

ONLINE DISPUTE RESOLUTION: THE NEW NORMAL?

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ABSTRACT

Online Dispute Resolution (ODR) might have several meanings varying from individual to individual. On a common note, it means “online settlement of disputes” or “use of technology and online driven mechanism for support and settlement of e-transaction dispute resolutions including both online ADR and conventional disputes.” Ostensibly because of proliferated technology and e-commerce towards the end of the 20th century Online Dispute Resolution has witnessed assistance from academicians, technology, and lawyers practicing in the online mediums. If cyberspace holds all sorts of businesses in the near future, it is rational to solve the disputes arising thereto online. Online Dispute Resolution being a subset of Alternative Dispute Resolution (ADR) saves expenses and time as equated to traditional litigation. It may also be argued at the same time that ADR itself holds its place under the umbrella of litigation conducted traditionally.

In light of the above “notion”, this paper contributes by highlighting various facets as well as the fate of Online Dispute Resolution considering the present perspective.

Keywords

Online Dispute Resolution, Alternative Dispute Resolution, National Science Foundation, Hybrid Dispute Resolution, COVID-19, Cyber Security, Critical Information Infrastructure, National Critical Information Infrastructure Protection Centre, Intermediary, Gig economy

A BRIEF UNTOUCHED HISTORY

United Nations was the only organization that primarily used the internet until 1991. The U.S.A.'s governmental policies did not use the internet in businesses. Online infrastructure was used by universities to grease the academics. The trade of various electronic gadgets by Amazon and e-bay then started when National Science Foundation¹ gave a green signal to the internet to be used for trade purposes. Later on, the increased demand of the internet towards the end of the 20th century, the internet itself was reckoned to be a dispute resolution mechanism due to lesser limitations, quicker solutions and cheaper costs.

However, this mechanism becomes more strenuous and dynamic to proceed within the lack of facial expressions, body posture, gesture and other physical characters of parties to be used as a tool in writing judgments. Sympathy, empathy, kindness towards each other or sincerity holds no value in delivering justice.

WHAT IS ODR?

Primarily ODR was used as a tool to settle disputes on a computer-based developed mechanism, coming out of online businesses among consumers and traders. Providers inculcated ODR mechanisms in contracts among businesses locally, nationally and internationally. The subject matter could be retail, manufacturing, distribution, insurances, contract breaches and so on. Perhaps it functions efficiently when the concerned issue does not include emotional elements rather solely concerns contractual interpretations. The abovementioned might be possible reasons at the beginning of the 21st century, because of which it was a fact then that Online Dispute Resolution might not provide resolution in employment disputes or work until broadband can facilitate real-time video-conferencing.

It serves as an aid to offline ADR. Today we do communicate as well as lay down dispute resolution mechanisms online (for example in the form of *Help-desks* or *Queries*). Parties fill out forms online acknowledging their positions as well as interchange vital documents. Both private and caucus sessions can be held under a pre-written guideline by the bar associations, concerned

¹ <https://www.nsf.gov/>

organizations, or courts. A huge number of organizations such as Amazon, Nestaway, Keystone Partners (a Law firm) offer the ODR model nowadays.² There is an ample amount of computer-assisted software providing automated resolutions. We must acknowledge various other Hybrid developments today where ODR is not just a part of the dispute resolution, but is being used very commonly. Undoubtedly keeping in mind, the nature of various disputes inferring a longer duration of settlement, it is presumably better to use online meetings and online negotiation options, which in my view is certainly the future of not only Online Alternative Dispute Resolution (ODR) but also traditional litigation.

