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Dr Rahul Nikam

Faculty of Law, Marwadi University, rahulsnikam@gmail.com

Bangkim Singh Nongthombam

Faculty of Law, Marwadi University, julie22nd@gmail.com

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AN ANALYTICAL STUDY ON LEGAL VALIDITY OF ONLINE DISPUTE RESOLUTION (ODR) SYSTEM IN INDIA AND INDONESIA

Dr. Rahul J Nikam and Dr. N. Bangkim Singh

Faculty of Law, Marwadi University, Rajkot, Gujarat, India.

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Corresponding author's e mail : rahulsnikam@gmail.com, julie22nd@gmail.com

Abstract

Advancements in technology brought many inevitable changes with more efficiency, making human life easier. The benefit of technology shall be incorporated for effective and efficient justice delivery in dispute resolution mechanisms. New development in this area is online arbitration dispute resolutions (ODR) which have been without a doubt adopted and practiced by justice delivery systems across the globe. But the question remains the same as whether justice delivery systems are equipped to cope with the same pace with the changes taking place in society and technology. Are the existing laws enough to conduct an online system as an effective mechanism to settle disputes among the parties? Keeping in context the preceding query, the present research resorted to tracing the laws relevant to the use of the ODR mechanism in India and Indonesia, as their present legal framework of arbitration/ Mediation addressing dispute resolution through the ODR mechanism lack specific laws. The present research adopts a mixed method using both primary and secondary data for tracing and comparing the ODR system in India and Indonesia. Nevertheless, it is concluded that ODR deliverance is valid and enforceable in the present legal framework of both countries; people must not have doubts about using the ODR mechanism to settle their disputes. It also demonstrates that ample scope is there in the existing laws of both countries to accommodate and enhance the overall process and deliverance of the ODR mechanism through amendments and separate guidelines. State, as well as public and private investors, sought ways to adjudicate conflicts or alleged violations of trade agreements through dispute settlement mechanisms within their legal framework alone. Evolving specific laws addressing the need and requirements will enhance the trade and confidence of both countries.

Keywords: *online dispute resolution in India, online dispute resolution in Indonesia, Information Technology Act ("IT Act"), 2008, judicial response, constitutional validity.*

I. INTRODUCTION

People in virtual business transactions are getting engaged from different locations and jurisdictions through the proliferation of the internet. This scenario can be seen through India and Indonesia's trade engagements. India exported \$4.55 billion to Indonesia in 2020. India's main exports to Indonesia are Special Purpose Ships (\$772 million), Semi-Finished Iron (\$302 million), and Frozen Bovine Meat (\$272 million). Over the last 25 years, India's exports to Indonesia have increased at an annualized rate of 7.91 percent, rising from \$678 million in 1995 to \$4.55 billion in 2020. Similarly, in 2020, Indonesia exported \$11 billion to India. Indonesia's main exports to India were coal briquettes (\$3.8 billion), palm oil (\$3.05 billion), and stearic acid (\$258 million). Indonesian exports to India have increased at an annualized rate of 12.9 percent over the last 25 years, from \$534 million in 1995 to \$11 billion in 2020. India and Indonesia did not export any of the services to each other in 2020 due to the Covid-19 Pandemic¹. In the last 20 years, India has invested nearly \$1.5 billion, but the investment that is actually from India but is routed through Singapore is around \$54 billion." The issue is how to direct Indian investments from India to Indonesia without going through the Singapore route. To overcome this scenario, India and Indonesia must also build trust in each other's capabilities to expand trade and investment². To build trust among each other, one of the areas is the laws relating to the dispute resolution mechanism, which must help both countries' investors and businessmen to get assured relief in each other country if any dispute occurs among them. This is more evident in the present Covid 19 pandemic when there are more restrictions on the physical movement of people. This consequently results into creates challenges to the traditional approach of the justice delivery system and the opening of new technological platforms. Private organizations are already started coming up with innovative techniques to resolve disputes among people online. This can be evidenced when eBay back in 1999³ brought in an online mediation process between the eBay platform and consumer complaints. Since then, this model has evolved into more sophisticated advanced variants in present days which is popularly been known as online dispute resolution (hereinafter ODR) and is used by most private organizations such as Smartsettle⁴, Cybersettle⁵ etc.

The Commission on International Trade Law, a United Nations working group, has described the ODR as a system assisted by the usage of electronic communications with the help of other communication and information technology to resolve disputes among parties⁶. In its simplest form, ODR is E-ADR (Electronic- Alternative Dispute

¹ OEC - The Observatory of Economic Complexity. 2022. *India (IND) and Indonesia (IDN) Trade*. OEC. Accessed 8 August 2022 at 01:30 PM. [https://oec.world/en/profile/bilateral-country/ind/partner/idn#:~:text=During%202020%2C%20India%20had%20a,and%20Chemical%20Products%20\(%24957M\)](https://oec.world/en/profile/bilateral-country/ind/partner/idn#:~:text=During%202020%2C%20India%20had%20a,and%20Chemical%20Products%20(%24957M).).

² ANDRIYANTO, H., 2022. *India Seeks Direct Investment Passage to Indonesia*. [online] Jakarta Globe. Accessed 8 August 2022 at 01:45 PM. <https://jakartaglobe.id/news/india-seeks-direct-investment-passage-to-indonesia>.

³ Gintarepetreikyte. 2016. "Review of ODR Platforms: eBay Resolution Center", in the *15th ODR Conference 2016*. Last accessed 07 August 2022 at 06:24 PM. <https://2016odr.wordpress.com/2016/04/14/odr-platforms-ebay-resolution-center/>.

⁴ 2022. *Smartsettle.Com*. <https://www.smartsettle.com/>. [Last accessed 07 August 2022 at 06:30 PM]

⁵ Bol, S., 2003. Ethan Katsh and Janet Rifkin, *Online Dispute Resolution, Resolving Conflicts in Cyberspace*. *Artificial Intelligence and Law*, 11(1), pp.69-75. Last accessed 07 August 2022 at 06:45 PM. <https://www.wiley.com/en-us/Online+Dispute+Resolution%3A+Resolving+Conflicts+in+Cyberspace-p-9780787956769>.

