

Online Dispute Resolution in India: A Distant Reality or Dream?

Akash Gupta¹ and Arushi Bajpai²

Abstract

How disputes are resolved in India? The most frequent answer to this question is litigation. However, there are alternatives to litigation to resolve a dispute, namely mediation and arbitration. These two methods of dispute resolution are prevalent in commercial cases as it supports party autonomy and provides a private and confidential way of resolution. As there has been the growth of disputes in electronic transactions, the ODR movement has started to pick up. India is still in its nascent stage concerning ODR. Though, there have been certain ODR platforms which have shown positive results by resolving a substantial number of cases fully online. This indicates that India has great potential for the ODR market. All this is happening without a single law specifically recognizing ODR in India. The Government and Judiciary are making strong efforts to crystallize the ODR program in India. There are three positive outcomes of the ODR program's success in India, an increase in access to justice, a reduction in the backlog of cases, and an improvement in the 'Ease of Doing Business Index' ranking. This article aims to analyze the situation in India with respect to online dispute resolution in mediation and arbitration. Additionally, this article finds the challenges in the road of ODR development in India. Finally, the article proposes suggestions to overcome the barriers.

Keywords: *Online dispute resolution, alternative dispute resolution, access to justice, mediation, arbitration, confidentiality.*

¹ Assistant Professor, Jindal Global Law School, O.P. Jindal Global University, Sonipat, India; Email: akash@jgu.edu.in.

² Assistant Professor, Jindal Global Law School, O.P. Jindal Global University, Sonipat, India; Email: abajpai@jgu.edu.in.

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Introduction

In India, more than 47 million cases are pending in various courts. Recently, a lawyer has had to fight for a twenty-three yearlong battle for a refund of Rs. 20 from Railways.³ Even though the preferred method of resolving the dispute is litigation but because of the increasing backlog of cases in India, parties are afraid to approach the court for dispute resolution. In that case, Alternative Dispute Resolution (ADR) is a potential option. In fact, Online Dispute Resolution (ODR) can be a much better option as it will help in providing more transparency to the parties involved, less expenditure since it is online it incurs less cost to the parties and an increase in access to justice. It is considered one of the most convenient resolution as parties from one place will not be required to travel to another place for physical hearings. Nonetheless, there

³ Taniya Dutta, “‘I Felt Looted, Insulted’: My 23-Year, 20,000-Rupee Battle for a 20-Rupee Rail Fare Refund” *The National News* (19 August 2022) <<https://www.thenationalnews.com/weekend/2022/08/19/i-felt-looted-insulted-my-23-year-20000-rupee-battle-for-a-20-rupee-rail-fare-refund/>> accessed 22 August 2022.

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are questions like the due process in ODR, awareness of ODR, and the digital divide which had to be addressed before initiating an ODR movement in India⁴.

ODR in 2020 has been a great success in India⁵, it has a great potential to change the Indian legal system. For instance, during the lockdown phase in 2020, one of the ODR platforms helped the State Legal Services Authority to settle more than 60,000 cases out of 1,00,000 filed cases worth more than 47 Billion INR.⁶ Recently in August 2022, NALSA solved 7.4 million cases in India.⁷ If India comes up with an ODR model where we have ODR in litigation as well as ADR, the whole conundrum of excessive judicial intervention and delay will be smoothened. A good dispute resolution program will contribute to the enforcement of contracts, which will result in gaining foreign companies' confidence in the Indian regime.

Backlog of Cases in the Indian Courts

To resolve a dispute, there are several ways like litigation, arbitration, mediation, and negotiation. However, in a country like India where 33 Million cases are pending in courts⁸, litigation does not sound like the best option for the litigants. Pendency before the Supreme Court and the High Courts has been increasing in the last decade by more than 36% and 17% respectively.⁹ The pendency problem appears to be intensified during Covid-19 and in the subsequent years. The year 2021 has witnessed the highest spike in pendency, that is 3320 cases. Pendency in 2022 is less drastic in comparison, with an increase of 613 cases.¹⁰

According to the PwC Report, 91% of the companies in India have a dispute resolution clause to resolve their disputes.¹¹ The formalistic court system is more time-consuming, public in

⁴ Ethan Katsh, 'ODR: A Look at History' in Mohamed Abdel Wahab and others (ed), *Online Dispute Resolution Theory and Practice* (EIP 2013) 27.

