

ONLINE DISPUTE RESOLUTION (ODR): SOME PERSPECTIVES

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ABSTRACT

Online Dispute Resolution (ODR) was a concept unheard by many in India, till very recently. The COVID 19 pandemic opened up discussions on ODR around the world. Lockdown brought everything at halt, including the justice system. Adopting technology became inevitable. This adoption of technology in legal systems certainly led to new discussion and deliberations adoption of ODR in India. This paper attempts to present the ODR models for India. What is ODR, Why ODR, Where ODR and How ODR can be introduced are the points of discussion in this paper.

WHAT IS ODR

While the term ODR in the current challenging situation has become the buzz word, it is crucial to know what it means and how it has been defined. It is imperative to understand the various definitions of ODR which has been evolved over a period of time. These definitions also reflect the development of ODR and the basic characteristics of ODR.

Online Dispute Resolution – as the name indicates- is the presence of virtual space, where disputes can be resolved. The pioneer of ODR Ethan Katsh defines ODR in one of his interviews as “online dispute resolution is dispute resolution that's supported, facilitated, helped by the use of technology”

ODR encompasses a series of online means of communication, including “e-mail, Internet Relay Chat (IRC), instant messaging, Web forum discussions, and similar text-based electronic communications”ⁱⁱⁱ:

According to Dr. Pablo Cortes “Online Dispute Resolution (ODR) is often referred as a form of ADR which takes advantage of the speed and convenience of the Internet and ICT”ⁱⁱⁱ.

According to Colin Rule “Online Dispute Resolution (ODR) is the use of information and communications technologies to help parties resolve their disputes”^{iv}.

According to Robin Cupido: ODR in simplest form the term refers to the “use and adaptation of traditional alternative dispute resolution models (most commonly mediation, negotiation and arbitration) to resolve disputes which arise online”. This definition in with specific reference to ADR mechanisms for the disputes which may arise online

A simple working definition of ODR is dispute resolution which "takes advantage of the Internet, a resource that extends what we can do, where we can do and when we can do it."

Richard Susskind terms “ODR as disruptive technology”. He firmly believes that ODR can enhance existing dispute resolution system and will be the only feasible way of resolving disputes in cases of geographical distance”. This definition highlights the advantage of technology in addressing geographical distances.

From the Indian perspective, in the discussion paper, published during the Covid 19 pandemic, Niti Ayog says “Online Dispute Resolution (ODR) has been defined to mean utilizing information technology to carry out alternative dispute resolution. ODR is a means of dispute settlement whether through conciliation or arbitration, which implies the use of online technologies to facilitate the resolution of disputes between parties. The information management and communication tools in ODR may apply to all or part of the proceedings, and also have an impact on the methods by which disputes are being solved”^{vi}.

The interesting aspect to note from this definition is though primarily used for ADR practices, the pioneers of ODR have been futuristic and has defined in such a way that it covers

technology as a medium to technology as a decision maker in dispute resolution. It is interesting to note the history of ODR and analyze the development.

ODR saw its beginning with the development of World Wide Web in 1989 and after the first browser was started which was post 1989 with Netscape being the first one. The academic discussion on ODR began from 1994 and the lead for the same was taken by University of Massachusetts. The first ODR project Virtual Magistrate was an initiative of National Centre for Automated Information Research funded by the University of Massachusetts. Also a family dispute ODR was initiated at the University of Maryland. Later the University of Massachusetts established the National Centre for Technology and Dispute Resolution. We see these early developments between the period of 1989 to 1994. The period also witnessed the online space booking by registration for domain names. Though seemed fancy and all in borderless world, it was not free from conflicts and hence the need for different mechanism of dispute resolution was the required where ODR played a prominent role by having the uniform dispute resolution policy. With the interconnection of world with World Wide Web, the shopping spaces went virtual and e-commerce began. E bay which was founded in 1995 to facilitate consumer to consumer sales and business to consumer sale, realized the need for dispute resolution mechanism on the same lines as transactions were taking place i.e. online. The first pilot project was undertaken for establishing the model for E-bay. The model was based on ADR. And project was successful.^{vii}

The growth of e commerce demanded for the mechanisms which were faster and on same lines. Hence a lot of ODR providers started establishing their platforms and practice in that period, some of them being [squaretrade.com](#), [cybersettle.com](#), [mediate.com](#), [youstice.com](#), [smartsettle.com](#), [settletoday.com](#), [fairclaims.com](#), [netneutrals.com](#), [virtualcourthouse.com](#). There are many more which saw its establishment in the west initially. Mainly these platforms focused on easy filing of disputes and providing virtual space for communication to resolve. The development also saw the movement to automated negotiations and sites like [cybersettle.com](#), [clicknsettle.com](#) and [settlementonline.com](#) provided the facility of blind bidding and settlements. Hence the ODR movement almost for a decade was predominantly in the area of ADR services, though in that arena various possibilities were discussed. With technology proliferation on one hand the necessities which has emerged from global nature of business and now with the global pandemic the need of ODR has become a necessity.