⁶ "UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW". 2017. UNCITRAL Technical Notes

Resolution involved in arbitration and mediation), in which the conduct of proceedings and documents are exchanged by way of technology over the internet.

In actuality, compared with traditional offline ADR, ODR possesses more advantages because participants are not required to be physically present in person. An asynchronous hyper-real communication mechanism is used to resolve the dispute.⁷ It implies that the parties and the arbitrator/ mediator are not required to communicate at the same time and can record their response at their leisure. As a result, technology is acting as a “fourth party” in ODR⁸. ODR offers some key benefits, such as, first, it is cost-effective as information is transmitted through a reliable video conferencing technology which reduces the cost of dispute resolution. Second, for the disputing parties, the Internet is a neutral space. Third, flexibility is available to the parties as they can hold meetings and hearings remotely using audio and video conferencing technology. Finally, by going to a website, the parties will be able to file and defend a claim and fill out forms for the arbitration/ mediation procedure online. At present, there are two types of ODR. First, the ODR that is supported by private bodies, and second, the ODR that is supported by Court Annexed. Internationally Smartsettle, Cybersettle, and the Mediation Room⁹ are private entities across the globe having their own setup of regulations, offering online mediation and resolution to disputes in commercial matters. For example, The International Council for Online Dispute Resolution (“ICODR”),¹⁰ a partnership of public and private sector organizations that use online dispute resolution service providers to resolve disagreements or conflicts. The group promotes ODR by establishing standards and best practices, as well as educating and certifying service providers. Because of the success of private ODR, most countries’ governments in various jurisdictions have decided to incorporate ODR and opening of ODR centers affiliated with their court systems. Some examples include car accidents, loan defaults, and consumer disputes, among others¹¹. Some of the prominent court-affiliated ODR centers are the New Mexico Courts ODR Centre in the USA¹², online money claim disputes¹³ in the United Kingdom¹⁴, small value disputes in the civil administrative tribunal of Canada. Against

On Online Dispute Resolution. Vienna, Austria: UNCITRAL. Last accessed 07 August 2022 at 06:50 PM. https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.

⁷ «DELHI DISPUTES RESOLUTION SOCIETY(REGD.): Online Mediation & Cases Appropriate For Mediation». 2022. *Mediation.Delhigovt.Nic.In*. Last accessed 07 August 2022 at 07:00 PM. http://mediation.delhigovt.nic.in/wps/wcm/connect/doi2_ddrs/DELHI+DISPUTES+RESOLUTION+SOCIETY/Home/Online+Mediation.

⁸ «Cybersettle: Welcome To Cybersettle». 2022. Last accessed 07 August 2022 at 10:55 PM. *Cybersettle.Uk*. <http://www.cybersettle.uk/>.

⁹ “The Mediation Room, Mediator, Uk, Company Mediator, ODR.” 2015. *Themedroomhtml5*. 2015. Last accessed 07 August 2022 at 07:05 PM <https://www.themediationroom.com/>.

¹⁰ “About ICODR | ICODR”. 2019. *Icodr.Org*. Last accessed 07 August 2022 at 07:10 PM. <https://icodr.org/sample-page/>.

¹¹ Agrawal, Akansha. 2022. “With Judiciary Embracing Technology, Time To Push Dispute Resolution Online”. *Business-Standard.Com*. Last accessed 07 August 2022 at 07:15 PM. https://www.business-standard.com/article/current-affairs/with-judiciary-embracing-technology-time-to-push-dispute-resolution-online-120032901023_1.html.

¹² “New Mexico Courts | The Judicial Branch Of New Mexico”. 2022. *Nmcourts.Gov*. Last accessed 07 August 2022 at 07:20 PM. <https://www.nmcourts.gov/ODR.aspx>.

¹³ Vermeys, Nicolas, and Karim Benyekhlef. n.d. “4 ODR and the Courts.” Last accessed 07 August 2022 at 07:25 PM. https://www.mediate.com/pdf/vermeys_benyekhlef.pdf.

¹⁴ Witt, Nicolas de. 2003. «Online International Arbitration: Nine Issues Crucial To Its Success* – Vol. 12 No. 3-4 – American Review Of International Arbitration». *Blogs2.Law.Columbia.Edu*. Last accessed 09 August 2022 at 07:15 AM. <http://blogs2.law.columbia.edu/aria/issues/12-3-4/online-international-arbitration-nine-issues-crucial-to-its-success-vol-12-no-3-4/>.

this backdrop, this article explores the following research questions; whether online Dispute resolution & relevant agreements are valid in India and Indonesia? And if so, whether existing arbitration provisions relating to the process, support the process followed in ODR or required a new one, the seat of arbitration & jurisdiction of local courts. Lastly, whether the award obtained in the ODR mechanism are enforceable in the present legal framework to see its logical conclusion in the justice delivery system of both countries. The present article discusses the ODR system in India and Indonesia in a comparative form of the present legal framework of Arbitration laws and allied supporting laws on the online arbitration process.

II. METHODS

The present research adopts a mixed method that relies on the use of legal doctrines, legal principles, and data. These include the Indian Arbitration and Conciliation Act 1996 and amended in 2015 & 2021; Information Technology Act 2002; Indian Evidence Act 1872 and Indonesian Law Number 30 of 1999 (Arbitration and Alternative Dispute Resolution); Law Number 11 of 2008 (Electronic Information and Transactions); Code of Civil Procedure Reglement op de Burgerlijke Rechtsvordering or hereinafter, “Rv”); Herziene Indonesisch Reglement (hereinafter, “HIR”) and the Rechtsreglement Buitengewesten (hereinafter, “RBg”). The present research article also utilizes journal articles, commentary of jurists and judges, and judgments of courts. Relying on the above method and sources the present research analyses and compared the aforementioned online dispute resolution of both countries.

III. RESULT AND DISCUSSION

A. Judicial response and preparedness in India and Indonesia

The Indian Supreme Court is unceasingly playing a significant role in laying down the groundwork for online dispute resolution (ODR). This is evident from the State of Maharashtra V. Praful Desai case¹⁵, where Supreme Court upheld that the witnesses’ evidence and testimony through video-conferencing as a valid mode in the court of law. In the said case Supreme Court decided that this mode of virtual reality is now the actual reality specifically in the present Covid 19 pandemic. Going with this trend the Apex Court further said that it’s not required that people sit together in the same physical space if the consultation could take place by electronic media and remote conferencing mode. Apart from this the Apex Court also noted the need to expand the application of ODR in cases such as traffic challans and cheque bouncing, which can either partly or entirely take place in online mode instead of parties’ physical presence, and recommended the solutions.