⁵ 'Online Lok Adalat' (Sama: Space for Resolution) <<https://www.sama.live/lokadalat.php>> accessed 20 August 2022.

⁶ *ibid*.

⁷ Over 7.4 mn cases settled during third National Lok Adalat today: NALSA <https://www.business-standard.com/article/current-affairs/over-7-4-mn-cases-settled-during-third-national-lok-adalat-today-nalsa-122081301057_1.html> (Business Standard, 13 August 2022) accessed 15 August 2022

⁸ Harish Nair, '3.3 Crore Backlog Cases in Courts, Pendency Figure at Highest: CJI Dipak Misra' (New Delhi, 28 June 2018) <<https://www.indiatoday.in/india/story/3-3-crore-backlog-cases-in-courts-pendency-figure-at-highest-cji-dipak-misra-1271752-2018-06-28>> accessed 20 August 2022.

⁹ 'Pendency of Cases in the Judiciary' <<https://www.prsindia.org/policy/vital-stats/pendency-cases-judiciary>> accessed 20 August 2022.

¹⁰ Joyston D'Souza, 'Pendency at the Supreme Court: Half-Yearly Trends (2022)' Supreme Court Observer (15 July 2022) <<https://www.scoobserver.in/journal/pendency-at-the-supreme-court-half-yearly-trends-2022/>> accessed 28 July 2022.

¹¹ 'Corporate Attitudes & Practices towards Arbitration in India' <<https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf>> accessed 21 July 2022.

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nature, more costly and less flexible.¹² The timely disposal of cases and access to justice is a fundamental right.¹³ In contradiction, the Law Commission Report No. 245 indicates that the judiciary is unable to deliver timely justice as there is a huge backlog of cases¹⁴. To counter this problem, the usage of ADR shall increase and consequently it will reduce the burden of the courts.¹⁵ Taking this idea forward, employing ODR will advance efficiency and productivity in resolving cases.¹⁶

ADR and Covid-19

Several instances indicate that the disputes were referred to the head of the village groups for a final and binding settlement of the disputes.¹⁷ The village groups were called Panchayats and the adjudicating member was called Panch. The first law in the history of modern-day arbitration in India was the Bengal Regulations of 1772 which provided the reference for a court dealing with arbitration. Later on, there were a series of legislations related to arbitration before opening the doors of the Indian economy, namely: the Arbitration (Protocol and Convention) Act, 1937; the Indian Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961. After the liberalisation, privatisation and globalisation in 1991, the Parliament of India passed the Arbitration and Conciliation Act, of 1996 to modernise the outdated arbitration legislation.¹⁸

During Covid-19 (2020-2022) India witnessed an economic crisis. However, there has been significant growth in the digital economy and e-commerce sectors. Commercial companies have moved online and contributed to the evolution of ODR.¹⁹ One can deduce that covid times have forced businesses as well as consumers to move to online platforms. Courts, schools, colleges, and offices moved to online platforms as there was no other option to sustain.

¹² Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law Is Illegal* (Wiley-Blackwell 2008) 196; Marc Galanter and Jayanth K. Krishnan, 'Bread for the Poor: Access to Justice and the Rights of the Needy in India' 55 *Hastings L.J.* 789 (2004); Robert A. Baruch Bush, 'Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades' 15 *REV. LITIG.* 455, 457 (1996).

¹³ *Asian Galaxy Pvt. Ltd. Vs Sidhivinayak Electric*, C-482 No.2246 of 2019 (Uttarakhand High Court); *Imtiyaz Ahmad v. State of Uttar Pradesh and Ors.*, AIR SC 2012 642.

¹⁴ 'Arrears and Backlog: Creating Additional Judicial (Wo)Manpower' (2014) Law Commission of India 245 54 <<http://lawcommissionofindia.nic.in/reports/report245.pdf>> accessed 21 July 2022.

