

ODR-FUTURE OF ADR

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Abstract

Technology has made its way into almost all areas of our life. The same is true for the legal field. The judiciary is taking steps to integrate ICT into its work. The judiciary is also focusing on increasing acceptance of alternate forms of dispute resolution(ADR). ADRs are methods using which parties can settle their disputes without a trial or litigation. The most common form of dispute resolution includes arbitration, conciliation, mediation and negotiation. The intersection of ICT and these alternative dispute resolution methods is what we call Online Dispute Resolution(ODR). ODR means any of these dispute resolutions that are carried out online. The parties do not need to be physically present in front of each other in ODR. ODR can be done through mail or video conferencing. With the huge pendency of cases facing the judiciary right now, ADR can help significantly reduce the burden for the judiciary. ODR can speed up this process. ODR is a cost-effective, more convenient, and less time-consuming way of arriving at a solution. This article aims to understand the basic concept of ODR, its origins and the current state of ADR in India.

Keywords: Online Dispute Resolution, ODR, Online Mediation, ADR, Dispute Resolution, Judiciary, Alternative Dispute Resolution, Electronic Arbitration

Introduction

Technology has changed our lives to an unimaginable extent. The tasks which took months now take a few seconds. Technology has connected us beyond geographical restriction and made the world into what we call a 'global village', the world is more connected than ever before, and the 'world wide web' encompasses several countries and sectors. More and more businesses and governments are utilizing technology to harness its full potential to save resources and extra labour. This shift towards technology was only accelerated by the unfortunate COVID-19 pandemic.

Indian legal system and the judiciary are also taking significant steps to integrate technology into their work to facilitate its working. The E-court project is a giant leap forward in changing

the traditional working of the Indian judiciary and incorporating the best possible technology to improve current practices in the courts. The courts are evolving to reach citizens, making it easier to approach the court.

Apart from the technology legal system has also witnessed a recent push by the judiciary towards Alternative Dispute Resolution (ADR) methods. The current lack of infrastructure, officials and the large number of pending cases makes it very difficult for the judiciary to deal with the pending cases.

ADR methods provide an alternative remedy for people. By using these methods people resolve their disputes without a trial. The most common methods of ADR are arbitration, negotiation, mediation, conciliation and lok adalat. These methods offer an easier way to resolve a dispute instead of lengthy and often arduous

conventional methods of litigation. These methods are less expensive and time-consuming as compared to litigation. The parties can exercise more agency and prioritize their interests in ADR methods.

Online dispute resolution (ODR) is the intersection of technology and ADR methods. Technology can make access to ADR easier. With the growth of the Indian economy and the booming of Indian business, the need for effective dispute resolution is increasingly felt. In an age where business deals and agreements are no longer limited to the geographical boundary of the nation, dispute resolution arising also has to overcome the geographical barriers using technology.

ADR and digital technology together if used effectively can significantly reduce the burden on the Indian judiciary which despite its impressive track record of delivering justice and serving as a protector of the rights of Indian citizens has been unable to deal with the mounting number of cases and is slow at disposing of the cases. This delay in disposing of cases reduces the faith of the common man in the judiciary. The right to a speedy trial is a fundamental right contained in Article 21 of the Indian Constitution, the Right to life and liberty. Therefore it becomes essential to reduce the burden on the Indian judiciary for faster disposal of cases. ADR can serve as a tool to resolve this problem. Indian judiciary and the government are well aware of this and the potential of ODR.

It is important to understand ADR and ODR to fully understand the advantages it can offer.

Alternate Dispute Resolution Methods

Out-of-court settlements are considered better from historical times. ADR is not a new concept in India, the practice of Nyaya Panchayats dates back to the British Moghul era. Sage Yajnavalkya has alluded to many forms of arbitral bodies, often referred to as panchayatdars and their members

panchas.⁸ ADR methods are modern out-of-court settlement tools. These methods are the alternative resolution methods that are used to resolve the disputes between the parties without opting for going through litigation and trial. These methods are increasingly accepted as an alternative by the parties as they offer several advantages as compared to litigation. The ADR methods are more cost effective and time efficient and prioritize the comfort of parties. These proceedings require an active 'mindset of resolutions' to succeed. These methods are less formal as compared to litigation. In India, section 89 of the civil procedure code gives the court authority to refer disputes to ADR.⁹ Section 89 was adopted for the first time in 1997 as a result of an amendment based on the suggestions of the Law Commission's 129th Report, with the stated goal of ensuring swift justice. After problems are formulated, the court is now required to recommend the matter for resolution via 1) arbitration, 2) conciliation, 3) judicial settlement, including Lok Adalat settlement, or 4) mediation. If the parties are unable to resolve their differences through any of the ADR alternatives, the matter may be continued in the court where it was filed.

