

Online Dispute Resolution- Application and Challenges

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ABSTRACT:

Alternative Dispute Resolution means resolving the conflicts between the parties concerned outside the periphery of the courts. But the ADR is something which is not new to India. It has been prevalent in the country since beginning time. Legal history indicates that there were many ways through which people obtained justice which were easy, convincible and helped in reducing the burden of the king. This type of system was prevalent in resolving issues related to families and other domestic affairs and also minor issues relating to property. The oldest written source which provided the codes of law and the method to resolve the conflicts among the people. The Punch system in the ancient time, which can also be described as earlier form of ADR, helped in maintaining the stability by resolving the conflicts which can be resolved by negotiating with the involved parties.

Alternative Dispute Resolution came to be used explicitly with the overloading burden on the courts as each judge in the court has been assigned to resolve many cases in a day. Thus, filing a case in the court is a time consuming task and it takes a lot of time in resolving a dispute. Now, with the coming of new techniques in ADR such as mediation, arbitration and conciliation, most of the disputes are settled outside the courts. With the coming of internet as a platform of political, financial and social activities, the ADR has also taken a step ahead in form of Online Dispute Resolution as Section 89 of Civil Procedure Code clearly mentions the terms of it. This concept is certainly evolving in India as in the case of Salem Advocate Bar vs. Union of India (2003) gave rules for proper functioning of ADR.

The paper talks about the application of ADR in various fields and what are the challenges of the same in the country. Is it effective enough? How well the country has accepted it?

Keywords: Alternative Dispute Resolution, Online, Salem Advocate Bar v. Union of India, Punch, Civil Procedure Code.

I. INTRODUCTION

Online dispute resolution is a part of Alternative Dispute Resolution. Since the beginning of the 21st century, the use of internet has grown and increased at a rate of 566.4% which is because of the rapid development of the ICT sector.¹ The growth of internet and the digital economy held a pause for a certain period because of the 2000-2001 economic crisis and the "Dotcom bubble burst" along with the 2009 recession but after all these events they have bloomed as much faster than ever.

Consequently there are rising number of disputes relating to the e-commerce and the digital economy. Ethan Katsh refers to this phenomena as the "e-commercial revolution"² such online claims may arise from the B2B (business to business), B2C (business to consumer), and C2C (Consumer to Consumer) e-contracts. It is this time that we realize that there is a safe haven of the Online Dispute Resolution.

¹Internet Usage Statistics, *The Internet Big Picture : World Internet Users and Population Stats*, INTERNET WORLD STATS : USAGE AND POPULATION STATISTICS (June 2012), <http://www.internetworldstats.com/stats.htm>.

² Ethan Katsh, *Online Dispute Resolution, Some lessons from the E-commerce Revolution*, 28 N Ky. L. REV 810, 811(2011).

Online Dispute Resolution (ODR) becomes necessary tool for solving the disputes relating to the e-contracts. It can take place entirely and partly online and the concerns of the two types of the disputes- Cyberspace and the contracts that arise offline as well. The different methods of the Alternative Dispute Resolution (ADR) are negotiation, mediation and arbitration. With the need to incorporating the ADR to the present times some courts have started the use of the advanced technology to ease their work and set up the cyber courts or cyber tribunals. A major thing is that the ODR must be distinguished from the Cyber Courts. ODR is a traditional alternative dispute resolution mechanism embracing the out of the court mechanisms and indeed resolving a dispute online.

II. METHODS OF ONLINE DISPUTE RESOLUTION

The ODR uses the traditional methods of the ADR mechanism and at the same time modifies it with the needs of the present times and make them more effective. The ODR basically focuses on the negotiation, mediation and arbitration and change their outlook. These methods can be studied in detail as -

- **Assisted Negotiation-** It is the traditional, direct negotiation of the party but is assisted by the technological tools to reach at the consensus and hence easily resolving the disputes. Instead of the third party role played by a human, it is the technology that plays an important role in the resolution of the disputes among the parties. The technology helps by asking the parties various questions and also suggesting answers and sends reminders as well. For instance this ODR method was used by Square Trade in the eBay transactions.³

- **Automated Negotiations-**It is a type of an assisted negotiation only but it is also called the blind bidding negotiation and is extremely useful with disputes relating to only the monetary claims and nothing else. Each party places a confidential bid at the end of each round of negotiation. The system automatically solves the disputes. Cyber Settle and Smart Settle are the good examples of providers of this ODR method.

