

TECHNOLOGICAL ADVANCEMENTS IN ENFORCEMENT OF CONSUMER RIGHTS: ONLINE DISPUTE RESOLUTION

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ABSTRACT

A massive digital transformation has been underway for some time now and technology is becoming a part of our everyday lives. It has also crept into the arena of consumer policy where use of technology to resolve consumer disputes is being encouraged. With technology taking over, a huge number of consumer transactions are taking place online. This has given rise to sharp rise in disputes and conflicts which are unavoidable even if all parties act in good faith. Most of these are for low-value products and services, and hence a consumer has no incentive to invest time and money in court litigation or other out-of-court settlement mechanisms which are often lengthy and costly. Hence, the use of online platforms to resolve such disputes is being encouraged, so that consumers play an active role in exercising their rights. These mechanisms where disputes are resolved online using technology and software are called Online Dispute Resolution Mechanisms. It is becoming increasingly common in the West, where national authorities are developing public Online Dispute Resolution platforms to resolve minor disputes. However, despite its increasing popularity, the mechanism suffers from various risks and challenges. These include lack of clarity on the role of online platforms providing such mechanisms and lack of awareness and trust among consumers. Hence, before Online Dispute Resolution mechanisms replace or take over traditional dispute resolution mechanisms, it is important to address these issues to make the system more dependable and accessible to consumers.

INTRODUCTION

The recent growth in digital transformation cannot be unseen. New business models, technologies, and new ways of transacting are being developed every day. The scale of this transformation today has reached a level that is impacting the economies and societies alike, and is changing the ways in which people interact. One of the areas in which digital transformation is creating a huge impact is consumer policy. Issues like information asymmetries, inadequate disclosures and misleading or unfair commercial practices have now existed for a long time in the consumer policy arena.ⁱ However, they have become more important now, than ever. Digital transformation has made consumers more vulnerable, and there is an urgent need to take measures which could enhance the consumers' trust in this new transformation age along with providing them with adequate protection. The Organisation for Economic Cooperation and Development (OECD) has thus recommended that fair and easy-to-use out-of-court mechanisms, especially Alternate Dispute Resolution (hereinafter "ADR") and Online Dispute Resolution mechanisms should be developed by merchants and payment providers together, which the consumers can use without undue cost or burden.

IMPORTANCE OF CONSUMER REDRESS AND DISPUTE RESOLUTION

Consumer grievances and disputes are inevitable. Whether it's between buyers and sellers or contactors and service providers, some disagreements are bound to arise and possibility of a dispute cannot be eliminated altogether even when all parties are acting in good faith.ⁱⁱ Hence, in addition to ensuring the quality of goods and services available to consumers, a good amount of investment needs to be made in mechanisms of grievance redressal and dispute resolution. These mechanisms should be designed so that they can be used by consumers without the need for much additional information or help. A good dispute resolution mechanism would thus provide a consumer with clear, comprehensible and accurate information on the entire procedure, including expected costs and duration.ⁱⁱⁱ

Investment in these mechanisms becomes all the more important with the increasing digital transformation as goods and services are being purchased without physical examinations leading to increased possibility of grievances. According to some estimates, approximately 1 to 3% of online transactions generate some form of dispute due to reasons like late delivery or

poor quality of products.^{iv} Further, in an EU-wide survey conducted in 2017, 16% EU consumers said they did not shop online as they were worried about not receiving or being able to return goods.^v According to yet another consumer survey conducted in six G20 economies in 2016, consumers had mixed views on the effectiveness of existing dispute resolution systems.^{vi}

ONLINE DISPUTE RESOLUTION MECHANISMS

An Online Dispute Resolution (hereinafter “ODR”) mechanism is the online private mediation of legal conflicts and disputes, without resorting to court litigation which is public in nature. It uses information and communications technology, and software to facilitate dispute resolution, negotiations or settlement through standardised communications.^{vii} These platforms use algorithms based on data from prior cases and complaints to suggest settlements, and identify patterns of consumer behaviour to avoid future disputes. Though, it was initially developed to resolve disputes in online transactions only, it is now also being used for offline transactions.

