

# LEGALFOXES LAW TIMES

## Online Dispute Resolution in India – The Future of Justice?

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“Dialogue is the most effective way of resolving conflict.”

- Tenzin Gyasto, The 14<sup>th</sup> Dalai Lama

### **Abstract**

Alternate Dispute Resolution in India has been gathering momentum and the people of India have high hope for such mechanisms. However, with the help of ICT technology courts proceedings are done online. This has given hopes that dispute resolution should also be conducted online, and this is Online Dispute Resolution. Online Dispute Resolution is used in many countries and has its share of success however in India it is yet to take off. The Civil Procedure Code, along with the Information Technology act, provides the base for online dispute resolution.

In this paper, I have discussed Online Dispute Resolution, the various types of online dispute resolution platforms used all around the world. I have also discussed why online dispute resolution is required, areas of law where online dispute resolution can be successful and what mechanisms India can inculcate in its legal system. I have also discussed the challenges that online dispute resolution faces and even the potential suggestions for the same.

Keywords: ADR, ODR, Judiciary, UNCITRAL, Technology.

### **Introduction**

In May 2020, Justice DY Chandrchud revealed that around 32.4 million cases were pending before the Indian judiciary.<sup>1</sup> In November 2019, the number was 3.14 crores, as revealed by the Union

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<sup>1</sup> LexLife, *Pendency in Indian Judiciary: An Update*, LEXLIFE THE LEGAL WAY OF LIFE (Oct. 12, 2020, 19:31), <https://lexlife.in/2020/08/18/pendency-in-indian-judiciary-an-update/#:~:text=Recently%20Justice%20DY%20Chandrchud%20shared,making%20the%20scenario%20much%20worse.>

Law Minister.<sup>2</sup> The number is bound to upsurge owing to COVID-19 restrictions by the courts. This number seems to haunt the whole country. Despite all the judicial efforts and by the government, this number seems to remain stagnant.

The only viable solution is to leap into Alternate Dispute Resolution<sup>3</sup>. ADR essentially means that the parties can sort out their disputes outside the court. Various jurisdictions are now implementing ADR on a wide scale aspect. India is one country that desperately needs to improve ADR to reduce the burden on the judiciary.

### **What is Alternate Dispute Resolution?**

Generally speaking, ADR means that the conflicts can be resolved outside the courts' boundaries. i.e., ironing out disputes between two parties privately and informally. ADR is the last resort before initiating the formal method of resolution, i.e., the courts.

### **Types of Alternative Dispute Resolution**

There are various ways in which two parties can resolve their disputes. This distinction depends on the framework on which they are based on:

1. **Negotiation** –In negotiations, the parties to the dispute work out a solution to resolve their disputes. In negotiations, no third party is involved. This process of negotiation is voluntary, not formal, non – binding, and is highly confidential.
2. **Mediation** - Mediation is a voluntary process where parties arrive at a mutually agreeable settlement in the presence of a neutral third party known as a mediator. The mediator helps them in reaching an amicable solution. Mediation is confidential, non-binding, and does not involve a strict formal procedure or delve into legal questions.
3. **Conciliation** – Conciliation is like mediation, which involves a neutral third party. The difference is that the third party plays a more pro-active role in this form of dispute resolution. Conciliation is also a voluntary process, non – binding and confidential. Conciliation in India is governed by the Arbitration & Conciliation Act, 1996.<sup>4</sup> (Section 61 to 81)
4. **Arbitration** – Arbitration is one of the most popular forms of dispute resolution. Parties invoke arbitration by submitting their dispute to the arbitrator or panel of arbitrators. The parties are free to decide the process of arbitration, the number of arbitrators, the place,

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<sup>2</sup> The Wire Staff, over 3.5 crore cases pending across courts in India, little change in numbers since 2014, THE WIRE (Oct. 12, 2020, 19:36), <https://thewire.in/law/pending-court-cases>.

<sup>3</sup> Herein referred to as ADR.

<sup>4</sup> Arbitration and Conciliation Act, 1996, No 26, Acts of Parliament, 1996 (India).

and all related aspects. The Arbitration & Conciliation Act governs arbitration <sup>5</sup>in India. Based on the UNCITRAL Model Law<sup>6</sup>.

5. **Lok Adalat** – This form of dispute resolution is exclusively in India only. Legal Services Authority Act<sup>7</sup> established the system of Lok Adalat. It is a forum where disputes which are at the pre-litigation stage are settled. Under the act, the Lok Adalat's decision is deemed to be a decree of the court. The decision of Lok Adalat is final, and there lies no appeal against the decision. If the aggrieved party is not satisfied with the decision, then he can go to the courts.

### **What is Online Dispute Resolution?**

The advancement in ICT technology has led to an unprecedented rise in internet users all around the world. The internet has now brought people from different jurisdictions and locations to engage in the virtual world. Online Dispute Resolution<sup>8</sup> is one such product of the development of technology. ODR is the use of ICT in the process of dispute resolution.

The UNCITRAL ODR Working Group defines ODR as “a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.”<sup>9</sup>

According to Farah, “ODR means to utilise information technology to carry out alternative dispute resolution.”<sup>10</sup> Schiavetta said that “ODR comprises of a process to resolve disputes exclusively online and also other dispute resolution process that uses the internet<sup>11</sup>.”

Hon. Arthur M. Monty Ahalt (ret.) defined Online Dispute Resolution as “ODR is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of all three. In this respect, it is often seen as being the online equivalent of ADR.”<sup>12</sup>

<sup>5</sup> *Ibid.*

<sup>6</sup> Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, Adopted on Jun. 21 1985, (United Nations document A/40/17, annex I and A/61/17, annex I).

