
ONLINE DISPUTE RESOLUTION POST COVID-19: DISINCLINATION TO PREDILECTION

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ABSTRACT

Covid-19 is here to stay, even after when normalcy will be returned to the world, some of the aftermaths will surely leave a lasting impact over businesses, individuals and institutions. Likewise, a strong impact will be left over the legal fraternity. Soon after the outbreak, it took a while for the Legal fraternity to take everything online. As soon as the things will become normal, the judiciary will be flooded with the cases pending due to the outbreak, thus it will be wise to deal with such situation in a quick and smart way, such a way is online dispute resolution. Online dispute resolution was amongst us from a very long time however, it was a less preferable way of dispute resolution. The contingency which aroused because of the Covid-19 has led to the growth of online dispute resolution. Even after being a more convenient way of resolving any dispute, it was not preferred because it lacked physical presence. The pandemic has left no other option but for people to rely over the online dispute resolution for resolving their issues during lockdown and also the government and the judiciary are overburdened due to this pandemic, ODR can also improve situation of the government and the judiciary. This reliance will lead to development of online dispute resolution. This will encourage the parties to a dispute for resolving it through online means even after the repercussions of Covid-19 are over as it a more convenient and pocket friendly way of resolving a dispute, thus, increasing the reliance and usage of online dispute resolution much higher.

Keywords: *Online Dispute Resolution, Arbitration, Mediation, Negotiation, Covid-19, Legal Fraternity, Internet.*

INTRODUCTION

Online Dispute Resolution is a type of dispute resolution mechanism, which is available for both types of disputes, any cyberspace dispute or any offline dispute. There are several ways of resolving any dispute, which is chosen by the parties of the disputes according to their

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convenience. A dispute may be via arbitration or via mediation or any other source, depending upon the situation of the case and desire of the parties. With the increase in usage of Internet, it has become utmost important to design a fluent and efficient mechanism, to swiftly resolve the dispute between the parties and maintain well access to justice.

MEANING OF ONLINE DISPUTE RESOLUTION

Online Dispute Resolution (ODR) is a process of dispute resolution which is based on internet and utilizes the Information Communication Technology (ICT) to resolve disputes. The purpose for creating such a process is to provide a substitution to traditional methods of dispute resolution like negotiation, mediation and arbitration.³

At the first instance, primary aim of ODR was to provide a platform based on network for the process of dispute resolution; however, it was conducted by a human mediator, so it was basically a new concept for swift and efficient working of the traditional ADR mechanism.⁴

Gradually with time, ODR also evolved and outgrew its initial stage, and became the platform which not only resolved online community disputes but also combined the process of resolution of any dispute with the prevention of the same.⁵

STATUS QUO OF ONLINE DISPUTE RESOLUTION

Before surveying some of the newest approaches to ODR, it is important to note that ODR suffers from a lack of definition. As a result, some commentators use ODR as a term that means nothing more than the use of technology in an already existing judicial system. Technology as an annex or facilitator of document receipt, search, and storage is an important advance in the judicial system; it is, however, not ODR.

In fact, online communications as a means to allow parties to voice complaints, when not coupled with a dispute resolution mechanism should also not be thought of as ODR. Mechanisms that allow customers to complain to a business are nothing more than online customer service facilities; and are not per se, ODR. We argue that a true ODR system is one that allows the parties to do more than merely complain—the platform must involve the

³ Joseph W. Goodman, *The pros and cons of online dispute resolution: an assessment of cyber-mediation websites*, 2 DUKE LAW & TECHNOLOGY REVIEW 1, 1, 1 (2003).

