



## AN ANALYSIS OF ONLINE DISPUTE RESOLUTION AND ITS CHALLENGES

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### ABSTRACT

The rationale of this study is to present the main facets of online dispute resolution, as well as a definition of the term, the types of resolution accessible, and the most recent legal regulations in this area. The article is an in-depth study of this field, discussing online mediation and electronic arbitration, their uses and their relationships with e-commerce. The strengths and weaknesses of online dispute resolution are identified and used to help formulate *de lege ferenda* stipulations. Online dispute resolution (“ODR”) can take place either entirely or partly online and concerns two types of disputes: those that arise in cyberspace and those that arise offline. As Internet usage continues to expand, it has become increasingly necessary to design efficient mechanisms for resolving Internet disputes because traditional mechanisms, such as litigation, can be time-consuming, expensive and raise jurisdictional problems. Offline disputes, on the other hand, can be addressed with traditional dispute resolution mechanisms supplemented with online technologies.

**Keywords:** Online dispute resolution (ODR), Alternative dispute resolution (ADR), online mediation, Electronic arbitration, e-Commerce, Consumer dispute, Impact of ODR, challenges of ODR

## INTRODUCTION

Indian judiciary is one of the few very old judiciaries throughout the globe and is a carefully designated one under the Constitution of India. Even after being efficient enough, the Indian courts are known worldwide for their slow judicial procedure. More than 43 lakh cases are pending in the high courts all over the country and it was reported to the Rajya Sabha in 2019 that over 8 lakhs of these cases are over a decade old. This is a big problem and the major reason for it is the increasing population and with it the ‘unsatisfactory’ proportion of judges to citizens.

Long unsettled cases disturb the mental as well as the financial health of both the parties. This problem persists long after establishing more than a thousand fast track Courts but the filing of a case requires a day, but disposal of cases take months. So, Courts alone efficiently handling pending cases while disposing of new ones is possible only in a Utopian country.

## DEFINITION

Online dispute resolution (ODR) is a form of online settlement that uses alternative methods for dispute resolution (alternative dispute resolution). The term covers disputes that are partially or fully settled over the Internet, having been initiated in cyberspace but with a source outside it (offline) (Abdel Wahab, Katsh, & Rainey, 2012). In literature on the subject, the terms electronic ADR (eADR), online ADR (oADR) and Internet dispute resolution (iDR) are treated as synonymous.

There is no permanent system for reporting the number of entities that use online dispute



resolution. Published research focuses mainly on showing levels of alternative dispute resolution (ADR) use in specific countries. However, there is no similar record on entities offering its online form (European Parliament, 2011).

In accordance with published research, it can be stated that the number of ODR providers is not constant between years. Pursuant to analysis conducted by Conley Tyler, they numbered no less than 115 in 2004 (Conley Tyler, 2004). As shown in research by Suquet, Poblet, Noriega, and Gabarró (2010) the number had decreased to 30% of this figure (less than 40 active ODR systems) (Suquet et al., 2010).

### ODR & TECHNOLOGY

Online dispute resolution constitutes an implementation of existing forms of ADR that enables its use on the Internet. The main assumption of alternative methods of dispute resolution – that is, the presence of a third party during the process of reaching an agreement – remains unchanged. However, this has attained a different character because of the use of modern forms of communication. There are therefore indirect ways of submitting requests or evidence (Settle Today), as well as of carrying out a full online process together with issuing a judgment at the end of proceedings (WIPO).

In the case of ODR, the technological aspect is crucial for the effectiveness of the process. With reference to research published in 2010 by Lodder and Zeleznikow, ODR systems may be divided according to the forms of synchronous and asynchronous communication used. Looking at the first type, entities may communicate with each

other in real time by using Messenger or Skype. In the asynchronous form, communication is not conducted at the same time – via e-mail, for example – and is therefore less direct such as with using the services of the National Arbitration Forum. Research by Suquet, Poblet, Noriega and Gabarró has shown that the second form constitutes the most frequently used solution (42%), but as many as 48% of ODR providers use the two forms jointly (Suquet et al., 2010, p. 4). Low usage levels of online forms such as chat (10%) suggest that ODR systems fail to fully exploit the IT possibilities of extensive programmes, with their focus still on less modern methods such as forums. Each form of ODR may use a different technological system, individualizing the course of a given process. Online mediation can take different forms, from a fully automated Internet platform using a portal based on electronic chat or videoconferencing (TheMediationRoom.com), to exclusive use of the asynchronous form of communication, i.e. through methods such as e-mail (RisolviOnline.com).

The first option constitutes a system involving video meetings or online conversations (chat), during which possibilities for dispute resolution are analyzed with the mediator – a more direct form of ODR. The second option is used, for example, in mediation within the scope of pecuniary obligations. Using a system of submitted offers, the parties agree on an amount that is acceptable for all parties without the need to meet directly. Electronic arbitration, which refers to amicable proceedings conducted via the Internet, may take either a synchronous (Smart settle) or asynchronous form (Settle Today).