<sup>7</sup> The Legal Services Authority Act, 1987, No. 39 of 1987, Acts of Parliament, 1987 (India).

<sup>8</sup> herein is referred to as ODR.

<sup>9</sup>." United Nations Commission on International Trade Law, '*UNCITRAL Technical Notes on Online Dispute Resolution*, 2017 (Oct. 15, 2020, 19:51), [uncitral.org/pdf/english/texts/odr/V1700382\\_English\\_Technical\\_Notes\\_on\\_ODR.pdf](https://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf).

<sup>10</sup> Farah C, *Critical analysis of online dispute resolution: optimist, realist and the bewildered*, COMPUTER TELECOMMUNICATIONS LAW REVIEW 11(4), 123-128.

<sup>11</sup> Schiavetta S., *Relationship between e ADR and Article 6 of European Convention of Human Rights pursuant to the case-law of European Court of Human Rights*, JOURNAL OF INFORMATION LAW AND TECHNOLOGY, 2004 (1) JILT.

<sup>12</sup> Soumya Jha, *Online Dispute Resolution – A compelling option or far-fetched reality during pandemic times*, MONDAQ (Oct. 09, 2020, 12:30), <https://www.mondaq.com/india/arbitration-dispute-resolution/972422/online-dispute-resolution-a-compelling-option-or-a-far-fetched-reality-during-pandemic-times>.

Ergo, we can conclude that Online Dispute Resolution is the amalgamation of ICT and other technologies with dispute resolution. From Schiavetta's definition, we could also say that ODR means e – ADR (e – arbitration, e- conciliation, and e - mediation) and those mechanisms of dispute resolution that employ the internet in its process.

### **A Brief History of ODR**

The first-ever ODR scheme to be launched was the Virtual Magistrate (VM) in Villanova University USA and was created by the National Center for Automated Information Research (NCAIR) in 1995. The VM was a voluntary online arbitration procedure to settle issues with the ISPs and the customer. It also could solve disputes in defamation, IP, and property fraud.<sup>13</sup>

In 1996, Online Ombudsman Office was created by NCAIR at the University of Massachusetts by offering mediation services for all internet-related disputes.

Professor Ethan Katsh, a leader in ODR, mediated many cases ranging from domain name dispute to IP. He is also credited with the supervision of eBay's online auction site, in which he resolved over 150 disputes through mediation within 14 days. He also went out to co-create 'Disputes.org', which worked later with e-resolution and is one of the four ICANN accredited organisations in resolving domain name disputes.<sup>14</sup>

Later the Hewlett Foundation funded the University of Massachusetts to establish the Center for Information Technology and Dispute Resolution, known as The National Center for Technology & Dispute Resolution. In 1999, E-bay asked the Center to create the first E-Commerce ODR platform.

Ergo, we can divide the short history of ODR into the following phases or timelines: -

- Hobbyist phase: This started with the creation of the internet. ODR was not known until a dispute arose, and it was later resolved through the internet. It was then people realised the capacity of using ODR effectively.
- Experimental phase: This phase started from 1995 to 1998 when more disputes arose, and people started creating the platforms of ODR for the same purpose. Some platforms failed, like the Virtual Magistrate, while others were still experimenting with the platforms.
- Entrepreneurial phase: ODR industry started to emerge, and many platforms thrived like E-Bay, Square trade, and Cyber Settle. This phase started from 1998 to 2002.

<sup>13</sup> Pablo Cortes, *Online Dispute Resolution for consumers in the European Union*, ECONSTOR, 2011, at 51,55.

<sup>14</sup> Ethan Katsh, Director, THE NATIONAL CENTER FOR TECHNOLOGY & DISPUTE RESOLUTION (NCTDR) (Oct. 16, 2020, 15:14), <http://odr.info/ethan-katsh/>.

- Institutional phase: In this era, new technologies were developed, and faster, more user-friendly, and convenient platforms were created while the ones already in the market had to upgrade to stay in the market and not lose out.<sup>15</sup>

Today, there are a vast number of platforms that help the parties to solve disputes via ODR. WIPO has an ODR under Uniform Domain Name Dispute Resolution Policy (UNDRP). In 2017, the UN published the technical notes on ODR, explaining all the essential aspects of ODR.<sup>16</sup> India, too has ODR platforms like – Presolve 360, SAMA, CODR, CADRE.

### **ODR in India**

Like other countries, India, too, is now focusing on ODR for dispute resolution. The delay in the judicial system, along with the pandemic, has forced litigants and judges towards ODR. This pandemic in 8 months has done what was thought to be unimaginable for decades.

### **Framework for ODR**

#### **1. Legislative Framework**

- **The Constitution of India, 1950** – Article 21 of the Constitution talks about the right to life and personal liberty<sup>17</sup>. The Supreme Court held that the right to a speedy trial is an aspect of personal liberty and hence comes under Article 21.<sup>18</sup>
- **The Code of Civil Procedure**<sup>19</sup> – Section 89 (Out of court settlement) along with Rules 1A to 1C and Order 10 (Direction of the court to opt for ADR after the first hearing) was inserted via Amendment Act, 1999<sup>20</sup>. These provisions detail that where it is the courts' opinion that the particular matter can be settled with the help of ADR, then the court can call upon the parties to do the same by any of the ADR mechanisms.
- **Arbitration and Conciliation Act**<sup>21</sup> – The act is based on the UNCITRAL Model Law<sup>22</sup> governs arbitration and enforcement of foreign awards in India. The objective of this act is to encourage the use of ADR for the settlement of disputes. Under section 73, the settlement is deemed to be a court order. The Arbitration Amendment Act<sup>23</sup> gave legal recognition to those arbitration agreements entered electronically.

