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Mainstreaming Online Dispute Resolution in India: Diligence for Access to Justice

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ABSTRACT

Access to justice is a fundamental principle of the administration of justice. Indian Courts are burdened with a huge backlog of pending cases. The Internet as a medium has revolutionized many areas of life, including law. ODR, a synergy of Alternative Dispute Resolution and Information and Communication Technology tools aims at rendering an amicable settlement of disputes via online proceedings which might resolve a wide range of disputes ranging from interpersonal disputes to court disputes and interstate disputes or conflicts. It is considered to be a more convenient, time-efficient and cheaper method over litigation and merely a practicable solution. Online Dispute Resolution which uses modern internet tools will set a good example of the existence of specialized legal methods for serving Justice. It is the need of the hour to incentivise the service of Online Dispute Resolution mechanisms as a resolution tool to enforce cost-efficient and fast-track remote dispute resolution. The current status of the dispute resolution in India catalyzes the innovation of Online Dispute Redressal. This paper attempts to discuss the contribution of Indian Government in par with global initiatives.

The study aims to analyse the legislative framework supporting alternative dispute resolution mechanism in India and discusses the India's step towards introduction of Online Dispute redressal to the already existing legal framework and the need for its effective implementation in India in terms of rendering justice. The paper discusses the prospective view of Indian Judiciary in implementing information and communication technology tools into the Court system and enhancement of dispute redressal landscape by its effective interpretations. The paper concludes by emphasizing the myriad initiatives of the executive in mainstreaming the Online Dispute Resolution mechanism in India along with the applaudable contribution of the European Union towards development and promotion of Online Dispute Resolution mechanism in the developing countries.

Keywords: arbitration, dispute, mediation, resolution.

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I. INTRODUCTION

“Let us never negotiate out of fear. But let us never fear to negotiate”²

- **John F Kennedy**

With the advent of information technology, be it the way of transactions or communication in the business, everything has undergone a revolutionary change. Right to Redressal is a fundamental right be it under any law when there is a probability of dispute. Apart from general e-disputes that arise by the acts or omissions in the internet world like online hate speech, invading privacy matters of an individual, posting of a defamatory matter, disclosure of a sensitive matter online, etc., there are different kinds of other complex disputes like intellectual property related, commercial disputes like domain name disputes or breach of an e-contracts or criminal activities such as cyber frauds, identity thefts or data thefts, consumer disputes, etc. The effectiveness of this right to Redressal lies in addressing the grievance and securing justice. But at times people are left in a situation wherein they are far away from reaching to any real remedy because of various reasons like the place of formation of contract, choice of forum, choice of law, small claims, practical difficulties, etc. It is evident that there are millions of times people get wronged on the Internet, but they don't have access to the court system³. Transactions, be it online or offline ‘Courts can't handle too many disputes. Hence there is an essential requirement for a solution to be introduced to deal with such challenges and issues.

The development of the Online Dispute Resolution Mechanism (hereinafter referred to as ODR) with the already existing dispute resolution system is significant and essential for the redressal of disputes as of today.

II. COMPONENTS OF ODR

- ODR is an out-of-court settlement, a branch of dispute resolution, similar to that of Alternative Dispute Resolution (hereinafter referred to as ADR) is more convenient and resolves disputes speedily between parties, the only difference being the usage of the internet to improve the process;
- Professionals and experts in the ADR field guide and support the parties in the Internet process;

² Inaugural address of John F. Kennedy, 35th President of the US. Washington, DC (January 1961) available at: <https://kr.usembassy.gov/education-culture/infopedia-usa/living-documents-american-history-democracy/john-f-kennedy-inaugural-address-1961/>

³ Sarah Kessler, “Ebay Spinoff Modria is Judge Judy for Cyber Shoppers” Fast Company, <https://www.fastcompany.com/3005402/ebay-spinoff-modria-judge-judy-cyber-shoppers>

- The rules and practices adopted by ADR are adapted to the internet environment;
- To enhance Internet exchanges software tools are used.