¹⁵ Erik Jensen and Thomas C. Heller, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (SUP 2003) 7.

¹⁶ Kashish Sinha and Manisha Gupta, 'Arbitrability of Consumer Disputes: Excavating The Hinterland', *Indian Journal of Arbitration Law*, (2018) 7(1) *Indian Journal of Arbitration Law* 120.

¹⁷ Indra Deva Shirama, *Growth of Legal System in Indian Society* (Allied Publishing 1980) 14.

¹⁸ 'Amendments to the Arbitration and Conciliation Act 1996' (Law Commission of India) 246 8 <<http://lawcommissionofindia.nic.in/reports/Report246.pdf>> accessed 21 July 2022.

¹⁹ Abhilasha Vij, 'Arbitrator- Robot: Is A(I)DR the Future?' (2021) 39(1) *ASA Bulletin* 123.

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Serving justice through the traditional methods is a cumbersome and costly affair while serving justice with the use of ODR can be effective, cheap and flexible. The parties are free from any kind of location barriers, one party can be sitting in Delhi and the other party can be situated in Andaman, the ODR can happen through a video conferencing link. Of course, the accessibility of the internet has a great role to play in this regard.²⁰ The cost involved with travel is substantially reduced as all the stages of ODR are online. A person sitting in a distant village can also take part in ODR, the only catch is that the person should have internet access and awareness about ODR methods.

In the majority of cases, people do not choose litigations because the average time taken to decide a case is almost 1500 days. Even in that case, there is a long pendency of cases in the courts. One of the potential solutions to the backlog of cases issues can be an increase in ODR cases. This will help in reducing the burden on the courts.²¹

Legal Framework of ODR in India

There is no legislative framework, especially for ODR in India. There are certain legislations in ADR and technology domains which support ODR in India. The main legislation in the ADR regime is the Arbitration and Conciliation Act, of 1996. However, for mediation and negotiation, there is no specific law. Under Section 89 of the Civil Procedure Code, 1908, the Courts have the power to refer the parties for arbitration, conciliation, and judicial settlement including settlement through Lok Adalat or mediation.

Apart from the above laws, there are specific laws which prescribe the use of ADR. Section 9 of the Family Courts Act, 1984 provides that the courts have a duty to persuade the parties to arrive at a settlement through conciliation. In *K. Srinivas Rao v D.A. Deepa*, the Supreme Court made mediation mandatory which must be exhausted in matrimonial disputes.²² Regulation 16 (1) of Securities and Exchange Board of India (Ombudsman) Regulations, 2003 provides for Ombudsman to attempt settlement of the complaint by agreement or mediation between the complainant and the listed company.²³ Section 12 A of the Commercial Courts Act, 2015 made it compulsory to have mediation before litigation. This kind of mediation before litigation is

²⁰ 'The Future Of Virtual Courts And Access To Justice In India By Dr. Justice D. Y. Chandrachud' (itaonline.org, 29 June 2020) <https://itaonline.org/articles_new/the-future-of-virtual-courts-and-access-to-justice-in-india-by-dr-justice-d-y-chandrachud/> accessed 18 July 2022.

²¹ Aranya Chatterjee and Sharique Uddin, 'Online Dispute Resolution: An Effective Mechanism and an Alternative Tool for Justice at a Reasonable Time', (2021) 87(4) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 529.

²² *K. Srinivas Rao v D.A. Deepa* (2013) 5 SCC 226.

²³ Securities and Exchange Board of India (Ombudsman) Regulations 2003, reg 16(1).

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called pre-litigation mediation. In countries like Italy, this model has been successful as it has helped to reduce the burden on the courts.²⁴

The Insolvency and Bankruptcy Board of India (Model Byelaws and Governing Board of Insolvency Professional Agencies) Regulations, 2016 provides for the establishment of a Grievance Redressal Committee by the Insolvency Professional Agencies.²⁵ The Committee should receive complaints and seek to resolve them through mediation. Section 442 of the Companies Act, 2013 provides that any party to proceedings before the Central Government, National Company Law Tribunal (NCLT) or National Company Law Appellate Tribunal (NCLAT) request mediation. To complement this provision, there are Companies (Mediation and Conciliation) Rules, 2016, which regulate the empanelment of mediators and prescribe the mediation procedure.