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<sup>15</sup> *Supra* Note 17.

<sup>16</sup> *Supra* Note 12.

<sup>17</sup> Article 21 – “No person shall be deprived of his life and personal liberty except according to the procedure established by law.”

<sup>18</sup> *Hussainara Khaton (1) v. Home Secretary, State of Bihar* (1980) 1 SCC 81.

<sup>19</sup> The Code of Civil Procedure, 1908, No. 5 of 1908 (India).

<sup>20</sup> The Code of Civil Procedure (Amendment) Act, 1999, No. 46 of 1999, Acts of Parliament, 1999 (India).

<sup>21</sup> *Supra* Note 7.

<sup>22</sup> *Supra* Note 9.

<sup>23</sup> The Arbitration and Conciliation (Amendment) Act, 2015, No.3 of 2016, Acts of Parliament, 2015 (India).

- **Information and Technology Act** <sup>24</sup>– This act is one of the pillars for the development of ODR in India. Based on the UNCITRAL Model Law on E-Commerce,<sup>25</sup> this act gives legal sanctions to digital signatures, e-contracts, e-transactions, and all kinds of electronic records. This act also amended the Indian Penal Code<sup>26</sup> Indian Evidence act <sup>27</sup>with the help of which electronic documents can be produced as evidence in court proceedings.
- **The Indian Evidence Act, 1872**<sup>28</sup> - Sec 65 – A and 65 – B were added, which made submission of electronic record permissible in the court proceedings as evidence as a secondary copy subject to the satisfaction of Sec 65-B.

## 2. Judicial Framework

- In 2007 the Supreme Court upheld the validity of video conferencing as a medium for taking the testimony of witnesses and also said that such recording is valid under the Criminal Procedure Code in State of Maharashtra Vs. Praful Desai.<sup>29</sup> In the case of In-Grid Corporation of Orissa Ltd. vs AES Corporation<sup>30</sup>, the Supreme Court held- “when an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or the ruling contract between the parties.” Similarly, in the case of M/S Meters and Instruments Pvt Ltd vs Kanchan Mehta,<sup>31</sup> the court said a category of cases could be resolved online and recommended that issues like traffic violation and cheque bounce.
- In the cases of Shakti Bhog <sup>32</sup>and Trimex case<sup>33</sup>, the court held the online arbitration agreement is valid provided it complies with the provision of the IT act<sup>34</sup> along with Sec 65 – B of the Evidence act<sup>35</sup>. The court further in the trimex case held that the agreement so concluded must comply with Sec 7 of the arbitration act<sup>36</sup>. In the case of Shakti Bhog, the court also held that communication and acceptance by telex, telegram, and other modes of communication are valid.

<sup>24</sup> The Information Technology Act, 2000, No. 21 of 2000, Acts of Parliament, 2000 (India).

<sup>25</sup> UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, 1996, Resolution No. 51/162.

<sup>26</sup> The Indian Penal Code, 1860, No. 45 of 1860 (India).

<sup>27</sup> The Indian Evidence Act, 1872, No.1 of 1872 (India).

<sup>28</sup> *Ibid.*

<sup>29</sup> AIR 2003 4 SCC 601.

<sup>30</sup> AIR 2002 SC 3435.

<sup>31</sup> AIR 2017 (4) RCR (Criminal) 476.

<sup>32</sup> Shakti Bhog v Kola Shipping (2009) 2 SCC 134.

<sup>33</sup> Trimex International v Vedanta Aluminium Ltd 2010(1) SCALE 574.

<sup>34</sup> *Supra* Note 30.

<sup>35</sup> *Supra* Note 33.

<sup>36</sup> *Supra* Note 7.

- In cases of Tata Sons Vs. The Advanced Information Technology Association<sup>37</sup> and Maruti Udyog Ltd vs Maruti Software Pvt Ltd,<sup>38</sup> WIPO was made the medium to resolve the domain name dispute between the parties.
- Justice Ramana in the SCO summit talked about the use of ODR in resolving consumer, family, business, and commercial disputes. He also stressed the importance of e-filing and cutting down on paperwork in the judiciary.<sup>39</sup>
- It was the effort of the Supreme Court that prevented the shut down of the courts during the pandemic and moved the proceeding to the online platform, and today, we can see that the virtual courts are a huge success.<sup>40</sup>

### 3. Executive Framework

The government also has to play a vital role along with the legislature and the judiciary towards ODR. Significant steps have been taken by the Indian government to induct ODR in our lives. Some of them are: -

- The Ministry of Consumer Affairs has launched an online portal, 'Integrated Grievance Redress Mechanism'<sup>41</sup> bringing all stakeholders such as consumers, ombudsmen, companies, etc. on a single platform. Through this portal, the aggrieved consumer can file a complaint along with the necessary details, and the related agencies can help in the redressal of that grievance.
- The Parliament of India in 2018 passed the 'Pre-Institution Mediation and Settlement Rules'<sup>42</sup> which makes mediation mandatory for commercial dispute of over Rs 3,00,000.
- The Finance Ministry had initiated Sabka Vishwas Scheme in 2019. The main task of this scheme was to settle the disputes of pending services tax and excise. This scheme was a huge success where 1,33,661 taxpayers had submitted their disputes and settled the applicable tax dues of Rs 69,550 crores at Rs 30,627 crores.