III. HISTORY OF ONLINE DISPUTE RESOLUTION

⁴The four phases of development of ODR as given by Tyler are:

- Amateur phase - where electronic solutions have been in a test period (1990 to 1996);
- Dynamic development of ODR phase - first commercial web portals offering ODR services established (1997–1998);
- Business phase - A favourable period of economic development gave way for the initiation of projects based on electronic dispute resolution by companies (1999 to 2000);
- Institutional phase - introduction of ODR techniques into institutions i.e., the courts and administration authorities.

IV. ODR AND INDIAN JUDICIARY

The introduction of E-court websites, Case Information System Modules, e-filing of complaints, Supreme Court Vidhik Anuvaad Software, etc. are significant initiatives in the implementation of Information and Communication Technology (hereinafter referred to as ICT) tools in the Judiciary. In the case of *State of Maharashtra v. Dr. Praful B Desai*, the Supreme Court of India allowed video conferencing for evidence of a witness⁵. Provided the record of arbitration agreements be it online or offline the Court recognised its validity through its judicial pronouncements.⁶ In *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*⁷ put forth the ‘arbitrability test’ for disputes and limited the use of ADR thereby hindering the evolution of ODR in India. However, the Judiciary through its various judicial pronouncements propounded clarity by suggesting myriad tests to determine the arbitrability of disputes enabling the prospect of ADR and ODR mechanism. During uncertain events like the times’ COVID-19 outbreak (2020), the Courts functioned online relying on ICT tools for seeking justice. The arbitrability of disputes holds no water in certain cases like consumer disputes, data privacy, etc. due to explicit legislation on inclusion of dispute resolution.

The enforcement in domestic matters flows naturally where the real problem would be the

⁴ Karolina Mania, “Online dispute resolution: The future of justice”, Volume 1, *International Comparative Jurisprudence*, Issue 1, 76-86 (2015) <https://www.sciencedirect.com/science/article/pii/S2351667415000074>

⁵ (2003) 4 SCC 601, AIR 2003 SC 2053.

⁶ *Shakti Bhog v Kola Shipping* (2009) 2 SCC 134; *Trimex International v Vedanta Aluminum Ltd* 2010(1) SCALE574.

⁷ (2011) 5 SCC 532 (India).

enforcement of multiple complaints disposed of a similar nature when arise against a single online portal, which is spread across various District and State Forums. Monitoring its enforcement becomes a real challenge, such as one that occurred in the Timtara.com case,⁸ where several customers were cheated by an online shopping portal came together through social media and kept up the pressure on the police, finally leading to the arrest of the timtara.com executives.⁹ A common interest among consumers can now be resolved by filing a class action with the permission of the District Commission on behalf of a group of consumers or by the Central Government, Central Authority or State Government. The class action can be taken by paying the prescribed fee in the prescribed manner which includes electronic filing of complaints.

V. LEGISLATIVE FRAMEWORK SUPPORTING ADR AND ODR MECHANISM IN INDIA

(A) Arbitration and Conciliation

A uniform substantive law for governing e-commerce can be achieved only by developing an effective ODR mechanism as developed for dealing with domain name disputes. Extensive rules have been developed by UNCITRAL and ICC for governing the arbitration process. The Arbitration and Conciliation Act, 1996 has been enacted in India based on the UNCITRAL Model Law on Arbitration and UNCITRAL Conciliation Rules for providing a legal framework for out-of-court settlement of commercial disputes. The genesis of ODR lies in ADR. However, there is no separate provision in the Arbitration and Conciliation Act, 1996 considering the use of ICT tools, in India, there exist many organisations and institutions promoting ADR and ODR processes (like the Indian Council for Arbitration, Construction Industry Arbitration Council, International Centre Alternative Dispute Resolution the Indian Chamber of Commerce).

However, the Information Technology Act 2000 enunciates legal recognition of e-contracts, e-records, e-signatures and e-commerce. A significant change brought to the Indian Evidence Act, 1872 with the enactment of the IT Act, 2000 is the amendment of Sec. 65-A and Sec.65-B which grants legal recognition and admissibility to electronic evidence.

