclosure by Internet Merchants and Other Stakeholders

Consumer concerns point to the need for additional consumer education about how to transact online safely and securely. At the same time, reports and data concerning best practices among Internet merchants suggest there is great room for improvement in the way merchants provide information to consumers. A recent study of international e-commerce transactions, conducted by Consumers International, also points to the need for enhanced disclosure by merchants on their Web sites as well as heightened compliance

with relevant consumer protection law³⁰ It is important to stress that many online vendors are committed to the highest best practices standards and their Web sites fully reflect that commitment. Indeed, as experience is gained, one can only anticipate that the market for these early entrants will improve dramatically. Nevertheless, the Task Force must be cognizant of the fact that the rate of entrance to the world of online selling is almost certainly growing faster than the rate that the existing vendors improve their online practices and procedures. This suggests that all relevant communities - business, government, and legal - have considerable work yet to do to inform and protect consumers, as well as ensure the scope and availability of appropriate ADR and ODR mechanisms. From the standpoint of the typical vendor's Web site, these concerns appear to be well documented. A New Zealand study³¹ of 700 Web sites released in October 1999 revealed that:

- more than 50% of the vendors failed to outline their payment security mechanisms.
- 62% provided no refund or exchange policies.
- 75% had no privacy policy.
- 78% failed to explain how to lodge a complaint.
- 90% failed to advise customers what laws applied; and
- 25% showed no physical address.

In September 2000, the U.K. company Clicksure examined business Web sites in Europe and the United States - focusing on privacy, security, Web site information, transaction management, quality, and monitoring - and concluded that there was a clear failure to measure up to "internationally recognized best practices." Thereafter, in January 2001, the leading international consumer organization, Consumers International, released its Privacy net study in which it concluded:

"Despite the fact that the majority of the sites collected personal information from the user,

only a tiny minority provided a privacy policy that gave users meaningful information about how that data would be used. Sites both in the US and EU fall woefully short of the standards set by international guide on data protection. The majority of sites ignore even the most basic principles of fair information use, such as telling consumers how their data will be used; how it can be accessed; what choices the consumer has about its use; and how security of that data is maintained. Despite tight EU legislation in this area, researchers did not find that sites based in the EU gave better information or a higher degree of choice to their users than sites based in the US. Indeed, US-based sites tended to set the standard for decent privacy policies. EU consumers are not only protected by legislation, but also have a data protection commissioner in each country looking out for their rights and have a right to redress if the law is breached. However, in practice, EU sites do no better than US ones at keeping their users informed."

Chapter 5: The Development of ODR as a Response to the Need for Redress in the E-Commerce Marketplace

parties to a dispute may use the Internet in order to communicate with one another as part of a conciliation process. Alternatively, a neutral person might communicate with both parties via the Internet as part of a mediation or arbitration. Additionally, the Internet may facilitate the collection, transmission, and storage of information pertaining to the dispute. In certain circumstances, ODR involves dispute resolution where the parties may never meet in person but may interact solely online. ODR may be used, of course, to resolve disputes generated online as well as offline. ODR, as a process, may involve various types of dispute resolution including:

- dispute prevention (education, outreach, rating, and feedback programs)
- ombudsman programs
- conflict management

- assisted negotiation
- early neutral evaluation and assessment
- mediation/conciliation
- mediation-arbitration (binding and/or non-binding)
- arbitration
- expert determination
- executive tribunals; and
- consumer programs (private, trade groups, quasi-governmental, and governmental).

