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# Online Dispute Resolution in India - A Study

## (With Reference to Information Technology Act, 2000)

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### ABSTRACT

*Online Dispute Resolution (ODR) is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of all three. In this respect, it is often seen as being the online equivalent of alternative dispute resolution (ADR). However, ODR can also augment these traditional means of resolving disputes by applying innovative techniques and online technologies to the process.*

*ODR is a wide field, which may be applied to a range of disputes; from interpersonal disputes including consumer to consumer disputes (C2C) or marital separation; to court disputes and interstate conflicts. It is believed that efficient mechanisms to resolve online disputes will impact in the development of e-commerce. While the application of ODR is not limited to disputes arising out of business to consumer (B2C) online transactions, it seems to be particularly apt for these disputes, since it is logical to use the same medium (the internet) for the resolution of e-commerce disputes when parties are frequently located far from one another.*

*ODR was born from the synergy between Alternate Dispute Resolution (ADR) and Information and Communication Technologies (ICT), as a method for resolving disputes that were arising online, and for which traditional means of dispute resolution were inefficient or unavailable. The introduction of ICT in dispute resolution is currently growing to the extent that the difference between off-line dispute resolution and ODR is blurry. It has been observed that it is only possible to distinguish between proceedings that rely heavily on online technology and proceedings that do not. Some commentators have defined ODR exclusively as the use of ADR assisted principally with ICT tools. Although part of the doctrine incorporates a broader approach including online litigation and other sui generis forms of dispute resolution when they are assisted largely by ICT tools designed ad hoc. The latter definition seems more appropriate since it incorporates all methods used to resolve disputes that are conducted mainly through the use of ICT. Moreover, this concept is more consistent with the fact that ODR was born from the distinction with off-line dispute resolution processes.*

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## I. INTRODUCTION

Instances The Indian legal framework, through Section 89 of Code of Civil Procedure, 1908 promotes use of alternative dispute resolution between parties. Similarly, Order X Rule 1A<sup>2</sup> confers powers on the court to direct the parties to a suit to choose any Alternative Dispute Resolution (ADR) method to settle its disputes. This can include ODR as well.

ODR follows the Information Technology Act 2000, as well as the Arbitration and Conciliation Act 1996. The first and foremost necessity for ODR is that the parties must unequivocally decide that they are going to resolve their disputes online. The Arbitration Act specifies that the parties are free to choose the place where the hearing would take place, which could be online as well.

In *Grid Corporation of Orissa Ltd. vs. AES Corporation [(2002) 7 SCC 736]*<sup>3</sup>, the Supreme Court explicitly mentions that:

“When an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties”.

The IT Act enumerates that electronic records and signatures can be introduced as evidence and given legal recognition under the Indian legal system (Sec-4, &5 of IT Act & 65-B of Evidence Act, 1872)<sup>4</sup>.

In *State of Maharashtra vs. Dr. Praful B. Desai [(2003) 4 SCC 601]*<sup>5</sup>, the Supreme Court acknowledged the use of video conferencing to record witness statements. Therefore, the submissions and the proceedings can take place online. For this, the International Chamber of Commerce has laid some guidelines which ought to be followed for uniformity. These include agreeing upon the time zone, format of documents and other paraphernalia.

Finally, when the award is declared, as per Section 31 of Arbitration Act, it can be exchanged via emails by sending scanned copies. The original copy can be sent later via post. This completes the procedure and the only thing left is the enforcement of the award, a decree for which can be easily obtained in a court.

Therefore, the crux of the matter is that practicing ODR is perfectly valid in India. It is even

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<sup>2</sup> Code of Civil Procedure 1908

<sup>3</sup> *Grid Corporation of Orissa Ltd. vs. AES Corporation (2002) 7 SCC 736*

<sup>4</sup> Section 65-B of Evidence Act, 1872

<sup>5</sup> *State of Maharashtra vs. Dr. Praful B. Desai (2003 4 SCC 601)*

being used currently by the National Internet Exchange of India (NIXI) for domain name dispute resolution. It is similar to traditional arbitration but the only difference is that it is conducted over the internet. Therefore, the law applicable to traditional arbitration is to be applicable to ODR also. Just as ADR is legal in India, so is ODR.

An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as “electronic commerce”, which involve the use of alternative to paper-based methods of communication and storage of information to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the India Evidence Act, 1872, the Banker’s Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto:

## **II. ESSENTIAL REQUISITES FOR APPLICATION OF ODR**

Application of ODR requires the presence of certain crucial components such as existence of advance informational technology, trained expert professionals, user friendly interface of online modules and maintenance of privacy of the disputants. Besides these components the generic principles of affordability, accessibility, infrastructure, flexibility and transparency forms the basic structure of the mechanism. The components and the principles open up for empirical research to envision a triangle of convenience, expertise and trust. These three factors assist in attracting users and services over time. The degree of factor may vary according to the usage. In respect of ODR the triangle shall have a longer convenience side. Unlike other ADR mechanisms ODR ought to be simpler, faster and more efficient, in order to be able to be used in a “real world setting”, including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.