Arbitration is a process in which the parties refer the dispute to one or more arbitrators whose duty is to decide the outcome. The arbitrator hears the arguments from both parties, records evidence and arrives at the decision. In India Arbitration and Conciliation Act 1996 serves as a legislative framework for the law relating to arbitration-domestic and international, commercial arbitration and enforcement of foreign tribunal awards. It is a favorable method of dispute resolution for commercial disputes.

Conciliation is an informal process where the parties are helped by one or more conciliators to arrive at a solution. The conciliators inform parties of possible options and compromise ideas. The conciliator has to keep the interests

⁸Vijay Kumar Singh, Learn the Law, Understanding the law for common person, 156 (EBC, 2022)

⁹The Civil Procedure Code 1908, §89

of both parties in mind and has to be fair, objective, impartial and independent while proposing a settlement to the parties. The conciliator has to keep the information revealed during proceedings confidential. This process is less formal as compared to arbitration.

Mediation is a process where the discussion between parties is facilitated by a neutral third party. Mediation is an informal and voluntary process. The mediator only helps parties negotiate a mutually acceptable solution, the mediator does not propose a solution. The parties arrive at a solution and record it in a mediation agreement. This method is suitable for matrimonial, family disputes and smaller disputes. Unlike the conciliator who plays an active part in settling, the mediator does not participate proactively in settling. Negotiation is a method where no third parties are involved. The parties to the dispute themselves try to arrive at a solution acceptable to both parties.

Online Dispute Resolution

Online Dispute Resolution or ODR is the intersection of technology and ADR. ODR integrates technology with ADR methods. Online dispute resolution (ODR) is a type of online settlement that employs alternative conflict resolution methods. The phrase refers to conflicts that are partially or completely resolved through the Internet after being originated in cyberspace but with a source outside of it (offline).¹⁰ The terms electronic ADR (eADR), online ADR (oADR), and Internet dispute resolution (iDR) are also used to refer to ODR. This method seeks to mix up the traditional ADR methods with ICT.

ODR is the settlement of conflicts, particularly in small and medium-sized cases, via the use of digital technology and ADR approaches such as arbitration, conciliation, and mediation. It refers

¹⁰Sruti Devan. K., An Analysis of Online Dispute Resolution and Its Challenges, 30 *Supremo Amicus* 289,289 (2022). https://heinonline.org/HOL/Page?handle=hein.journals/supami30&div=27&g_sent=1&casa_token=&collection=journals (Accessed 12 July 2023)

to the practice of employing technology to avoid, contain, and resolve disputes outside of the traditional legal system. It can be used as an extension of the public court system or as an alternative conflict resolution method.¹¹

The number of electronic forms of alternative methods for dispute resolution changes over time, but mediation (74% of ODR providers) and arbitration (40% of ODR providers) are most frequently used. Just behind these is negotiation.¹²

This process allows the parties to use these methods either completely online or started in an online mode. This reduces the time taken to resolve disputes and allows parties to settle their disputes from anywhere.

The parties no longer need to be physically present in the same place to communicate and resolve their disputes. The COVID-19 pandemic forced the world to communicate through video conferencing. This showed how this can be the future of judicial hearings as well as dispute resolution methods.

The first ODR projects were initiated in 1996 at the University of Massachusetts and the University of Maryland.¹³ With increasing globalization and the increase in the number of businesses the number of disputes also grew. In this scenario to address the need for the platform to settle these disputes some platforms emerged. e-bay started a pilot project to give online mediation facilities to settle disputes arising between buyers and sellers on its platform.¹⁴ Over the next decade, the number of disputes handled by eBay rapidly increased, and by 2010, the company was managing over 60 million disputes per year

¹¹The NITI Aayog Expert Committee on ODR, "Designing the Future of Dispute Resolution THE ODR POLICY PLAN FOR INDIA", October 2021, <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>, (Accessed 12 July 2023)