Furthermore, the Apex Court has specifically recognized the validity of online arbitration as long as it complies with the conditions outlined in Sections 4 and 5 of the Information Technology Act (“IT Act”), 2008. Followed by Section 65B of the Indian Evidence Act of 1872 has been followed by provisions of the Arbitration and Conciliation Act of 1996^{16,17}.

In the recent instances of the Supreme Court of India and sitting judges are

¹⁵ State of Maharashtra V. Praful Desai, 4 SCC 601. (2003). Supreme Court of India.

¹⁶ Shakti Bhog v Kola Shipping, S.L.P.(C) No.16109. (2007). Supreme Court of India.

¹⁷ Review of *Trimex International v Vedanta Aluminium Ltd*, 2 SCC 134 (2009). Supreme Court of India.

identifying the importance and need of ODR mechanisms to be present across the courts in India. Present Supreme Court Chief Justice N. V. Ramana¹⁸ has stated that in areas such as consumer, family disputes, business, and commercial cases ODR can be successfully implemented and disputes can be resolved. In the same line, retired Supreme Court Chief Justice Bobde reiterated that in the light of the present Covid 19 situation¹⁹, Court must take forward steps in making virtual courts to overcome the shutdown of the courts including the Apex Court²⁰. In the past, Justice Bobde also reiterated that pre-litigation mediation agreement must be made binding to gain many benefits in dispute resolution and use technology such as Artificial Intelligence in arbitration as an alternative mode and introduction of SUVAS i.e., Supreme Court Vidhik Anuvaad Software²¹ for translating judgment from English to various Indian vernacular languages. In fact, Nilekani Committee, in 2019, has recommended setting up a formal online dispute resolution system for the resolution of disputes arising out of digital payment. The said ODR system will have two modes i.e., automated and human with appeal provision. In recent times NITI Aayog (An apex public body think tank to foster investment and participation in the economic policy-making process by the State) organized a meeting on catalyzing online dispute resolution in India with all key stakeholders to ensure collaborative efforts are put into scaling up online dispute resolution in India by pointing out the great potential of ODR in resolving small and medium values disputes. The above scenario is a clear indicator that the judiciary is simultaneously moving toward integrating technology in the resolution of a dispute and relying on ODR as one of the Alternate Dispute Resolution mechanisms in India.

Indonesian judiciary is also pushing similar trends in Indonesia. This can be seen through civil court practice in 2019 introduced an e-court system through SC Regulation No. 1/2019 and SC decree No. 129/2019²² wherein parties are partially allowed to conduct hearings via electronic means. Under this system, parties are allowed to submit pleadings electronically on mutually predetermined dates. On certain hearing agendas like 1st hearing and submission of court documents, parties through mutual agreement attend it through teleconference hearings instead of physical attending. If the judges' panel agrees, then verification and cross-examination of evidence and witnesses can also take place by teleconference. To eliminate the requirement of the physical presence of parties²³ / witnesses²⁴ in litigation under Indonesian general rules of civil procedure, i.e. HIR, RBg, and Rv, the Supreme Court recently issued regulations that allow court proceedings to be conducted remotely. Supreme Court Regulations

¹⁸ "14Th Meeting Of Supreme Court Chief Justices Of The SCO Member States". 2019. In *14Th Meeting Of Supreme Court Chief Justices Of The SCO Member States*, <http://eng.sectscsco.org/news/20190625/556607.html>. Shanghai (China): Shanghai Cooperation Organization. Last accessed 07 August 2022 at 07:24 PM. <http://eng.sectscsco.org/news/20190625/556607.html>.

¹⁹ Saigal, Sonam. 2020. «Pandemic Affected Access To Justice: Chief Justice Of India.». *The Hindu*, 2020. Last accessed 09 August 2022 at 07:25 AM. <https://www.thehindu.com/news/national/cji-inaugurates-e-resource-centre-virtual-court-in-nagpur/article32992383.ece>.

²⁰ Kinhal, Deepika. 2020. "Every Crisis Presents An Opportunity – It's Time For India To Ramp Up Its ODR Capabilities". *Livewlaw.In*. Last accessed 07 August 2022 at 07:35 PM. <https://www.livewlaw.in/columns/every-crisis-presents-an-opportunity-its-time-for-india-to-ramp-up-its-odr-capabilities-154196>.

²¹ "The NITI Aayog Expert Committee On ODR "Designing The Future Of Dispute Resolution: The ODR Policy Plan For India Draft For Discussion". 2020. New Delhi: Niti Aayog. Last accessed 07 August 2022 at 07:40 PM. <https://niti.gov.in/sites/default/files/2020-10/Draft-ODR-Report-NITI-Aayog-Committee.pdf>.

²² Law, Conventus. 2019. "Indonesia - The New Regulation On E-Litigation. - Conventus Law". *Conventus Law*. last accessed 07 August 2022 at 07:45 PM. <https://www.conventuslaw.com/report/indonesia-the-new-regulation-on-e-litigation/>.

²³ Art. 130, Para 1, HIR

²⁴ Articles 140, 141 of HIR and Articles 166 and 167 of RBg

No. 1/2016 on Court-annexed Mediation Procedure that the mandatory mediation proceedings may be conducted remotely which includes remote audio and visual communication by parties in arbitration procedure and will have the same effect as those conducted physical²⁵. Moreover, the Supreme Court Regulations No. 1/2019 on Electronic Administration of Disputes and Court Hearings establishes a critical legal framework for remotely conducted court proceedings²⁶. This satisfies a fundamental principle that must be followed in court proceedings²⁷. The current new regulations have established a framework for distant hearings, which allows parties to deviate from traditional court practices of physical presence if they agree to waive it. A similar trend can be seen through «SC Circular Letter No. 1/2020» which empowers ‘the examining panel of judges’ discretion to minimize physical meetings in the present Covid 19 pandemic and allows civil case hearings to be held by teleconference. Additionally, in criminal cases, the court in criminal proceedings is fully authorized to use the teleconference under a Cooperation Agreement signed between the Ministry of Human Rights, Supreme Court, and the Public Attorney in 2020. Finally, Law 30/1999 only allows witnesses to be summoned to appear physically on the order of an arbitrator or at the request of the parties under Article 49(1), without referencing any mechanism to compel such order or request. This undoubtedly prevents the right to physically hear witnesses under Law 30/1999, as any contrary conclusion would result in an absurd result in which a party holds an inherently unenforceable right under Indonesian *lex arbitri*.

