

ONLINE DISPUTE RESOLUTION,

Whether a blessing or a curse!

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ABSTRACT: *In addition to judicial system of every nation, there lies a concept of Alternative Disputes Resolution Mechanism, which since late 1990s has undergone augmentation in the form of Online Dispute Resolution Mechanism. This transformation has annexed an ingredient of technology to the primitive dispute resolution schemes. Yet again, the notion of conflict resolution in cyberspace is in its infancy phase of growth longing to be discovered profoundly through the concept of public-private partnerships, aspiring to provide justice quickly, efficiently and that too at party's disposal.*

Key words: ODR, e-mediation, e-negotiation, e-ADR, e-justice, online courts.

1. Introduction

Online dispute resolution (abbreviated as ODR) is a family descent of existing dispute resolving system which with the assistance of technological development resolves the disputes amidst two or more individuals. It includes negotiating, mediation, arbitration etc, or a fusion of above all along with an additional facility of online feature. In short, ODR comes under the ambit of ADR. Online dispute resolving mechanism is conceived as a spring to accomplish some of the most impactful changes in the prevalent justice system in various nations globally, with the technological solution is to disputes between secluded parties, and further, by preventing such conflicts along with the provision of legal certitude.

Internet is a viable road for executing your dreams of exploring the world of your own choice and moving ahead in its direction, where an individual is offered a good foundation stage for business advancement along with a new recourse to existing communication system. This virtual world of Cyberspace over the time has been commonly a preferred means of social interaction and a capacious channel for making transactions across the border possible in a fraction of few minutes only. ODR here works as dual machinery by solving the disputes that have either arisen online between the parties or offline too. In layman's words, ODR is a process to provide speedy online solution to disputes which happen to arise online or even offline. Hence, ODR does not have jurisdictional or any other formal technicalities that require to be fulfilled by the parties.

2. Origin Of ODR

On 4th March 1996, the Virtual Magistrate project was publically announced introducing arbitration mechanism of resolving defamation cases online, then ODR came into existenceⁱ. In the span of 3 years, a lot of ODR service providers actively participated in resolving disputes in the public as well as private field consisting of states and commercial entitiesⁱⁱ.

The ODR structure is a kind of web-oriented platform formed by the Europe Commission firstly. Its goal is to aid people availing any sort of services online or even offline in resolving their disputes relating to online purchases and services out-of-court at a minimal expenditure in an easy and effective mannerⁱⁱⁱ. ODR in Europe permits people to file their disputes online in any of the 23 official languages of the European Union. In India, ADR techniques are widely supported through Naya Panchayat System, Lok Adalats, Arbitration and Conciliation Act, 1996 based on UNCITRAL Model law of arbitration, the Information Technology Act, 2000. The legal framework of India supports ODR through various legal sanctions such as Section 89 of Code of Civil Procedure, 1908 that advocates use of alternative dispute resolution among the parties. In two landmark judgments of Supreme Court of India, *State of Maharashtra vs Dr. Praful B. Desai*^{iv}, legal recognition was given to Video conferencing as a worthy means of recording evidence for witness testimony and in *Grid Corporation of Orissa Ltd. vs. AES Corporation*.^v

3. Domain Of ODR

The branch of ODR is generally preferred to resolve various types of disputes including civil, commercial, industrial and banking disputes^{vi}, construction or partnership disputes, insurance companies related disputes. In few democracies such as Australia, family disputes are mandated to choose and participate in mediation even before litigation as it is made compulsory. However, criminal law or constitutional law issues requires to undergo litigation process and are separated from the ODR sphere. Novel subject areas such as telecommunications law or labor laws are being united with the sphere of ODR. For example, in United States, the Federal Mediation and Conciliation Service^{vii} is making use of ODR to settle labor disputes. In e-governance based nations quite a good number of government departments are also using ODR to solve consumer related problems. Hence, online dispute resolving can be identified as close relative of Alternative Dispute Resolution, belonging to same blood line.

4. ODR Procedure

1. Filing of complaint with ODR provider,
2. Appointment of panelist or neutral third party,
3. Respondent may respond,
4. Oral hearing of both parties (e-documents, encryption or electronic signatures),
5. If dispute is resolved and amicable agreement is reached,
6. Settlement (having legal enforcement).