When it comes to out-of-court settlements for deciding disputes it is generally encouraged by the Court, although it is not mandatory. The Court makes the parties obliged to try settling their disputes via ADR with Section 89 of CPC, 1908. The out-of-court settlement includes arbitration, conciliation, mediation and Lok Adalat. According to Order X, Rule 1A, the court

⁸How defrauded customers taught Timtara.com a lesson using social media, Moneylife Digital Team, published on 02 April 2013. Available at: <https://www.moneylife.in/article/how-defrauded-customers-taught-timtara.com-a-lesson-using-social-media/32003.html> (Last Accessed on Jul. 2, 2023).

⁹ Section 35 of the Consumer Protection Act 2019.

can direct the parties to choose any of the settlement methods as prescribed under Section 89 (1). As per Order X, Rule 1B, the parties to the suit are required to appear before such forum for conciliation. On failure of the specified Conciliation method, the matter would be referred to the Court to decide the case thereafter as stated under Order X, Rule 1C. Post-Covid, Conciliation services via video conferencing were organised at several places during 2020 in India enabling the resolution of a huge number of disputes through Virtual Lok Adalat.

Section 28 of the Indian Contract Act where states two kinds of agreement as void one being absolute restriction on legal proceedings in an ordinary court or tribunal arising under a contract and the other one being limiting the period of time to enforce the contractual rights. This section also provides for two exceptions on restraint of legal proceedings saving of contract to arbitrate dispute that may arise and saving of contract to refer to arbitration any questions that have already arisen.

This does not render it open to the parties to confer jurisdiction on a court via an agreement, which it does not possess under the Civil Procedure Code (CPC, 1908). Even the right to proceed against the arbitrator's award - for example, to set aside cannot be excluded by a contract.¹⁰

(B) Mandatory Mediation

Sec 9 of the Family Courts Act, 1984 along with its statement of objectives and reasons supports settlement availing Conciliation and its mandated in the case of K.Srinivas Rao v. D.A.Deepa that mediation as an avenue must be exhausted when it comes to matrimonial disputes.¹¹

Pre-litigation mediation is a mandatory requirement under Sec. 12A of Commercial Courts Act 2015, amended in 2018 unless there is an urgent requirement for interim relief.

¹²The Ombudsman is mandated to settle complaints by agreement or mediation to certain matters in the Indian Securities market under SEBI Regulations 2003.

Mandatory mediation though appears to be coercive is inevitable in certain matters like family matters but when it comes to commercial it might cause unnecessary costs and delay among individuals and in economic growth. However, when backed by optimal usage of technology in Mandatory Mediation the feasibility of conducting mediation can be enhanced.

¹⁰ Ganges Manufacturing Co. v. Indra Chand, (1906) 33 Cal. 1169.

¹¹ (2013) 5SCC 226.

¹² Regulation 16(1) Securities and Exchange Board of India (Ombudsman) Regulations 2003.

(C) Voluntary Mediation

According to Section 442 of the Companies Act 2013, Proceedings pending before the Central Government or NCLT or NCLAT may by Suo moto action or by voluntary application of the parties be resolved through mediation. Parties aggrieved are also allowed to file objections before the same.

¹³Right to be heard and ¹⁴right to redressal of grievance is a fundamental consumer right.

¹⁵Parties to consumer disputes are encouraged to solve their dispute by availing mediation in their first hearing or at any stage during the proceeding. Rule 4 of the Consumer Protection (Mediation) Rules, 2020 provides for exceptional matters not to be considered for mediation and it is the discretion of the Commission in certain matters not to refer to mediation.

With the enactment of the Mediation Act 2013, ¹⁶Online mediation including pre-litigation mediation is encouraged at any stage if the parties involved give written consent (inclusive of electronic means). The newly enacted Mediation Act 2023 also gives for an amendment to the Legal Services Authorities Act, 1987 to encourage the settlement of disputes including online by way of negotiations, arbitration, mediation and conciliation¹⁷.