The Indonesian National Board of Arbitration i.e., Badan Arbitrase Nasional Indonesia (BANI) issued a Decree on 28th May 2020 paving the way for Electronic Hearing to be conducted through audio or video conference in upcoming or ongoing arbitration proceedings under BANI²⁸. This Decree however has put conditions that in the emergencies like natural/non-natural disasters occurrence or in a situation where parties are not able to present in person at the hearing before arbitrators.

Other Indonesian Quasi-Judicial Bodies such as Business Competition Supervisory Commission (KPPU), and the National Agency for Consumer Protection (“BPKN”) among others began implementing electronic hearings by the medium of teleconferences during the pandemic situation. KPPU issued Regulation on 6th April 2020 for the handling of electronic hearings which enables reports, pieces of evidence, and other documents to be submitted through a designated electronic system as well as conducting hearings through teleconferencing. The National Agency for Consumer Protection (BPKN) is conducting online procedures for consumer cases for addressing breach of contract grievances due to the situation surrounding the Covid-19 outbreak.

²⁵ Article 5, Para 3 of Supreme Court Regulation No. 1/2016

²⁶ Arts. 19-28 SC Regulations 1/2019.

²⁷ Art.2 Para 4, Law 48/2009 provides that the judiciary must be conducted in a straightforward, expedient, and inexpensive manner; Art. 24 Para 1 SC Regulations 1/2019 provides that: “Upon an agreement by the parties, the evidentiary hearing on the examination of witnesses and/or expert witnesses can be carried out remotely through audio-visual communication media which allows all parties to participate in the hearing”; Art 26 and Art 27 of SC Regulations 1/2019 Electronic hearing conducted [...] on public internet networks by law have fulfilled the principle and requirement that hearings must be open to the public in accordance with the statutory provisions”.

²⁸ BANI, Decree No. 20.015/V/SK-BANI/HU on the Rules and Procedures for Electronic arbitration (28 May 2020). Last accessed 07 August 2022 at 07:50 PM]. <https://www.mondaq.com/arbitration-dispute-resolution/948320/bani-moves-arbitration-online>.

B. Analysis of present laws and implementation of ODR in India and Indonesia

1. Online Arbitration Phases and Interpretation of Present Legal Framework

Both the countries are using arbitration, consultation, negotiation, mediation, consolidation, and expert assessment for dispute resolution in the existing laws. Arbitration award importance rests on its legal effect. If there is no recognition and enforcement then there is no legal effect to online arbitration awards. This status of an online award poses a challenge to online arbitration, as there are no executorial powers with arbitrators to recognize the award and enforcement of the award. As recognition and enforcement are performed by local courts having jurisdiction over it as per their governing laws. Let us understand this proposition with the help of the present legal framework of India and Indonesia in table 1 below which reveals that Arbitration and IT laws of both countries support online arbitration.

Table 1.
Online Arbitration Phases and Interpretation of Present Legal Framework

Online Arbitration Phases	Online Methods	Indonesia		India		
		Arbitration Law	IT Law	Arbitration Law	IT Law	Evidence Act
Agreement	Electronic mail & various online communication devices, electronic signatures	Art. 4(3)	Art. 11	S. 7 (4) (b)	Ss. 4, 5, 10A, and 11 to 15	Ss. 65A and 65B
Proceeding	Video conferences	Art. 31 (1)		S. 19		
Awards	Online awards, digital signatures	Art. 54	Art. 11	S. 31		
Recognition and Enforcement		Offline (Article 59 and 67)		Offline (Ss. 35, 36, and 47)	S. 15	

Source: Data analyzed by the author (Compiled).

2. Whether online Dispute resolution & related agreements are legally valid in India and Indonesia?

Before answering the above question, we need to understand the existing legislations of India and Indonesia relating to Arbitration and Mediation. Indian legal framework of arbitration is based on UNCITRAL model laws and governed by the Arbitration and Conciliation Act (hereinafter "ACA") 1996 followed by the amendment in 2015 and 2021. The said Act facilitates a framework wherein arbitration is conducted by self-governing rules of arbitration institutions or be ad hoc with the parties themselves deciding proceedings of the arbitration. Section 7 of the ACA 1996 mandates that there must be an arbitration clause while entering into a contract by parties to resolve the disputes through arbitration or there can be a separate contract on it. Other key

points of Section 7 are that the seat and venue of the arbitration proceedings must be specified in the arbitration clause or separate arbitration contract between the parties. Section 7 (4) (b) states that parties can enter into an arbitration agreement by exchanging letters, e-telex, telegrams, or other forms of telecommunication. Other means of telecommunication include communication through electronic means under Amendment Act 2015. Section 19 also states that the parties are free to determine the regulations of the arbitration process to be accompanied by the arbitral tribunal in conducting its proceedings. As aforementioned both sections are having wide scope for incorporation of ODR, if parties are interested to adhere and follow it in the arbitration proceedings. The aforementioned present framework of legislation would be used to implement ODR in practice. Before we move on to understand the Arbitration law in Indonesia, we need to know the right of the parties to a physical hearing in the Indonesian -lex Arbitri.

