



## ONLINE ARBITRATION: THE FUTURE OF ONLINE DISPUTE RESOLUTION FOR CONSUMER DISPUTES

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### Introduction

The advent of globalization and the advancement and increased accessibility of internet services has led to an increase in the cross-border consumer transactions. Such transactions give rise to numerous low-value claims which are best dealt with the apparatus of Online Dispute Resolution [“ODR”]. However, out of these mechanisms, Arbitration poses itself as the best remedy available owing to the nature of proceedings commencing into a final and binding award which is enforceable and enjoys the force of the law. Online Arbitration relieves the process of arbitration of its criticisms pertaining to its cost and time efficiency. This model of ODR might be particularly advantageous if employed by India, where consumer dispute forums have been unable to effectively address concerns of time and costs involved in litigation.

### Online Dispute Resolution for Consumer Disputes

Consumer transactions are small and quick. The disputes surrounding such transactions involve “*low value and high volume*” claims.<sup>1</sup> The issues in such cases are not complex or compound in nature and pertain to simple questions of sale of goods and services. Such cases demand dispute resolution mechanisms that are quick and inexpensive. It would be unreasonable to expect parties to go through the entire process of litigation or arbitration, especially if it involves the application of international law. It is essential to recognise that such processes extract a huge amount of time and resources from the parties involved.<sup>2</sup> The complexity of the same can also not be discounted. With due consideration to such elaborate intricacies, the parties to a dispute would naturally be demotivated to pursue their grievances and seek redressal.

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<sup>1</sup> Karim Benyekhlef and Nicolas Vermeys, ‘Low-Value, High – Volume Disputes: Defining the indefinable’ (*Slaw*, 29 January 2022) <<http://www.slw.ca/2014/01/29/low-value-high-volume-disputes-defining-the-indefinable/>> accessed 13 May 2022.

<sup>2</sup> Shruti Kakkar, ‘Litigation Costly, Tedious & Time-Consuming: CJI Ramana Encourages Arbitration & Mediation’ (*Live Law*, 20 August 2022) <<https://www.livelaw.in/top-stories/litigation-costly-tedious-time-consuming-cji-ramana-encourages-arbitration-mediation-179972>> accessed 13 May 2022.

In an attempt to amend the aforementioned complexities, various online consumer websites have commenced extending internal dispute resolution mechanisms as a service. This mechanism, much like the websites themselves, are completely online. The United Nations Commission on International Trade Law [“UNCITRAL”] in their Technical Notes on Online Dispute Resolution define as a “*mechanism for resolving disputes through the use of electronic communications and other information and communication technology*”.<sup>3</sup>

Ebay ODR mechanism as a service in case of transactional faults is a fine example of the same. Ebay is an American multinational e-commerce corporation which offers an online marketplace that facilitates consumer-to-consumer and business-to-consumer sales. Here, every buyer has the means of raising an online complaint in case of any purchase related grievance such as damaged or poor quality of the product received, or non-delivery of the product. Here, the seller is given time to respond to the complaint and remedy the situation. Seller’s failure to do that would automatically raise this concern to the Ebay who then requires the buyer and the seller to make their case. In this case, Ebay acts as a neutral party and determines penalties. Additionally, there is an appeal process attached to this dispute resolution mechanism that may be employed unsatisfied customers or sellers. Ebay’s enforcement mechanism enmeshes fraudulent buyers or sellers being denied access to the platform.<sup>4</sup>

Although such dispute resolution mechanisms are appreciated, they come with their own drawbacks. First, they are restricted to transactions that take place over the websites that employ such initiative. Secondly, the enforcement mechanisms of such websites are limited to the realm of restricting further access to the website and might not be effective in all circumstances. Third, there is no metric of assessing the fairness of the process since the website acts as the neutral party. Additionally, careful attention to the laws at play in any given transnational, cross-border dispute might be neglected in such methods of dispute resolution.

The UNCITRAL Working Group in its twenty fifth session recalled the implication of consumer protection framework while devising ODR mechanisms. It summarized how the ODR process would be of significance to the consumers both as claimants and the respondents. They were further cognizant of the importance of consumer protection issues and its possible solutions that could be incorporated within the proposed mechanisms. The Working Group also recognised how

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<sup>3</sup> The United Nations Commission on International Trade Law, ‘UNCITRAL Technical Notes on Online Dispute Resolution’ (United Nations, April 2017) < [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382\\_english\\_technical\\_notes\\_on\\_odr.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf)> accessed 13 May 2022.