Section 74 of the Consumer Protection Act., 2019 provides for the establishment of Consumer Mediation Cells in every district which can serve as a one-stop mediation centre for all consumer-related disputes. In addition, Consumer Protection Act (E-Commerce) Rules, 2020 mandates e-commerce companies to draft internal grievance redressal mechanisms.

Industrial Relations Code, 2020 provides for the appointment of conciliation officers and encourages the dispute settlement of industrial conflicts through conciliation. The code also encourages voluntary arbitration of industry-related disputes. Section 65-A and 65-B of The Indian Evidence Act, 1872 recognize electronic evidence and its admissibility.²⁶ This provision helps in recognizing documents sharing over the internet, online hearings, electronic awards²⁷ and settlements. Section 4 and 5 of the Information Technology Act, 2000 recognize electronic records and electronic signatures. Electronic signatures play a crucial role in signing up for ODR by the parties, signing in the arbitral award or settlement agreement.

As there is no specific law for ODR, there is only limited guidance in the ODR field. The first step should be introducing certain amendments for the recognition of ODR. Later on, there shall be specific legislation on ODR which recognises ODR, regulates the ODR platform and prescribes the ODR procedure. Given that there is a vacuum in the recognition of ODR in

²⁴ Leonardo D'usro 'Italy's 'Required Initial Mediation Session': Bridging the Gap Between Mandatory and Voluntary Mediation' (ADR Centre) < <https://www.adrcenterglobal.com/2020/04/28/article-italys-required-initial-mediation-session-bridging-the-gap-between-mandatory-and-voluntary-mediation/>>accessed 27 July 2022.

²⁵ Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations 2016, reg 3(2).

²⁶ *State of NCT Delhi v Navjyot Singh* (2005) 11 SCC 600; *Anvar P.V. v P.K. Basheer* (2014) 10 SCC 473; *Arjun Paditrao Khotkar v Kailash Kushanrao Gorantyal* (2020) 3 SCC 216.

²⁷ Antonov Jaroslav Valerievich, 'Electronic Arbitration: Legal Issues' (2017) 11(3) *Romanian Arbitration Journal* 27.

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legislation, the courts have done an impressive work of recognizing some facets of ODR through judicial precedents.

The courts in India have recognized the use of technology in the arbitration process²⁸, online arbitration agreements which provide the record of agreement²⁹, upheld video-conferencing for the purpose of appointing an arbitrator³⁰, video conferencing for recording evidence and witness testimony³¹, video conferencing for obtaining the expert opinion³². In addition to this, the courts reached an extent where they validated the service of summons through WhatsApp.³³ The Supreme Court formed Mediation and Conciliation Planning Committee (MCPC) to draft a law on mediation. The Committee submitted the draft legislation which also provided for recognition of ODR.³⁴ The Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice report on 'Functioning of the Virtual Courts/Courts Proceedings through Video Conferencing' observed that online proceedings help to counter major issues like distance, delays and cost. Even though the report is based on virtual courts and not ODR, it indicates the approach of the judiciary and the Government towards online dispute resolution.³⁵ Online disputes should be resolved online.³⁶

Lastly, focusing on Gandhi's Talisman that mentions "whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man [woman] whom you may have seen, and ask yourself if the step you contemplate is going to be of any use to him/her." Applying Gandhi's Talisman, the disadvantaged and low segments of society will be able to use online dispute resolution and

²⁸ *Shakti Bhog v Kola Shipping* (2009) 2 SCC 134.

²⁹ *Trimex International v Vedanta Aluminum Ltd* 2010(1) SCALE574.

³⁰ *Grid Corporation of Orissa Ltd. v AES Corporation* (2002) 7 SCC 736.

³¹ *State of Maharashtra v Praful Desai* (2003) 4 SCC 601.

³² *Balram Prasad v Kunal Saha and Ors* (2014) 1 SCC (Civ) 327.