⁴ Nicolas W. Vermeys and Karim Benyekhlef, *ODR and the Courts*, MEDIATE.COM (June 23, 2020, 10:17 PM) https://www.mediate.com/pdf/vermeys_benyekhlef.pdf

⁵ Orna Rabinovich-Einy, Ethan Katsh, *Digital Justice: Reshaping boundaries in an Online Dispute Resolution Environment*, 1 INTERNATIONAL JOURNAL OF ONLINE DISPUTE RESOLUTION 1, 5, 5 (2014)

resolution of a dispute and use a neutral facilitator (mediation) or a neutral decision maker (arbitration).⁶

ODR METHODS

1. Online Mediation

Mediation is a part of ADR, here the neutral third party is appointed by the parties to a law suit in an effort to resolve the dispute. In online mediation also the third party is appointed as mediator to settle the dispute but the proceeding and meetings are conducted virtually by the help of “Chat Room” or “Cyber Conferencing”. Online mediation starts when an e-mail is sent to the parties containing the basic information on proceedings, then the parties attend the meetings through cyber conferencing. It may be carried out individually or together with all the parties simultaneously, and then the mediator comes up with a remedy by keeping the interest of parties⁷.

However if the dispute affects a large number of people then the third party is referred as a facilitator. The role of facilitator is to make sure that all the parties have the chance to keep their views and arguments and then a solution is decision upon which is agreeable by all parties⁸.

The digital way of resolving a dispute come up with new prospects like simultaneous existence of many parties without their personal presence at a specific place and time it is less inexpensive in comparison to mediation, the classic meeting room are replaced with virtual space which is helpful for the parties. In accordance with a quoted researcher “asynchronous online mediation is most popular form, allowing greater flexibility because of 24*7 hour access to the platform.”⁹

2. Online Arbitration

In online arbitration all case proceeding are regulated virtually all other things remain the identical with arbitration. The hearing are attended through the video conferencing by parties

⁶ Anjanette H. Raymond, Scott J. Shackelford, *Technology, ethics, and access to justice: should an algorithm be deciding your case.* 35 MICH. J. INT'L L. 3, 485, 500 (2014)

⁷ Karolina Mania, *Online Dispute Resolution: The future of justice.* 1 INTERNATIONAL COMPARATIVE JURISPRUDENCE, 76, 79 (2015)

⁸ Anubhuti Rastogi, *Online Dispute Resolution.* LAW TIMES JOURNAL (June 24, 2020, 10:01 AM) <http://lawtimesjournal.in/online-dispute-resolution/>

⁹ Supra Note 7

and they are required to upload their evidential records, they need to answer all the questions asked by the arbitrator and at last the arbitrator gives his final decision. Online arbitration is also advantageous as online mediation, it also shares the same benefits like low cost method, greater flexibility etc.¹⁰

Online arbitration is eminent in resolving the internet domain name dispute, these are usually governed by the Internet Corporation for Assigning Names and Numbers (ICANN) Uniform Domain Name Dispute Resolution Policy (UDRP).¹¹ The World Intellectual Property Organization (WIPO) is one of the UDRP dispute resolution service providers administering the UDRP administrative procedure for domain name dispute and manages the selection of panelist to decide the dispute¹². The settlement decided under the UDRP administrative procedure are non-binding but they are highly effective because these decisions are not binding on parties but it is binding on domain name provider¹³. If the parties are discontented by the decision then they can go for litigation.

Online arbitration is less popular method of ODR but it covers up the process up to certain extent¹⁴. Online arbitration is even allowed on the basis of convention on the recognition and enforcement of foreign arbitral awards and directive on electronic commerce (2000)¹⁵. Online arbitration is less popular method of ODR but it covers up the process up to certain extent.

ODR PLATFORMS

According to noted ADR author Jacqueline Nolan-Haley, “*Arbitration’s fading popularity over the last two decades has energized mediation’s growth and has helped it to displace arbitration as the ADR process of choice.*”¹⁶ Indeed, Professor Nolan-Haley asserts,

¹⁰ Stewart K, Matthews J, *Online arbitration of cross-border, business to consumer disputes*, 56 U. MIAMI L. REV, 1111, 1112 (2002)

¹¹ *Id* at 1115

¹² Derric Yeoh, *Is Online Dispute Resolution The Future of Alternative Dispute Resolution?* KLUWER ARBITRATION BLOG (June 24, 2020, 11:04 AM) http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/?doing_wp_cron=1592903240.4126179218292236328125

¹³ *Id*

¹⁴ Karan Singh, *Online Dispute Resolution (ODR): A Positive Contrivance to Justice Post COVID-19*, KING STUBB AND KASIVA (June 24, 2020, 01:37 PM) <https://ksandk.com/arbitration/9653/>

