ONLINE DISPUTE RESOLUTION: A WINDOW OF OPPORTUNITY IN A POST COVID-19 INDIA

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Abstract

In the wake of our struggle with the pandemic “COVID-19”\(^1\) and the various travel and social restrictions it has brought, there has surfaced invigorated interest in online dispute resolution ("ODR") in India. ODR is essentially e-alternative dispute resolution ("ADR") where interactions take place online using technology and resolution can take place through asynchronous communication.\(^2\) Therefore, it serves as a viable conflict resolution solution for minimising contact during the pandemic but more importantly - once fully developed it will become an affordable and easily accessible form of justice. Set in the current background of the increasing attention to ODR, in this article we will analyse how to best implement and develop ODR mechanisms.

I. Introduction

The idea of ODR is not a new one; it has existed as a concept since the early 2000s and has found footing in many jurisdictions globally. However, it has been primarily restricted to small claims and has not found mainstream acceptance. Traditional dispute resolution has remained the preferred choice for a number of years despite the ease that technology affords. The most prominent reason for this is that once a routine is established, people are ill-inclined to give in to change unless it becomes completely imperative.

The pandemic has caused the industry to take cognizance of the over-reliance they have placed on traditional practices and shifted their focus onto existing yet unexplored alternatives. Lately, the Supreme Court ("SC") of India, the NITI Aayog (policy ‘think tank’ of India) and industry experts have been encouraging all sectors to work collaboratively to scale ODR in India. The scope of this article is to discuss how to bring ODR processes to fruition. Part II of this article will delve into the concept of ODR. Following which, Part III will discuss the need and implementation of ODR in India. Part IV will examine and suggest the best practices that can be adopted from around the world. Lastly, Part V will analyse implementation of ODR across sectors.

II. The Concept of ODR

There has been a technological presence in the law in many facets, but the focus of this article is its foray into the domain of alternative dispute resolution. There is now online mediation, online arbitration and even arbitration utilizing blockchain technology.\(^3\)

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\(^1\) United Nations Development Programme, “COVID 19 pandemic – Humanity needs leadership and solidarity to defeat the coronavirus”


These forms of alternative dispute resolution, known as “online dispute resolution”, have been increasingly making their presence felt in recent times.

ODR casts a wide net, which may be applied to a range of disputes such as interpersonal disputes including consumer disputes, marital separation, court disputes and interstate conflicts. ODR was born from the collaboration between ADR and Information Communication Technology, as a method for resolving disputes that were arising online, and for which traditional means of dispute resolution were inefficient or unavailable.

The UNCITRAL Technical Notes on Online Dispute Resolution issued in 2016 defined ODR as “a system for dispute resolution through an information technology-based platform and facilitated through the use of electronic communications and other information technology”. ODR will enable ADR to become more efficient, faster, and less expensive, because of which it will make ADR a real alternative to a greater number of people.

ODR primarily has two forms: private ODR and court-annexed or public ODR. The adoption of ODR began and evolved in the private sector, with private international organisations like Smartsettle and Mediation Room that offered online mediation to resolve disputes. ODR particularly witnessed a boom in e-commerce market places such as Ebay, wherein the disputes were settled in an impersonal, efficient and objective way.

These private organisations generally have independent platforms and are governed by their own rules and regulations. Their success led many of the world governments to employ ODR into their own courts for a certain class of cases that can be disposed off quickly such as motor vehicle accidents, loan defaults, insurance claims etc as is discussed further in the article. Notable examples of ODR adopted in the public sector are the Money Claim Online program set up by the Ministry of Justice of England and Wales.

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8 'Smartsettle' <https://www.smartsettle.com/> accessed 16 August 2020
9 The Mediation Room’ <https://www.themediationroom.com/> accessed 16 August 2020
11 Ibid
and the Canadian Civil Resolution Tribunal.\textsuperscript{12}

Like any mechanism for dispute resolution, there are a number of ways that parties must determine whether ODR is appropriate for their situation. As regards to filing and exchanging documents, electronic filing is generally more efficient, economical, environmentally friendly, and less cumbersome.\textsuperscript{13} Additionally, remote hearings, which avoid travel time, expenses, and other fees associated with in-person hearings, should be more efficient to schedule and less expensive for the parties.\textsuperscript{14} Hence, these benefits have helped the adoption of ODR in resolving e-commerce disputes where the parties belong to different jurisdictions and also in low-value disputes arising out of business-to-business and business-to-consumer transactions, which do not warrant the necessity of approaching the courts.\textsuperscript{15}