¹²Sruti Devan. K., *An Analysis of Online Dispute Resolution and Its Challenges*, 30 *Supremo Amicus* 289,291 (2022). https://heinonline.org/HOL/Page?handle=hein.journals/supami30&div=27&g_sent=1&casa_token=&collection=journals (Accessed 12 July 2023)

¹³ Ethan Katsh, 'ODR: A Look at History' in Mohamed Abdel Wahab and others (ed), *Online Dispute Resolution Theory and Practice* EIP 21,23 (2013)

¹⁴Id

through its ODR Platform.¹⁵The success of this paradigm, along with the rapid expansion of the internet, accelerated the evolution of ODR, resulting in the explosion of ODR Platforms.¹⁶

After the success of this model, the number of new startups focusing on ODR grew. The Corporation for Assigned Names and Numbers (ICANN) established a Domain Name Dispute Resolution Policy, which began as an offline procedure but gradually became increasingly online. However, the majority of these ventures failed. Only a few successful systems, such as Cybersettle, Smartsettle, and the Mediation Room, have had a significant influence on the dispute resolution environment. As per the three phases of growth of ODR. the first phase was an experiment by e-Bay, the second phase was the growth of startups and the third phase is acceptance of the ODR by the government and the judiciary. The success of the private platforms also pushed the government to consider ADR. In 2004 city of New York adopted an ODR system developed by Cybersettle. European Union also adopted the European Online Dispute Resolution Platform.¹⁷ Many other countries followed in their footsteps to adopt ODR as an effective way to resolve disputes.

Few models have evolved over the year after the successful implementation of ODR.

They are:

1. In-house private ODR Platforms managed by individual firms;
2. Private ODR Platforms or service providers catering to many kinds of disputes and diverse means of settlement;
3. Government-administered or state-sponsored ODR programs and platforms; and

4. Court-annexed ODR systems.¹⁸

Methods of ODR

Some ways in which the ODR can be practiced is-

Synchronous ODR- It is an online dispute resolution approach in which the parties speak in real-time utilizing various video-conferencing technologies.

Asynchronous ODR - It is a technique of communication that uses email or other similar communication apps. Communication does not take place in real-time here.

Online Mediation- It is becoming the most advantageous means of conflict settlement. This is a hybrid of synchronous and asynchronous ODR. The majority of ODR systems employ this strategy to obtain a decision. In most cases, internet mediation begins with the parties receiving an email. The email would provide basic details on the proceedings. Following that, virtual meetings are held in chat rooms.

Electronic Arbitration- It involves using video conferences similar to online mediation but for the process of arbitration.

Blockchain arbitration-Blockchain arbitration is a new type of online dispute resolution that is presently being developed. Blockchain arbitration has emerged as the preferred dispute-resolution tool for smart contract issues. Smart contracts are a result of blockchain technology. Smart contracts, unlike traditional contracts, are totally written in code rather than natural languages such as English or French. Another distinction is that, like a programme, smart contracts execute or enforce commitments automatically. For example, in a basic contract to sell an item, the smart contract may be programmed in such a manner that after payment is received, ownership of the object is instantly transferred to the buyer.

¹⁵Id

¹⁶Ethan Katsh, 'ODR: A Look at History' in Mohamed Abdel Wahab and others (ed), *Online Dispute Resolution Theory and Practice* EIP 21,27 (2013)

¹⁷The NITI Aayog Expert Committee on ODR, "Designing the Future of Dispute Resolution THE ODR POLICY PLAN FOR INDIA", October 2021, <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>, (Accessed 12 July 2023)

¹⁸Id

In turn, blockchain arbitration has been established to meet the dispute resolution demands that may arise as a result of smart contracts.¹⁹

ODR in India

In India COVID-19 pandemic served as an impetus for the growth of ODR in India. In India, ODR has a lot of potential. Online mediation witnessed a rise in India during the pandemic.

In India, litigation is still the preferred method of dispute resolution. In such a scenario, first ADR needs to gain more acceptance before ODR can gain acceptance. There is recognition of the potential of ODR by the government and the judiciary. The Supreme Court accepted the legality of using technology in the arbitration process in *Shakti Bhog v Kola Shipping*, and *Trimex International v Vedanta Aluminium Ltd*. The court also supported the legality of online arbitration agreements reached by emails, telegraph, or other modes of communication that serve as a record of the agreement.