<sup>37</sup> Case No D2000-1713, accessible at <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1713.html>.

<sup>38</sup> Case No D2000-1038, accessible at <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1038.html>.

<sup>39</sup> India Legal, *Justice Ramana tells SCO to harness technology to resolve disputes*, INDIA LEGAL (Oct. 17, 2020, 20:55), <https://www.indialegallive.com/top-news-of-the-day/news/justice-ramana-tells-sco-to-harness-technology-to-resolve-disputes/>.

<sup>40</sup> PTI, *CJI rules out total shutdown of Supreme Court amid coronavirus threat*, LIVEMINT (Oct. 17, 2020, 20:59), <https://www.livemint.com/news/india/cji-rules-out-total-shutdown-of-supreme-court-amid-coronavirus-threat-11584300621602.html>.

<sup>41</sup> The portal's website - <https://consumerhelpline.gov.in/about-portal.php>.

<sup>42</sup> Commercial Courts' (Pre-Institution Mediation and Settlement) Rules, 2018, Notification No. GSR 606(E), dated July. 03, 2020.

- The National Consumer Disputes Redressal Commission had drafted the consumer mediation rules <sup>43</sup>under the consumer protection act, 2019<sup>44</sup>. It talks about the mediation of consumer grievance at the district, state, and national levels.
- The Finance Ministry recently launched the ‘Vivad sa Vishwas’ scheme in 2020 budget for taxpayers to settle disputes pending at various judicial forums. Under this scheme, the taxpayers will get a complete waiver on interest and penalty on the disputed amount if this scheme is availed before Mar. 31, 2020. However, seeing the pandemic, this deadline was extended. <sup>45</sup>

### **Present ODR Platforms in India**

ODR has seen some success stories in India too. There are many platforms in India, both private and public, which have developed these ODR platforms. Some of these are: -

1. **Cadre** – Center for Alternative Dispute Resolution Excellence<sup>46</sup> has been the ODR platform for NestAway – A place that connects potential tenants with landlords. First, one party approaches the platform with its dispute; then the platform contacts the other party. If both parties agree to the rules, an arbitrator is appointed, and updates are sent via WhatsApp and SMS. The decision is legally binding and typically comes within 20-25 days.
2. **SAMA** – <sup>47</sup> A start-up by Pranjali Sinha, Akshetha Ashok, and Vikram Kumar. Anyone can share their dispute on this online platform, then SAMA will approach the other party, and if both parties agree, they appoint a neutral third party. After signing up, both parties make settlement offers. The final settlement is binding and is enforceable. Sama was the winner of the 2019 E-Alternate Dispute Resolution Challenge launched by ICICI bank and Agami, a non-profit. After winning the challenge, ICICI bank had given its disputes worth Rs 20 Lakhs to Sama for ODR. In 2020 Sama was given the role to provide its platform to the Lok Adalat of Delhi and Rajasthan.
3. **Center for Online Dispute Resolution** <sup>48</sup>– Vikas Mahendra, a partner at Keystone Partners, co-founded CODR in 2019. It specialises in a relationship property agreement, dispute resolution, and separation agreement.

<sup>43</sup> The Consumer Protection (Mediation) Rules, 2020, Notification No. G.S.R 450 (E).

<sup>44</sup> The Consumer Protection Act, 2019, No. 35 of 2019, Acts of Parliament, 2019 (India).

<sup>45</sup> Bhaven Shah, *Case for Online Dispute Resolution in India*, LEXADR (Oct. 09, 2020, 00:22), <https://www.lexadr.com/post/case-for-online-dispute-resolution-in-india>.

<sup>46</sup> CADRE website can be accessed from <https://atthecadre.com/>.

<sup>47</sup> SAMA website can be accessed from <https://www.sama.live/>.

<sup>48</sup> CODR website can be accessed from <https://resolveoncord.com/#/home>.

4. **Presolve 360**<sup>49</sup>– Presolve 360 was co-founded by Aman Sanghavi, Bhaven Shah, Namita Shah, in 2017. It has expertise in dispute prevention, dispute resolution, ODR, ADR, neutral evaluation, as well as all kinds of commercial cases.

### **Scope of ODR in India**

This section will discuss the scope of ODR in India. First – Under which law ODR can be successful, and second what is the diverse range of ODR mechanisms that can be implemented successfully in India.

#### **1. Types of ODR**

ODR does not only include e-ADR but also includes all other dispute resolution mechanisms which adopt ICT and technology for this process. Various types of ODR are in force all around the world.

- **Automated Negotiations**

Automated negotiation is where ‘blind bidding’ negotiations take place and are not binding. It starts when one party invites the opposite party to negotiate. When the other party agrees, parties place their offers and are not revealed to the other. The proposals are usually revealed after they achieve specific standards. Generally, the settlement is the mid-range of the two offers. This technique also encourages both parties where they feel that the settlement is fair.

In the USA, CyberSettle is the only platform where such an ODR technique is available<sup>50</sup>. CyberSettle has patented these blind bidding negotiations. Since 1998 CyberSettle has resolved disputes worth US\$ 1.6 billion. Around 1,50,000 attorneys are already registered on this platform, and over 30,000 have already used it. CyberSettle had also agreed with the City of New York to assist the police and its citizens in resolving claims relating to traffic violations, personal injury, etc. CyberSettle had also entered into an association with the American Arbitration Association, where the users, if not satisfied with the automated negotiations, can then use the ADR services provided by the Arbitration Association.<sup>51</sup>

- **Mediated/Assisted Negotiations**

Under this system, negotiations take place with the help of a mediator or assistant. The only catch is – That Mediator is the technology itself. The technology gives both parties the solution to the dispute, and then the parties settle the claims. If any party is unsatisfied, then they can consider alternative options.