III. The Need for ODR in India

In today’s world, where data driven solutions are the norm, ODR will play a much bigger role than just replicating the existing process of ADR online. The pandemic has re-iterated the crucial role that technology has to play in providing an accessible form of justice. Steps have already been taken to make virtual court hearings to prevent a complete shutdown of courts in India. It is extremely likely that there will be surplus of disputes in courts, particularly in lending, credit, property, commerce and retail in the coming months that will require judicious resolution.\textsuperscript{16} Banks, NBFCs and even families could take recourse to ODR. Hence, with ODR, a “mechanism of justice” would be made accessible, affordable and easily available for citizens.\textsuperscript{17} A durable ODR system in India can have the potential to reduce the load on courts by resolving a large number of disputes outside courts and most importantly, providing access to justice and ease of doing business by making dispute resolution cheaper and quicker.

In a virtual meeting hosted by NITI Aayog, senior judges of the SC, secretaries from government ministries, legal experts and other key stakeholders discussed the feasibility of ODR in India, wherein the common theme was a multi-stakeholder agreement to work collaboratively to ensure efforts are taken to scale up online dispute resolution.

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\textsuperscript{12} Ibid
\textsuperscript{14} Ibid
\textsuperscript{16} Indulekha Aravind, 'Online dispute resolution is beginning to find takers in India' (The Economic Times, 12 January 2020) <https://economictimes.indiatimes.com/small-biz/startups/features/online-dispute-resolution-is-beginning-to-find-takers-in-india/articleshow/73206371.cms?from=mdr> accessed 14 July 2020
\textsuperscript{17} Amitabh Kant, 'NITI Aayog and the SC judges’ meeting on ODR' (The Daily Guardian, 30 June 2020) <https://thedailyguardian.com/niti-aayog-and-the-sc-judges-meeting-on-odr/> accessed 15 July 2020
resolution in India.\textsuperscript{18} The meeting overall provided a much-needed boost for the recognition of the opportunity that ODR presents in India.

The two most important factors to make ODR a reality in India are a robust technological base and strong internet connectivity. However, they are also the greatest roadblocks that ODR faces in India due to poor infrastructure in both. It was noted at the NITI meeting that for a transformative impact the digital infrastructure and statutory framework require changes along with a mindset more accepting of change.\textsuperscript{19} We need to take cognisance of these obstacles for successful implementation. The only solution to this is that the government, in consonance with private players will have to completely revamp the current infrastructure and provide for better capabilities for the successful adoption of ODR in India. The public sector has seen success in the use of ODR in the form of the e-assessment scheme of the income tax department, the object of which is to do away with any interaction between the assessee and the income tax officer for faceless scrutiny of income tax returns.\textsuperscript{20}

India also needs to formulate and adopt an ODR scheme, which will lay down the foundation for its adoption and give it a much-needed legal backing. The procedure for the dispute resolution process, the identification of cases that can be resolved through ODR and the enforceability of the outcome of such disputes are some of the issues that need to be expanded upon. ODR should be given recognition in current ADR legislations.\textsuperscript{21} Awareness campaigns, legislative support along with encouraging ODR in the public and private sector are the measures that need to be taken to implement ODR in India. However, in order to truly make ODR mainstream, the ADR mechanism needs to be strengthened as well, which has not been fully realized in India yet. An example of this is that India follows the ‘opt-in’ method of mediation in India, which is voluntary.\textsuperscript{22} According to Justice Indu Malhotra,\textsuperscript{23} the ‘opt-out’ method, which would make mediation mandatory, will defeat the purpose of mediation and what will work well in India is a hybrid of the two models. It is necessary to give a stronger foothold to ADR in India to make sure that ODR can be sustained.

\textsuperscript{18} PIB Delhi, ‘Catalyzing Online Dispute Resolution In India’ (Press Information Bureau , 7 June 2020) <https://pib.gov.in/PressReleasePage.aspx?PID=1630080> accessed 14 July 2020
\textsuperscript{19} Niti Aayog & ors, ‘Catalyzing Online Dispute Resolution In India’ (NITI Aayog, 12 June 2020) <https://niti.gov.in/catalyzing-online-dispute-resolution-india#p3> accessed 14 July 2020
\textsuperscript{22} Niti Aayog & ors, ‘Catalyzing Online Dispute Resolution In India’ (NITI Aayog, 12 June 2020) <https://niti.gov.in/catalyzing-online-dispute-resolution-india#p3> accessed 14 July 2020
\textsuperscript{23} Ibid
IV. ODR around the World

When discussing the ways of developing and implementing ODR in India, it becomes beneficial to our cause to discuss the ways in which it has manifested around the world. We can draw from the ODR policies of countries in response to COVID-19 and otherwise generally from some countries for the development of a robust ODR mechanism.

