



GNLUSRDC - ADR

MAGAZINE

VOLUME III | ISSUE II



STRENGTHENING THE ARBITRAL SPIRIT: THE INTERLOCKING OF SAFETY WITH THE CYBERSPACE

- Iram Majid

Executive Director, Asia Pacific Centre for Arbitration and Mediation, Director IIAM

Introduction

The pandemic has completely transformed the usage of the internet in society. Its usage is not restricted as media of entertainment and for accessing various resources, but extends to being a growing marketplace wherein people can meet their market demands without stepping out of their homes. The internet turned out to be a blessing during the disturbances of the pandemic, it allowed the market system to be accessible through digital devices and gadgets. However, as is with the advent of every new facility, there exist challenges with the same which need to be tackled effectively.

The e-commerce giants have not only dominated in the form of economy, but also captured the legal field through web-click contracts. Web click contracts are the newest systems of standard form of contract. This has led to uneven balance of power, related to the contractual relationships pertaining to rights and obligations of contractual relationships between consumer and ecommerce platforms. There is a compulsion under the garb of easy and accessible online marketplace, as the consumer either has to accept the terms of usage or reject it, which means that it becomes impossible to access such marketplaces.

Undoubtedly, the internet has been able to successfully supplement the general form of market and allow the consumer to access the market through its own safe and convenient place, but at the same time, the incidents of unfair legal transactions and unaccountability has excessively escalated. The lack of statutory infrastructure to meet the legal needs regarding contractual obligations in this

field has led to no definitive place to make actionable claims. The best alternative available is to opt for arbitrations instead of cumbersome traditional court set-ups.

Now, considering the backdrop of the issue discussed above, it appears that arbitration is available as one of the safest options to raise the legal issues pertaining to web-click contracts, as there are no geographical hindrances involved and can serve the purpose of dispute resolution as per the need of the legal issues involved. At this juncture, it must be noted that web click transactions are multi-faceted, with multiple transactions which leads to parallel proceedings of arbitration and joinder of various parties.

Ascertaining the national and international network of arbitrability

The internet contracts in India enjoy validity through the statutory framework of the Arbitration and Conciliation Act, 1996 [“**A&C Act**”], the Information and Technology Act [“**IT Act**”], and the Indian Contract Act, 1872 [“**ICA**”].

The A&C Act, 1996 governs the practice of Alternative Dispute Resolution [“**ADR**”] in India, as it enforces ADR as a mechanism of dispute resolution, if it has been agreed by both of parties expressly through a contract and covers internet contracts as well. Further, the enforceability of arbitral award is also governed through A&C Act, 1996. The A&C Act, 1996 allows parties to decide upon the governing laws, but it must be noted that such choice of law is subject to the principle of constitutional morality, as is not against the concept of public policy as developed through jurisprudence by judiciary.

i. Addressing the absence of ‘choice of law’ clauses in arbitration agreements

In cases wherein the governing laws have not been decided between the parties through ADR clauses in the contract, it becomes tough to initiate arbitration proceedings. Few foreign jurisdictions consider governing laws based on the decided seat of arbitration, however, the Indian judiciary have taken a liberal path while deciding such matters.

In the case of **National Thermal Power Corporation Ltd v Singer Corporation**,¹ it was held that both offline and online contracts, in absence of express provision in the contract related to governing laws, the law which has closest connection to the dispute will be applicable. To determine the closest connection between the dispute involved and the application of governing

¹ *National Thermal Power Corporation Ltd v Singer Corporation* [1992] 3 SCC 551.

laws, the doctrines of severability and kompetenz-kompetenz are applied for deciding upon the issues. The other important factors are the place of performance of contract, the place of conclusion of such contract, residence of parties etc.

ii. Restraints on party autonomy in the public interest

It can be fairly observed that even if not explicitly barred by any legal provision, there exists a restriction to party autonomy with respect to precluding the jurisdiction of Indian Courts. It is therefore essential to understand the factors involved in the jurisdictional issues of internet contracts and transactions related to online business.