¹⁵ *Supra* note 7

¹⁶ Jacqueline M. Nolan-Haley, *Mediation: The ‘New Arbitration’*, 17 HARV. NEGOT. L. REV. 61, 66 (2012) [citing Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System*, 108 PENN ST. L. REV. 165, 183 (2003) (noting that court created “rigid” policies deterred parties from engaging in arbitration)]

“mediation is the new arbitration.”¹⁷ In many ways, the growth of mediation has spurred renewed attention to ODR, as mediation is a cooperative process fostered through communication—something that can be facilitated within the online world. The extension of mediation into cyberspace could drastically improve individuals’ access to justice.

Private Platform

Self-contained dispute resolution platforms have several benefits over other private systems in which the marketplace can respond to parties that fail to comply with outcomes of the process of dispute resolution. For example, within the eBay platform, it is able to initiate action against parties, failing to obey by suspending accounts or permitting the winning party to post something against the non-compliant party.¹⁸ Moreover, in most of these settings, the mechanism of payment is internal to the marketplace. In these circumstances the payment share of the marketplace can be delayed or can even reverse charges within the event that matters arise concerning the transaction. Systems that accept delayed payments or that incorporate a savings account share of the payment system accept to provide a refund to the customers, without the compliance of the merchant with the mediated outcome.¹⁹ The use of payment mechanisms, particularly the one that incorporates a chargeback facility, is a vital means of compliance and is often prefigured as one of the important features or essential features of a successful private ODR platform.²⁰ These systems, attached with the internal “trust mark,”²¹ permits for a complete internal system of dispute resolution.

Public Platform

Many of the advantages of a private self-contained member-based complaint platform can be simulated in the online public justice ODR environment. The major difference between

¹⁷ *Id* at 61

¹⁸ See, *How Does eBay Buyer Protection Work?*, EBAY, (June 25, 2020, 12:07 PM) <http://pages.ebay.com/coverage/BuyerProtectionForBuyers.html>

¹⁹ See for example, eBay. See *supra* text accompanying notes 6–11. In fact, chargeback facility is used by eBay and other online providers, such as PayPal. For more information, see PayPal website, Chargeback guide, at <https://www.paypal.com/us/webapps/mpp/security/chargeback-guide>

²⁰ Vikki Rogers, *Knitting the Security Blanket For New Market Opportunities*, ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION; and Ruha Devanesan & Jeffrey Aresty, *ODR and Justice – An Evaluation of Online Dispute Resolution’s Interplay with Traditional Theories of Justice*, ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 251, 293 (Mohamed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012) at 95.

²¹ A trustmark is, for example, a top rated seller designation based on customer feedback. *What is E-commerce Trustmark?*, WEBOPEDIA, (June 25, 2020, 10:57 AM) http://www.webopedia.com/Term/E/e_commerce_trustmark.html. See also Pablo Cortés, *Developing Online Dispute Resolution for Consumers in The EU: A Proposal for the Regulation of Accredited Providers*, 19 INT’L J. L. & INFO. TECH. 1 (2010) (describing the potential use of trustmarks in the E.U.).

private and public ODR platforms, though, subsists in the mechanism of implementation of outcomes. For the public-based and/or judicially-supported ODR platforms, enforcement can be done through various different mechanisms—the simplest of which is to gain assistance of the local courts in enforcement, should the losing party fail to comply. In this kind of mechanism, no accreditation, feedback or account restrictions are needed to encourage compliance. Instead, merchant accepts to abide by particular laws and rules and allow a public supported ODR system to resolve their issue.²²

Cross-border Platform

In a somewhat similar manner, individuals within the European Union suffer time delays and lack efficient means to access to justice, especially in any cross-border e-commerce environment. According to the 2013 European Union (E.U.) Justice Scoreboard, the majority of European Union Member State courts take over 200 days to resolve a litigious civil and commercial case,²³ and many States have a high number of such cases pending.²⁴ However, a large majority of member states have a well-developed system for the registration and management of cases,²⁵ including filing in small claims courts.²⁶ And nearly all member states report the availability of ADR methods,²⁷ yet few have a full online dispute resolution platform available, and none of which reach cross-border trade.²⁸

Indian Platforms

In recent times, a shift within the pattern of resolving disputes are often established as more and more ODR platforms became operable within the country facilitating particular sorts of dispute resolution for several national and international companies. With the help of ODR platform the process of resolving dispute has become simple by merging the already existing procedure of ADR with cutting edge technology, creating the procedure reasonable and time-saving.

