ONLINE DISPUTE RESOLUTION AS THE FUTURE OF ALTERNATIVE DISPUTE RESOLUTION – THE ROAD AHEAD AND THE ROAD BLOCKS

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# INTRODUCTION

Disputes are common world over and their effective and timely resolution is a big challenge for Governments around the world. In India, the massive backlog of cases crippling the judicial system of the country has been a high priority item in the agenda of all Governments, the law Commission, the Judiciary, the bar Council and all other stake holders of the system. Though numerous reforms and improvements have been suggested and implemented, the current level of pending cases within the prevalent infrastructure would require almost two centuries to get cleared and then not to think of the new additions to litigation. Establishment of E-courts in India has been viewed as a means to reduce such backlog of cases and for promoting access to justice. However, it is not easy to establish E-courts as it is not mere computerization of court proceedings and records. Establishment of E- courts would involve a lot of expenses and other overheads; in addition to operational hazards.

The resolution of disputes through Alternative Disputes Resolution methods have been looked upon as an effective mechanism for speedy and cheaper disposition of justice in almost every legal system. Dispute resolution outside of courts is not new; societies world-over have long used non-judicial, indigenous methods to resolve conflicts. What is new is the extensive promotion and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realize goals broader than the settlement of specific disputes. The rapid expansion of commercial transactions and globalization has given rise to spiraling growth in arbitration at the national as well as international stages. The disputes arising out of the huge volumes of business transactions need solutions by various forms of settlement outside the cumbersome procedure of courts and free from technical formalities and all the more in a cordial win- win atmosphere.

But the experience in India shows that the ADR modes; especially the arbitration is also taking considerable time and of late has become more expensive due to various reasons. Many a time it is found that the Arbitration proceedings itself have been conducted arbitrarily and thereby become inaccessible to common men and at least at times; they lose confidence in the entire process. This calls for the development of Online Dispute Resolution (ODR) which is a branch of dispute resolution using technology to facilitate the resolution of disputes between parties. It is comparatively easier and economical to use Online Dispute Resolution (ODR) for resolving various sorts of disputes especially those pertaining to International Trade and Contracts, E-commerce, Intellectual Property Rights etc. ODR in India is still evolving as Indian government is still hesitant to use the same. Indian government has announced promising initiatives like digital India but the actual implementation of these initiatives is a big challenge in itself.

## NEED FOR ONLINE DISPUTE RESOLUTION

Any method of alternative dispute resolution outside the court primarily involves negotiation, mediation or arbitration, or a combination of all three. Online dispute resolution (“ODR”) is the employment of these techniques through electronic media and it is conceived as a means to achieve some of the most powerful legal ideals of the Western legal tradition, which include:

(1) Legal Certainty: In making individual plans, decisions, and choices everyone is entitled to know what the law is in advance.

(2) Access to Justice: Everyone involved in a dispute shall be entitled to an easily accessible redress mechanism that provides for a timely resolution and effective remedies at reasonable cost.

The provision of alternative dispute resolution (ADR) services on the Internet has become quite popular in the developed countries. But in India it is in its infancy stage. With the enactment of Information Technology Act, 2000, E-commerce and E-governance have been given a formal and legal recognition. E- Courts have become a reality. So, there shall not be any difficulty in recognizing and encouraging Online ADR mechanism. If conciliation, mediation and other forms of disputes solutions have been successful in other countries, they must and will succeed here also. Where the problems are same, the solutions could be similar, though there may be differences in degree or the methodology adopted. The procedure for conciliation/mediation are part of the present day systems of almost every judicial administration both in common law countries as well as in countries governed by civil law systems.

For the success of Online dispute resolution process; there must be adequate provisions in the law and also a shift in the approach of the Judiciary. The present paper is an attempt to understand the efficacy of such a process in the Indian Scenario of dispute resolution.

Forms of Alternative Dispute Resolution (ADR)

Courts of justice are also public institutions addressing the public need. Speedy disposal of cases is the demand of every society. If the legal system fails to provide fast and effective justice, the system would become insignificant and irrelevant. Therefore, the courts all over the world are facing growing problems when trying to meet these needs of the society. ADR methods, whether they are initiated privately or publicly, have a common goal: to solve disputes simply, quickly, efficiently and at a cost proportional to the stakes.