The case of **Banyan Tree Holding Pvt Ltd v Murali Krishna Reddy**² is relevant while discussing internet contracts and online businesses. The High Court of Delhi held following relevant factors to decide upon the jurisdictional issues. The factors enlisted by the court are as follows:

1. *Nature of engagement*: whether there was an active or passive targeting of Indian consumers through the online platform?
2. *The nexus test*: whether there is a reasonable and substantial connection of the defendant's actions with the forum state?
3. *Origin*: whether the cause of action arises from actions of the defendant within the forum?
4. *Reasonableness*: whether the exercise of the jurisdiction of the courts in the dispute would be reasonable?

iii. Resolving the issue of accessibility while determining jurisdiction

The Indian Judiciary has taken a step ahead in determining the jurisdictional issues over the dispute pertaining to arbitration agreement. It has been found that mere accessibility is not a sufficient criterion to determine the jurisdiction of the court over the arbitration proceedings, as online infrastructure comes with its challenges.

It is relevant to refer to the case of **Impresario Entertainment and Hospitality v S&D Hospitality**,³ which offers a complex question. In the matter, the question over the jurisdiction

² *Banyan Tree Holding Pvt Ltd v Murali Krishna Reddy* CS (OS) No. 894/2008.

³ *Impresario Entertainment and Hospitality v S&D Hospitality* CS(COMM) 441/2017.

was whether an application available on a website of a hotel service in Hyderabad could be accessed by people in Delhi, and which court would have the jurisdiction over the proceedings. The Delhi Court held that since there is no direct engagement between the hotel and consumers in Delhi, the court at Delhi do not have the jurisdiction. Similar facts can be observed in the matter of **Millennium Copthorne International v Aryan's Plaza Services**,⁴ where court held that the website which interacted directly with the consumers in Delhi then the court at Delhi shall enjoy the jurisdiction. Hence, it can be held that direct engagement with the consumer with online forum is essential in determining the jurisdiction of the court. Now, it is also noteworthy to appreciate the cases related to Business-to-Business platform such as Flipkart and Amazon, the jurisdiction can be determined based on the buyer's location also.

The case of **World Wrestling Entertainment v Reshma's Collection**⁵ it was ruled that factors such as purchase of goods, payment of goods, and delivery takes place at the buyer's place then the court at buyer's place of residence is competent to exercise the jurisdiction.

iv. The Personal Data Protection Bill: the untapped issues

The right to privacy also appears to be a critical factor to be dealt with. The Supreme Court of India, in the case of **KS Puttaswamy v Union of India**,⁶ held that the right to privacy is part and parcel and Article 21 of the Indian Constitution. The issues related to data leakage and data processing without permission are significant concerns of online disputes.

The Personal Data Protection Bill tabled before the Indian Parliament has widely extended the jurisdiction of Indian Courts in case of data use, data processing and data profiling, under which Indian or foreign parties shall be subject to Indian Jurisdiction irrespective of the terms agreed between the parties. Hence, it can be seen that in the realm of data protection and data privacy, the concept of party autonomy has been restricted to a larger extent.

v. Interconnected Arbitration Agreements: an increasing challenge

The diversity of legal proceedings and conflicting decisions based on such proceedings have remained a challenge in the legal domain. Now, in the cases of arbitration proceedings, the situation becomes much more complex as it not only involves proceedings under domestic laws but also operates in the international jurisdiction. More particularly in internet contracts and smart forms

⁴ *Millennium Copthorne International v Aryan's Plaza Services* MANU/DE/1854/2018.

⁵ *World Wrestling Entertainment v Reshma's Collection* MANU/DE/3515/2013. ⁶

KS Puttaswamy v Union of India [2017] 10 SCC 1.

of contracts, the terms are embedded in forms of codes; they are interconnected across various jurisdictions and parties.

Due to such variation, there is more or less no possibility of consolidating such arbitration proceedings. This multiplicity mainly occurs due to different commercial and contractual relationships, which leads to the constitution of separate arbitral tribunals and separate decisions.