The Right of the Parties to a Physical Hearing in the Indonesian-Lex Arbitri²⁹

The right to a physical hearing is not expressly stated in (Undang-Undang Republik Indonesia Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa) know as Indonesian Arbitration Law (IAL) (Law no. 30 of 1999). The provisions and Explanatory Note to Law 30/1999 do not define what constitutes an appearance at an arbitral hearing, i.e., oral and exchange of opinions, or what form it shall take³⁰. As a result, it is questionable whether Article 40, paragraph 2 of Law 30/1999 establishes the right to a physical hearing in arbitration. This conclusion is supported by numerous provisions of Law 30/1999 that contradict the existence of such a right. Prior to the Law of 30/1999, arbitration provisions were borrowed from Dutch laws known as the lex arbitri, i.e., Ss. 615-651 of the Code of Civil Procedure Reglement op de Burgerlijke Rechtsvordering or hereinafter, "Rv"³¹) applicable to Europeans in Indonesia, Herziene Indonesisch Reglement (hereinafter, "HIR") and the Rechtsreglement Buitengewesten (hereinafter, "RBg") applicable to native Indonesians. Article 377 of the HIR and Article 705 of the RBg, as well as the enactment year of the Rv in 1847, demonstrate that there is no express provision that treats a physical hearing as a right of the parties. Notwithstanding, Article 37, Paragraph 3 of Law 30/1999 suggests that the examination of witnesses before an arbitral tribunal shall be carried out in pursuance of the provisions of the code of civil procedure, namely Rv, HIR, and RBg. Eventually, neither Law 30/99 nor the Old Rv expressly provide for the right to a physical hearing in arbitration/mediation. This right to a physical hearing in arbitral proceedings cannot be inferred or excluded by interpreting other procedural rules. This is evidenced by provisions in Article 36 and Article 46 paragraph 2 of Law 30/1999.³² Arbitrators have broad discretion to hear witness testimony or hold meetings in different locations if necessary.³³

²⁹ Pakpahan, D., 2022. *ICCA Project: Does a Right to a Physical Hearing Exist in International Arbitration?*. Last accessed 07 August 2022 at 07:55 PM. https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Indonesia-Right-to-a-Physical-Hearing-Report.pdf.

³⁰ Art. 40, paragraph 2, Law 30/1999 provides that: "At the same time [upon receipt of the response from the Respondent], the arbitrator or chair of the arbitral tribunal shall order the parties or their representatives to appear at an arbitral hearing fixed for no more than fourteen (14) days from the issuance of the order".

³¹ Art. 615 of the Rv reads: "Any person may submit to arbitration disputes regarding rights the disposition of which are within such person's control".

³² Each party in the dispute has been given opportunities to explain their positions in writing and present necessary evidence for supporting their position.

³³ Article 37, Para 2 of Law 30/1999

Furthermore, Article 31 of Law 30/1999 states that parties have the freedom to include the procedure of an arbitral tribunal in their agreement as long as it is not inconsistent with Law 30/1999. If the parties do not specify any specific procedural rules, the arbitral tribunal shall conduct the arbitration procedure as per and within the limits of Law 30/1999.

Arbitration and mediation is being governed by Law no. 30 of 1999. The scope of the said law is to deal with the arbitration, mediation, conciliation, consultation, expert assessment, and negotiation in eleven chapters comprising 82 Articles overall.

According to Article 1 (1), arbitration is a method of dispute resolution in civil disputes outside of the general courts per the arbitration contract that is entered into by the parties to the conflict. The Article is silent on the type of method that can be used in conducting the arbitration processes. It can be interpreted broadly to include both traditional and online processes aided by technology. Since online arbitration includes the internet, emails, online conference, etc. Another important Article is 4 (3) which states that there must be a written agreement between the parties with their signature to resolve disputes through arbitration. The aforementioned understanding of both countries' main legislations clearly shows the scope wherein Online processes in alternative dispute mechanisms can be accommodated in existing provisions of the arbitration legislations.

Furthermore, the question of entering into an online arbitration agreement by parties is also required to answer. The appropriate response can be found in Article 4(3), which states that parties can enter into a dispute settlement agreement through other forms of communication, including the exchange of letters, the sending of telexes, telegrams, faxes, emails, and so on. The only condition is that parties must receive communication accompanied by a record of receipt. Thus, the interpretation of this Article shows that it is permissible where parties through emails in written form to enter into an arbitration agreement and are treated as evidence in this regard. The answer to the requirement of a signature can be found in Article 11 of Law No. 11 of 2008 Concerning Electronic Information and Transactions. Article 11 states that when a digital signature meets the requirements listed below, it has a legal bearing and legal force. Signatories or signers must be associated with electronic signature creation data and have power at the time of electronic signing. Any alteration after signing must be knowable and has followed the method of identification to identify the signatories and indicates consent to the electronic information. This is further supported by the amended law in 2016, which states that electronic information and documents can be used as evidence under Articles 5(1) and (2). As the Indonesian government is increasingly going online itself and the Indonesian court are known for their preferred choice of hard copy documents as evidence, the amendment law simply re-emphasizing the concept of accepting e-evidence, and contract are binding and can be used as evidence in court as an alternative to the hard copy documentary evidence. This simply ensures that Indonesian courts are accepting e-evidence and contracts in their proceedings. The above interpretation of provisions makes it clear that an electronic signature is at par with the manual signature and enjoys the same legal force and effect. This strengthens the case of online dispute resolution where it can be described that parties can come to the term of using technology to settle their dispute in arbitration by adopting an online arbitration agreement.

In the Indian scenario, the appropriate response can be found in the Indian Evidence Act of 1872 and the Information Technology Act of 2000. Under the Indian Evidence Act, two sections namely, 65A and 65B enable sharing of virtual documents and

virtual hearings. Both sections i.e., 65A and 65B are complete codes in themselves as far as evidence relating to and admissibility of electronic records during the course of a court trial. To prove the originality of documents, if the contents of documents fulfill the requisites of Section 65B then such electronic records shall be treated as primary evidence under section 65A. If a party wishes to use computer output document evidence as primary evidence instead of secondary evidence, he or she must submit a certificate declaring that all of the requirements listed in section 65B (4) for a computer output/document have been met. Thus, throughout the trial, a computer output document shall be considered as document/primary evidence under Indian Evidence Law. The Supreme Court recently affirmed the production of a certificate before having to submit digital evidence under 65B (4) in *Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal*³⁴.