<sup>4</sup> ‘Chapter 1: ODR and Access to Justice’ in Zbyněk Loebel, *Designing Online Courts: The Future of Justice is Open to All* (Kluwer Law International 2019) 3 – 24.

ODR mechanisms can be critical in swelling economic interactions between countries by integrating consumer protection into their scaffold.<sup>5</sup>

The concerns highlighted above have the potential to be resolved if online arbitration is used as a means of consumer redressal.

### Online Arbitration

What makes online arbitration distinctive from other forms of ODR mechanisms is that the said procedure has enforcement mechanisms in place that render the awards binding on the parties involved. Online arbitration combines an efficient mechanism of conflict resolution with a legally recognised and enforceable award without the costs and time traditionally associated with it.<sup>6</sup>

The UNCITRAL in its thirteenth session reaffirmed how online arbitration was more consumer protective as compared to the courts since the latter requires a higher legal knowledge that contributes to increased costs in the process.<sup>7</sup> It is evident from the International Chamber of Commerce Commission Report's findings that 99% of the respondents to its survey recommend international arbitration to resolve cross-border disputes.<sup>8</sup>

### Costs and Time

The biggest criticism of Arbitration has been the exorbitant amounts of costs involved in arbitral proceedings.<sup>9</sup> Arbitration costs may be divided into two categories. First, the costs involved in the procedural aspect of it. Second, the legal costs encompassed in it.<sup>10</sup> The procedural costs include the fees and expenses of the arbitrators. It also comprises of the administrative costs of the institution chosen. The legal costs cover the other aspects of the proceedings, such as, the fees of

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<sup>5</sup> UNCITRAL, 'Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session' (21-25 May 2012) UN Doc A/CN.9/744 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V12/540/19/PDF/V1254019.pdf?OpenElement>> accessed 13 May 2022.

<sup>6</sup> Karim Benyekhlef and Nicolas Vermeys, 'Low-Value, High – Volume' Disputes: Defining the indefinable' (*Slaw*, 29 January 2022) <<http://www.slw.ca/2014/01/29/low-value-high-volume-disputes-defining-the-indefinable/>> accessed 13 May 2022.

<sup>7</sup> UNCITRAL, 'Report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session' (20-24 October 2014) UN Doc A/CN.9/827 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V14/073/90/PDF/V1407390.pdf?OpenElement>> accessed 13 May 2022.

<sup>8</sup> International Chamber of Commerce, 'ICC Commission Report: Decisions on Costs in International Arbitration' (*ICC Dispute Resolution Bulletin Issue 2*, 2015) <<https://iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf>> accessed 13 May 2022.

<sup>9</sup> School of International Arbitration, Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (*White & Case*, 2018) <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF)> accessed 13 May 2022.

<sup>10</sup> Neil Newing, Ryan Cable and Johnny Shearman, 'Costs in International Arbitration – Are Changes Needed?' (*Kluwer Arbitration Blog*, 1 January 2019) <<http://arbitrationblog.kluwerarbitration.com/2019/01/01/costs-in-international-arbitration-are-changes-needed/>> accessed 13 May 2022.

hiring the services of a counsel, getting expert opinion, witnesses, or translators.<sup>11</sup> A close analysis of the costs would reveal that legal costs scale the costs higher as compared to the other costs involved.<sup>12</sup> The Chartered Institute of Arbitrators, Costs of International Arbitration Survey 2011 explains how 74% of the party costs were attributable to legal fees.<sup>13</sup> Costs can either be calculated ad valorem or on an hourly rate system. In the hourly rate system, however, the worth of the claim is not irrelevant. It is of prominence while deciding the maximum hourly rate.<sup>14</sup>

It is only logical that the courts hold international arbitration clauses unconscionable in small consumer disputes, in light of the aforementioned discussion, due to the impracticality of the costs involved in it.<sup>15</sup>

The International Chambers of Commerce [“ICC”] offers guidelines on controlling costs by informing the parties that the allocation of costs would consider the behaviours of parties pertaining to “excessive document requests, excessive legal argument, excessive cross-examination, dilatory tactics, exaggerated claims, failure to comply with procedural orders, unjustified applications for interim relief, and unjustified failure to comply with the procedural timetable”.<sup>16</sup>

In this light, a survey on international arbitration discloses people’s faith in the use of technology in arbitration which could potentially lead to a more effective dispute resolution.<sup>17</sup> Online arbitration was not only preferred over delayed physical hearings but also appreciated for greater procedural and logistical flexibility.<sup>18</sup> Online arbitration eliminates the costs of travel and stay of

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<sup>11</sup> Micha Bühler, ‘Costs in International Arbitration Damages’ (*Global Arbitration Review*, 29 November 2018) <<https://www.lexology.com/library/detail.aspx?g=0537f158-18da-4fbc-b232-e737f6232ad5>> accessed 13 May 2022.