In specificity to COVID-19, inspiration can be taken from countries like Hong Kong and China which have taken quick decisions in favour of ODR. The Hong Kong government, anticipating an influx of cases from the pandemic, has taken proactive measures such as introducing an ODR scheme for MSME sector providing a three-tier dispute resolution framework. It identifies an online platform to facilitate all the three arms of ADR for disputes with a claim amount of less than HK$ 500,000. The scheme has fixed strict timelines and fees which make it affordable and fast.24 Similarly, China foreseeing a surge in cases has taken steps to speed up the development of their state ‘Internet Arbitration System’. It also supports speedy arbitration if it results in resumption of production.25 In the past, ODR in China was primarily used for resolving internet disputes but now it is proposed to be used for debt issues, labour disputes and work injury compensation. They also want to further develop their ‘internet judiciary’ by improving the court’s online mediation platforms.26 The strategies of these jurisdictions serve as a good model for formulating policies and applying our existing expertise to ODR.

Moving onto general implementation of ODR, it has been observed that the shape that ODR takes in any country depends on a lot of variable factors such as the nature of the economy, the laws of the country, efficacy of the judicial systems or even cultural differences.27 Common trends demonstrate how judicial systems and economies can affect the development of ODR.28 Countries with efficient judicial systems like Japan are slower to accept and implement ODR whereas countries where the judiciary is overburdened turn to ODR as a viable alternative. Countries such as India and Brazil fall under the latter bracket and also share many economic traits such as both are growing economies with large populations which cause delays in the judicial process.

In Brazil, ODR methods in a relatively short time have become successful and are steadily gaining momentum. These strategies can be useful in an Indian context. The expansion in Brazil can be attributed to a two pronged approach - legislation promoting ODR and

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26 Vincent Chow, ‘China Pushes for Increase in Online Dispute Resolution as It Reboots Economy’ (NCTDR, 24 March 2020) accessed 15 August, 2020
28 Ibid
external influences, such as the expansion of e-commerce.\(^{29}\) Although the judiciary still remains the first sought option, citizens are opting ODR mechanisms for less complex consumer disputes. Their government has also developed a platform for consumer redressal called “consumidor.gov.br” which resolves conflicts in less than 10 days and there is also a private platform “reclameaqui.com.br”. Many other large national and international companies such as Uber offer their consumers ODR mechanisms.\(^{30}\) India can incentivise domestic and international companies to develop their own ODR mechanisms and can also develop its own ODR platform which allows direct dialogue between parties to solve conflicts.

Apart from the above, there are some execution challenges that exist in most developing nations which also need to be overcome in India. The most relevant one as discussed above is the technological challenge which includes the local digital economy and information communications technologies which need to appropriately develop for the success of ODR.\(^{31}\)

V. Use of ODR in Different Industries

The first ODR system was first born out of the advent of e-commerce. Virtual business transactions brought people together from various jurisdictions resulting in cross border disputes. This prompted novel processes to be developed by players in the sector. The first ODR process was employed by eBay, which still remains one of the biggest ODR systems in the world.\(^{32}\) The eBay Resolution Centre resolves over 60 million disputes per year by referring its customers to its ODR platform.\(^{33}\) Currently, it employs a dispute resolution provider which offers two services: a free web-based forum which allows users to attempt to resolve their differences on their own or if necessary, the use of a professional mediator.\(^{34}\) The original eBay model has since then been replicated and customized by various private organisations and states alike.\(^{35}\)

Other similar models are employed by other e-commerce companies like Alibaba, PayPal for conflict resolution. These companies employ processes that are impartial, objective and predictable with a 90% success rate.