Similarly, Sections 4, 5, 10A, and 11 to 15 of the Information Technology Act provide validity to electronic contracts. Under the chapter title ELECTRONIC GOVERNANCE, Section 4 states that if the information is required in writing, typewritten, or printed form under any law, and it is provided in an electronic form that is accessible for further reference. Then it is deemed to fulfilled all requisites and such electronic records are legally recognized. Section 5 states that in any law, if details or any other matter is validated by affixing the signature or signed or bears any person's signature and is authenticated by adhering to the rules of digital signature affixed, it is presumed to have been satisfied and therefore is legally recognized.

Most pertinently, if a contracting party communicates, accepts, or withdraws proposals in digital form or through digital records, such a contract creation through digital communication is a legal contract and enforceable as an electronic contract under Section 10A. Under the chapter title "Attribution, Acknowledgment, and Dispatch of Electronic Records", Section 11 asserts that an electronic document shall be credited to the originator if it has been sent by him or a person appointed by him, or if it is instantaneously sent on his behalf through a programmable information system. If the originator has not mentioned any clear method for electronic record receipt acknowledgment by the addressee, then he can use any communication mode including automation mode which sufficiently indicates that he has received the electronic record from the originator as per Section 12. If the originator specifies that the digital record shall only be conclusive if a specific requirement, such as receipt of an acknowledgment, a specific time, or an agreement within a reasonable period, is met, therefore the intended recipient must meet that particular requirement. Otherwise, the electronic record shall be deemed to have been not received or it has been never sent by the originator and not banding on him.

Section 13 states that dispatch of an electronic records time and place can be determined by parties mutually and it will be treated as dispatched once it is out of the control of the originator and enters a computer resource of the addressee. If the parties' consent on the time and place of delivery is of an electronic record, it takes place when it enters a computer resource that is no longer under the control of the originator. When there is no reference of the particular time and assigned computer resource, the time of receipt shall be considered when the online record enters at the designated computer resource or when the said record is tracked down by the

³⁴ *Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal*, Civil Appeal No. 20825-20826 of 2017. The Supreme Court of India. Last accessed 07 August 2022 at 08:00 PM. https://main.sci.gov.in/supremecourt/2017/39058/39058_2017_34_1501_22897_Judgement_14-Jul-2020.pdf.

addressee. Except as otherwise agreed between both the originator and addressee, it'll be assumed that a digital record is dispatched and received at the corporate headquarters, regardless of additional locations. In absence of a place of business, the addressee's residence shall be treated place of business, and in the case of companies its usual place of residence as per registration record.

Section 14 states that if a security treatment is administered in an electronic record, the record is considered secure until the verification time. Section 15 discusses digital signatures, which are considered secure if they are under the unique control of the signatory and are based on the signatory's creation data at the time of appending them. If parties are agreed to follow a security procedure where it can be verified the identification of the subscriber, unique affixation. The digital signature is then considered secure. If tampered with, then the digital signature is invalidated. The aforementioned analysis of the present legal framework has ample scope to incorporate and implement ODR in practice. These existing provisions also support the virtual/ online hearing and sharing of documents having a legal backup in dispute resolutions. Similarly, the validity of digital signatures in online contracts is also recognized by the present IT Act. This was facilitated by the adoption of the UNCITRAL Model Law on E-commerce in 1996 and the Model Law on Digital Signatures in 2001.

3. Whether the existing arbitration process supports the process followed in ODR or required a new one, the seat of arbitration & jurisdiction of local courts?

As mentioned in an earlier discussion both countries' main legislations do not have any problem with the process that is going to be followed by parties in ODR so far these processes are aligned with the existing legal framework and in compliance with it. The issue of the seat of arbitration and the jurisdiction of local courts is significant because it is a critical step in determining the nationality and legality of the award, and the recognition of the award by courts or the setting aside of the award is a matter of concern in both countries. It is important that, prior to the online hearings and proceedings, parties and arbitrators are required to decide the seat of arbitration, and the arbitrators are required to mention the seat of arbitration in its award. When the parties are silent on the seat of arbitration, the question becomes how to determine the seat of arbitration. This question is answered by Article 31(3) of Indonesian Law No.30 of 1999. If parties have not finalized the timeframe and venue as per para (1) then it will be finalized by an arbitrator or arbitration panel itself. Thus, as per the aforementioned interpretation, there shall not be any problem in determining the seat of arbitration in online arbitration. Moreover, Law No. 30 of 1999 does not prohibit proceedings and hearings of the online arbitration so far, they are in compliance with the principle of equality, due process, and transparency³⁵. So, the online arbitration award is having legal effects and recognition under Law No. 30 of 1999. India is a signatory to two international treaties: the New York Convention of 1958 and the Geneva Convention of 1927³⁶. Indian Arbitration and Conciliation Act 1996 (ACA) is very much clear about the seat of the arbitration & local courts' jurisdiction for setting aside the award. Part I is applicable to the domestic awards if the seat is within India and Part II is applying to foreign awards where the seat is outside India. ACA 1996 and the Code of Civil Procedure 1908 (CPC) are the two legislations that govern the

³⁵ Art. 31, Para 1 & 2, Law 30/1999; Art. 34 Para 1 & 2, Law 30/1999.

³⁶ *United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards (New York, 10 June 1958)*. 2022. New York: United Nations.

enforcement and execution of decrees procedure of Arbitral awards. Domestic and international awards, along with consent awards, have been enforced in the same way that Indian court decrees are. Below mentioned some important steps must be taken in order for awards and decrees to be executed and enforced successfully. These crucial steps are the opposite party has received order/judgment/ attachment/ notice/arrest/appointment of a receiver to avoid objections raised at a later stage by the opposite party because the natural justice principle is evenly applicable in execution proceedings before courts. For the domestic award, the award holder is required to wait for 3 months from the date of receipt of the award before proceeding further with execution and enforcement. The purpose of this interval is to enable the losing party, through a separate application, to challenge the award and seek a stay order on execution of the award under S. 34 of the Act. Once this stage is over then enforceability of award cannot be further challenged and will be proceeded by competent commercial court/ High Court commercial division having jurisdiction as per subject matter, resident of losing party or at the place of business will be executed and enforced. Likewise, foreign awards are enforceable in India if the award's seat is announced by the signatory country to the two aforementioned conventions. The foreign award is required to follow a two-stage process for enforcement i.e., filing an execution petition for Court determination of the adherence to the requirement of the ACD Act. If the award is found to meet all of the requirements of the Act, it will be enforced as a decree of a competent court. Other requirements are the same as those stated in the domestic award in order to avoid any objections from the opposing party before the court. Section 47 sets out the requirements for enforcing a foreign award in an Indian court i.e., i. Submission of original authenticated award copy must be submitted ii. Original certified agreement of parties, and iii. Proof of evidence showing that the award is foreign may be provided at the time of application for enforcement³⁷.