The Honorable Supreme Court of India vide various notices and circulars recently talked about personal or virtual appearances of the advocates in various courts and has insisted on the settlement of various virtual courts and related infrastructure for speedier justice delivery over the spread of COVID-19 to tackle its adverse effects.³

PRIVACY AND CONFIDENTIALITY CONCERNS

In recent days numerous questions are being raised as to whether ODR is free from privacy and confidentiality concerns? Are the notes made during online sessions free from attached legal issues or are capable of raising concerns related to IPR, fundamental rights, or other legal rights and privileges as the e-communications are virtually preserved for a long time without much physical damage (Cloud Storage). They are prone to several security breaches. Talking of security breaches any intermediary must make sure no breach is happening to survive in the current market. Moreover, the costs incurred in setting up encryption and related security software are way too much for everyone to pay for. It is possible to look at the recent COVID-19 pandemic that such facilities could be provided at a cheaper rate but still is doubtful that everyone can afford it in the available cyberspace. These security bases must have quality as we usually find in e-mails, WhatsApp, Facebook or other major software that follows current legal frameworks. It can be noted here that as of now there are very few security breaches cases available concerning ODR.

² <https://economictimes.indiatimes.com/small-biz/startups/features/online-dispute-resolution-is-beginning-to-find-takers-in-india/articleshow/73206371.cms?from=mdr>

³ https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf

This may lead us to divide present ODR methodologies into major sects such as a fully automated mechanism for decision making or a technology combining telephonic communication, chatting and other online communications.

Providers such as CyberSettle working extensively in the insurance sector use a fully automated technology whereas Square Trade uses online communications for complaints, denials, documentation, etc. among e-bay users. Another provider such as Electronic Courthouse provides a mechanism for parties to fill forms regarding complaints and denials and arrange a resolution room for caucus sessions using computers and teleconferencing. But another landmark question arises as to how many of such decisions hold good in the eyes of actual courts and practice if the parties remain unsatisfied. There is no doubt to date regarding less reliance and non-satisfaction being felt by a layman on such an online dispute resolution mechanism. We do not have enough trained lawyers, dedicated adjudicators or an efficient mechanism altogether to facilitate ODR in the near future. We are expecting continued development as “time” remains the biggest factor hampering trust or justice delivery mechanisms and to serve followed by parties’ willingness to pay. We are looking forward to an institutional involvement in online ADR which is dedicated not only towards insurance or commercial litigation but also revamps broadband technology and real-time interactions.



HOW DOES ODR FIT IN A LAWYER’S PRACTICE?

There could be two major routes available for lawyers practicing in any area wherein they can apply the ODR mechanism. Firstly, to improve their practice, lawyers can make sure most of the meetings are conducted using video conferencing to promptly execute processes as they often meet with clients to negotiate or mediate concerns. Wherever face to face meetings is not pre-required for a better result, lawyers should opt for the use of technology.

Secondly, lawyers should start learning about the applications of ODR and educate their clients to opt for it. For example, if the party is trading with local vendors, he can get indulged in vast business and global customers if he chooses an online medium for the same. As soon as such an online transaction (or business) develops, ODR comes into play. But we as lawyers shall have to make people understand the lessen cost of travelling, accommodation, physical safety, damage

of hard-copies or arranging a multi-party meeting. ODR has certainly contained benefits for a particular party coming from a certain cultural background or skills that the opposite party does not entail.

By saving one's time and money, it shall bring ease to both parties and their lawyers if proper security concerns are taken care of. It sees no time zone limitations and geographic boundaries for an advanced practitioner of law.

CYBER CRIME AND COMPLIANCE: THE NEW NORMAL

This could be a slight deviation from the soul of my article but is vital to be read and understood along with. As we all know that necessity is the mother of invention. In the current age of online transactions as well as ODR as the future of legal education and dispute resolution the primary questions coming to our minds could be what is a crime? How crime is evolving? What various stakeholders are doing? How is police agency helping? How are governments responsible and taking measures to curb issues related to therewith?

Dr. Pawan Duggal, an IT expert views that COVID-19 is a milestone in the development of cybersecurity. On one hand where cybercriminals are increasing and breeding computer networks globally (affecting even US health services), the cyber world is coming up with various security patches.⁴ It is not doubtful that cyber laws would be the key catalyst now in the coming world. With an estimation of losing 6 Trillion Dollars in the world economy by 2020,⁵ cybersecurity laws of different countries are coming up to regulate cybersecurity breaches. Under the Information Technology Act, 2000 consequences of non-compliance could be huge damages per contravention and potential imprisonment of 3 years up to life imprisonment. Therefore, "due diligence, caution and care" is certainly the new mantra.