### **Binding Agreement**

An agreement stipulating the mutual consent of the parties to settle any future matter by course of ODR technique shall consists of essentials of a valid contract as per Section 10 of the Indian Contract Act. It should be contracted by persons capable of contracting; to be formed for legal consideration with mutual consent and should be valid in the eyes of law. Thus, the want of mutual consent for invocation of ODR process is such that without it all orders of any ODR institution will stand invalid. With respect to Indian jurisprudence there are no concrete guidelines for online dispute settlement in any statute. Although the technique can be brought to use by referring to definite sections of Arbitration and Conciliation Act and Information Technology Act, lack of desired laws leaves way for contracts to provide

sanction to ODR.

### **Determining Jurisdiction**

Jurisdiction defines the limits of an adjudicating authority. In case of conduction of ODR, determination of jurisdiction gives apprehension of its decision. The place of occurrence of dispute directs the application of international and domestic laws, understanding of the facts and nature of the settlement process. In mid-1990s the Courts, were struggling with the jurisdictional questions such as where an event occurred if parties were in different places and were interacting online. Expansive legalization of domestic laws and profound judgements of the Indian Courts have not only solved this riddle but have also accepted the cyber world as a real place. ODR service providers are obligated to disclose the jurisdiction, where complaints against the ODR provider can be brought, and any relevant jurisdictional limitations.

### **Transparency**

Settlement of a dispute through an ODR institution is a matter of availing services from a provider. The provider cannot take advantage of the virtual world to commit fraud or cause unwanted loss to its clients. The underlining doctrine of accessibility makes the principle of transparency a critical aspect of ODR. All information and disclosures, regardless of form, should be accurately and completely stated, should be presented as clearly and simply as the substance permits in identifiable and accessible formats, and should present the most important points in an appropriately conspicuous manner. It should be printable and able to be downloaded electronically. Indian courts are made a court of record for the sole reason of maintaining transparency and making the orders and judgements available to the masses.

### **Privacy**

The unending debate of privacy of an individual gets complicated with every day evolving technology. The Apex Court has held privacy to be a matter of personal liberty within Article 21 of the Indian Constitution<sup>6</sup>. In the most recent case on privacy the bench, headed by Chief Justice and eight other judges unanimously declared that individual privacy is a “guaranteed fundamental right”. The judgement makes privacy an indispensable ingredient of day’s world. ODR procedures are to work retaining the concept of preservation of one’s privacy. They are to balance the contrary and collateral fundamentals of transparency and privacy. Purpose of ODR is to settle disputes and not to create one by infringing an individual’s privacy. The ODR modules should be accurate and specific as to what they disclose and what

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<sup>6</sup> *Puttaswamy’s case of 2018*

they do not. Minimum level of information like contact and organizational information, terms and conditions and disclaimers for the service, explanation of services/ADR processes provided any pre-requisites for use of service like geographical location should be mentioned distinctively. It is required that the ODR organizations state their confidentiality policy meticulously.

### **Advanced Technology**

ODR providers should be equipped with the latest and the apt technology to keep the process straightforward. The providers should disclose all relevant facts as to the technology they use. Its flaws, any history of mis-happening or data leakage should be communicated by them. The technology should be accessible to persons of all language and low level of literacy, it should be affordable, it should be secured and apposite in preserving the privacy of the parties.

### **Expert and Trained Professionals**

The ODR providers should be well trained professionals. They are to be experts in both the fields of dispute management and information technology. Even though internet has become an everyone's thing and has connected masses from all countries and sectors, it is viewed with sceptical eyes and requires vigilance at every step. Without a specialist's direction, it is difficult to track and get the know-how of everyday development of technology and to understand the complexities of law. The ODR providers are to provide all material details of their members, their relationship with other organizations of similar or dissimilar nature. They are to create a team consisting of arbitrators, mediators and counsellors; their eligibility, background and affiliations to any interested party must be disclosed by the providers. The providers should appoint neutral arbitrators to the disputes and make desired research in the history of the appointed members and the disputant parties to check for any affiliations. They should disclose the steps they take to require neutrals to fulfil their responsibilities promptly, maintain communication with the parties, and comply with the stated ethical guidelines. Also, what steps can the participant take to file complaints for neutrals' failure to comply with the ethical requirements.