4. Is the award obtained in the ODR mechanism enforceable in the present legal framework to see its logical conclusion in the justice delivery system of both countries?

As online dispute resolution (ODR) proceedings are taken place online and award is obtained online this possesses a pertinent question of enforceability of such award in the local courts. Arbitrators do not have executory power to enforce arbitration awards as a general rule. As a result, it is the responsibility of the concerned State judiciary to follow the laws of the land and the processes that will govern the process of award recognition and enforcement. So is the case of enforcement of online arbitration award.

If the parties' agreement is silent on the manner in which arbitration will be heard, then Article 31 (2) of the Law No. 30/1999 applies, and also the provisions of the Law No. 30/1999 apply to the arbitral tribunal, leaving no room to determine the procedure or otherwise require the arbitrator's consent. As a result, various provisions in Law 30/1999, such as Article 28³⁸ and Article 37³⁹, have mandatory character, limiting the parties' autonomy. As a result, subsequent agreements to the contrary will not bind the arbitrators or have an adverse impact on the arbitral tribunal's award. Furthermore,

³⁷ PEC Limited v. Austbulk Shipping SDN BHD, Civil Appeal No. 4834 of 2007. 2018. Supreme Court of India.

³⁸ The usage of Bahasa Indonesia is the default language of the arbitration and the usage of any other language is with the approval of arbitrators.

³⁹ Arbitrators' freedom to select any place to hear witness testimony/meeting.

due to a failure to timely object to a procedural breach/an agreement to have physical hearings, parties' right to challenge an award in Indonesian courts will be barred⁴⁰.

In this regard, Article 70 of the Law No. 30/1999 provides limited grounds for setting aside an award in contrast to Article 643 of Rv, which provides ten grounds. In practice, the ambiguity surrounding Article 70 of Law No. 30/1999, whether the grounds listed are exhaustive or inclusive, caused constant confusion⁴¹. As a result, several courts'⁴² handlings of setting aside applications have been inconsistent, as they have interpreted Article 70 as exhaustive and used the phrase among others in the explanatory note, opening the floodgates for a slew of setting aside grounds that go beyond the letter of the law.

As per Law No. 30 of 1999, there are two types of awards i.e., National arbitration awards and international arbitration awards. If Indonesia is the seat of arbitration, then it will be categorized as Domestic arbitration awards, and if the seat is a foreign arbitrator/arbitration institution whose jurisdiction is outside Indonesia then it will be treated as international awards as per Article 1(9) of the Law No. 30 of 1999. Thus, it is the seat that determines the enforceability as mentioned earlier. As the implementing legislation for the New York Convention in Indonesia, the Supreme Court Regulations No. 1 of 1990⁴³ on the Procedure of Enforcement of Foreign Arbitral Awards govern international awards along with Articles 65-69 of Law No. 30/1999. It is also highly improbable that Indonesian courts will refuse enforcement under New York Convention Articles V(1)(b) and V(1)(d).⁴⁴

Article 59 (1) of Law No. 30/1999 will also be applicable to the enforcement of the award by online arbitration. It is also required that true certified copies of the award be registered by the arbitrator/his proxy and submitted to the Clerk of the District Court of Jakarta within 30 days from the date of the award. Failing of this will render the arbitration award unenforceable by virtue of Article 59(4) of the said Act. The above analysis shows that except for the last phase i.e., enforcement of arbitration awards is going to be implemented in traditional ways in the form of printing awards signed by an arbitrator. All other phases can be conducted through an online arbitration process under Law No. 30/1999.

Indian ACA 1996, clearly laid down the conditions for enforcement of domestic and foreign arbitral awards. Section 48 states that awards could be refused, and Section 34 states that awards could be set aside. Both the sections lay down the following conditions; if proved, then the award may be refused or may be set aside. Parties were incapacitated, there was a failure to provide notice, the appointment of arbitrators/arbitration proceedings were unclear/undecided, or one of the parties was unable to present his case. The award is ultra vires to the agreement, or the scope of the decisions exceeds the authority of the arbitration, or the procedure is not in accordance with

⁴⁰ Gatot Soemartono and John Lumbantobing, "Indonesia" in *The UNCITRAL Model Law and Asian Arbitration Laws: Implementation and Comparisons* Gary F. BELL, ed., (Cambridge University Press 2018) p. 300 at p. 323.

⁴¹ Noah Rubins, "The Enforcement and Annulment of International Arbitration Awards in *Inter-American University International Law Review* Vol.20 (2005), p. 359.

⁴² *E.D. & F. Man (Sugar) v. Yani Haryanto*, Central Jakarta District Court, Judgment No. 736/Pdt/G/VI/1988/PN. Jkt.Pst; *Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karaha Bodas Co. LLC.*, Central Jakarta District Court, Judgment No. 86/Pdt.G/2000/PN.Jkt.Pst; *Bankers Trust International v. PT Mayora Indah*, South Jakarta District Court, Judgment No. 454/PDT.G/1999/PN.Jak.Sel.

⁴³ Article 3 of Supreme Court Regulations 1/1990, specifies several requirements for international award enforcement rather than grounds for refusing enforcement.