The newly enacted Digital Data Protection Act gives the Data Principal the right to grievance redressal to be provided by the Data fiduciary or Consent manager before approaching the Data Protection Board of India¹⁸. It also encourages the ADR mechanism by directing mediation under Sec 31 if the Board thinks it is fit to be resolved by mediation.

(D) Indian Governments' Initiatives

In the year 2006 National Internet Exchange of India adopted .IN Domain Name Dispute resolution policy which processes written submissions to the arbitrator/s. However, the problem of filing complaints against various disputed domain names and assigning different arbitrators for the same, results in expensive redressal.

Grievance Against Misleading Advertisements (GAMA) and ConfoNet are government-launched portals for registering misleading advertisements and online case monitoring systems respectively for easy access to information.

After a decade, the government launched the Integrated Consumer Grievance Redressal

¹³ Sec. 2 (9) (iv) of Consumer Protection Act, 2019.

¹⁴ Sec. 2 (9) (v) of Consumer Protection Act, 2019.

¹⁵ Sec. 37 of the Consumer Protection Act 2019.

¹⁶ Sec. 30 of Mediation Act 2023.

¹⁷ Fifth Schedule of Mediation Act 2023.

¹⁸ Sec. 13, Digital Data Protection Act.

Mechanism (INGRAM) and an app named "Consumer app" for dealing with consumer dispute redressal.

Online Consumer Mediation Centre was introduced at the National Law School of Bangalore in the same year.

Consumer Protection Act 2019 included provisions for the protection of e-consumers and developed a portal named e-daakhil to facilitate e-filing of complaints.

In 2018, the SAMADHAAN Portal was introduced to deal with payment delays in Micro and Small enterprises.

In 2019, a High-Level Committee led by Nandan Nilekani set up by RBI on Deepening Digital Payments recommended ODR based on tier I - automated system and tier II - human intervention and right of appeal to the Ombudsman for addressing online payment disputes.

E-Commerce entities are required to have developed an interim grievance redressal mechanism in their companies as enshrined under the Consumer Protection Act (E-Commerce) Rules 2020.

Vidhi Centre for Legal Policy reports suggested mainstreaming of ODR in India.

The government launched the Vivaad se Vishwas Scheme for resolving tax disputes using ODR.

¹⁹SEBI introduced an Online dispute resolution Portal and is awaiting the linking of SEBI Complaint Redressal (SCORES) with the ODR Platform.

VI. EUROPEAN UNION'S CONTRIBUTION TOWARDS ODR

(A) The ODR Regulation and The ADR Directive

The Directives and Regulations are soft laws and do not have a binding nature on its members, however, they act as a facilitator and are considered to be a much-needed push for developing the legal system better. Thus, States are obliged to extend the said mechanism to all kinds of transactions be it online or offline. The promulgated Regulation on Consumer Online Dispute Resolution 524/2013²⁰ and Council Directive on Consumer Alternative Dispute Resolution 2013/11 provides consumers with a simple, cost-effective and time-efficient dispute resolution for both domestic and cross-border disputes arising from sale or service contracts along with a minimum threshold of requirements for ADR, which further boosts both the consumers' and

¹⁹ 'Sebi postpones linking of SCORES with online dispute resolution platform to April', Economic Times Dec 1, 2023 <https://m.economictimes.com/markets/stocks/news/sebi-postpones-linking-of-scores-with-online-dispute-resolution-platform-to-april/articleshow/105663285.cms>

²⁰ Regulation on Consumer Online Dispute Resolution, 2013 O.J. (L 165) 1; Council Directive 2009/22, 2009 O.J. (L 110) 30 (EC).

traders' confidence in the digital single market. The prerequisites prescribed by the Council Directive on Consumer Alternative Dispute Resolution 2013/11 for promoting a uniform and reliable model for online arbitration are expertise, independence, impartiality, transparency, effectiveness, fairness and liberty.²¹