In such cases, due to the involvement of a large number of parties across various jurisdictions, the remedy that flows out of separate arbitral tribunals appears unsustainable in law.

vi. Addressing a power imbalance in arbitration clauses

The basic nature of arbitration is that both parties have equivalent powers to invoke the arbitration proceedings. However, it has been observed that, particularly in the case of internet contracts, there are instances of unilateral power available only with the online platforms. Due to this power imbalance, one party has the power to sue another at a preferred forum, which makes the other party suffer. The approach of Indian courts has remained blurry on this issue.

In **TRF Ltd v Energo Engineering Projects**,⁶ the Supreme Court upheld the arbitration clause's validity, wherein one party was allowed to invoke the clause and appoint the arbitrator without the consent of the other.

It is pertinent to mention that such clauses lack the flavour of mutuality, which is an essential part of ADR clauses in the agreement. Now, if the same path is followed in online contracts, it would vest the giant online platforms to use the power against the customers unevenly. Due to a lack of clarity on the subject, there may be instances where the consumer may be left without a remedy or, at times, may be compelled to submit to arbitration proceedings. The courts must be more vigilant and draw different parameters for such unilateral favourable online contracts, generally favouring the strong and mighty online business houses.

Unshackling the arbitration process: making a difference with big data

The absence of agency inherent in Internet contracts has been a source of concern in the global scenario. Traditional click-wrap and shrink-wrap contracts do not reflect consensus *id idem* or the agency of both parties in the transaction, resulting in an asymmetric process. There is a need to

⁶ *TRF Ltd v Energo Engineering Projects* [2017] 8 SCC 377.

develop an internet justice protocol that establishes uniform rules and standards for the smooth & efficient operation of arbitration agreements in the online environment.

Big data has been gradually included in international commercial arbitration in order to scale it up. Big data analyses a large database of conflicts to guide decision-making and produce sustainable conclusions for parties in seconds. Even though this streamlines the arbitration procedure and expands access globally, transparency suffers. There is apprehension about private actors settling conflicts involving a large amount behind a veil, away from public scrutiny. The extra crystallization of private arbitral awards decided by the parties with little or no control or transparency into a body of general law to govern the procedure for everyone was also deemed undesirable. This sparked a new global campaign to democratize arbitration data.

With the majority of dispute resolution practice taking place online in cases of internet disputes, more transparency in the process avoids the creation of arbitrator “cliques”, who harmonize among themselves and deliver agreeable conclusions instead of fair ones. As a fast-expanding body of law, it is necessary to strike a balance between party autonomy, norms for disclosure and the process' overall confidentiality, as well as the use of data to inject more impartiality and openness into the choices made. International platforms such as SmartSettle and Immediation have already started the process of algorithm-based arbitration, where the award is decided using a concealed sliding scale that gathers inputs from both parties and splits it through an objective, analyticsdriven judgement of the ratio.

Conclusion

The emergence of the unique legal character of the internet has sparked a race worldwide to provide the necessary infrastructure and resources to satisfy its demands and guarantee the protection of the rights and remedies of internet actors. As evidenced by the developments in India, this paternalistic intrusion has resulted in a power struggle where courts assert their claims to resolve disputes regardless of the arbitration agreement. The internet, whose lifeblood is the flow of data, will come under severe examination in the absence of comprehensive enforcement measures to preserve a balance of interests, frequently at the expense of its global nature and freedom. Additionally, it is important to consider the underlying threats to party autonomy associated with the global push to democratize arbitration data and provide greater objectivity and openness to the arbitration process.

Concerns of this nature have also arisen in asymmetrical agreements, where courts have been found to be ambiguously at ease with some degree of asymmetry despite a blatant violation of the principle of equal treatment of parties and a lack of reflection of consensus *id idem*. Therefore, in order to advance the practice and prevent it from becoming out of date, online arbitration rules in the future will be based on healthy balancing and time, where the substance of the process must be preserved along with the adoption of new techno-legal means.