1. CADRE or Centre for Alternate Dispute Resolution Excellence is a website grounded stage for ODR. Here one of the party reaches the platform to create the contract with

²² Supra note 6, at 501.

²³ *European Comm'n*, THE EU JUSTICE SCOREBOARD (2013), available at [http:// ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf).

²⁴ *Id*

²⁵ *Id*

²⁶ *Id*

²⁷ *Id*

²⁸ Supra Note 6 at 489.

other party. If both side parties gives their consent then an arbitrator is selected and information like meeting timing are conveyed through e-mails or WhatsApp. Mostly with the help of video calls the meetings are conducted between the parties. The final decision is made between 20-25 days which is legally binding. CADRE has been impactful in solving tenant and rental contract disputes for NestAway which is an online home rental startup.

2. SAMA is another ODR platform that enables easy contact to high-quality ADR service providers and assists in solving the disputes online. ICICI Bank is using SAMA to resolving nearly 10,000 disputes with amount going up to INR 20 lakh.
3. CODR or Centre for Online Dispute Resolution places itself as an organization that will manage cases online end to end.
4. AGAMI is another non-profit ODR platform that seeks to make an improved system of law and justice by providing time-saving and reasonable dispute solving ways.

COVID19 AND ONLINE DISPUTE RESOLUTION

Covid19 which is also known as “*Severe Acute Respiratory Syndrome Coronavirus 2*” (SARSCOV-2), this outbreak has changed our world upside down because it has affected the countries socially, politically and economically. The first identified amid an outbreak of respiratory illness case in Wuhan city Hubei province China²⁹, slowly and gradually it was spread in whole world and created a pandemic. On January 30, 2020 the World Health Organization (W.H.O) proclaimed Covid19 as a “*Global Pandemic*”³⁰. Seeing to the situation it is going to be a challenging task to make everything normal as earlier, the only measure to stop the spread of this virus is following the principle of social distancing and the lockdown which is being imposed by the government of all the countries for the welfare of its public.

Talking about legal framework of countries, in upcoming time courts around the world including India will be flooded with large number of pending and new cases because currently the courts are not working as they used to they are hearing only the urgent matters

²⁹ *How Covid-19 spreads?*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 26, 2020, 09:37 AM) https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Findex.html

³⁰ Donald G. McNeil Jr., *Coronavirus Has Become a Pandemic, W.H.O. Says*, THE NEW YORK TIMES, March 11, 2020 (June 26, 2020, 3:16 PM) <https://www.nytimes.com/2020/03/11/health/coronavirus-pandemic-who.html?action=click&module=RelatedLinks&pgtype=Article>

to maintain the social distancing and looking into this scenario it is going to be so difficult in the administration of justice to all. The Arbitration and Mediation is also affected by this pandemic, right now it is not possible for the parties to attend the meetings physically and resolve the dispute, there must be so many pending cases for the non-performance of contract, force majeure etc.

Therefore a proactive approach is needed to insulate the legal system from possible breakdown³¹ that is Online Dispute Resolution (ODR). It is known for speedy disposal of dispute; it is inexpensive, maintains the confidentiality and doesn't require the physical presence of any party because it uses the method of video conferencing. In respect to Arbitration and Mediation travelling and loading costs are hugely curtailed if the party uses the method of ODR³².

As per the survey of Global Access to Justice there are 47% suspension of face to face legal aid and legal services, 69% temporary suspension of court hearing, 49% temporary suspension of proceedings of judicial cases worldwide due to COVID19 and to resolve all this 71% of the people now rely on the technology to avoid face to face contact with the client, 35% adopted video conference for legal dispute resolution³³. As we can see that now large numbers of people have started using the ODR for solving their legal problems, so ODR should be promoted worldwide as in the current time it is the best way to resolve legal issues.