<sup>12</sup> International Chamber of Commerce, ‘Decisions on Costs in International Arbitration’ (*ICC Commission Report, ICC Dispute Resolution Bulletin Issue 2* 2015) Issue 2 <<https://iccwbo.org/content/uploads/sites/3/2015/12/Decisions-on-Costs-in-International-Arbitration.pdf>> accessed 13 May 2022.

<sup>13</sup> The London Court of International Arbitration, ‘LCIA Releases Costs and Duration Data: Tools to Facilitate Smart and Informed Choices’ (*The London Court of International Arbitration*, 2015) <<https://www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx>> accessed 13 May 2022.

<sup>14</sup> *ibid.*

<sup>15</sup> Mark E. Budnitz, ‘The High Cost of Mandatory Consumer Arbitration’ (*Faculty publication, Georgia State University College of Law*, 2004) <[https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2481&context=faculty\\_pub](https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2481&context=faculty_pub)> accessed 13 May 2022; *Brower v Gateway* 2000 - 246 A.D.2d 246, 676 N.Y.S.2d 569 (App. Div. 1st Dept. 1998) (United States of America).

<sup>16</sup> International Chamber of Commerce, ‘Controlling Time and Costs in Arbitration’ (*ICC Commission Report*, 2018) <<https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-english-version.pdf>> accessed 13 May 2022.

<sup>17</sup> School of International Arbitration, Queen Mary University of London, ‘2018 International Arbitration Survey: The Evolution of International Arbitration’ (*White & Case*, 2018) <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF)> accessed 13 May 2022.

<sup>18</sup> School of International Arbitration, Queen Mary University of London, ‘2021 International Arbitration Survey: The Evolution of International Adapting arbitration to a changing world’ (*White & Case*, 2021)

arbitrators, witnesses and translators, especially in a transnational disputes which involve international fare.

The online hearing rooms, video conferencing,<sup>19</sup> and use of other technologies reduce the cost of arbitration drastically. Such technologies include email, which is quick, affordable, and keeps track of all communications. Live testimony from faraway locations is now possible due to the emergence of video testimony, which has decreased the expenses of the procedure while also making it more accessible. A searchable electronic or software copy of the brief is an e brief. It also includes links to the back-up papers mentioned in the brief, as well as textual references to those documents. In other words, each reference to the record or authority in an e-brief is a hot link that the reader may mouse click to bring up the record or authority in a new window. The need to refer to the original record or look for the legal authority is reduced since it is available with a single mouse click.<sup>20</sup> Additionally, this would make the lives of paralegals, lawyers and anyone involved in the process, simpler. In a snowballing effect, it would reduce the legal hours billed by lawyers engaged by the parties which would in turn reduce the legal costs.

Online platforms facilitate new possibilities such as easy rescheduling according to the convenience and time preferences of parties. This feature of conducting proceeding outside tribunal hours is something that cannot be envisaged by physical dispute resolution centers.

The Costs and Duration Report by the London Court of International Arbitration provides that the median total duration of the cases in consideration was sixteen months and the median time to render an award was three months. The delay is caused due to the parties taking time to make submissions.<sup>21</sup> Online Arbitration provides for a greater availability of dates for hearing.<sup>22</sup> Thus, reducing this time significantly.

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<[https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf)> accessed 13 May 2022.

<sup>19</sup> Aceris Law LLC, 'How to Minimize the Cost of International Arbitration' (International Arbitration) <<https://www.international-arbitration-attorney.com/how-to-reduce-the-cost-of-international-arbitration/>> accessed 13 May 2022.

<sup>20</sup> Adesina Temitayo Bello, 'Online Dispute Resolution Algorithm: The Artificial Intelligence Model as a Pinnacle'(2018) 84 (2) INT'L J. OF ARB. MED. & DISP. MAN. <<https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/84.2/AMDM2018033>> accessed 13 May 2022.

