

# Online Dispute Resolution: Virtual Justice as Reality

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## ABSTRACT

*If the world could be crystallized into one space-it is the virtual world devoid of territorial boundaries where conventional offline laws may have no application. With the growth of Internet & e-commerce, disputes of diverse nature have surfaced including social, commercial, intellectual property related and cultural or political conflicts, involving multiple territorial jurisdictions. In such a scenario, 'Online Dispute Resolution', robotic by software or by appointing a neutral third party and conducted online seems to be the most viable and practicable solution. In this Paper, I aim to discuss the meaning and scope of application of ODR, efficiencies and challenges in the applicability of ODR. The role of government and judiciary in developing ODR techniques will also be elucidated. Several pertinent issues such as resolving jurisdiction and enforcement issues, privacy and confidentiality concerns interlinked with successful adoption of ODR techniques will be considered and recommendations made to eliminate the possible hurdles for effective deployment of ODR in India.*

**Keywords:** Online dispute resolution (ODR); alternate dispute resolution; technology e-Commerce and judiciary.

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## 1.0 Introduction

The proliferation of internet brought together people from different parts of the country to engage in virtual business transactions. This eventually led to a large number of cross border disputes and consequently, the advancement of technology has made it possible to use information and communication technologies to resolve disputes between parties irrespective of their location. The first such platform introduced in 1999 was eBay which allowed a customer to file a complaint online and initiate a settlement process. In the event of the failure of the settlement an online mediation process would commence. Basically this platform was designed to diagnose the problem and conduct automated negotiation followed by mediation or arbitration. This model, which has since then evolved into more sophisticated variants which are widely used by other private organizations and states alike, has popularly been termed as ODR. The ODR as defined by UNCITRAL is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology. Basically ODR is simply e-ADR where interactions take place online using technology. In practice, ODR offers more advantages than the traditional offline ADR mechanisms as ODR is cost effective and more useful for resolving cross-border disputes and issues that may arise because of multiple jurisdictions. While the adoption for ODR has been in resolving e-commerce disputes where parties are in different jurisdictions, now it has since been adopted to resolve a wider variety of disputes viz. consumer disputes, family disputes, insurance claim, intellectual property/ domain name dispute etc.

## 2.0 ODR in India

In India where courts are overburdened and the backlog of cases clogging court rooms,

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access to justice in India is a challenge and resolving disputes is evidently a pain point, considering the time, money and efforts involved. There have even been some instances where the courts identify the need for having ODR mechanisms across courts, for example, hon'ble Justice N.V. Ramana has stated that ODR can be used successfully to resolve consumer, family, business and commercial disputes.<sup>i</sup> The Ministry of Law and Justice has recently issued a list of agencies and organizations, which have online dispute resolution services and also advised various government departments to avail of such online services. During the COVID-19 pandemic, the present Chief Justice of India, Justice S.A. Bobde has noted the need for steps to be taken to make courts virtual in order to prevent the shutdown of the top courts and emphasised on the need to have international arbitration (IA) and artificial intelligence ("AI") as a leading alternative to the current status quo: IA to traditional methods of dispute resolution, AI to traditional methods of performance.<sup>ii</sup> He has also cited the recent launch of the official mobile app of the Supreme Court, which provides information on cause lists, case status, daily orders, judgments and circulars, among other and also mentioned the artificial intelligence-powered translation engine "Suvas (Supreme Court Vidhik Anuvaad Software)" that translates judgments from English to Indian languages.<sup>iii</sup>

However the Nilekani panel in 2019 has already been initiated the setting up of online dispute resolution systems to handle complaints arising out of digital payments. The high level committee suggested that such ODR platform should have two levels – one automated and one human, with a provision for appeal.<sup>iv</sup> Recently NITI Aayog, in association with Agami and Omidyar Network India, organised a meeting on 'Catalyzing Online Dispute Resolution in India' where it brought together key stakeholders to work collaboratively to ensure efforts are taken to scale online dispute resolution in India. It was also recognised that ODR can enhance access to justice and as efficient dispute resolution will be key in reviving the economy from the challenges posed by the COVID-19.