⁴ <https://www.bloomberg.com/news/articles/2020-03-16/u-s-health-agency-suffers-cyber-attack-during-covid-19-response>

⁵ <https://economictimes.indiatimes.com/news/economy/indicators/world-economy-will-go-into-recession-with-likely-exception-of-india-china-united-nations/articleshow/74905696.cms?from=mdr>

The “Critical Information Infrastructure”⁶ dealt under Section 70 of the IT Act is the backbone infrastructure of any nation. This is also responsible for economic growth and national security. Composition of N.C.I.I.P.C. (*National Critical Information Infrastructure Protection Centre*) under Section 70A,⁷ for the protection of Critical Information Infrastructure covers the transport sector, power and energy, telecom, banking and finance, strategic and public enterprises, PSUs and governmental sectors. N.C.I.I.P.C. guidelines are important to be understood for cybersecurity purposes.

Another vital concern is with regard to intermediaries. An “intermediary” defined under Section 2 (1) (w) of the Information Technology Act, 2000 has become so important now a day as they are construed of having deep pockets. They are “*the connectors*” of users and the offenders. Causing various data losses to security breaches they might also be held responsible for Intellectual Property infringements. Laws concerning intermediaries for their smooth function along with Section 79 of the IT Act helps them develop a robust infrastructure for online transactions as well as ODR.

In company with the abovementioned topics, the major concern regarding the safety of women and children in an online platform and the dispute arising thereto, ODR might have the following issues to be dealt with:

1. Creation of false profile
2. Image threatening women and children
3. Non-consensual image sharing
4. Online bullying
5. Increased crime during COVID-19 pandemic (*Boys Locker Room incident*)

Cybercrime commonly includes threats such as ransomware attacks, phishing attacks, spyware/adware attacks, man in the middle attacks and so on. These include attacks made through e-mails, advertisements and message links. Recently Google has blocked 18 million ads and e-mails worldwide in the COVID-19 pandemic leading to cybercrime.⁸

⁶ <https://indiacode.nic.in/bitstream/123456789/1999/3/A2000-21.pdf>

⁷ <https://nciipc.gov.in/>

⁸ <https://www.bbc.com/news/technology-52319093>

Work from home is now a new normal. It helps in bringing a “*gig economy*”. The Gig economy in a layman’s term means working from home in shifts as freelancers. Hence people can work with multiple people on an hourly basis. But the vital question arises here is whether our current IT Act sufficient enough to deal with it? In my view we do not have a robust and enlarged mechanism solely for this. Although various state governments are working extensively (e.g., Tamil Nadu government) for bringing changes in an online mechanism for both acknowledgement, processing and resolutions of disputes. For this we must develop stronger firewalls, development of training and monitoring mechanisms, dedicated lawyers and equipped courts (both physical and virtual). There is no denial from the fact that there is no “*cybercrime illiterate*” and “*cybercrime literate*”. All we need to do for the time being is building knowledge and awareness about both precautionary measures and dispute resolutions in an online space as threats which was earlier limited to offices has now reached the door to door.

CONCLUSION

The recent e-filing procedure for High Courts and District Courts in India by the Ministry of Law & Justice, Government of India provides for online updating of documents which certainly is a very futuristic approach. The interoperable system between a police agency and courts for want of digital data; police station equipped with the computers; continuous training and hiring of technology savvy people as employees (both in government and private sector); e-filing to capture data at source; video conferencing; open courts; live streaming; e-payments; e-challans; virtual courts, etc. are apt examples of the development of online or e-courts and e-governance. Certainly, the future of ODR in India depends on such small developments in traditional court systems and goes hand in hand.

ODR has certainly become the ever-developing zone of dispute resolution sharing a warm relation with the judiciary. It is largely dependent on the legal community for its future goals. It has become the need as well as the responsibility and duty of the current legal sphere to strengthen ODR for better justice delivery. It has not only become a future technological revolution but a fantasy being lived in the present.