<sup>21</sup> The London Court of International Arbitration, 'Facts and Figures - Costs and Duration: 2013-2016' (*The London Court of International Arbitration*, 2017) <<https://www.international-arbitration-attorney.com/wp-content/uploads/2018/07/LCIA-Costs-and-Duration-Statistics.pdf>> accessed 13 May 2022.

<sup>22</sup> School of International Arbitration, Queen Mary University of London, '2021 International Arbitration Survey: The Evolution of International Adapting arbitration to a changing world' (*White & Case*, 2021) <[https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf)> accessed 13 May 2022.

It also reduces the time spent in travel and physical submission and registration of documents. It has the potential of accommodating short and realistic deadlines as suggested by the ICC for effective time management.<sup>23</sup> The time allocation given to the use of transcripts, order of witnesses and other practical arrangements that facilitate smooth proceedings, which is usually indicated to the parties in the pre-hearing conference, is lesser of a trepidation in an online setting. Consequently, the online nature attributed the dispute resolution mechanism has improved access to justice.

Designers of online arbitration platforms attempt to re-invent court procedures in order to better meet the requirements and expectations of the court system's ultimate users while upholding the ideals of fair trial. It is owing to this consumer centric approach that makes Online Consumer Arbitration unique and approachable.<sup>24</sup>

## India

The issue of arbitrability of consumer disputes was settled by *Emaar MGF v. Aftab Singh*.<sup>25</sup> The Supreme Court, in this case, read Section 2(3) of the Arbitration and Conciliation Act<sup>26</sup> **["Arbitration Act"]** as affording importance to reliefs provided by specialized acts in place. The court held that consumer disputes are governed by the Consumer Protection Act<sup>27</sup> which contains within itself, rights *in rem*.<sup>28</sup> The public policy implications of these rights render such disputes non-arbitrable.<sup>29</sup> Consequently, if a person decides to submit a complaint in the first instance with a competent consumer forum, that person cannot be refused redress by citing Section 8<sup>30</sup> of the Arbitration Act.<sup>31</sup>

The structural framework for online arbitration echoes the Supreme Court's concerns raised and attempts to reconcile them. An assembly of anxieties that get raised by pronouncing consumer disputes as arbitrable can be resolved by adopting arbitration in its online form. The charters of online arbitration offered extend due consideration to principles pertaining to law, technology and

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<sup>23</sup> International Chamber of Commerce, 'Controlling Time and Costs in Arbitration' (*ICC Commission Report*, 2018) <<https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-english-version.pdf>> accessed 13 May 2022.

<sup>24</sup> 'Chapter 2: First Online Civil Courts' in Zbyněk Loebl, *Designing Online Courts: The Future of Justice is Open to All* (Kluwer Law International 2019) 25 - 54.

<sup>25</sup> *Emaar MGF Ltd. v Aftab Singh* 2018 SCC OnLine SC 2378.

<sup>26</sup> The Arbitration and Conciliation Act 1996, s 2(3).

<sup>27</sup> The Consumer Protection Act 2019.

<sup>28</sup> *Emaar MGF Ltd. v Aftab Singh* 2018 SCC OnLine SC 2378.

<sup>29</sup> *Booz Allen & Hamilton Inc v SBI Home Finance Limited & Ors* (2011) 5 SCC 532 (India); *A. Ayyasamy v A. Paramasivam*, (2016) 10 SCC 386.

<sup>30</sup> The Consumer Protection Act 2019, s 8.

<sup>31</sup> Pavitra Naidu and Shreya Jain, 'Arbitration of Consumer Disputes in India: A Need for Reform' (*IndiaCorpLaw*, 18 March 2021) <<https://indiacorplaw.in/2021/03/arbitration-of-consumer-disputes-in-india-a-need-for-reform.html>> accessed 13 May 2022.



design, and data.<sup>32</sup> In that, it endeavours to adhere to principles of natural justice by efficient identification and elimination of biases.

The UNCITRAL Working Group deems consumer disputes submitted to courts incommensurate due to the disparity between the value of the transaction and the costs involved in perusing it in the court of law.<sup>33</sup> An evaluation of the consumer redressal system has revealed a particularly high pendency clearance time of cases.<sup>34</sup> Consequently, incorporating ODR within the consumer dispute resolution system to offer consumers with better accessible and cost-effective options has been recommended.<sup>35</sup>

The digital surge during the pandemic has already eased individuals into the online mode of operation.<sup>36</sup> Therefore, a redirection of the consumer disputes to institutionalised online arbitration would be convenient and reap advantageous results.