\(^{29}\) Ricardo Silva, ‘ODR in Brazil: Challenges and Perspectives of Use’ (2018)
\(^{32}\) Luca Dal Pubel, E-bay Dispute Resolution and Revolution: An Investigation on a Successful ODR Model (2018)
\(^{34}\) ‘Dispute Resolution Overview’ (eBay) <http://pages.ebay.com/services/buyandsell/disputes.html> accessed 15 July 2020
\(^{35}\) Vidhi Centre for Legal Policy, “ODR The future of Dispute Resolution in India”, 22
It must also be noted that their algorithms collect data as they resolve conflicts which keeps improving the quality of the process with each new resolution. While ODR processes may have first been employed by the e-commerce industry, they have since been adopted to resolve disputes across many sectors.

Some of these sectors are insurance, intellectual property, small causes, small claims and disputes involving small and medium enterprises. To illustrate some of them - in the realm of insurance, some websites like Cybersettle allow parties to negotiate through rounds of blind bidding and help arrive at a settlement point; the intellectual property sector has made use of ODR in the resolution of domain name conflicts through online arbitrations; an example of small dispute ODR can be found in Canada, where an online tribunal exercises jurisdiction over small claim disputes, strata property disputes, motor vehicle accident and injury claims, the tribunal assists parties in negotiations and even converts their resolutions into enforceable orders. Some other areas like family disputes can have an excellent recourse to ODR but have not yet found popularity. Although the spectrum of sectors applying ODR to disputes has increased it is still scattered and in a stage of infancy leaving much potential to be tapped. These applications of ODR have been slow to pick up in India, however lately they have been finding more and more momentum. The most recent addition to the growing pool is the Reserve Bank of India (“RBI”) which on August 6, 2020 introduced its ODR system for digital payments. It also issued a notice that authorised Payment System Operators (“PSO’s”) were to implement an ODR system in a phased manner. In the first phase the system was to be implemented for disputes and grievances related to failed transactions in their respective payment systems by January 1, 2021. RBI’s legislation promoting ODR is a nod to the Brazilian model and a hopeful sign of the road ahead.

Another example of India embracing private ODR is the start-up NestAway, which incubated an ODR platform — Cadre or Centre for Alternate Dispute Resolution Excellence to resolve rental disputes online through a website-based platform.

37 Ibid
38 Vidhi Centre for Legal Policy, “ODR The future of Dispute Resolution in India”, 23
39 Norman Solovay and Cynthia K. Reed, The Internet and Dispute Resolution: Untangling the Web, (Law Journal Press 2003)<https://books.google.co.in/books?id=ebps89jY7EC&pg=SA3-PA41&lpg=SA3-PA41&dq=cybersettle+insurance+pdf&source=bl&ots=tlRIPfMbWP&sig=ACfU3U06DTgzCKFRIJTq4rU_tvryijsRXg&hl=en&sa=X&ved=2ahUKEwj9tI81K3oAhXeisKHc-OBzYQ6AEwBHoECAoAQ#v=onepage&q=cyber
40 Pablo Cortés, Online Dispute Resolution for Consumers in the European Union (Routledge 2010) 196
41 Civil Resolution Tribunal, ‘Starting a Dispute’ <https://civilresolutionbc.ca/tribunal-process/starting-a-dispute/#1-apply-from-the-solution-explorer> accessed 15 August, 2020
42 Reserve Bank of India, Statement on Developmental and Regulatory Policies (6 August, 2020)
43 Reserve Bank of India, Online Dispute Resolution (ODR) System for Digital Payments (6 August, 2020)
44 Indulekha Aravind, ‘Online dispute resolution is beginning to find takers in India’, The Economic Times (12 January 2020)
arbitration process delivers a decision in less than 30 days where typically a traditional arbitration would have lasted for 6 months. ICICI Bank is also running a pilot project and has employed ODR platform SAMA which is helping resolve nearly 10,000 disputes with values up to Rs 20 lakhs.45

These are all positive indicators of a paradigm shift in ADR. Organisations now have an opportunity to embrace ODR and enhance their own efficiency by reducing their reliance on external processes. We can take inspiration from the many applications found around the world and infuse ODR into disputes for saving time, energy and costs.

VI. Conclusion

Though ODR definitely has its advantages, its implementation comes with a fair share of drawbacks as well, especially in India as all parties involved need to have adequate access to technology, which is not yet completely feasible in India. High value disputes that have a certain complexity to them are likely to be resolved through traditional means of alternative dispute resolution. However, as has been discussed above, these traditional mechanisms are also slowly incorporating technology into their proceedings. The government and the private sector need to work in harmony for expansion and increased reliance on ODR. It is therefore important to keep up with the latest technological improvements while also taking into account the need of the hour in the wake of the ongoing pandemic.

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