5. Techniques Of ODR

1. e-negotiation
2. e-mediation
3. e-conciliation
4. e-arbitration
5. e-appoint a judge

Giving a brief explanation about above in online negotiation and mediation, the neutral third party recommends various alternatives to solve problems related to the parties and actively participate in the dispute settling process. Whereas online

conciliation and arbitration could be termed as an adjudicatory process, in which the final pronouncement given by the arbitrator is enforceable on either parties (ODR process arbitrator mostly functions as an administrator). In Med Arb, firstly mediation is undertaken and if it fails, arbitration is undertaken. Coming to Mini trial, the parties submit briefs of their dispute for assessing their cases on merits and mutually a settlement with a neutral advisor is done. Hence, it is a non-binding procedure. In a Neutral listener agreement, the individuals involved disclose their proposals with a neutral third individual in private and later on hearing both sides, the neutral person recommends the best offer for them to settle. Lastly, in Rent a Judge, the disputed persons submit their case for judgment before an appointed Judge.

6. Challenges In ODR Process

Every new innovation has to undergo hurdles coming in its path in the initial stage of growth, similar is the scenario with ODR. Although it has been two decades already since ODR has come into existence and has gained limelight globally still there remains certain loopholes or lacuna's that needs to be addressed:

1. First of all there is a requirement of consent of both the parties, since it is basically a voluntary effort taken by the parties.
2. In dealing with issues relating to B2B or B2C transactions, contractual clause should be made legally enforceable.
3. Lack of personal interaction or face to face talking^{viii}.
4. Differences in languages, customs and individual perspectives makes it difficult for parties to agree to each other. (Goffman's face theory^{ix})
5. Inadequate ODR software and service providers in every nation.
6. Increased fees charges by some private service providers makes this process quite expensive for parties coming out of different backgrounds.
7. Authenticity of conduct of e-minitrials, e-medarbetc remains in doubt as to the maintenance of quality and standard of security in online proceedings.
8. Illiteracy and poverty-stricken or the under-developed countries could not effectively manage to create awareness as well as provide these ODR facilities.
9. Divergence of legal justice system of every nation and international treaties and statutes etc.
10. Criminal matters, family disputes etc. are not recommendable for this process.
11. Strict rules and adherence to be made to safeguard the confidential information of the parties involved.
12. Governments must be involved so as to create a legal sanctioning of e-conciliation and e-arbitration etc.

7. Suggestions To Improve ODR Usage

1. ODR service providers must come up with penal enforceability clauses in case of breach in online settlement made through it.
2. Amount of fees charged by the service providers must be nominal so that parties prefer this process over litigation.
3. Incorporation of high quality translators or even hiring of third neutral party as individuals who are proficient in two to three languages.

4. Technical infrastructure such as encryption and security tools to be employed to alleviate any concerns regarding personal information etc.
5. Legislative enactments to reinforce consumers' rights and among others, certifying as an unfair commercial practice in the digital world^x.
6. ODR should be advocated through a centralised initiative through policies of e-governance.
7. Public Private Partnerships in ODR service providers would be preferred wherever feasible so as to inculcate the faith of citizens in this out of court process.
8. Recent developments in field of law such as labour laws, telecommunications laws, media laws, cyber laws etc must be incorporated in the ambit of this process.

8. Present ODR Service Providers

1. The Cyber Tribunal in Montreal (in Canada)
2. the Online Ombudsman office, Cyber Settle and Clickn Settle, BBB Online, Square Trade (in US)^{xi}
3. European Small Claims Procedure (in Europe)
4. the NMI Mediation^{xii} (in Netherlands)
5. WIPO, National Arbitration Forum and many other accredited centers globally.
6. Two Centers established in India as (TLCEODRI)^{xiii} and (CECSRDI)^{xiv}

9. Public-Private Partnership In ODR

ODR is an online activity which is the combination of internet and alternative dispute resolution system. This process is mostly taken up by private companies where as in countries such as Australia, Europe etc, it has been made government regulated as well but still much has to be done in this developing branch which is in its infancy stage of growth. Hence, it must not be left to self-prescription and state intervention would do immensely good to this activity. Few of the steps that can be taken up by the government of a country for inculcating the faith of people in it are discussed below –

- *Need of a statutory enactment or at least provisions in legal framework of a country :*

The question is why people doesn't turn up for online or out-of-court settlement, the first thing that comes up in mind is whether they are aware of its benefits or not? Secondly, if fortunately they are aware of certain online process whether they feel it can be beneficial to them? The answer to above two question is requirement of government oriented research and awareness in the concept of ODR which could highlight the merits or the out comings of undergoing this process. As some countries have made mediation mandatory in divorce cases (as in USA) similarly effort should be made up by the government to introduce online dispute resolution techniques which will not only save their time, money but reduce overburdening of national courts too. This objective can only be achieved when there is government backing in ODR service providers, where there exist certain jurisdiction to which both the parties have to submit failing which certain action

can be taken against them. This will not only ascertain trust in ODR but give national legal recognition as well.