The Supreme Court issued guidelines<sup>37</sup> for online hearings which finds consonance with the suggestions of the International Commission of Jurists.<sup>38</sup> A similar set of guidelines or recommendations can be formulated for implementation within the institutions and ad-hoc proceedings to ensure a justice, fairness, accessibility, and accountability in the proceedings.<sup>39</sup>

With due reflections on the aforementioned arguments in favour of ODR in India, *Emaar MGF v. Aftab Singh*<sup>40</sup> must be revised by a larger bench or overruled by subsequent legislation. This must duly be done to give effect to arbitration clauses in consumer contracts and extract the provision of approaching the consumer court at first instance without, first, resorting to arbitration.

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<sup>32</sup> Deepika Kinhal, Tarika Jain, Vaidehi Misra and Aditya Ranjan, 'ODR: The Future of dispute Resolution in India' (*Vidhi Centre for Legal Policy and JALDI*, July 2020) <<https://vidhilegalpolicy.in/research/the-future-of-dispute-resolution-in-india/>> accessed 13 May 2022.

<sup>33</sup> Mirèze Philippe, 'ODR Redress System for Consumer Disputes' (2014) 1 *International Journal of Online Dispute Resolution* <[https://www.elevenjournals.com/tijdschrift/ijodr/2014/1/IJODR\\_2014\\_001\\_001\\_004](https://www.elevenjournals.com/tijdschrift/ijodr/2014/1/IJODR_2014_001_001_004)> accessed 13 May 2022.

<sup>34</sup> Aamir Khan, 'Is consumer really king? Growing pendency, adjournments at consumer courts reflect otherwise' (*Bar and Bench*, 9 October 2021) <<https://www.barandbench.com/columns/is-consumer-really-king-growing-pendency-adjournments-at-consumer-courts-reflect-otherwise>> accessed 13 May 2022.

<sup>35</sup> Deepika Kinhal and Aditya Ranjan, 'Enforcing Caveat Venditor' (*Vidhi Centre for Legal Policy*, 2 November 2020) <<https://vidhilegalpolicy.in/research/enforcing-caveat-venditor/>> accessed 13 May 2022.

<sup>36</sup> Rahul De, Neena Pandey and Abhipsa Palchit 'Impact of digital surge during Covid-19 pandemic: A viewpoint on research' (2020) 55 *International Journal of Information Management* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7280123/>> accessed 13 May 2022.

<sup>37</sup> *Guidelines for Court Functioning through Video Conferencing during Covid-19 Pandemic*, Suo Motu Writ (Civil) no. 05/2020 (India).

<sup>38</sup> International Commission of Jurists, 'Videoconferencing Courts and COVID-19: Recommendations Based on International Standards' (*International Commission of Jurists*, November 2020) <[https://www.unodc.org/res/ji/import/guide/icj\\_videoconferencing/icj\\_videoconferencing.pdf](https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf)> accessed 13 May 2022.

<sup>39</sup> Deepika Kinhal and Aditya Ranjan, 'Enforcing Caveat Venditor' (*Vidhi Centre for Legal Policy*, 2 November 2020) <<https://vidhilegalpolicy.in/research/enforcing-caveat-venditor/>> accessed 13 May 2022

<sup>40</sup> *Emaar MGF Ltd. v Aftab Singh*, 2018 SCC OnLine SC 2378.

However, this of course should not mean that the consumers do not have the power to approach the court exercising supervisory jurisdiction in case of interim reliefs, enforcement of an award, or to set aside an award as per the Arbitration Act.<sup>41</sup>

Acceptance of online arbitration in consumer disputes would bring a paradigm shift the jurisprudence surrounding consumer disputes by not only reducing the pressure on consumer courts but also by empowering people and increasing access to justice. It would place consumers in an advantageous position despite having exercised minimum bargaining power when entering into an arbitration agreement during purchase.

### **Conclusion**

The use of ODR mechanisms has become increasingly popular in recent times, particularly for cross-border consumer transactions. While the mechanisms offered by online consumer websites are useful, they come with several limitations. However, the use of online arbitration can provide a legally recognized and enforceable award without the traditional costs and time delays associated with the process. Additionally, online arbitration is considered more consumer-protective than traditional courts as it requires less legal knowledge and contributes to lower costs. By incorporating ODR mechanisms into consumer protection frameworks, countries can benefit from increased economic interactions and better integration. Overall, the use of online arbitration has the potential to be a more efficient and cost-effective means of consumer redressal.

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<sup>41</sup> The Arbitration and Conciliation Act 1996.