

The Evidentiary Dilemma: Section 65B and the Admissibility of Electronic Evidence in Arbitration

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Introduction

The widespread use of digital documents as a form of evidence has become crucial in substantiating/establishing the contentions raised in arbitration and commercial proceedings. The admissibility of such electronic evidence under Indian Law is subject to Section 65B of the Indian Evidence Act (now [Section 63](#) of Bhartiya Sakshya Adhinyam).

However, [Section 1](#) of the Evidence Act [“**IEA**”] and [Bharatiya Sakshya Adhinyam, 2023](#) expressly excludes arbitral proceedings from its scope, and [Section 19\(1\)](#) of the Arbitration and Conciliation Act [“**A&C Act**”] concurrently outlines the non-binding nature of the Indian Evidence Act on Arbitral Tribunals. In *stricto sensu*, the admissibility of evidence in arbitration proceedings is disassociated from the procedures followed in courts.

Paradoxically, a prevailing issue involves instances where some arbitral tribunals exclude electronic evidence due to them lacking the certificate required under [Section 65B\(4\)](#) of the Indian Evidence Act. Although the statutory provisions

indicate otherwise, such a tendency reflects an ‘*informal procedural borrowing*’ by tribunals, which leads to an ‘*evidentiary dilemma*’ as parties expect arbitration to be more flexible, yet arbitrators often default to courtroom formalism to avoid challenges.

The Judicial Confusion

Strict application of Section 65B in arbitration

The growing tendency of tribunals to enforce section 65B of IEA, which mandates a certificate by the in-charge of the device for the e-record to be admissible as secondary evidence when the original device is not produced. Without this certificate, such evidence is generally inadmissible, as the Supreme Court upheld in [Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal](#), reaffirming [Anvar P.V. v. P.K. Basheer](#) [¶59]. This court-like rigor in Section 65B has led to the inadmissibility of electronic evidence (emails, bank statements, etc.), in arbitration proceedings due to technical non-compliance.

In [Millennium School v. Pawan Dawar](#), the tribunal rejected crucial emails by parents of students alleging deficiency in transportation services led by the petitioner on the sole ground that the certificate under Section 65B(4) of IEA did not conform to the statutory requirements. This was despite the petitioner providing a certificate in support of the said e-mails, which was duly exhibited and marked, and to which the tribunal did not object at the time of production yet later deemed it to be “defective”. The Delhi High Court held that a tribunal cannot reject evidence on 65B grounds, and doing so in Millennium was “manifestly erroneous” when the emails were already on record [¶44].

Earlier, in [Aez Infratech \(P\) Ltd. v. Snowtemp Engineering Co. Ltd.](#), the Delhi High Court endorsed the tribunal’s reasoning in rejecting the statement of accounts filed by the claimant, and the rejection was partly due to the absence of a Section 65B certificate [¶10]. Furthermore, in [Indraprastha Gas Limited v.](#)

Pawan Casting, the Delhi High Court upheld the Tribunal's finding of rejecting photographs and video recordings submitted by the claimant, on one of the ground that the claimant had not filed any affidavit in terms of Section 65B [¶29].

Similarly, in **M/S Scholastic Pvt. Ltd. & Anr. v. Smt. Kanta Batra**, a lease deed dispute led an arbitrator to award damages, partly based on the lessor's income tax returns and bank statements, proved through a Chartered Accountant. However, the commercial court set aside the award, holding these documents inadmissible for lack of Section 65B certificate. On appeal, the Delhi High court restored the award holding that Section 1 of IEA states that it does not apply to "*proceedings before an arbitrator*" [¶24]. Furthermore, in **M/S Jop International Limited v. M/S Multifold Group Contractor**, the tribunal again rejected the e-mails relied on by the respondent for payment of construction work, due to lack of Section 65B affidavit. On challenge, under **Section 34** of A&C Act, the commercial court set aside part of the award and allowed the claims, effectively re-evaluating tribunal's finding. The Delhi high court intervened, clarifying that a court may examine evidence under S34 of A&C Act to assess procedural fairness, assuming this include the power to modify the award, is erroneous. The Court also reversed the tribunal's award as it rejected the evidence, deeming it patently illegal and not sustainable in law [¶6].

Pragmatic and Flexible Approach Adopted by Tribunals or Courts

Arbitral tribunals have, at times adopted a notably pragmatic approach towards electronic evidence, admitting it on the basis of probative common sense rather than strict formal compliance of Section 65B. The most notable instance of flexibility appears in **Shamsher Gujjar @ Choudhary v. Sartaj Hotel Apartments And Villas Pvt.**, where the arbitral tribunal permitted comprehensive forensic review of extensive electronic data (CDs with audio/video recordings and transcripts) gathered from 'sting operation' carried out by

respondent. On challenge the Delhi High court upheld this approach, affirming that it is within the tribunal discretion “*to obtain in arbitral proceedings... appropriate direction for forensic examination of documents by experts*”.