When we look in India, ODR existed hardly a decade back. Use of technology was primarily to ease communication. The initiative of government of e-court helped people in knowing the status of the case or to access orders of the court but nothing beyond that. Pre Covid there were no e filings and video conferencing was not a norm but an exception. First court to come up with E-Filing in pre covid period was the Delhi High court. While steps to digitized was taken in full-fledged form the ODR was introduced in Legal systems. Private practice and ADR systems at the institutional arbitration level, had technology assistance however not completely in virtual space.

Merging technology with the system certainly has advantage and the potential to address the concerns in the Indian legal system. Why ODR should be explored in India is an important question to be addressed.

WHY ODR

The need for ODR undoubtedly rested on two pillars viz access and ease. Access to justice has various parameters. To name the important ones are the ease to approach, cost and time involved, understanding procedural complexities. When we discuss of ease of approach the aspect of inclusive justice needs to be emphasized. Is every one in a position to approach the established institutions? These difficulties can be due to complexities, cost or even fear of will the resolution taken place on time.

There can be two notions to the adoption of ODR. One could be the ease to the litigants and to ensure Justice at any time emphasizing Equal Access and Inclusive systems. The ease arises when it is merged in the existing systems and not when layers are created by way of ODR. However, at the same time amicable settlement should be explored. This paper presents various models of ODR which can be adopted. Also, as one jacket doesn't fit all, one model of ODR will not fit in all countries, all jurisdictions and all disputes. Hence from the Indian perspective where we have population of one billion and more, with diversification at all levels, social and economic, it is important to design systems which can be accessible by all.

In the Indian context where we still have debates, discussions, deliberations on delayed justice and access to justice i.e inclusive justice, it's time we explore the adoption of ODR as

mandatory at the prelitigation stage and also merging of ODR in the main stream legal systems also. Justice systems can be said to be accessible only when it meets parameters of both, inclusivity and ease. By inclusivity it is observed that many a times keeping the cost benefit ratios in mind people don't approach the dispute resolution mechanisms as given in the respective legislations and by ease it means the hardships caused to one after approaching may be related to process and time both. The need of the hour is to design systems which can resolve these concerns and make the aim of equal justice achievable. Hence the next important question in the Indian context is where can the ODR be implemented.

WHERE & HOW ODR?

ODR has the potential to help in resolve any kind of dispute, however as discussed in the foregoing paragraphs, it will need dispute design system as one method of resolving disputes may not be applicable to all kinds of disputes. Secondly a win win solution is always a welcome and hence using ODR in ADR services and pre-litigation stage may prove advantageous. This part of the paper proposes various models of ODR which can be adopted at pre litigation stage. For the better understanding these models are classified:

1. Trust Model
2. ODR in Private Practices
3. Institutionalised ODR

This paper will discuss the Trust model as the one which can be adopted at the Prelitigation stage.

TRUST MODEL

Dispute resolution mechanisms through ODR systems can be adopted at the pre litigation stage. In this system the organisations can adopt ODR platforms to address disputes. It can be done in two ways, designing their own systems or a tie up with external organization offering ODR services and incorporating a clause in the contracts to that effect. This in a way instils assurance

in people of the best practices which will be adopted in resolving dispute. If there are third party services for dispute resolution mentioned, it serves two advantages, parties know beforehand the organisation through whom the disputes will be resolved. This adds to the trust badge in that at product or service which the organization deals in. Trust models can be adopted in two ways viz ODR systems and Automated Systems.

i) ODR Systems

When we talk about the inclusivity model of justice system, justice is taken in its wider connotation of getting what is due or enforcement of rights. The proposal of adopting dispute resolution mechanism at the pre litigation stage or the inception stage idea would again lead to the satisfaction of the people having disputes that it has been resolved, even in the pre-litigation phase. These suggested models can be incorporated at the institutional and organizational levels. This will help with B2C disputes. The purpose of introduction of dispute resolution systems at the organizational level is twofold: amicable settlement, saving time and money for both organizations and the customers. It is recommended that the companies incorporate a dispute resolution clause which is inbuilt the company in the dispute resolution policy and should be notified. The recommended system is a step forward from the grievance cell or the help line. It is when a fault is accepted, the dispute can be resolved through ODR. These systems were first reported to be adopted by e-commerce companies. These ODR models can be replicated in other disputes too where there is large consumer base

Advantages of Adopting ODR at Organization Level

- 1. Time and Cost:** Reduced time and costs are a decisive factor in accepting ODR, as they save on both. Online mechanisms may allow people to fight and get compensated for their rights.
- 2. Dispute Design System:** It would give liberty to the organization to get the system designed in accordance with the type of dispute. For instance, a housing dispute may have a different mechanism to be resolved as compared to a FMCG goods dispute.
- 3. Better analysis for companies:** Understanding the kind of disputes will enable the companies to address the same and make changes in policy to reduce such disputes.
- 4. Unique Inbuilt features:** The issue of impersonal platform can be resolved by having the in-built feature of face to face meeting.

Keeping this as a basic requirement, the ODR system designed should be user friendly. The resolution of disputes can be done by the experts in the field appointed by the organizations, or it can be automated or both.