### 3.0 ODR and Judiciary

The Supreme Court has sought to ensure access to justice during the ongoing pandemic and has issued orders stating that it would hear urgent matters via video conferencing and prescribed standard operating procedures, for advocates and parties for mentioning cases, e-filing and hearings. The ongoing pandemic Covid-19 has created an unprecedented need for courts, arbitral institutions and organisations to adapt at short notice to new and different ways of working and offer solutions to parties and practitioners that will enable dispute resolution in a time of quarantine and enforced social distancing. The Supreme Court has been laid down the foundation for ODR in to the country and held that if consultation could be achieved through electronic media and remote conferencing, it was not necessary for people to sit with each other in the same physical space.<sup>v</sup> The Apex Court also observed that there was a need to consider categories of cases which can be partly or entirely concluded "online" without physical presence of the parties and recommended the resolution of simple cases like those concerning traffic challans and cheque bouncing.<sup>vi</sup> Further, the court has recognised the validity of online arbitration and held that an online arbitration agreement is valid as long as it is compliant with Section 4 and 5 of the Information Technology Act ("IT Act"), 2008 read with Section 65B of the Indian Evidence Act, 1872 and provisions of the Arbitration and Conciliation Act, 1996. The simultaneous movement to integrate technology in dispute resolution and reliance on ADR mechanisms is a clear indicator that India is gearing itself to logically transition towards ODR.<sup>vii</sup>

### 4.0 Challenges in Adoption of ODR

Though ODR provide for efficient and effective dispute resolution, its integration in the mainstream dispute resolution ecosystem holds several challenges. A successful implementation of

ODR depends on several factors such as availability of reliable and secure technology tools, digital infrastructure to enable usage, willingness of parties, co-operation and support from lawyers, Judiciary, Government to ensure enforcement of awards and agreements etc.<sup>viii</sup> Based on extensive literature review there are following challenges that need to be addressed in a phased manner for successful implementation of ODR:

### **5.0 ODR and Legislation**

The present legislative framework has certain provisions have enabled the accommodation of online processes, especially sharing of virtual documents and virtual hearings. As mentioned earlier, Indian Evidence Act, 1872 under Section 65-A and 65-B allows for the recognition of electronic evidence. Similarly, the IT Act accords recognition to digital signatures under Section 4, 5, 10-A and 11-15 to provide validity to online contracts. This has been made possible by adopting the UNCITRAL Model Law on Electronic Commerce in 1996 and the Model Law on Electronic Signatures in 2001. This framework can be used to implement ODR in practice.

### **6.0 ODR and technology**

Important variant in making ODR a reality in India is the technological capacity and internet perforation across population. However India might have a large number of internet users but still it accounts for only 50 percent of its population. This limited internet access and lack of infrastructure problems would require large-scale resource intensive intervention to ramp up capabilities which can enable ODR adoption in India. Apart from technological barriers, ODR also faces mental barrier since people may not be comfortable with online communication as opposed to face to face communication. However, there is a shift in India's relationship with online technology with reliance on e-commerce. There are certain prerequisites for an effective ODR mechanism viz:

### **7.0 Digital literacy**

ODR requires a basic level of digital literacy as a prerequisite to ensure that ODR is adopted by the society at large and not remain limited to urban areas only. Recently the Government of India has taken initiated measures to impart digital literacy amongst citizens. In March 2019, Pradhan Mantri Gramin Digital Saksharta Abhiyaan (PMGDISHA) was launched with an objective to expand digital literacy in rural India and make 6 million people in rural India digitally literate.<sup>ix</sup> Under this project, the Government has set up 3,06,975 training centres and has conducted 2,98,00,507 digital literacy trainings.

### **8.0 Lack of awareness regarding ODR**

It is essential that apart from strengthening ADR processes, initiatives should be taken to build awareness regarding ODR as usage of technology to connect disputing parties with Neutrals to resolve disputes, is at a very nascent stage in India. At present, the lack of awareness having low confidence in ODR processes and restricted application of ODR in sectors with huge potential for such as MSME, consumer disputes etc. As with any technology services, comfort and trust is built overtime with continuous usage, individuals become accustomed to ODR with its increased usage. Therefore, apart from increasing awareness through systematic campaigns, there is need to provide more avenues for continuous usage of ODR.

## 9.0 Legal culture

It is often difficult to introduce ODR in countries where people rely more on courts and there is low filtration of ADR mechanisms for dispute resolution. However, it is necessary to create capacity to provide quality ADR services through mediation and arbitration which will help in transitioning faster towards ODR.

### 9.1 Jurisdiction issue

When dispute entirely resolved online through ODR, the question as to applicability of substantive law to resolve the dispute will arise, as parties are at distinct places. In traditional arbitration, place of arbitration is decided by the parties as per section 20 of the Arbitration and Conciliation Act, 1996 which is subject to convenience of both the parties. But during online proceedings, conflict may arise with respect to place or seat of arbitration as they do not have to go anywhere physically. It may lead to ambiguity with respect to jurisdiction.