- **Online Mediation-** It is a voluntary mediation proceeding conduct over internet with the assistance of human third party. The mediator has no decision making power but acts only as a facilitator for the dispute resolution. A major drawback of this method is that it doesn't have face to face interaction of the parties and the other relevant pint to consider is that the technological tools act as the fourth party in this method. ODR online mediation is provided by Juripax⁴, Modria⁵, and the Mediation room.⁶

- **Online Arbitration-** It is an arbitration which is conducted over internet with the assistance of the third party. It has its roots to the traditional arbitration methods. The online arbitrator must be a neutral and impartial party which helps in the resolution of the disputes. The main criticism however is the fact that there is no face

³ Aura Esther Vilalta Nicuessa, Resolution electronica de conflictos, Chapter 7.

⁴ *Juripax Technology for Early Dispute Resolution*, <http://www.juripax.com/EN/home.php>

⁵ MODRIA, <http://modria.com>.

⁶ THE MEDIATION ROOM, <http://www.themediationroom.com>.

to face interaction and technology plays a role of the fourth party to the dispute. There is a special feature attached to it which is that the rewards may be binding or non-binding⁷.

III. FROM ADR TO ODR

To reduce the cost and the time in the litigation process ADR developed as the means to solve the disputes with ease in the Roman Empire. After the older model a new model was developed on the lines of the ADR to make the model more comprehensive and commendable. ODR saves time, cost of legal representative while dealing with the international and e-commerce disputes. In 2005 book *Cyberspace: Online Dispute Resolution (ODR) for e-commerce*, Lucille M. Ponte and Thomas D. Cavenagh offer brief description of how the ODR process can work.

"The emerging field of online dispute resolution refers to a collection of conflict resolution methods that utilize the online technologies to help resolve the disputes. Parties might decide to negotiate a conflict through an exchange of emails or by posting a message to each other in a secret chat room a mediator may work with two disputants in real time online conversations over web or use information distributed."

ODR plays as an institutional method of ADR where a set of guidelines are established to guide the parties, arbitrators/mediators and the proceedings. With the advent of ODR the entire proceedings are available online at the comfort of our home as well as our interests which is very helpful for resolving the disputes and conflicts.⁸

IV. HOW DOES ODR WORK?

Online Dispute Resolution is the main organ to resolve the disputes online. It has mainly three functions - Convenience, Trust and Expertise.⁹

- **Convenience-** ODR systems can never be acceptable if they are contradictory to the interests of the masses or are very difficult to use. The ODR gets hampered by many background barriers which would be discussed in the later sections.
- **Trust-** ODR provides an environment which is healthy and trusting. It instills public sense of trust and ease. Colin Rule, eBay's Director of Online Dispute Resolution says that, "Trust can create a self-reinforcing cycle, where one member's trust urges them to behave in a trustworthy way to the other community membersTrust is built up over time"
- **Expertise-** The most important service that the ODR serves is the expertise in the field of law and other disciplines which can in turn help in the resolution of conflicts and disputes. The delivery of expertise is

⁷ Kofmann-Kohler & Schultz, *Online Dispute Resolution*, Challenges For Contemporary Justice 7, 2004

⁸ *Online Dispute Resolution: Advantages and roles* (11 March 2013)

⁹ Ethan Kath and Janet Rifkin, *Online Dispute Resolution: Resolution conflicts in cyberspace* (2001)

different from the delivery of information. It is important while providing the expertise the need to evaluate the interests and the benefits of the parties involved and resolving the disputes. At the end of the day it is the dispute that has to be resolved and hence it carries a great significance.

V. RESOLVING THE DISPUTES DIGITALLY-

Online dispute resolution may not overtake the dispute resolution process but there are certain ways in which it influences the way in which the disputes can be resolved and taken care off. There are different methods as to how can the disputes be resolved the specified procedure for the same

- **Filing a Claim Online-** Many online platforms use specific ways to file a claim. Many include the process of direct negotiation and provide online forms to the parties to fill so that their disputes can be resolved easily. If the direct negotiation doesn't work then the mediator can join in. For example- Square Trade used the tool called the direct negotiation which could really helped in the resolution of the disputes.
- **Trading Settlement Offers-** In many of the platforms a claims professional initiates the process with the confidential offers and the same is notified to the opposition via fax, e-mail or mail and the respondent tries to settle the claim and if his offer is less than or equal then the claim settles. For example- Cyber settle's system is very effective as regard to the trading settlement offers
- **Discussing The Issues-** It includes allowing the parties to create an entire ODR system, handling case document-sharing between the parties and offering full security. The parties share, discuss and collaborate o documents and even reach the agreements online as well.
- **Signing an Agreement-** This the way of putting the signature into the document which has become an essential part of verifying the document.¹⁰

VI. CHALLENGES TO ODR

The Online Dispute Resolution is in an initial phase and has not taken a concrete shape. This phase is related to it evolutionary process and in this evolutionary process there are many barriers and hindrances to a successful online dispute resolution. These challenges are as follows:

- **Cultural Challenges-** These are the challenges that are predominantly found in the developing nations of the continents of Asia, Africa and Latin America. The people have lack of confidence over the online activities and hence their contribution to this field remains less. Their ideas transmit culturally and flow in an unregulated manner. There is the need of the government to understand and implement proper schemes to solve this challenge.