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<sup>49</sup> Presolve 360 website can be accessed from <https://www.presolv360.com/>.

<sup>50</sup> CyberSettle website can be accessed from <http://www.cybersettle.com/>.

<sup>51</sup> *Supra* Note 17 at 64,65.

E-Bay and PayPal used SquareTrade as their ODR platform. SquareTrade had a two-level system of solving disputes. First is direct negotiation, and then comes assisted or mediated negotiations.

In this system, the process starts when the buyer or seller files the complaint. The complainant is asked to fill out a form and the category of disputes and is present with a list of solutions from which he selects the desired one. The other party is intimated by email, where he is asked to participate in the process. The other party files his response along with the resolutions. If both agree, the dispute is resolved; if not, then the issue would move on to the second stage where the negotiations would take place with technology's help. The technology is used to offer propositions, set deadlines, and even create a polite negotiation environment. More than 80% of the disputes were solved using this ODR technology.<sup>52</sup>

- **Med-Arb**

Med-Arb is a tiered process that involves two kinds of ADR – Mediation and Arbitration. First, the parties negotiate in the mediator's presence, and if a settlement is not reached, then the arbitration process commences. The parties can request the mediator to act as an arbitrator to give his decision. The decision can be both binding as well as non-binding, depending on the agreement reached by the parties.<sup>53</sup>

- **Neutral Evaluation**

A neutral third party is appointed to act as a listener as well as an evaluator. Here both the parties put forward their offer along with the relevant documents as evidence. The evaluator listens to both parties and recommends the best proposal for settlement. The decision of the evaluator can be binding as well as non-binding, depending on the parties.<sup>54</sup>

- **Sui Generis Arbitration**

This type of arbitration is different from traditional arbitration as it is non-binding. The best example is the UNDRP, i.e., Uniform Domain Name Dispute Resolution Policy. WIPO's proposal was implemented by ICANN, i.e., Internet Corporation for Assigned Names and Numbers, in 1999. UNDRP has an ODR process where the issues of the domain name can be settled between the parties. TATA sons<sup>55</sup> and Maruti Udyog<sup>56</sup> have been involved in the domain name disputes, which were resolved by UNDRP.<sup>57</sup>

- **Mini Trial**

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Supra* Note 17 at 66,68.

<sup>54</sup> Karnika Seth, *Online Dispute Resolution*, CIAC CONFERENCE PAPER (Oct. 18, 2020, 16:57), <http://www.karnikaseth.com/wpcontent/uploads/ODR-CIAC/20conference%20paper.pdf>.

<sup>55</sup> *Supra* Note 43.

<sup>56</sup> *Supra* Note 44.

<sup>57</sup> *Supra* Note 17 at 95,115.

In mini trial, parties file summaries of their disputes to a neutral judge and negotiate a settlement in front of the judge. It is a non-binding process.

- **Rent a Judge**

The parties appoint a neutral judge and submit their case for resolution.<sup>58</sup>

- **Online ADR**

Traditional ADR is conducted on an online platform. All rules regarding traditional ADR has to be followed in online ADR too. The main advantage of online ADR is that parties need not come face-to-face. Hence, decisions can be rendered quickly compared to traditional arbitration. Online ADR constitutes Online Arbitration, Online Mediation, and Online conciliation.

## 2. Fields of Legal Practice where ODR can be used effectively.

The scope of ODR not only depends on the mechanisms used but also where those mechanisms can be used. In India, there is a considerable backlog of repetitive cases and can be resolved with the help of ODR. This concern has been highlighted by many eminent Supreme Court judges as well as academicians. Insurance claims, property disputes, small causes, and small claims, cheque bounce, are some fields that are primarily clogging the courts and causing an inevitable delay.<sup>59</sup>

Some of the fields of legal practice where ODR can be effectively used are: -

- **Insurance Claims** – There are a vast number of disputes concerning insurance claims in the courts. Ergo, ODR will be very useful and thriving in the cases of insurance claims. Also, the insurance sector has a massive capability for AI in its industry, which can also help the parties in ODR. Earlier, we saw the examples CyberSettle and how it had resolved disputes worth US\$ 1.6 billion in almost 2,00,000 cases.<sup>60</sup> Therefore, in India, too ODR in insurance claims can create a significant impact for both the insurer, the insured, and the judiciary.
- **Intellectual Property Rights** – IPR is one area of law that is not tapped by ODR. IPR cases can also be resolved with the help of ODR. In the Singapore arbitration act, all matter relating to IPR can be resolved through arbitration<sup>61</sup>. Further, Sec 52F also states that the validity of patents can also be resolved through arbitration. We also saw UNDRP and its ODR resolve domain name disputes. ODR also has the potential for cross border IPR disputes. Ex – Disputes in domain name were two parties are from different jurisdictions.

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<sup>58</sup> *Supra* Note 67.

<sup>59</sup> Justice Indu Malhotra, Judge, Supreme Court of India, on the '*Potential and Possibilities of Online Dispute Resolution*,' NITI AAYOG CONFERENCE ON CATALYZING ONLINE DISPUTE RESOLUTION IN INDIA (Oct. 14, 2020, 19:30), <https://niti.gov.in/catalyzing-online-dispute-resolution-india#p3>.