### 9.2 Enforcement of the outcome of ODR process

A key challenge towards meeting the implementation of ODR is the existing uncertainty regarding enforcement of ODR outcomes. The Supreme Court in *Afcons Infrastructure case*<sup>x</sup> held that the court-initiated mediation proceedings will be deemed as Lok Adalat and settlements reached through such proceedings are enforceable under S. 21 of Legal Services Authorities Act, 1987. However, there seems to be a legal vacuum when mediation processes are not initiated by the courts. For these proceedings, settlements can only be enforced as an agreement between the parties and any breach of such agreement will result in further judicial processes. Further, the process for enforcement of arbitral award in India is complex and burdensome. The arbitration awards require stamp duties in most of the states and the archaic requirement to attach eStamp certificate to the document create barriers in an end-to-end online process. The Arbitration and Conciliation Act, 1996 provides for enforcement of the arbitral award in the same manner as if it were a decree of the court. However it is required that the signed copy of the arbitral award passed online can be provided to the parties by arbitral tribunal electronically via email and the actual signed copies can be simultaneously sent through post or the arbitrators can also put their digital signatures and provide accuracy and integrity to the award. The original signed copy received either received by post or it's a digitally signed awards, can be filed before the courts, for the enforcement of the arbitral award. There won't be any change in the procedure for enforcing an online award. Pursuant to passing of valid award online, it can be enforced in accordance with procedure outlined in the Arbitration Act read with the execution procedure enshrined under Code of Civil Procedure, 1908 (CPC).

### 9.3 Suggestion and recommendations

- ODR is still in its infancy stage in India and ODR is required to introduce on a wide scale to rescue the courts from backlog of cases. In order to make ODR mechanism more effective, mass awareness and training through social media is required.
- It is also suggested to introduce a tiered dispute resolution framework for cases, which can be resolved through negotiation, mediation and arbitration in a time-bound manner, for all disputes below a certain monetary limit as model used in Hong Kong.
- It is also suggested to introduce a 24\*7 legal help to educate the public regarding their rights and obligations under law.
- It is also required to collaborate and co-opt existing expertise and resources from grass-root organisations and private sector ODR service providers.
- Governments can play a pivotal role in granting financial aids to ODR projects in India and work

towards building robust technical infrastructure.

- More recognition should be given to ODR mechanism for expedient resolution in coming times.
- More Advocates and Legal Experts should be encouraged to come forward to register themselves as mediator on online platforms such as SAMA.
- E-arbitral awards in our opinion would have an equivalent effect as that of traditional arbitral awards and would be final and binding upon parties.

Thus the need of the hour is to maximize the reach of access to justice delivery system to all the sections of the society. For that a strong infrastructure, for easy access and for ensuring the justice delivery within minimal time and in adequate manner by increasing literacy rate, reducing language and cultural barriers, creating awareness, manpower training in technology, funding for projects and codification of ODR law and practice and easy access to e-courts might be the stepping stone towards achievement of the same.

## References:

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<sup>ii</sup> /www.livemint.com/news/india/cji-rules-out-total-shutdown-of-supreme-court-amid-coronavirus-threat11584300621602.html> accessed 22 May 2020

<sup>iii</sup> <https://www.theweek.in/news/india/2020/02/08/cji-bobde-bats-for-law-containing-compulsory-pre-litigation-mediation.html> accessed on 21st October 2020

<sup>iv</sup> Nandan Nilekani and others, 'Report of the High Level Committee on Deepening of Digital Payments' (2019) 97 accessed 30 October 2020

<sup>v</sup> Grid Corporation of Orissa Ltd. v AES Corporation (2002) 7 SCC 736

<sup>vi</sup> M/s Meters and Instrument Private Limited v Kanchan Mehta 2017(4) RCR (Criminal) 476

<sup>vii</sup> Shakti Bhog v Kola Shipping (2009) 2 SCC 134 & Trimex International v Vedanta Aluminum Ltd 2010(1) SCALE574

<sup>viii</sup> Roger Smith, 'Rechtwijzer: why online supported dispute resolution is hard to implement' (Law, Technology and Access to Justice, 20 June 2017) accessed 30 October 2020

<sup>ix</sup> PMGDISHA, 'Objective' <https://www.pmgdisha.in/about-pmgdisha/> accessed 3 October 2020.

<sup>x</sup> Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd (2010) 8 SCC 24