Governments must be given substantial credit for the development of ODR. As evidenced by the third annual progress report of the U.S. Government Working Group on Electronic Commerce, released January 16, 2001, governments have shown considerable restraint in this area, acting primarily to promote "collaborative efforts among the private sector and consumer groups to develop and implement fair and effective ADR mechanisms for online transactions as one means of promoting consumer confidence and participation in electronic transactions."²¹⁸⁵ In an important statement issued by the E.U. and the U.S. governments on December 18, 2000, the two governments committed themselves jointly to the use of ADR and ODR in the e-commerce arena:

*"Easy access to fair and effective ADR, especially if provided online, has the potential to increase consumer confidence in cross-border electronic commerce and may reduce the need for legal action. We, accordingly, agree on the importance of promoting its development and implementation."*²¹⁸⁶

In this statement, the two governments went on to acknowledge that the issues of applicable law and jurisdiction will be "difficult to resolve in the near term," emphasized the importance of global "self-regulatory programmes such as

²¹⁸⁵ Justin Kelly, White House Report Signals Consensus on ADR for E-Commerce, ADRWorld.com, Jan. 18, 2001 (quoting U.S. Gov't Working Group on Electronic Commerce, Third Annual Progress Report (2001)), at <http://www.onlineresolution.com/adrworldpress.cfm>

²¹⁸⁶ Statement of the European Union and the United States on Building Consumer Confidence in e-Commerce and the Role of Alternative Dispute Resolution, European Union in the US (Dec 18, 2000)

codes of conduct and trust marks," and recommitted themselves to the Organization for Economic Cooperation and Development (OECD) Guidelines on Consumer Protection in the Context of Electronic Commerce issued in December 1999.

Some fundamental observations or assumptions about ODR services must be noted:

- The ODR community is, in most respects, still in its infancy, without a meaningful database of experience, information or analysis.
- No strong or significant business or "trade" association has emerged, around which the ODR community can coalesce, particularly on a worldwide basis.
- To date, consumers worldwide do not have great awareness of the existence of ODR as a means of resolving disputes generated online or offline. They are not, therefore, making decisions whether or where to transact online based on the availability of ODR.
- Existing ODR providers range from the old, respected, and financially stable to the new, unproven, and less capitalized. The ODR industry is currently in a state of flux and some providers will ultimately fail, as is natural in any new marketplace.
- Whether styled as a for-profit or as a non-profit entity, each member of the ODR community is subject to all forms of market pressures and business and financial realities and can be expected to respond to those pressures and realities as any other business entity might respond.
- No guidelines or standards for ODR have emerged as a dominant code of practice within the ODR community.²¹⁸⁷

The establishment of a robust ODR industry clearly requires even greater growth and a more effective global reach, and just as clearly awaits greater financial, business, technological, and legal maturity. The opportunity to create, invent, and put into practice new, as well as traditional ideas of dispute resolution, must be allowed to continue; the ODR community must be allowed to respond, without significant constraint, to the demands of the market it now serves.

General principles of procedural fairness is always essential but online justice calls for some particularization such like:

- Transparency: this covers information given to users on the procedural rules and the outcome of the process and is particularly important when dealing with consumers.
- Accessibility: also important in a consumer context, this includes the absence of cost barriers. Due to the delocalized nature of the online medium, accessibility is of course one of the main assets of ODR: users can stay at home and dispute resolution is a mere mouse click away.
- Independence: this is a traditional requirement and may raise funding issues in an online context.
- Timeliness: speed is another of ODR's principal advantages, especially as the slowness of traditional court proceedings has become endemic.
- Fairness: with independence, this constitutes the essence of procedural guarantees.

Chapter 6: Conclusion and Suggestions

Internet users are measured in the hundreds of millions; Internet sellers are measured in the millions; and trust-marked sellers are measured in the thousands. As brick-and-mortar companies turn to "brick-and-click," and as new online sellers come to market, one can expect their rate of growth to be substantially greater

²¹⁸⁷ American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution in Cooperation with the Shidler Centre for Law, Commerce and Technology, University of Washington School of Law, 'Addressing Disputes in Electronic Commerce: Final Recommendations and Report' The Business Lawyer, Vol. 58, No. 1 (November 2002), pp. 415-477

than the rate of growth at which trust mark companies increase their subscriber base. The consumer clearly benefits from trust mark programs but, just as clearly, other efforts are needed, particularly in the educational and informational arenas.

Consumers should be made aware of ODR as one of arrays of options that will instil increased confidence in the online marketplace. Business should also be apprised of the possible benefits of ODR as part of a comprehensive complaints handling and customer service program. Also, ODR providers should develop effective codes of practice.

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