<sup>60</sup> *Supra* Note 64.

<sup>61</sup> Part IXA, of the Arbitration Act, 2001, No. 37 of 2001, The Statutes of The Republic of Singapore.

- **Family Disputes** – Family and matrimonial disputes are one area where ODR can create an impact. Matters relating to marriage and family are susceptible, and the courts have exclusive jurisdiction. Still, in India, it has been a precedent that parties go through mediation before coming to courts. ODR can remove geographical boundaries and can save travel time and cost by mediating online. Also, both parties would not be under any influence and can open up about the issues they are facing during ODR.
- **Consumer Disputes & E-Commerce** – In India, there is already a platform INGRAM for filing a complaint online. However, it takes time to resolve the complaints filed. Though mediation has been made compulsory, there is no robust mechanism of ODR available to the consumers at large.

South Korea has a robust system in place for consumer and e-commerce disputes. The Electronic Commerce Mediation has a panel of lawyers, experts as mediators. An application can be filed for mediation online, by mail, or via fax. The mediation process is conducted electronically, but the evidence has to be submitted physically. The panel will mediate within 45 days and will render a decision. This decision, if accepted by the parties, has the effect of a court order.<sup>62</sup>

India can also have such mechanism(s) in place, and the consumer disputes will not add up to the additional burden to the courts.

- **Property Disputes** – The disputes of property are one of the most tedious disputes in India. It takes years to arrive at a judgement in property disputes. With the help of ODR, the parties can arrive at a suitable solution in less than half the time taken in regular courts. This would also reduce the cost of litigation to a vast extent.
- **Real Estate** – In India, there is often delay for builders in handing over the flats to the buyers. As a result, buyers have to approach the RERA Authority, which takes time. ODR between the builder and the buyer will help the buyers save their time and cost, and the builder will not have to go through the legal hassles.
- **Taxation** – matters relating to taxation is one of the most important to the corporate sector and the government. For any disputes relating to taxation, both the parties are at a loss. One of the most famous examples - Vodafone tax dispute. One of the longest ongoing conflicts and also happens to be one of the most expensive. This dispute is ongoing since 2007 and closes to US\$ 2 billion at stake. Therefore, ODR in tax disputes would be beneficial to both the taxpayer and the government. As earlier mentioned, the finance ministry had settled dues of Rs 69,550 crores at Rs 30,627 in 2019, and a similar scheme was launched in 2020<sup>63</sup>. Ergo, this shows the potential of ODR for tax disputes in India.

<sup>62</sup> Electronic Commerce Mediation Committee, 'Mediation Procedure FAQs' (Oct.18, 2020, 21:29), <https://www.ecmc.or.kr/ecmceng/subIndex/233.do>.

<sup>63</sup> *Supra* Note 54.

- **Cheque Bounce Case** – This is another category of disputes choking the courts. Sec 138 of Negotiable Instruments act<sup>64</sup> talks about cheque bounce. This section talks explicitly about dishonour due to insufficient funds. Sec 138 was introduced in the year 1988 to secure the payment of creditors. However, in turn, it has done more damage. The government has planned to decriminalise this section. However, ODR is the only viable solution. With the help of ODR, the creditor can also get his dues, the debtor can pay his dues swiftly and economically, and the matter would not even reach the doorsteps of the courts.
- **Recovery of Money** – For recovery of money too, ODR can be used. One can even file a civil suit, but it would take years for the creditor to recover his money. Ergo, with the help of ODR, the creditor can also get his dues; the debtor can swiftly pay his dues and economically, and the matter would not even reach the doorsteps of the courts.
- **Insolvency and Bankruptcy Matters** – Justice Indu Malhotra, in a conference, talked about using ODR in IBC matter. She mentioned that both creditors and debtors could use ODR to reach an amicable solution in the shadow of insolvency, especially in this post-COVID-19 world, where the business would tend to be fragile, and courts may be seeing an increase in IBC matters.<sup>65</sup>
- **Contracts of Sale and Service** – Any disputes regarding the sale and service contract can be resolved with the help of ODR. ODR can help both parties discuss the issues relating to the sale or service contracts. ODR can resolve the problems of deficiency of services, quality of goods and related matters.
- **Small Causes and Small Claims** – Claims of motor vehicle accident, low-value claims, and other Small Claims can be resolved via ODR. Since these claims are monetarily small, ODR can help the party to enforce their claims and also ensure that the settled solution is implemented as soon as possible.
- **Defamation** – No country in the world has an ODR system for defamation. However, the UK government and the courts are studying the feasibility of resolving defamation through ODR. Therefore, India also should study and research defamation in ODR.

### **The need for ODR in India**

- **Pendency in the judiciary** – one of the primary reasons for implementing ODR is the huge pendency in the judicial system. ODR can help to reduce these cases to a very significant amount, as discussed in the previous section. Pendency is the reason why many people are reluctant to file cases. ODR can help bring these sections of people on its platform too.

<sup>64</sup> The Negotiable Instruments Act, 1881, No. 26 of 1881 (India).

<sup>65</sup> *Supra* Note 73.