In the new world economy, where more and more transactions are completed in cyberspace, ADR becomes the natural mode of settlement of disputes.. The rapidity with which transactions are performed (one of the many advantages of electronic commerce) also requires that disputes should be resolved with the same speed. We cannot assume that those operating in cyberspace will have the patience to wait for several years, what can sometimes go up to life term to resolve disputes by traditional means.

New York based Centre for Public Resources (CPR) a leader in the movement towards Alternative Dispute Resolution (ADR) observes that the High Cost of litigation and long span of time, were misuse of public resources. Therefore, a number of ADR techniques, which include mini trials, having main focus on arbitration, mediation and disputes resolution by negotiation have been recommended. Alternative dispute resolution mechanism principally consists of mediation, negotiation and arbitration as techniques for resolution of disputes by the consenting parties. The ADR procedures consists of Negotiation, Conciliation, Mediation, Arbitration and array of hybrid procedures including last offer arbitration, medola , mini trial, med-arb, and neutral evaluation. But Arbitration and Mediation is two of the modern techniques of alternative dispute resolution that has gained a lot of prominence due to the freedom it offers to the disputants.

In countries like U.S.A several federal and State judges have incorporated ADR techniques in their court room practice and encourage litigants to adopt them. Legislations were also enacted to promote the use of ADR by state instrumentalities. A number of ADR procedures are hybrids that combine two or more well established ADR procedures. ADR procedures can be broadly divided into two categories namely, adjudicatory and non-adjudicatory. The most effective adjudicatory procedures such is Arbitration in which two or more parties may obtain a final and binding resolution to their dispute by an expert and independent professional of their own choice. For the arbitration process to be legally valid and ultimately binding, the parties must agree to using arbitration of their own free will and must signify their resolve to abide by and perform the award of the arbitrator.

The non-adjudicatory procedures like ‘Mediation’ and ‘Conciliation’ contribute to resolution of disputes by agreement of the parties without adjudication. Mediation is a process in which the mediator, an external person, neutral to the dispute, works with the parties to find a solution which is acceptable to all of them.[[1]](#footnote-1)  The motive of mediation is to provide the parties with an opportunity to negotiate, converse and explore options aided by a neutral third party, to exhaustively determine if a settlement is possible.[[2]](#footnote-2)

Conciliation may be defined as a non-adjudicatory and non-adversarial.[[3]](#footnote-3)ADR mechanism involving a settlement procedure wherein an impartial third party (conciliator) enables and steers the disputant parties to arrive at a satisfactory and acceptable settlement of a dispute. The Halsbury’s Laws of England defines Conciliation as a process of persuading the parties to reach an agreement.[[4]](#footnote-4) It is considered as an effective and meaningful alternative to litigation for resolution of disputes through the guidance and assistance of a neutral and impartial third party.[[5]](#footnote-5) Negotiation-communication for the purpose of persuasion-is the pre-eminent mode of dispute resolution. Compared to processes using mutual third parties, it has the advantage of allowing the parties themselves to control the process and the solution.[[6]](#footnote-6)

## ONLINE DISPUTE RESOLUTION

Online Dispute Resolution is a branch of dispute resolution, which uses technology to facilitate the resolution of dispute between parties.[[7]](#footnote-7) It is an innovative way to resolve grievances, issues or disputes especially with regards e-commerce. Online dispute resolution t means different things to different people and many authors have defined ODR differently. A precise definition of ODR is not easy and it is not intended here. At this juncture, it would be fair to see ODR an offspring of traditional Alternative Dispute Resolution (ADR) using the internet to provide resolution to the disputes. Thus, ODR can be defined as the deployment of application and computer networks for resolving disputes with ADR methods. ODR in its simple terms refers to the use of online communication technology in the resolution process, even if the dispute itself has an offline origin. The provision of alternative dispute resolution (ADR) services on the Internet has become quite popular. Online dispute resolution (ODR) in India is in its infancy stage and it is gaining prominence day by day.

With the enactment of Information Technology Act, 2000, e-commerce and e-governance have been given a formal and legal recognition. Human beings, when it comes to disputes relating to money or status, are all the same, everywhere round the globe. Selfishness, strength of money-power for protracting litigation or ego is common features. If the conciliation /mediation solutions have been successful in other countries, they must and will succeed in India also. What is required is the efforts in providing a conducive atmosphere for the development and growth of ODR

## PROCEDURES ADOPTED FOR ODR

Procedural rules have been framed by organizations providing ODR in their respective specialized areas of e-disputes. This institutional dispute resolution practiced online has attracted public confidence and provided an efficient alternative to litigation in national courts, especially in case of e-disputes wherein parties to a dispute, are often from different jurisdictions and the issue of jurisdiction itself becomes a point of preliminary objection. However, this point of contention never arises in ODR as parties mutually agree to resolve their cross border e-disputes employing the mode and the manner they both agree on. The parties may have entered into an agreement containing an arbitration clause providing that in the event that a dispute arises between the parties it shall be resolved by means of arbitration conducted electronically, or later as and when the dispute arises they may agree to resolve it through any of the following or other ODR mechanism.