⁴⁴ Fifi Junita, "Judicial Review of International Arbitral Awards on the Public Policy Exception in Indonesia", *Journal of International Arbitration*, Vol.29 (2012) p. 405. <https://doi.org/10.54648/joia2012027>.

the laws of the country where it occurred. If a foreign competent authority hands over an award that has yet to become binding or has been suspended or set aside under the law of the country where it has been made. The subject matter of the award would be unenforceable if it violated public policy or was not amenable to resolution through arbitration in India. Apart from the above legislations, there is another piece of legislation called The Indian Stamp Act 1899 and the Registration Act, 1908. If the obligation of stamping and registering an award/document is not met, the issue may be brought up at the stage of enforcement by another party underneath the ACA 1996. Both these legislation talks about the stamp duties and registration of domestic awards for admissible and validity of awards in India. The Stamp Act 1899 provides specific stamp duties for arbitral awards and Section 35 states that unstamped or insufficiently stamped is inadmissible for any purpose under Section 35. These issues can be resolved by making the payment with a penalty. The penalties would differ from state to state depending on where the award was made and validated. If the award affects immovable property, it should be registered in compliance with Section 17 (1) (e) of the Registration Act of 1908. The Supreme Court made it clear in the case of *M. Anasuya Devi and Anr. v. Manik Reddy and Ors*⁴⁵ that it is within the purview of the CPC and Section 47 deals with the precondition of stamping of awards and registration rather than Section 34 of the ACA 1996. Stamp duty is not applicable to foreign awards, according to Supreme Court decisions⁴⁶ and various High Courts⁴⁷ Judicial decisions^{48,49}. The Supreme Court has made clear that award enforcement is governed by the principle of asset location and the concerned court having jurisdiction in that location⁵⁰, as per the Commercial Courts Act 2015, would have jurisdiction in award execution proceedings⁵¹. In the domestic award, whether it has been awarded by India seated arbitration, i.e., international commercial arbitration, or not, the High Court commercial division in which the opposite party's assets are located will have jurisdiction for applications for enforcement of such awards where money is the subject matter. For any other aspect of award enforcement, the principal Civil Court of original jurisdiction in a district or the commercial division of a High Court in which the opposing parties live and work on business/personally work for gain shall have jurisdiction. When it comes to foreign award enforcement, if the issue is money, the commercial division of any High Court will have jurisdiction over it, regardless of where the opposite party's assets are located. The aforementioned court jurisdiction shall have jurisdiction over any other subject matter as if the subject matter of the award were a subject matter of a suit. As the arbitral award is deemed as decrees for enforcement so Limitation Act 1963 will be automatically applied and the limitation

⁴⁵ *M. Anasuya Devi and Anr. v. Manik Reddy and Ors*, 8 SCC 565. (2003). [2003] SCC 565. (Supreme Court of India), pp.1-2.

⁴⁶ *M/S. Shri Ram EPC Limited v Rioglass Solar SA*, SCC Online 147. (2018). [2012] SCC 552 (Supreme Court of India).

⁴⁷ Review of *Vitol S.A v. Bhatia International Limited*, SCC OnLine Bom 1058. (2014). Supreme Court of India.

⁴⁸ *Narayan Trading Co. v. Abcom Trading Pvt. Ltd*, SCC OnLine MP 8645. (2012) [2014] SCC OnLine MP SCC OnLine MP 864 (Madhya Pradesh High Court).

⁴⁹ *Naval Gent Maritime Ltd v Shivnath Rai Harnarain (I) Ltd*, 174 DLT 391. [2009] DLT 174 (2009) DLT 391 (Delhi High Court)

⁵⁰ *Sundaram Finance Ltd. v. Abdul Samad and Anr*, 3 SCC 622. (2018). Supreme Court of India.

⁵¹ *Commercial Courts, Commercial Division and Commercial Appellate Division Of Commercial Courts, Commercial Division and Commercial Appellate Division Of High Courts Act 2015*. 2018. Vol. 28. New Delhi: Ministry Of Law And Justice.

period for domestic⁵² and foreign awards⁵³ is twelve years.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusion

The aforementioned comparative analysis of both countries' laws on ODR shows that there is ample scope of interpretation of present provisions of the arbitration/mediation legislations read with information technology laws of both countries to cover traditional as well as online arbitration. As stated in Article 4(3) of Law No. 30/1999 and Section 7 of Indian ACA 1996, the issue of entering into an online agreement for online resolution through the use of emails or any other form of communication is resolved. The validity and legal enforcement of digital signature/ documents under Article 11 of Law No. 11/2008 and Indian Information and Technology Act (amended) 2016 Ss. 4, 5, 10A, and 11 to 15 provide validity to electronic contracts which allows parties to enter into an online agreement through an exchange of any online mode and the validity of the digital signature. Both countries' aforementioned legislations do not have any provisions which prohibit ODR proceedings and hearings as long as it is adhering to the due process, transparency, and principle of equality with the existing laws. On the enforceability of the ODR awards is concerned, it shall not be a problem. As ODR awards can be printed and signed by the arbitrators/mediators and submitted to the Registrar of the District Court of Central Jakarta in Indonesia. Similarly, in India, if the ODR award is stamped and registered can be enforced under the Commercial Courts Act 2015 by respective courts.

B. Recommendation

Furthermore, to strengthen the above propositions it is suggested that Indonesian and Indian arbitration/mediation laws should be amended by incorporating the common need for the enhancement of trade and confidence of both countries. The amendments should include arbitration/mediation proceedings that are entirely or partially administered through the use of information and communications technologies or any online mode maintaining the interest of both parties. There may be separate regulations drafted to put things in a more detailed manner while using ODR in ADR. Overall, ODR in Indonesia and India shall be made in such a way that it can be utilized by people for various platforms as the laws support the usage of ODR along with amendments in legislation to clear the doubts and boosting of this new way of dispute resolution mechanism.

⁵² *M/s Umesh Goel v. Himachal Pradesh Cooperative Group Housing Society*, 11 SCC 313. [2016] SCC 313 (Supreme Court of India).

⁵³ *M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd*, (6) SCC 356. [2001] SCC 356 (Supreme Court of India).

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Art. 130, Para 1, HIR

Art. 31, Para 1 & 2, Law 30/1999; Art. 34 Para 1 & 2, Law 30/1999.

Art. 40, paragraph 2, Law 30/1999 provides that: "At the same time [upon receipt of the response from the Respondent], the arbitrator or chair of the arbitral tribunal shall order the parties or their representatives to appear at an arbitral hearing fixed for no more than fourteen (14) days from the issuance of the order".

Art. 615 of the Rv reads: "Any person may submit to arbitration disputes regarding rights the disposition of which are within such person's control".

Article 3 of Supreme Court Regulations 1/1990, specifies several requirements for international award enforcement rather than grounds for refusing enforcement.

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