- *Introduction of cyber courts to govern the functioning of ODR service providers :*

Cybercourts are simplified court proceedings that exclusively use electronic communication means^{xv}. The entire process of ODR is an online activity which is becoming famous because of its easy method of solving dispute by saving both time and money. The end means of both courts and ODR is provide justice. Even courts are in favor of mediation, arbitration processes in some cases hence, offline method of dispute resolution differ to ODR in respect of certain cases where suitability has to been seen. So what if a separate cyber courts are established in order to supervise overall functioning of ODR's and a demarcation is made between the two systems of offline and online dispute resolution. This will make the concept more clear to the parties and make ODR procedure transparent, accessible, fair, efficient and effective. The major change by establishing cyber courts would be a presence of judge who will be passing the judgement only through online proceedings that too cases in which parties are unsatisfied by the decision of third neutral party. This feature will has an edge over the offline courts and final appeals in ODR processes will appear unbiased, to public at large who are not accustomed to such dispute resolving mechanism , for example consumers of e-commerce are the quantifiably most important claimants. This builds up confidence of society at large.

- *To keep a check on enforceability of the outcomes of ODR.*

The main aim of availing services through ODR is provide justice to people at their disposal by paying reduced fees charges as compared to litigation or other offline methods and to save their time but what if after undergoing the entire process and settlement agreement, either of the party does not comply with which is common in contracts case as well. The question arises whether the dispute resolving mechanism is capable of generating result that is final as well as effective? The usual way of enforcing any agreement is going to a court and obtaining a judgment else filing a writ of execution—requiring an adjudication since a settlement agreement in this process is enforceable in the same way as any other legal document or writings. If this happens it will not serve the basic purpose of going through ODR hence, the enforcement could be undertaken by providing online court proceedings (cyber courts) that yields the online judgment—this will promote the advantage of the essence of online services which can be further preserved. Most European countries and other democratic states in the US values judicial settlement agreements as 'consent judgments', which in itself is an enforceable instrument^{xvi}.

10. Conclusion

As it has been said by William Ewart Gladstone, "Justice delayed tantamount to justice denied", similarly by opting for a suitable mechanism for matters or disputes arising capable of being sorted without physical intervention in courts can do a lot in providing quicker access to justice. Every judicial system should give online disputes resolution mechanisms such as negotiation, mediation, arbitration etc more priority than adjudication and give the parties are as onably fair chance of solving the disputes

so as to reduce the time and money invested in judicial system, leaving certain complicated and the offline methods specific cases to pass through the formal adjudicatory system of any particular country.

It can't be doubted that the private ODR service providers are not enough in the attainment of a speedier economical and convenient justice system but the point is government can do a lot more in this concept as every monopoly need regulation by the state. Thereby, inducing the trust of it's citizens at large. Hence, the sooner ODR is incorporated in every legal system, the better it will be for the nations worldwide and the justice seeker in particular.

REFERENCES

Proceeding Papers and websites cited as endnotes:

ⁱ <http://www.umass.edu/dispute/ncair/gellman.htm>

ⁱⁱ See United States ODR provider at www.adr.org and Australia's ADR online at www.adr.online.org etc.

ⁱⁱⁱ http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm

^{iv} *Maharashtra vs Dr. Praful B. Desai* (2003) 4SCC 601

^v JT 2002 (8) SC 203

^{vi} <http://www.indianeconomy.net/splclassroom/128/what-is-banking-ombudsman>

^{vii} <https://www.fmcs.gov/>

^{viii} Jim Melamed, The Internet and Divorce Mediation, available at <http://www.mediate.com/articles/melamed9.cfm>

^{ix} https://monoskop.org/images/1/19/Goffman_Erving_The_Presentation_of_Self_in_Everyday_Life.pdf

^x <https://ec.europa.eu/digital-single-market/en/policies/ecommerce>

^{xi} <https://www.squaretrade.com/>

^{xii} www.nmi.mediation.nl/en/nmi/mediationframed.html

^{xiii} <http://odrindia.in/>

^{xiv} <http://perry4law.org/>

^{xv} Proceedings of the UNECE Forum on ODR 2003 <http://www.odr.info/unece2003>

^{xvi} See for instance the French supreme court decision of 12 June 1991 (Cassation civile, 2nd court) and comments Durieux in [1992] *Droits* 320. See also para. 601 A.15(9) Iowa Code Ann. 'agreements reached in civil rights mediation shall be issued as consent judgments which are enforceable by contempt'.