## ONLINE NEGOTIATION

Online negotiation can be of two types, closed model and open model.

Closed Model– Online negotiation thrives on technological changes through blind bidding which is one of the most prevalent dispute resolution services available online. The common characteristic of these processes is the parties’ submission of monetary offers and demands which are not disclosed to their negotiating counterpart, but are compared by computer in rounds. If the offer and demand match, fall within a defined range or overlap the case is settled for the average of the offer and demand, the matching amount, or the demand in the event of an overlap. If the claim is settled, the participants are immediately notified via email

Open Model– Under the open model, a party can view the other’s party offer or demand only after having made a demand or offer. Whenever any offer is within twenty per cent leverage limit of any demand, there is settlement of the median.

## ONLINE MEDIATION

A typical online mediation procedure takes place as follows. The complainant initiates it by completing a confidential form on the provider’s website. Then, a mediator contacts the respondent in order for him/her to participate. Both parties set forth the mediation ground rules.

The mediator communicates with the parties, sometimes jointly and sometimes individually, to facilitate an agreement. If an agreement is reached, it usually takes the form of writing.

Thus, the online process does not differ very much from the offline process, except for the expanded use of technology. Email is the mediator’s best friend for purposes of framing and moving discussion forward. But email was already used by offline mediators. In online mediation, websites such as Smart Settle, Legal Face off etc. are providing online mediators with new tools to supplement email with other communication tools including electronic conferencing, online chat, video-conferencing, facsimile and telephone[[8]](#footnote-8)

## ONLINE ARBITRATION

On-line Arbitration, as the name suggests, is a mixture of conventional Arbitration with the addition of technology. Conventional Arbitration, i.e. arbitration other than on-line arbitration, requires application of Arbitration & Conciliation Act, 1996 while in the case of On-line Arbitration, assistance of technological related laws, particularly the Information Technology Act, 2000 is also required. Sections 4 and 5 of Information Technology Act read with Sec 65-B of the Evidence Act provide legal recognition to electronic records and signatures. The Arbitration & Conciliation Act, 1996, if considered from the point of view of On-line Arbitration, can be divided into three parts.

1. The arbitration agreement,

2. The arbitral proceedings and

3. The arbitral award and its enforcement.

Online Arbitration in India and foreign countries is based upon implication of technology for dispute resolution. The domestic legal system in India is ill-equipped to handle the insurmountable arrears of disputes that continue to plague the legal system. The idea of arbitration was to ease the process of access to justice as reported by several expert bodies[[9]](#footnote-9) . The first instance of arbitration in India was The Bengal Regulation Act, 1772 that introduced the role of arbitrators in dispute resolution. Since then arbitration has undergone a lot of developments in India with the introduction of the Arbitration Act, 1940 which repealed the Arbitration Act 1899 and finally the formation of the Arbitration and Conciliation Act, 1996. Today, arbitration has developed further and a new form of arbitration has come to the fore which is known as online arbitration.

The Indian judicial system is marred by delays and the backlog of cases is continuing to surmount even with the various methods of ADR existing under the given legal system in India. Online dispute resolution is the only alternative left to cut down the huge arrears of cases and this form of dispute resolution has been used effectively by the National Internet Exchange of India (NIXI) for domain name dispute resolution[[10]](#footnote-10). Online Arbitration is a mixture of conventional Arbitration under Arbitration & Conciliation Act 1996, combined with technological features requiring application of Information Technology Act 2000. It is similar to traditional arbitration but the only difference is that it is conducted over the internet. The development and wide spread acceptance of online arbitration proceedings can be attributed to its cost-effectiveness and quickness. This is made possible because online dispute resolution by using internet and the parties autonomy, makes the proceedings quick and free from outside interference[[11]](#footnote-11).