On November 28, 2021, Niti Ayog presented its report titled 'Designing the Future of Dispute Resolution - The ODR Policy Plan for India' under the chairmanship of Justice (Retd.) A.K. Sikri. The research attempted to establish an action plan to cater to the online conflict resolution process in India by incorporating dispute avoidance, dispute containment, and dispute resolution.²⁰

The judiciary is working on ICT integration. The e-courts project is a milestone project in the involvement of technology. Indian government and its departments are taking steps in adopting the ODR mechanism Under the National Internet Exchange of India's (NIXI) Domain Dispute Settlement Mechanism, complaints can be filed online and disputes are decided by an arbitrator/s on the basis of

written submissions. The procedure does not require any in-person hearings to resolve the dispute.²¹

ODR can become a go-to mechanism for dispute resolution however in a country with a large digital divide the first work has to be done to support ODR. Lack of awareness is another challenge facing ODR. It can also prove to be risky and steps have to be taken to ensure the security of information of those participating in ODR.

In 2016, Online Conciliation and Mediation Centre (OCMC) was established at the National Law School of India University under the aegis of the Ministry of Consumer Affairs with an aim to propel online mediation as a first choice for resolving consumer disputes.²²

In 2017, the Department of Justice kicked off the conversation about using ODR to resolve disputes involving government agencies by issuing a list of ODR Platforms and encouraging government agencies to resolve their issues online.²³ In 2019, the RBI's Nandan Nilekani-led High-Level Committee on Deepening Digital Payments advocated the establishment of a two-tiered ODR mechanism to manage digital payment complaints.²⁴

E-lok adalats and start-ups like SAMA also show the potential of ADR in India. Agami is a non-profit organization working on the promotion of ODR. Dispute resolution centers that have traditionally provided dispute resolution services are also providing ODR services for example Bangalore International Mediation, Arbitration and Conciliation Centre offers online arbitration, conciliation, mediation services since 2013, Mumbai Centre for International Arbitration offers video conferencing facility to enable online arbitration proceedings and In 2020, the Delhi Dispute Resolution Society has introduced an initiative called SEHMATI, which is dedicated solely to ODR. The Indian Institute of

¹⁹Derric Yeoh, *Is Online Dispute Resolution The Future of Alternative Dispute Resolution?*, Kluwer Arbitration Blog, (July 12 2023, 4:23 pm) <https://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/>

²⁰The NITI Aayog Expert Committee on ODR, "Designing the Future of Dispute Resolution THE ODR POLICY PLAN FOR INDIA", October 2021, <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf> (Accessed 12 July 2023)

²¹Id

²²Id

²³Id

²⁴Id

Arbitration and Mediation has created Peacegate, an ODR Platform that aims to unify all aspects of ADR, from filing to back-office assistance.²⁵

Lack of awareness, lack of faith in ODR, lack of clarity about enforcement of ODR outcomes, lack of digital infrastructure and low digital literacy are challenges to ODR in India.²⁶

There is still a lack of good institutions and professionals for ADR in India. The lack of these professionals and institutions poses a challenge to the effective use of ADR. There is still no comprehensive legislation that covers mediation. The lack of a proper legislative framework for the implementation of outcomes of ODR proceedings is also a challenge.

Conclusion

Online Dispute Resolution is an intersection of ICT and ADR methods like mediation, arbitration, negotiation and conciliation. Online dispute resolution is a cost-effective, less time-consuming, more convenient method of dispute resolution that adds up to the benefits of alternate dispute resolution methods. These methods are way better alternatives to conventional methods of litigation. With the huge burden of cases on the shoulders of the Indian judiciary, ODR can serve as one of the most effective tools to reduce the pendency of the cases. This method allows the parties to resolve disputes without any need to be physically present in the same space to resolve the dispute.

One of the earliest examples of ODR was an online mediation service started by e-Bay to solve disputes between the seller and buyers on its platform. After this, the growth of ODR witnessed a rapid rise and gained acceptance from governments. The various ways in which the ODR can be practiced are synchronous,

asynchronous, online mediation and electronic arbitration.

India has witnessed a rise in ODR after the pandemic. ODR has a lot of potential in India. It can reduce the pendency of cases in India. India is focusing on developing an effective framework for ODR.

There are many issues that are preventing the utilization of ODR to the maximum. India has to focus on developing an effective mechanism to use ODR. It is important to focus on the potential ODR has and work towards utilizing it. The author will suggest that the judiciary and government should make efforts to lead the way to promote ODR. Training sessions and awareness campaigns should be organized to promote ODR and more platforms should be developed to increase its reach.

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