ODRs are fast and flexible and eliminate the need for the parties to be physically present at a meeting or hearing. An analysis undertaken for the European Parliament highlighted that court litigation in the UK typically took around 20-35 months to conclude, while ODR processes could be completed in hours or days.^{viii} Additionally, most ODR systems are affordable by a large consumer base as they are available either free of cost or at a small fee. Thus, with increasing digital transformation, consumers as well as governments are taking an interest in the use of ODRs for dispute resolution.

EXAMPLES OF EFFECTIVE APPROACHES TO ODR

The first widely used ODR was developed by eBay with the launch of its Resolution Centre in 2004. eBay has claimed that since its launch, its Centre has resolved “more disputes over a longer period of time than any other ODR process in the world.”^{ix} The Centre enables an amicable resolution of disputes between parties through direct communication. According to a consumers’ behaviour analysis, users who went through the ODR process to resolve disputes were found to have increased their usage of the platform, regardless of the outcome of the ODR.^x Soon after, eBay was followed by PayPal, Alibaba and other peer platforms like Airbnb.

Many G20 economies have also developed public ODR systems. Some of these are listed below:

- The most recent is the development in 2019 of a portal by the National Directorate on Consumer Protection of Argentina, where consumer complaints are filed and processed online.^{xi}
- Another example is the online platform in Canada where merchants and consumers are assisted in dispute resolution in exchange of a small fee.^{xii}
- An ODR portal was created by the National Consumer Secretariat of Brazil in 2014.^{xiii} This portal promotes online dispute resolution by facilitating direct exchanges between consumers and providers. The current resolution rate of this mechanism is a staggering 80% which the process being completed in an average of seven days. Its use is voluntary and companies need to formally register for the system. As of May 2018, the system had 900,000 registered users with 442 companies having signed up, and had completed around 1.2m complaints.^{xiv}
- Mexico's ODR mechanism called Concilianet was launched way back in 2008 by its consumer protection agency, the Office of the Federal prosecutor for the Consumer (PROFECO).^{xv} It provides online and offline consumers with access to an internet based virtual conciliation platform, which is free from bureaucracy and tiresome paperwork.
- The Russian Federation is also planning the creation of a public ODR platform powered by Artificial Intelligence by 2020.

Even though at present India does not have any public mode or method for ODR, many private ODR platforms have opened up in the country. The most recent development has been by a home rental start-up called NestAway. NestAway started with resolving disputes with its tenants via email, and later went on to establish CADRE or Centre for Alternate Dispute Resolution Excellence. Founded by Shalini Saxena and Kanchan Gupta, CADRE allows online dispute resolution through a website-based platform.^{xvi} Other similar platforms are also being developed in India. Sama, an ODR start-up is running a pilot for ICICI Bank and is helping resolve nearly 10,000 disputes with values up to Rs.20lakhs.^{xvii} In 2019, the Centre for Online Dispute Resolution (CODR) was founded which aims to administer cases online end-to-end.^{xviii}

At regional level, an ODR platform for online transactions is already in place since February 2016 in the EU which facilitates online resolution of consumer disputes.^{xix} The platform is

available in 23 languages and assists consumers and counterparty traders in documents submission and connects them with an appropriate ADR body for resolution of their disputes. In its first year itself, the platform had handled more than 24,000 complaints, in 85% of which the parties were able to agree on a competent ADR body within the deadline of 30 days of complaints submission. The ASEAN is also planning the establishment of a similar platform by 2025.^{xx} An online cross-border complaint platform initiated by ICPEN called econsumer.gov is also in place which provides information on Alternate Dispute Resolution.^{xxi}