## MERITS AND DEMERITS OF ODR

The most important advantage of ODR is that it provides quick results. Another most significant benefit of ODR is that it permits communication at a distance thus eliminating the need for traveling and substantially reducing cost and enable parties to resolve their disputes in the comfort of their homes. All that is needed is an internet enabled computer or laptop. ODR is faster than a typical trial or even ADR because technology can shorten the distances parties might otherwise need to travel.[[12]](#footnote-12) Another factor showing that ODR is convenient is that websites of some ODR providers are available twenty four hours a day and seven days a week. Most of these websites work around the clock and so once disputes arise, parties can resolve their issues immediately without having to wait for weeks or months before their case goes to trial.[[13]](#footnote-13)

Another important advantage is that parties can choose a neutral to aid them in resolving their disputes. Currently, most ODR providers have in their websites list of neutrals (either mediators or arbitrators) whom the parties can choose as per their convenience and requirement as an aid in resolving their disputes.

Litigation as well as commercial arbitration are expensive. In many cases parties engaging in ODR will not have to incur cost of renting rooms for hearing and deliberation of the award, and the travel costs for any third party involved in the proceedings as an expert or as a witness as all the participants in the process, ie; parties, lawyers, witnesses and arbitrators can participate from wherever they are, eliminates travel and related costs.

On the other hand there are serious criticisms against ODR; which are mainly based on their demerits. Lack of face to face interaction is considered to be a weak point especially in the backdrop of the conventional litigation. This sometimes diminishes confidence of the people. The possibility of parties getting duped cannot be ruled out. Another challenge is with respect to the ability of ODR service providers to keep confidentiality and protect the sensitive information and materials. There are issues with respect to the E – Arbitration agreements which are usually entered into by clicking ‘I agree’ or ‘I Confirm’. Reconciling the requirements of authenticity and originality with the Online Award. Most important amongst all challenges is the question of applicable law and seat of arbitration. However, all the challenges can be overcome with creating proper awareness and building trust in ODR. The law must equip itself to recognise Online Dispute Resolution and to enforce online awards.

# CONCLUSION

Online arbitration in India has to face difficulties of digital inclusion and widespread acceptance of the dispute resolution method via internet but India can definitely improve its technology infrastructure and develop institutional facilities to make Online Arbitration successful in India.

The rules for the traditional arbitration are, in the most important points, applicable for the online version. There are no provisions in the legal framework that forbid parties from engaging in an online arbitration procedure. However, certain issues may be best attended with a special set of rules created specifically for the online arbitration procedure; nonetheless, it would be convenient to create a specially designed legal framework for it. There may be some issues concerning the formalities of the validity of electronic contracting which need to be clarified by courts or legislative bodies to be left out of doubt.

1. Sriram Panchu, LexisNexis, Mediation: Practice and Law, at 9, (2011) [↑](#footnote-ref-1)
2. Madhubhushi Sridhar, LexisNexis Butterworths, Alternative Dispute Resolution: Negotiation and Mediation, at 1, (1st Ed. 2006). [↑](#footnote-ref-2)
3. There is neither a claimant/plaintiff nor a respondent/defendant in conciliation and as a result its proceedings are non-adversarial in nature. See Sudipto Sarkar & V.R. Manohar (Eds.), Sarkar’s Code of Civil Procedure (Wadhwa and Company, Nagpur, 11th Edn., 2006). [↑](#footnote-ref-3)
4. Halsbury’s Laws of England (2) 502 (Butterworths, London, 4th Edn., 1991). [↑](#footnote-ref-4)
5. M. K. Sharma, “Conciliation and Mediation”, available at: www.delhimediationcentre.gov.in (last visited on 15.03.2016). [↑](#footnote-ref-5)
6. A Consultation Paper, Proposed Amendments to the Arbitration and Conciliation Act, 1996, Ministry of Law and Justice, Government of India, at 18. [↑](#footnote-ref-6)
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8. Online Dispute Resolution System- A way toward hassle free dispute resolution - iPleaders http://blog.ipleaders.in/odr/#ixzz471YDApzw (Asses on 22.03.2016) [↑](#footnote-ref-8)
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12. Pappas B.A, 2008, *Online Court: Online Dispute Resolution and The Future of Small Claims*. UCLA Journal of Law and Technology Volume 12, issue 2. p.6 Available at [www.lawtechjournal.com](http://www.lawtechjournal.com) (last visited on 14th December, 2014). [↑](#footnote-ref-12)
13. Hang L.Q., 2001, *Online Dispute Resolution Systems: The Future of Cyberspace Law*; Santa Clara law Review, vol. 41: No.31 Article 4, p.354-355. [↑](#footnote-ref-13)