## **III. TYPES OF ODR MECHANISM IN USE**

ODR can involve varied methods of dispute resolution including Negotiation, Conciliation, Mediation, Arbitration and hybrid mechanisms including Last offer arbitration, Medola, Mini trial, Med Arb and Neutral Evaluation. ODR may adopt either adjudicatory or non-adjudicatory process. An example of an adjudicatory process is arbitration where the award

passed by the arbitrator is binding on both parties. To the contrary, in a non-adjudicatory process, the principal aim is to arrive at a settlement of the disputes between the parties without deciding on the merits of the matter.

1. **Consensual**

2. **Automated Negotiation**

Automated negotiation relates to those methods in which the technology takes over aspects of a negotiation. This is a negotiation process designed to determine economic settlements for claims in which liability is not challenged. There are two forms of automated negotiation, double blind bidding, which is a method for single monetary issues between two parties, and Visual Blind Bidding, which can be applied to negotiations with any number of parties and issues.

Automated negotiation has proven to be particularly successful with insurance compensations and commercial activities. It is also a valuable tool for lawyers because they too can use it without revealing what they're willing to accept unless an agreement is reached and more importantly, without waiving their right to access the court, in the case that the negotiation is unsuccessful.

Thus, ODR is useful for resolving brick and mortar disputes that arise in businesses, insurance companies and municipalities, who are finding that ODR saves them money and time when dealing with B2C disputes.

### **Assisted Negotiation**

In assisted negotiation, the technology assists the negotiation process between the parties. The technology has a similar role as the mediator in mediation. The role of the technology may be to provide a certain process and/or to provide the parties with specific (evaluative) advice.

Mediators use information management skills encouraging parties to reach an amicable agreement by enabling them to communicate more effectively through the rephrasing of their arguments. Conciliation is similar to mediation, but the conciliator can propose solutions for the parties to consider before an agreement is reached. Also, assisted negotiation procedures are designed to improve parties' communications through the assistance of a third party or software. In fact, it has been argued that assisted negotiation, conciliation, and even facilitation, are just different words for mediation. The major advantages of these processes, when used online, are their informality, simplicity and user friendliness.

### **Expedient Non-Adjudicative Online Resolution**

Another form of alternative dispute resolution prioritizes expedience and dispenses with adjudication all together, in recognition of the litigants' desire to simply dispose of the matter as quickly as possible. By removing any hint of adjudication, services e.g., One Day Decisions, "fast track" a version similar to blind bidding which is restricted privately to the two parties and an algorithm determines a fair value to be accepted by each party. Unlike other services, once accepted by both parties, the settlement amount is applied to the issuance of a Certificate of Final Resolution which both parties accept as irrevocable proof of resolution and final settlement. By avoiding adjudication, expedient non-adjudicative online resolution saves litigants time in court, time away from work and other fees and expenses, while protecting each from ancillary damage: The winning party generally collects more of his disputed amount and the losing party suffers no credit damage from having a judgment entered against him. Expedient Non-Adjudicative Online Resolution is generally utilized in cases that might otherwise be heard in small claims or limited civil matters.

1. **Adjudicative**

2. **Online Arbitration**

Arbitration is a process where a neutral third party arbitrator delivers a decision which is final, and binding on both parties. It can be defined as a quasi-judicial procedure because the award replaces a judicial decision. Arbitrators can be current or former trial judges, but that is not a requirement. However, in an arbitration procedure parties usually can choose the arbitrator and the basis on which the arbitrator makes the decision. Furthermore, it is less formal than litigation, though more than any other consensual process. It is often used to resolve businesses' disputes because this procedure is noted for being private and faster than litigation. Once the procedure is initiated parties cannot abandon it, unless they both agree to discontinue it (e.g. when they reached a settlement – although usually the settlement will be communicated to the arbitral tribunal and an award rendered on this basis). Another feature of arbitration is that the award is enforceable almost everywhere due to the wide adoption of the 1958 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards'<sup>7</sup>. Moreover, arbitral awards prove frequently easier to enforce than court decisions from overseas.

The majority of legal studies on online arbitration agree that, neither law, nor arbitral principles, prevent arbitration from taking place online. However, there may be several

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<sup>7</sup> *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

aspects in online arbitration that need to be regulated. Although online arbitration seems admissible under the New York Convention and the E-Commerce Directive, this is arguably an assumption by most commentators, rather than a legal statement. Since arbitration is based on a contractual agreement between the parties, an online process without a regulatory framework may generate a significant number of challenges from consumers and other weaker parties if due process cannot be assured. Currently, most arbitration providers allow parties to carry out online only part of the arbitration process, e.g. parties may download claim forms, the submission of documents through standard email or secure web interface, the use of telephone hearings, etc. Other providers conduct their proceedings exclusively online, either by email or on a dedicated web platform. The main challenge for online arbitration is that if judicial enforcement is required then it partly defeats the purpose of having an online process. Alternatively, some processes have developed self-enforcement mechanisms such as technical enforcements, black lists and trust marks.