ODR techniques can be used in many ways, with different levels of integration into proceedings. Systems that have an intensive impact on proceedings may “support” parties by suggesting arguments or assessing their levels of satisfaction at each stage. Using advanced technologies allows the creation of computer algorithms that analyze all data entered into the system (Family Winner).

### ONLINE MEDIATION AND E-ARBITRATION

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. Modern hybrid forms of ADR differ from classic models, being based on chosen elements of mediation and arbitration that constitute innovative and alternative joint methods. The leading examples are Med-Arb and a mini-trial (Ross, 2010, Ross and Conlon, 2000). At a European level, modern solutions have not been adopted to the same extent, giving way to classic models.<sup>1</sup>

### CHALLENGES

The use of computer programs and the concern for cyber security are two main concerns. That might link to the emergence of online dispute resolution. It is important to establish at the outset why data protection is an important feature. The use of online dispute resolution is also crucial to investigate whether it has an influence on privacy matters. Data protection has long

been seen as a fundamental aspect of India’s judicial system. Since it is not just necessary to ensure that the parties to this conflict come to justice. But to protect the rights of the parties concerned. The participation of major parties in conflicts entails such disclosures in the course of dispute resolution that it is absolutely necessary not to jeopardize them in any circumstances. These leaks cannot only have a negative effect on companies but can result in the revealing of trade secrets. In addition to affecting large organizations, the revelation of sensitive information has an important impact on people or families that choose mediation or other alternatives as a strategy to resolve problems.

If you prefer to utilize online services in order to resolve disputes, such as banks, talks, or disagreements, the security provided by the service providers inhibits you from doing so. People are often losing their money, their reputation, and their personal information. Hindrances in the way of Online Dispute Resolution.

- **The problem of hardware:** In addition to the internet problem, some hardware considerations render the ODR inaccessible for a large proportion of society. India has the lowest data charge in the world, as in the United States per GB. The cost of this data is Rs. 592, compared to Rs. 7 per GB in India. But the provision of inexpensive data does not include the gadgets required to run it. The absence of infrastructure and access to computer resources, therefore, constitutes a key barrier to ODR development.
- **Awareness:** Awareness by users is the next technological obstacle in the way of ODR.

<sup>1</sup> Online dispute resolution: The future of justice - ScienceDirect



The lowest among internet users worldwide are technology and digital literacy among users. More than 90 percent of the Indian population<sup>[9]</sup> knows nothing of the extent and proper use of the Internet and the technology; even Facebook and WhatsApp are fundamental to the younger generation. This lack of understanding and mental barrier must thus need proper addressing. And enhanced to make it available to the general public. Daksh's Access to Justice Survey (2015) shows that 54% of Indians are not aware of alternative dispute resolution (ADR) mechanisms such as mediation and arbitration. This challenge also extends to our legal community – one commentator recounted how J. Chandrachud, then a judge at the Bombay High Court, convinced litigants and their lawyers to settle the dispute through mediation, only for one of the lawyers to come back and ask him “Sir, what is mediation?” This lack of awareness amongst citizens and lawyers ensures that few disputes use ADR in the first place.

- **Infrastructure and training:** The absence of qualified specialists is another key obstacle to the inaccessibility of Online Dispute Resolution. Although 10% of the Indian population is digitally literate, this literacy is mostly in the informal sector. However, in India, courts and judicial processes run procedurally, and transition the same to an entirely new platform requires a stronger and taught support structure. Only when the system of judicial assistance is trained can they take additional measures in passing the information on ODR and another online method to individuals. There have therefore been several hurdles in growth and development since the online settlement began. The main area of concern was due to

extreme technological interconnectedness. Instead of being realistic, the ODR is more optimistic. Very little investment took place in infrastructure building and logistics, making the big strata of the society more luxurious. If the Internet explosion in India were not present in 2016, the status of ODR would still have remained in its infancy. But even following so many obstacles, as stated above, both government and commercial parties have to intervene to make the digital environment more convenient for resolving online disputes.

- **Analytical issues:** There is no doubt about the good effects on the Indian system, including the benefit of rapid and hassle-free justice, brought about in the ODR. But the difficulties in using technology for resolving disputes aren't overlooked at the same time. The major rationale for the idea is the constant dread that information disclosure. And those resources are not available to make use of it. Since every component of the process moves online, documents, data and other personal information must upload to the required platforms. It has also been highlighted over and over again that greater knowledge from the private sector should be used to address existing problems. Particularly in relation to protections.
- **Dispute Resolution Professionals & Institutions:** In countries such as the United Kingdom and the United States, dispute resolution is a well-recognized sector with professionals building entire careers as dedicated mediators or arbitrators. This, however, is not the case in India. Given that few businesses and citizens seek to resolve disputes through ADR (low demand), and that the practice does not pay, we do not have a thriving



market of dispute resolution professionals and institutions that can resolve disputes at scale. This situation leads to two adverse outcomes:

- One, because the practice does not pay, dispute resolution professionals are not incentivized to build the skills required to be an effective mediator or arbitrator (quite different from the skills that make you a good lawyer).
  - Two, the only type of disputes resolved through arbitration are high-value commercial disputes. The arbitrators for these disputes are most often retired judges. This leads to, what one of the general counsels I spoke to termed as “due process paranoia”, where the dispute resolution process is slow and expensive and is often similar to what happens in courts. These two issues sometimes result in a less than ideal experience for the disputing parties and end up negatively impacting the reputation of the sector.
- **Support from Lawyers:** A related point to dispute resolution professionals is that of support from lawyers, who, even in relation to disputes where they believe the best course of action might be to settle it through mediation or negotiation, might not advise the client along those lines, since recommending “settlement” or “mediation” is perceived as a weak position to take. Further, the current revenue model where lawyers are paid per hearing discourages them from advising clients to resolve disputes quickly. The lack of training on ADR also leads to a lack of familiarity and limited support from lawyers.
- **Support from Courts:** Although existing legislation and case management rules

often direct courts to refer appropriate cases to ADR, in practice this is rarely the case. When disputes are referred to ADR, as sometimes is done for those relating to family matters, they are referred to court-annexed services, and not private mediation centers. This is also the case when it comes to MSME’s Samadhan portal, where disputes related to delayed payments are referred to government facilitation councils and not private dispute resolution firms.

- **Enforcement:** The current act that regulates alternative dispute resolution in India allows arbitral awards to be challenged in very narrow circumstances. For example, the award can be challenged if the neutral is deemed to be partial or not independent, or if there is evidence to suggest that disputing parties have not been given enough time to put forward their case. However, appeals and challenges are often entertained by courts. And, once it enters the courts, these cases are subject to the same delays that other civil cases are subject to. This is also the case when it comes to getting an enforcement award from courts. When it comes to mediation, the lack of comprehensive legislation on mediation also adds to uncertainty regarding enforcement.
- **Role of Government:** The government and courts have recently grown increasingly attentive about developing the ODR process. The corporate ministry’s initiative in setting up online consumer complaint centers is among the remarkable moves made. One of these centers at the Bengaluru National School of Law is the online consumer center to handle consumer complaints using online media. Independent private Online Dispute Resolutions as CORD, Presolv360, and



CADRe have also been formed in order to reach the people in need, increase technical awareness, and resolve disputes at the basic level. In recent years the government has used Online Dispute Resolution measures, a valuable reference of the ODR. Progress was made of the E-assessment by the Department of Revenue Tax and INDRP by the National Stock Exchange. Justice DY Chandrachud was successful at including his perspective on the relevance of stakeholders' obligations, such as technology service providers, governmental and professional organizations in tackling the issue of technology and access to justice. In recognizing the role of internet service providers, he points out that such systems, built through which parties are aware of their rights and platforms for conflict resolution.<sup>2</sup>

These challenges, in no way insurmountable, are beginning to be addressed by several ecosystem stakeholders: policy discussions on online dispute resolution, along with private sector initiatives such as 'Suljhao Magar Pyaar Se' have popularised ADR mechanisms; several startups have started courses to train India's next generation of dispute resolution professionals; the Supreme Court has set up a mediation committee to draft comprehensive legislation to support the growth of mediation, and higher judiciary and leading law firms have signalled their support and enthusiasm for the sector.<sup>3</sup>

**ADVANTAGES OF ODR:** The main advantages of ODR can be summarized as follows:

1. Cost reductions in comparison to In-person alternative dispute resolution and litigation.
2. Flexibility as there is no need for physical presence.
3. Efficiency as time barriers are not an issue and parties can exchange documents and replies instantly online.
4. Involvement and influence – face to face influence and biases are reduced.
5. Confidentiality can be maintained.

**DISADVANTAGES OF ODR:** The main disadvantages of ODR can be summarized as follows:

1. Enforceability concerns arise, especially in cross-border disputes and references to written agreements and the Newyork convention.
2. Language and literacy of online disputants. Language barriers and culture differences arise.
3. Online persuasion behavior. For example, According to studies, online negotiation can be faster but concession and fair agreements chances are reduced.
4. Lack of face-to-face interactions, and hence is impersonal.
5. Potential inaccessibility for online means for some periods.
6. Confidentiality can be breached by disputants.<sup>4</sup>

<sup>2</sup> Online Dispute Resolution challenges for contemporary justice - Lexresolv

<sup>3</sup> Constraints to Scaling Online Dispute Resolution in India | Omidyar Network India

<sup>4</sup> Online Dispute Resolution: The Advantages and Disadvantages of ODR (odrguide.com)



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**CONCLUSION**

Finally, we can say that the increase in online dispute settlement has definitely alleviated the burden of judicial affairs but the efficiency of the decisions was not as good as it was, due to the lack of sufficient infrastructure and technology. Only individuals who were technologically informed and had access to appropriate equipment were able to benefit. Only by Covid-19 have people come to know what is technologically possible, and even simply because the conflicts can be settled by online means.

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