(B) The Unfair Contract Terms Directive

There is a presumption in EU member states courts drawn from the ²²Unfair Contract Terms Directive 1993 which is also reflected upon the national legislation of the EU that the arbitration agreement dispute in consumer contracts is unfair if the same has not been negotiated individually by the parties' post. Thereby limits almost all pre-dispute arbitration agreements to null and void since they would force consumers to seek redressal via arbitration mandatorily, limiting the seeking of redressal using any other legal provision.²³ Also, this directive applies to arbitration clauses in a contract that excludes completely the power of the court to review the award passed by the arbitrator. EU directive operates in such a way to prevent the abuse of consumers by assuming the contract between the parties is one of a boiler-plate contract i.e. standard form of contract. The European Court of Justice in ²⁴*Oceano Grupo Editorial SA v. Rocio Murciano Quintero* case held that "if in case the consumer is unaware of the protection accorded to him, the fairness of the arbitration agreement can be checked by the Court on its motion extending its protectionist regime".

Consumers' right to redressal court for canceling pre-arbitration agreement created complexity in establishing United Nations ODR Uniform Rules and United Nations Online Arbitration rules. In 2016, Technical notes on ODR were adopted by UNCITRAL to assist countries in establishing and promoting the ODR system. Asian Pacific Economic Co-operation (hereinafter referred to as APEC) Project was assisted by UNCITRAL and UNIDROIT to establish another global ODR platform which instead resulted in the adoption of APEC Collaborative Framework on ODR and APEC Model Procedural Rules on ODR helping global businesses to resolve cross-border low value business to business model disputes²⁵.

VII. CONCLUSION

Post-globalisation, online transactions are the preferred mode of procurement over offline transactions. At the same time, with the advancement of e-commerce and technological

²¹ Council Directive 2013/11, 2013 O.J. (L 165) 63 (EC), Articles 5, 6, 7, 8, 9 & 10.

²² Council Directive 93/13, 1993, O.J. (L 95) 29 (EEC).

²³ Council Directive 93/13, 1993, O.J. (L 95) 29 (EEC), art. 7(2).

²⁴ *Oceano Grupo Editorial SA v. Rocio Murciano Quintero*, 2000 E.C.R. (C-240/98).

²⁵ APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-Business Disputes – Endorsed, APEC Chile, 2019 http://mddb.apec.org/Documents/2019/EC/EC2/19_ec2_022.pdf

developments there lies enormous legal issues. There have been huge changes and developments in the field of technology requiring amendments to law on par with technological development. It is high time that amendments are necessary. Despite the rise in the rank of ease of doing business, the lack of a proper dispute redressal mechanism prevents investors and entrepreneurs from tying up business in India. There is no separate legislation in particular to govern contracting on the Internet. Information Technology Act, a verbatim of UNCITRAL Model Law speaks only about cybercrimes at large.

In the year 2020, Agami and Omidyar India associated with Niti Ayog took the initiative to catalyse ODR in India and published a handbook on ODR discussing various aspects. The Handbook stated overcoming Behavioural and Operational challenges and incorporating the structural requirements would ensure trust among people to avail the benefits of ODR²⁶.

Myriad policy initiatives are welcoming. The legal sanctioning of Mediation- both online and offline in various enactments is a notable initiative in expanding the scope of dispute resolution. However, the newly enacted Mediation Act 2023 departed from the United Nations Convention on International Settlement Agreements (Singapore Convention) signed by India in 2019 resulting enforceability of settlement agreements at the international level at stake which is exigent.

ODR mechanism is a preferable, effective way to overcome the existing gaps of time, geographical distance, etc. Exploitation of Technology like Artificial Intelligence, blockchain, Machine Learning, etc. can be lodged in the resolution process to ensure its smooth functioning. An effective ODR mechanism is a prerequisite for gaining public confidence and building trust among the people. Thus, proper implementation of ODR along with a stronger security mechanism and a comprehensive legal regime as ensured by the European Union is essential.

²⁶ Designing the Future of Dispute Resolution – NITI Ayog <https://www.niti.gov.in/sites/default/files/2023-03/Designing-The-Future-of-Dispute-Resolution-The-ODR-Policy-Plan-for-India.pdf>