#### **IV. FACTORS RESPONSIBLE FOR GROWTH OF ODR IN INDIA**

Various factors support development of ODR system in India such as:

- **Flexibility in adjudication by way of online process/ choice of procedure- The Arbitration & Conciliation Act, 1996:**

The subtle difference in the 1996 Act with regard to the provisions relating to conciliation proceedings as opposed to arbitration proceedings is that the 1996 Act does not restrict the application of its provisions to conciliation proceedings taking place in India only. This provision hence affords parties the flexibility to hold their proceedings anywhere, even in cyberspace.

- **Electronic Records and Signatures (Information Technology Act, 2000)**

The Information Technology Act, 2000 Act (the 2000 Act) was enacted with a view to facilitate and encourage e-commerce and hence gives legal recognition to electronic records and digital signatures. The enactment of this Act has also brought with itself amendments to several other Acts. It is a law meant to be “applicable to alternatives to paper based methods of communication and storage of information”.

- **Video Conferencing**

In a recent case it was held that video-conferencing could be resorted to for the purpose of taking evidence of a witness. Addressing the various submissions made before it, the apex Court stated that “Virtual reality is a state where one is made to feel, hear or imagine what

does not really exist. Video-conferencing has nothing to do with virtual reality. Video-conferencing is advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence.” “This is not virtual reality, it is actual reality.” Further the Court observed “when an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties”.

The IT Act enumerates that electronic records and signatures can be introduced as evidence and given legal recognition under the Indian legal system Section-4, & 5 of IT Act & 65-B of Indian Evidence Act, 1872. In the case of **State of Maharashtra vs. Dr. Praful B. Desai**, [(2003) 4 SCC 60]<sup>8</sup>, the Supreme Court acknowledged the use of video conferencing to record witness statements. Therefore, the submissions and the proceedings can take place online.

- **Usage of internet:**

In yet another decision in which use of available technology has been given a real boost, the Supreme Court held that “Technological advancement like facsimile, Internet, e-mail, etc. were in swift progress even before the Bill for the Amendment Act was discussed by Parliament. So, when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue.”

- **Written Online Agreement**

For this purpose, one needs to read the Arbitration and Conciliation Act<sup>9</sup> with the IT Act<sup>10</sup>. A few issues are considered below to demonstrate the point. (1) Arbitration agreement shall be in writing: Section 7(3) of the Arbitration Act provides that the arbitration agreement shall be in writing. However, if the parties agree online to refer the matter to an online arbitration through an ODR service provider, the question arises as to whether such an online agreement will be valid in law. Presuming that both parties admit that such an online agreement was made, it will have the sanction of law due to operation of section 4 of the IT Act. By reading section 4 of the IT Act into section 7(3) of the Arbitration Act, such an online agreement will be a valid one in the eyes of law. The same goes for written submissions, if any, made by the

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<sup>8</sup> *Ibid*

<sup>9</sup> *Indian Arbitration and Conciliation Act, 1996*

<sup>10</sup> *Information and Technology Act, 2000*

parties online.

- **Provision for E-Award**

Award to be in ‘writing’ and ‘signed’; Section 31(1) of the Arbitration Act requires the arbitral award to be in writing and signed by the members of the arbitral tribunal. As far as the ‘writing’ requirement is concerned, that is answered by section 4 of the IT Act. As regards the ‘signature’ requirement, section 5 of the IT Act provides that digital signature would have the same legal effect as a paper signature.

There have been instances where the parties have decided upon arbitration through emails in the cases of **Shakti Bhog Foods Ltd. V. Kola Shipping Ltd.**, (AIR 2009 SC 12)<sup>11</sup> & **Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.** [(2010) 3 SCC J]<sup>12</sup>. Finally, when the award is declared, as per Sec-31 of Arbitration Act, it can be exchanged via emails by sending scanned copies. The original copy can be sent later via post. This completes the procedure and the only thing left is the enforcement of the award, a decree for which can be easily obtained in a court. Therefore, the crux of the matter is that practicing ODR is perfectly valid in India.

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<sup>11</sup> *Shakti Bhog Foods Ltd. V. Kola Shipping Ltd.*, (AIR 2009 SC 12)

<sup>12</sup> *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.* (2010) 3 SCC 1)