- **Cost** – Today, the cost of litigation and traditional ADR is very high. Such high costs make the court inaccessible to the poor and the middle-class families. Ergo, more than half of the population does not have access to justice. ODR requires a low investment as compared to the traditional system of dispute resolution. Also, this cost depends on the pendency of the matter. ODR can help solve disputes within 30 days, saving more than 60% of the money spent on litigation and ADR.
- **Interference of Courts** – Although most of the court interference is in arbitration, this is still a concern for the judiciary as well as legislature. Time and again, there are conflicting judgements given by the Supreme Court of India on the same question of law. There is no court interference in ODR, as it is strictly between the parties. If any party is unsatisfied with the settlement, then it can approach the courts.
- **Time-Consuming** – NITI Aayog says that it takes 1,420 days for dispute resolution in India, whereas it takes only 452.8 days in China.<sup>66</sup> ODR can solve the disputes and enforce the agreement reached between the parties within 30 days.
- **Issues of Jurisdiction** – Current ADR regime has faced jurisdictional issues. The seat of proceedings, place of proceedings, enforcement of awards, language, etc. continues to be a problem for the parties and the judiciary. One of the significant advantages of ODR is that it eliminates the aspects of jurisdiction, therefore, easing the legal hassles of the parties.
- **Confidentiality** – Since ODR is strictly between two parties and a neutral third party, confidentiality is maintained. Business Organisations have also faced this issue in ADR, where they have to give confidential documents to resolve the disputes. ODR would also help the business organisation in keeping evidence confidential.
- **Friendly** - A person sitting in the USA can attend the ODR proceeding of New Zealand. Further, the party can send his representative to represent him instead of being in the proceeding himself. The parties, lawyers, and the neutral party need not travel all the way to attend the proceeding. A non-legal person can also understand the process of ODR proceedings, and it is not necessary to hire a lawyer for ODR proceedings. Also, the parties have the freedom to decide the process and rules to be followed during the ODR proceedings.
- **Lack of Infrastructure** – There is a huge infrastructure gap in the courts of India. There is no proper infrastructure for the court to handle the cases daily. ODR does not require complex infrastructure. There is a minimum investment required for the necessary

<sup>66</sup> Bibek Debroy & Suparna Jain, *Strengthening Arbitration and its Enforcement in India – Resolve in India*, NITI AAYOG (Oct. 15, 2020, 01:15), [https://niti.gov.in/writereaddata/files/document\\_publication/Arbitration.pdf](https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf).

software, connectivity, and hardware requirements. Further, Indian courts are hugely understaffed, increasing the pressure on a single judge to handle more cases daily.

## **Challenges for ODR and Possible Suggestions**

### **1. Challenges for the Government**

- **No Institutional Setup** - India does not have any institutional set up with international standards in ODR. There are several institutional setups, but they do not deal with ODR. Therefore, either the government should set up an independent ODR institution or setup institutional ADR, which would also deal with ODR worldwide.
- **A Statutory Body to regulate ODR practice** – The government should form a body that will regulate and set standards, rules, and procedures for ODR practice, just like the Bar Council of India. This body would also act as a bar for ODR specialists too. The body would set the professional standards and would also resolve any issues pertaining to ODR. This body will also be responsible for laying down standards for the recognition of ODR platforms in India. On satisfaction with the standards, the ODR platforms will be eligible to conduct the ODR process. Just like after satisfying the Bar Council of India, the law college is granted permission to teach law. This is very important for maintaining the international standards of the ODR platforms in India.
- **Lack of Experts** – Quite frequently, it is seen that a retired judge is appointed as the third party in ADR proceedings. This has two disadvantages – Judges are not expert in all the subject matter. Dispute Resolution has many cases where the technical know-how for the third party is crucial. Second – The judge on being appointed uses the same mindset as he used in courts, and therefore, this leads to delay and hinders the process. Therefore, experts are required in ODR, who has the technical know-how and has the knowledge of the dispute before him. The Statutory body set up will have to provide training to the individual in ODR. The training should be designed by the body and should be updated regularly. At the end of the training, there should be an assessment to test whether the particular individual is fit to practice ODR or not.
- **Aid for the poor and the middle class** – In India, there is a vast divide in affordability and access to technology. For the ODR to seep into lower-class people, specific measures have to be taken up. With the help of the Statutory body (point 3), the government will have to establish legal aid for these people. Further, the government should make it mandatory for all ODR platforms to create legal aid. Since expenditure in ODR is low, it will not be a problem for ODR platforms to create legal aid, and it will be the duty of platforms to ensure that the aid is used for ODR only.
- **ICT Technology** – This is one big challenge in the conduct of ODR. The question frequently arises that does India have the technology infrastructure to conduct ODR on a

large scale. India is far behind other developed nations. People are too not comfortable with the use of technology because of either personal issues or delusions and beliefs. Ergo, the government and the judiciary have to bring the technology providers on board to provide an integrated platform where the people feel comfortable and friendly.

- **Awareness** – Without awareness, no objective can be achieved. The people of India are not at all aware of alternative dispute resolution. They feel that the courts are the only recourse they have. Government has to take steps to spread this awareness. People are required to be educated via social media and visual media as they have widespread reach. Law Colleges should provide the necessary education to the lawyers in dispute resolution. This step has been taken recently by the Bar Council of India, where it has made mediation compulsory in the regular curriculum.<sup>67</sup>The teaching of ODR should be made mandatory in the school curriculum, too, so that future generations are aware of such a mechanism.
- **Data Protection** – When parties opt for ODR, data protection and confidentiality are primary concerns. In ODR, the documents must be uploaded in the system; this concerns the parties as there are chances of hacking, data leak, and breach of privacy of these crucial documents. It is the government's duty and that of the platform to ensure that a system is in the place where these concerns are addressed, and the parties are confident of using. The onus of data protection should be put on the ODR platforms. Another issue of concern is whether the proceeding would be recorded for an official record? To resolve this issue of privacy and protection, the neutral third party after every hearing has to give critical feedback about the hearing, including the parties' conduct. Thereby protecting their privacy, and the feedback can be treated as direct evidence in accusations of non-cooperation by the party.