Process for the system

1. System with online assistance of experts
2. Register with system
3. Establish the contractual relationship i.e. uploading of the bill or other documents which clears that a person is a consumer
4. Fill the form of grievance as designed by the system filling all the queries
5. Assignment of the expert by the system
6. On review of all documents uploaded and grievance form filled, a solution to be provided by the expert
7. The reason the expert has to directly give the solution is, it is presumed that he is aware of the other technicalities of the case as given by the concerned department of the company
8. The prescribed margin of claim on either side should be acceptable.
9. Once the claim is settled, the standard draft of settlement agreement should be prepared and notarized with one copy with each party
10. The amount if any to be paid to the consumer should be done within 15 days of the final settlement.
11. If need be there should be virtual meeting through an inbuilt feature in the software of face to face meeting. There can be a designated time for these meetings so the regular activity of any person will be least disrupted
12. If for any reason the outcome is not acceptable, the parties are free to choose other legal recourses. However, when such disputes are filed in the court, the court should first look in to the ODR claims exchange to shorten the process of hearings.

Legal Framework for adoption of Trust models

- **Contractual Framework:** The monetary claim has to be necessarily based on some contractual relationship. Hence it is important that the contract which the parties have

should be legal as per the prevalent laws. Moreover, this framework will apply more in formal and written contracts. Its pertinent to mention this as Indian Contract Act

- **Dispute Settlement Laws:** Since the amicable settlement of resolving disputes is the key element, there would be no need to amend the procedural laws to bring this system in place.
- **Policy Initiatives:** This system of dispute resolution can be very effective; it is backed by a policy of the government. The paper proposes that if the government can make it mandatory for certain sectors to adopt ODR, these systems can be made uniform by making it sector specific. Once there is a policy directive, no one should directly file any claims in the court. The first step should be to register the claim on the inbuilt ODR systems. The number of filings and settlement report should be prepared by the organizations. This will also enable to generate an empirical data of what is good. Hence to introduce this kind of system no much amendment would be required in the existing laws.

ii) Automated Systems at Organizational Levels

In situations where there are claims and counter claims, a blind bidding method can be adopted. In a blind bidding method, there is an acceptance of amount to be paid but the quantum of amount is in dispute. In face to face negotiation the possibility of not meeting or not accepting is high. In blind bidding either party shares the three amounts they are willing to settle for. The set algorithm on a variation of 10 percent decides the amount and is communicated to the parties. If agreeable, the settlement agreement is generated and mailed. Subsequent to receiving the confirmation of agreement, the amount is to be credited to the account of the concerned party.

Legal framework

To bring automated systems at the institutional level, there will be no need for a specific law unless it is made mandatory by the government that it should be resolved through automated systems. The legal framework for automated systems is discussed at length. The least that will be applicable is the contract law provisions if the settlement through automated systems is accepted by the parties.

ROAD MAP OF ODR FOR INDIA

We will need hybrid and integrated models of ODR in India. Systems should be designed for pre litigation stage. These systems can be customized according to the nature of the disputes keeping in mind the quick disposal of cases. However, these systems should be interconnected with the formal legal systems. To begin with the movement of online dispute resolution a need to develop system further from grievance redressal medium needs to be built. Since the idea of ODR is to help the citizens and make the dispute resolution process effective, it is imperative that through policy initiatives ODR is made mandatory at the pre-litigation stage. Though there would be sector wise policy to make it mandatory, however there can be a central policy for designing these systems. The journey of adopting ODR is bright in India, the time is apt and the model discussed in this paper is one such initiative. A lot further in this area holds to be explored. This will be possible with feasibility studies in various studies to be conducted in various sectors.

ENDNOTES

ⁱ The Evolution of ODR Mediator – Ethan Katsh – Interview of Ethan Katsh by Aled Davies, founder of mediatoracademy.com at https://www.judiciary.uk/wp-content/uploads/2015/02/ethan_katsh_int2_evo_of_odr.pdf

ⁱⁱ Robert Gordon, “The Electronic Personality and Digital Self” (2001) Feb–April *Dispute Resolution Journal* 11

ⁱⁱⁱ Dr. Pablo Cortés, What should the ideal ODR system for e-commerce consumers look like? *The Hidden World of Consumer ADR: Redress and Behaviour*, CSLS Oxford, 28 October 2011, https://www.law.ox.ac.uk/sites/files/oxlaw/dr_pablo_cortes.pdf

^{iv} Rule Colin Is ODR ADR? A Response to Carrie Menkel-Meadow, *International Journal on Online Dispute Resolution* 2016 (3) 1 <http://www.colinrule.com/writing/ijodr.pdf>

^v Moorhead, R. (2009). *The End of Lawyers? Rethinking the Nature of Legal Services*, by Richard Susskind. Oxford: Oxford University Press, 2008

^{vi} Available at <https://niti.gov.in/catalyzing-online-dispute-resolution-india>

^{vii} Katsh, E. (2012). *Odr: A look at history*. In W. Abdel, M. E. Katsh, & D. Rainey, *Online dispute resolution: Theory and practice: A treatise on technology and dispute resolution* (p. 9). The Netherlands: Eleven International Publishing