COURT ANNEXED ADR

Swift measures have been taken by the Indian Judiciary to make sure that people have access to the system and justice, albeit in a particular limited capacity. Various facilities like e-filing and the video conference hearings by some few courts is a significant stride towards indulging court processes and technology together. However it cannot be ignored that the usage of this practice is done by comparatively fewer High Courts and the Supreme Court, which do not deal with cases with less amount or value or cases with lesser importance. Data on how many district courts are conducting online hearings or e-filing is still unclear. Districts courts are entry point for any dispute, be it a dispute arising due to any contingent

³¹ Dr. Lalit Bhasin, *Covid-19 and its impact on the legal system*, LEGAL ERA (June 27, 2020, 12:44 PM) <https://www.legaleraonline.com/articles/covid-19-and-its-impact-on-the-legal-system>

³² Shalvi Mehta, *Is Online Dispute Resolution the need of the hour?*, BAR AND BENCH (June 27, 2020, 2:39 PM) <https://www.barandbench.com/columns/is-online-dispute-resolution-the-need-of-the-hour>

³³ *Impact of Covid-19 on justice systems*, GLOBAL ACCESS TO JUSTICE PROJECT 2020 (June 27, 2020, 3:37 PM) <http://globalaccesstojustice.com/impacts-of-covid-19/#graphic13>

situation because of Covid-19 or any other general case. What is important in such a situation is that capacity of such courts should be increased and looked over to deal with the situation and all the cases arising out of Covid-19 crisis.³⁴

Suggestions

To resolve this dispute, Government (Department of Justice) and judiciary can together take the subsequent measures:

1. To develop a policy framework enabling court annexed ODR via arbitration, negotiation and mediation specifically for disputes related to Covid-19.
2. To facilitate Court annexed ODR, via ADR mechanism; it is significant to infuse designated courts with appropriate technology solutions required for the process.

To make it happen, it is necessary for the Judiciary and the Government (Department of Justice) to work hand in hand with several mediation and arbitration institutions for involvement of top mediators and arbitrators in the process. Additionally for the post Covid-19 phase, it is necessary to streamline the handling of all the cases arising out of the Covid-19 crisis, by establishing special courts for dealing with all such disputes. It will be beneficial for the judicial system and will also prevent it from collapsing because of overburdening from cases.

It is very important to timely dispose the pending or newly arising cases for opening up stalled services and industries. Most importantly, it is of utmost importance to provide a fair access to the judiciary to all the individuals who are party to any dispute, being it a physical dispute, emotional dispute, or any financial dispute. The fate of various companies and individuals will be decided by the decision made by the Judicial System and the Government, any kind of failure will lead into a judicial crisis on a suffering nation, which can be avoided by actively inducing of the judiciary with the process of court annexed ODR.

CONCLUSION

Alternative Dispute Resolution (ADR) which consists of several heads, namely, arbitration, mediation, conciliation and negotiation is definitely a way forward for the traditional Judicial System and Online Dispute Resolution (ODR) is a way forward for the Alternative Dispute Resolution (ADR), making justice remotely accessible. Though Online Dispute Resolution

³⁴ Deepika Kinhal and Tarika Jain, *The Impending Judicial Crisis Post COVID-19*, VIDHI CENTRE FOR LEGAL POLICY (June 28, 2020, 07:19 AM) <https://vidhilegalpolicy.in/2020/04/27/the-impending-judicial-crisis-post-covid-19/>

(ODR) existed within the system from such a long time, still it was not a proper acknowledged way of dispute resolution for the parties to a dispute due to several reasons, but the contingency created by the Covid-19 is a great opportunity for the judiciary, government and ADR professionals as it can clear the misconceptions of the parties related to Online Dispute Resolution (ODR) and introduce them with the abundance of benefits which ODR inherit. The disinclination of people in ODR can be eventually converted into Predilection with the help of judicial system and the government, by mandating court annexed ODR for the cases arising due to the Covid-19 crisis. It can also be converted into a predilection because parties of any dispute do lack other options to resolve their disputes and in order to be safe from the virus; it is beneficial to conduct dispute resolution processes through virtual means. All these situations will gradually lead towards development of Online Dispute Resolution (ODR), and will make it a more preferred way of resolving dispute.