## 2. Legal Challenges

- **Absence of Mutual Consent / Refusal to ODR** – Since ODR is voluntary, both the parties have to consent to resolve the disputes via ODR. However, seeing the larger problem of backlog of cases and burden on the judiciary, ODR should be made mandatory in individual disputes. This is called the opt-out model. India now has followed the system of the opt-in model. A hybrid model would be best for India as both parties would not treat this as a mere formality. Therefore, if the government makes a law by which ODR is made mandatory in a particular category of disputes, mutual consent is no longer required. Parties by law cannot refuse to resolve disputes through ODR. If EVEN AFTER ODR parties are not satisfied with the outcome, then they can approach the courts. The courts should include a system where it knows before proceeding that the dispute could not be resolved through

<sup>67</sup> BCI:D: 1897:2020 (323/2020), Bar Council of India, (Aug. 13,2020).

ODR. Ex – In a consumer complaint, the complainant can attach the report of an authorised ODR platform where it says that the proceeding could not be resolved through ODR.

The Courts should consider whether the litigants have taken an effort to resolve on their own accord. Accordingly, the court can award costs as well as compensation to the aggrieved party. In the UK, the Civil Procedure Rules include this concept<sup>68</sup>. This would also create an impression in the minds of litigants that ODR is also a factor that the court considers before awarding damages and costs.

The Courts in the UK have set out some criteria used to determine the non-cooperation by the parties -

- The nature of the dispute,
- The strength of a party's case;
- Whether ADR has been tried and proven to be unsuccessful previously;
- Whether the cost of mediation is disproportionate to the claim at stake;
- Whether the mediation will lead to an unacceptable delay to the trial, and finally,
- What is the prospect of success?<sup>69</sup>
- **Non-Cooperation by the party** – Often, a party does not cooperate in the ODR proceeding; thus, the resolution fails. Therefore, the other party approaches the court to raise this issue; however, there is no evidence to back this claim. As discussed (point 8), the neutral party at the end of every hearing has to give his critical feedback on the platform, and this feedback can be treated as direct evidence in the issue of non-cooperation. The High Court in the UK held that if a party causes the mediation to fail, his position is considered the party who has refused to take part in mediation.<sup>70</sup>
- **The third party's credibility** – There are instances that the third party is not very active; they prolong the resolution of disputes; the issues of corruption have been an issue in the system. Ergo, it would be best that the ODR platforms or the Bar (as discussed in point 3) has a list of all such professionals along with their ratings on their websites. These ratings would be given by both parties only after the dispute is resolved. The Bar would also have pointers and the categories where the parties would rate them based on their performance. This would help both the parties in choosing the perfect professional for their resolution. This would also create a sense of competition among such professionals.

<sup>68</sup> Rule 44.4 (3)(a) (iii) of the Civil Procedure Rules, 1999.

<sup>69</sup> Julia Hornle & Pablo Cortes, *Legal Issues on Online Dispute Resolution*, June 2014 (Oct. 20, 2020, 14:28), <https://www.judiciary.uk/wp-content/uploads/2015/02/Legal-Issues-Hornle.pdf>.

<sup>70</sup> *Earl of Malmesbury V Strutt and Parker* [2008] EWHC 424 (QB).

- **Time Limit** – There is a time limit set for arbitration, i.e., 12 months, but the law is silent about other dispute resolution methods. Should a time limit be set for ODR, and if yes, then what should be the time limit? Different issues have their way of resolution and can take their own time. Therefore, the government needs to consult all stakeholders and then decide on the time limit for dispute resolution.
- **Enforcement of Awards** – In arbitration, enforcement is the beginning of all the legal hassles the parties have to go through. The main legal issue of ODR is the enforcement of the award. Who will be responsible for enforcement? What if the party refuses to adhere to the resolution? Which civil court will have jurisdiction to entertain the plea in cases of ODR where three parties are in different geographical positions? These are crucial aspects of the ODR framework. Again, the onus falls on the government to decide these aspects in consultation with the judiciary.
- **New Legislation** – The prime question - Is there a need for a new ODR legislation that addresses the concerns of ODR, awards, and its enforcement and about International ODR and its aspects. There is no international convention on ODR, but assuming that there will be in the future should the government address the issues beforehand.

### Conclusion

We can see that the IT world is progressing at a rapid pace. In the last years, no one would have imagined online classes or online exams. Ergo, this same technology should also be used in the adjudication of disputes. E-Courts is the first step in this direction by India has a long way to go towards full implementation of the ODR system. The success of ODR also depends on the coordination and cooperation of all three pillars of democracy. The legislature needs to discuss and pass laws, the executive needs to implement those laws and look after the framework, and the judiciary needs to address the concerns and legal issues in ODR.

Presently, there are ODR platforms, but they are still very much dependent on the people of the country. Unless and until there is no awareness among the people, the ODR will not take off in the country. Awareness is not enough but using such platforms is the key element. The parties should not be hesitant and should cooperate as this is a WIN-WIN.

Strengthening ODR will also help India in its global Business-friendly image. The Ease of Doing Business Rankings has a resolution of disputes as one of the leading rankings. India is not able to score high enough as compared to other business-friendly nations. ODR would help India achieve high and further improve India's rankings and thus bring in more Foreign Investment and thereby improve the economy.



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