¹⁰ American Bar Association, Jason Krause , ABA Journal, Vol. 93, No. 10 (OCTOBER 2007)

- **ICT Infrastructure Challenge-** One of the major problem in the ODR is the fact that many of the nations including India do not have robust internet infrastructure which is the first and foremost requirement of the ODR. Though, it has been the policy to focus on the internet facilities and it has been discussed continuously about considering the internet as the 'basic right' yet for the ODR procedure to take place there should be a well-developed ODR platform, legal professionals along with software to have a perfect online dispute resolution mechanism.

- **Regulatory Challenges-** There has been attempts to create a uniform regional legal framework for the consumer protection including the e-consumers.¹¹

- **Business Models-** The main challenges that are faced under this heading are the business models and the business processes. Mainly the performance and the scalability of the ODR should to be measured.

- **Adaptability to the present Context-** The adaptability is a type of challenge which incorporates poor infrastructure, Low personal computer penetration. The Internet and the Broadband connections are expensive and unaffordable for the general masses which can be a major barrier... Moreover there has been 'low bancarization'¹²(people using basic banking services and the presence of low usage of online banking services)

- **Efficiency-**The Court system is complex, expensive and inaccessible. The efficient system needs to be there in order to establish the principles of ADR and ODR. For this there must be a platform and a software to make the system of dispute resolution effective and efficient.

- **Great Economic Divide between the Developing and the Developed Nations-** Due to globalization, developing countries share the common characteristics of unequally distributed wealth the developed nations have a more potential for ODR than the developing and the underdeveloped states which causes a disparity to arise. A perfect ODR system has become a science fiction fantasy for the developing and underdeveloped nations.

VII. CONCLUSION

As effective as the Internet has been in rendering geographical location irrelevant for purposes of social and economic community, it has been equally effective in disrupting the jurisdictional framework by which participants traditionally seek redress. The Arbitration and Conciliation Act, 1996 also contains provision relating to conciliation in contractual matters arising out of legal relationship. In the year 1999, the Indian Parliament passed the Civil Procedure Code amendment by inserting section 89. The section 89 A Code of Civil Procedure, 1908(Act No. V of 1908), allows parties to resolve to dispute through Mediation. It's states as follows: 'Except in a suit under the (Artha Rin Adalat Ain, 2003 (Act No. 8 of 2003)), after filing of written

¹¹Juan Manuel Valaquez Gardeta, La Proteccion Del Consumidor Online ElelInternacionalPrivadointeramericano (Paraguay) (2009).

¹²Olivia Nottebohn et al., Online and upcoming: The Internet Impact on Aspiring Countries, High Tech Practice.

statement, if all the contesting parties are in attendance in the Court in person or by their respective pleaders, (the Court shall), by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit, or refer the dispute or disputes in the suit to the engaged pleaders of the parties, or to the party or parties, where no pleader or pleaders have been engaged, or to a mediator from the panel as may be prepared by the District Judge under sub-section (10), for undertaking efforts for settlement through mediation.¹³ Family law is the area of law where ADR has been recognized in India. Under section 5 of the Family Courts Act, 1984 the Government is required to associated with the social welfare agencies to resolve a family dispute and reach a peaceful settlement by way for negotiation.¹⁴ The techno legal centre of excellence for online dispute resolution in India (TLCEODRI) has launched a beta version of ODR platform that can be helpful in resolving disputes online for national and international stakeholders. Moreover, there is a special service created for Online Arbitration or Cyber Arbitration where parties can submit their dispute to the platforms of TLCEODRI. Once you register your dispute then a tribunal will be appointed and would proceed to deal with the dispute. These are things would be soon available on the platform and are under process. However, due to the lack of clear legal statutes in India the e-commerce websites do not follow the laws in India because of which the consumers have to suffer.¹⁵ Henceforth, India lacks the basic ODR platform for resolution of disputes online. It needs to amend its laws as there are no laws relating to ODR in India. A major drawback of this method is that it doesn't have face to face interaction of the parties and the other relevant pint to consider is that the technological tools act as the fourth party in this method.

¹³CPC 1908.

¹⁴ *The need of ADR and ODR system in India with a comparative analysis with the United Kingdom*, INDIAN LEGAL SOLUTION, January 15, 2018, https://indianlegalsolution.com/the-need-of-adr-and-odr-system-in-india-with-a-comparative-analysis-with-the-united-kingdom/#_ftnref35, visited the website on 2nd Oct., 2018.

¹⁵SC Tripathi, *The Arbitration and Conciliation Act 1996*, (5th Edition Central Law Publication 2010).