Furthermore, the tribunal displayed flexibility despite the petitioner’s inability to produce the formal 65B certificate in **Trimble Mobility Solutions India Pvt. Ltd. v. Hindustan Petroleum Corporation Ltd.**, the claimant submitted electronic evidence like email along with statement of claim, to which respondent raised no objections to the admissibility of the evidence. The arbitrator did not compel either party to lead evidence; it was left to their discretion. The court upheld the arbitrator decision that after parties consented to the procedure including reliance on evidence without formal proof and cannot be a ground to set aside the award [¶29]. Similarly, in **N.P.C.C. Limited vs. Jyoti Sarup Mittal Engineers**, court held that the technical procedures of evidence shall not apply to arbitration, as parties treated document filed by each other as proved. So, the proof of documents was waived [¶20,22]. The compelling nature of the parties’ autonomy in this context enabled tribunals to adopt a pragmatic approach to electronic evidence in arbitration proceedings.

The Practical Problem: Why Are Tribunals Still Applying Section 65B?

Indian arbitrators, often former judges or lawyers might not consistently have specialized knowledge of digital forensics or electronic evidence. They may not fully understand metadata, hashing, or digital signatures. Consequently, they often rely on the simplest proof of authenticity: a formal certificate under Section 65B. In practice, tribunals require the exact formalities that lawyers and judges use, the Section 65B “safe harbour” feels like the surest route when they lack confidence in alternative means of proving an e-document’s genuineness.

Maharashtra State Electricity Board v. Datar Switchgear Ltd, held that words of the Section 19(1) of A&C Act do not prohibit the arbitral tribunal from drawing sustenance from the fundamental principles underlying the Evidence Act [§41], but without defining any special regime for e-documents. In effect, the tribunal knows they have power to determine the admissibility, relevance, materiality and weight of any evidence (Section 19(4) of A&C Act), yet no standard practice has emerged. In this vacuum, arbitrators fall back on the default they know, strict Section 65B compliance.

Comparative International Perspective

The treatment of electronic evidence in international arbitration is governed by a flexible, principle-driven framework that prioritizes substance over form. India has no detailed arbitral evidence code or practice note to govern digital evidence. In effect, tribunals are left to fill a void. International standards entrust evidentiary discretion to arbitral tribunals without imposing formal statutory compliance.

In the IBA Rules on the Taking of Evidence in International Arbitration, Article 3.3(b) requires that requests for electronic documents specify custodians, search terms, or file types, while Article 3.12(b) allows production in a form that is both cost-effective and practically usable by the recipients. The emphasis is on facilitating efficiency rather than imposing rigid authentication standards. The aim is to avoid unnecessary work and to facilitate the arbitrators' and lawyers' analysis.

Similarly, the 2016 ICC Commission Report on Managing E-Document Production further provides valuable soft-law guidance. Under Section 5, it recommends that parties consider five core factors when managing e-discovery: timing, specificity, source accessibility, metadata, and the use of digital tools.

Across all these instruments, a consistent and important theme emerges '**authenticity is assessed contextually**', not through a rigid statutory filter. Arbitrators rely on metadata, forensic techniques, system logs, or witness

confirmation to verify authenticity. Concerns over digital reliability—such as data manipulation or algorithmic opacity—are acknowledged, but they are addressed through **tribunal discretion** and **party-agreed protocols**.

Crucially, no international arbitration rule or guideline mandates a certification requirement equivalent to Section 65B. This reflects a core value of international arbitration: to remain efficient, adaptable, and focused on substantive fairness. Electronic evidence is judged on what it proves and not on how it is presented.

Suggestions

To resolve the paradox of procedural flexibility versus evidentiary rigidity, the arbitral tribunal should adopt a “Functional Equivalence” Doctrine under section 19(4) A&C Act. Instead of insisting on formal certificate under Section 65B, tribunals should test electronic records by metadata consistency (timestamps, device identifiers), chain-of-custody logs (hash values, storage records) and party admission/consensus.

It is also helpful to harmonize forensic practices. In this respect, it is important to educate judges, arbitrators and lawyers in digital forensics and electronic evidence. No institutional arbitration rules, guidelines or domestic arbitration law refer to the necessity of authenticating evidence, let alone electronic evidence.

Lastly, it is imperative to curb judicial overreach. The 2024 Draft Amendment Arbitration Bill proposes an appellate arbitral tribunal reducing the role of section 34 courts in evidence based review. By shifting award challenges away from civil courts, empowering a specialized forum to review procedural compliance and preserving confidentiality and party autonomy. Collectively these measures will reconcile arbitration’s flexibility with the reliability of electronic evidence, ensuring that digital records are admitted on their merits rather than rejected on technicalities.

Conclusion

As arbitration continues to evolve in the digital age, it becomes imperative that its procedural framework adapts to contemporary evidentiary realities. The challenge lies not merely in legislative reform but to reimagine the evidentiary ecosystem in which arbitral tribunals thrive. The tribunals must be equipped both in competence and confidence to handle electronic evidence without undue reliance on rigid technical formalities. The emphasis must be provided to substance rather than form. Only then can arbitration in India truly reflect its promise of being an efficient, flexible, and future-ready mode of dispute resolution.

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