EMERGING RISKS AND CHALLENGES

In usual circumstances, an individual consumer might not be very active in seeking redress for a grievance pertaining to a low-value product. He may further be discouraged if the only way to seek redress is through ODR and the mechanism is not very user friendly. Other concerns like hidden costs and fear of fraud also arise with the use of ODR mechanisms. Some other issues that may arise from the use of ODRs are listed below:

Responsibility on Online Platforms

Even though a large number of online platforms have put in place ODR mechanisms, access to these remains limited worldwide. A survey conducted by Consumers International revealed that over half of its member organisations' countries do not have any ODR mechanisms and the online platforms are not legally obligated to provide this service.^{xxii} Even where ODRs are provided, the role of online platforms in the use of such mechanisms by its consumers is not very clear. Though the platform itself is subject to consumer protection responsibilities in its interaction with users, there is no mention of its role in the resolution of disputes for transactions occurring via their channel. Similarly, there is lack of clarity as to how ODR should compare to more formal types of self-regulation, which are subject to codes of conduct and accountability measures.

Lack of effectiveness

Any dispute resolution mechanism will be considered effective when it is capable of handling a wide variety of disputes related to varied goods and services and irrespective of mode of purchase. However, ODRs have an even tougher standard to meet, since in addition to having wide capabilities, it needs to be ensured that their decisions are enforceable. There is limited

information on this front, but it appears that not much progress has been made in making ODR decisions enforceable.

Lack of awareness

As stated above, ODRs are not as common as one would like them to be. But this is not the only problem. Even where these mechanisms are in place, consumers are either not aware of them, or do not know how to make use of them. Consumers face difficulties in understanding the procedures for making complaints and the working mechanism of ODRs. It is hoped that these problems will resolve with increase in use once more such ODRs are in place.

Lack of Trust

ODR mechanisms use algorithms to facilitate settlements by studying patterns in consumer behaviour. However, not much trust has been developed in the use of these algorithms. It has been argued that these algorithms may be based on wrong data and do not possess the ability to capture complex consumer behaviour.^{xxiii} Further trust issues arise since consumers do not have information about what kind of data is being used in an algorithm. It was also pointed out that use of huge amount of data before the algorithm can detect patterns may encourage unauthorised access to and use of consumer data.^{xxiv} The risk of data manipulation by businesses to provide targeted ads to consumers has also been pointed out by OECD.^{xxv}

Favourable to Merchants

As soon as the sales volume of a merchant on an online platform increases, it starts to repeatedly be involved in the ODR system, and a possibility arises that it is able to gather enough information to be able to tip the dispute resolution process in its own favour. Such merchants develop expertise regarding what policies govern the outcomes, and what kind of evidence leads to what kind of decision, thus hampering the neutrality of the entire process. Further, over time these entities develop better legal and financial resources than the consumers, allowing them to navigate through long and extended resolution proceedings, which a customer is very unlikely to be able to support. In other words, volume of data and resources available with merchants put them in a better position as compared to their counterparties.^{xxvi}

Thus, even though ODR is a welcome development in the wake of digital transformations, it needs to be ensured that these mechanisms are made effective enough so that they are used by consumers for whom they are developed. A framework for an effective ODR mechanism has been provided by both the OECD and the United Nations (UN). The United Nations

Commission on International Trade Law (UNCITRAL) also released its “Technical Notes on Online Dispute Resolution” in 2016 to foster the development of ODRs.^{xxvii}

CONCLUSION

With the tech revolution coming to the forefront, it has also made its place in the domain of dispute resolution by way of Online Dispute Resolution mechanisms. These mechanisms use technology for virtual communication between parties to assist in resolution of disputes without the need for physical presence. It may be concluded that ODR is increasingly becoming popular, at least for less complex disputes. However, there is still a scope of major improvements in the system to make it more dependable and accessible to consumers. Thus, it is still a long way before ODR can take over the traditional dispute resolution mechanisms like litigation or arbitration.

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