³³ *Central Electricity Regulatory Commission v National Hydroelectric Power Corporation Ltd.* (2010) 10 SCC 280.

³⁴ *M.R. Krishna Murthi v. The New India Assurance Co. Ltd.* Civil Appeal No. 2476- 2477 of 2019, order dated 5 March 2019; Ajmer Singh, 'Supreme Court forms committee to draft mediation law, will send to Government' (The Economics Times, 19 January 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms>> accessed 15 July 2022.

³⁵ Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 'Functioning of the Virtual Courts/ Courts Proceedings through Video Conferencing' (Report no 103, 11 September 2020) accessed 15 July 2022.

³⁶ Pablo Cortés, 'Online Dispute Resolution for Consumers: Online Dispute Resolution Methods for Settling Business to Consumer Conflicts', in Mohamed S. Abdel Wahab and others (eds), *Online Dispute Resolution: Theory and Practice, A Treatise on technology and Dispute Resolution* (Eleven International Publishing, 1st ed., 2012) 151.

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achieve greater access to justice at affordable costs. Consequently, ODR will also help in increasing inclusive justice.³⁷

For instance, a consumer buys a mobile phone for Rs. 10,000 from an e-commerce company. After 31 days of purchase, the mobile stops working. As a result, the consumer has a complaint against the company. Generally, these complaints are filed in the consumer forums which have the jurisdiction. However, there are alternatives to the consumer forums, that is opting for mediation. The problem lies here, the physical presence of the parties and the mediator is required.³⁸ To meet at a physical venue, the parties need to book a hearing room. However, in online dispute resolution, none of these issues is faced. The essential requirement of ODR is access to the internet. The procedures of ADR are used in ODR with the help of technology.

ODR Platforms in India

Generally, online dispute resolution starts with parties signing up model online dispute resolution clause or one of the parties approaching the ODR platform. In the second step, the ODR Platform reaches out to the other party. If it's a model ODR clause, both parties have already consented to online dispute resolution. In case, one of the parties approaches the ODR platform, the other parties have an option to either accept or reject the offer of resorting to an online medium of dispute resolution. If both parties have consented to the mechanism, the arbitrator/ conciliator/ mediator is appointed. In all the stages, there will be time-stamped communications sent via email and WhatsApp. Later on, hearings take place online. At the last stage, there will be an arbitration award or a conciliation/ mediation settlement agreement. In case conciliation or mediation fails, the Conciliator/ Mediator shall file the Failure Report with the ODR Platforms giving reasons for the failure of the process in the instant case. There are different ODR platforms in India, namely, Sama, Centre for Online Resolution of Disputes (CORD), Presolv360, Centre for Alternative Dispute Resolution Excellence (CADRE), Resolve Disputes Online, AdresNow, JustAct, Jupitice, Credgenics, WebNyay. To understand the working of ODR platforms, this article analyses two platform from India, namely Sama and Centre for Online Resolution of Disputes.

³⁷ Chittu Nagarajan and Timothy Sze, 'Online Dispute Resolution in Asia' in Mohamed S. Abdel Wahab and others (eds), *Online Dispute Resolution: Theory and Practice, A Treatise on technology and Dispute Resolution* (Eleven International Publishing, 1st ed., 2012).

³⁸ Ihab Amro, 'The Use of Online Mediation in the Resolution of Civil and Commercial Disputes in Theory and in Practice' (2021) 87(2) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 204.

Sama: Space for Resolution

Sama is an online dispute resolution platform which provides for the resolution of disputes fully online in a cost-effective manner. Sama was founded in 2015 as a mediation service platform and later on converted into a full-fledged Online Dispute Resolution platform. The Rules and Procedures, 2021³⁹ provides for three dispute resolution methods, namely, Arbitration (Part II), Conciliation (Part III) and Mediation (Part IV).

Part II of the Sama Rules and Procedures, 2021 provides for stricter timelines for each stage of arbitration, fast-track arbitration, emergency arbitration, appellate tribunal and other procedural aspects. The appellate tribunal hears appeal from the award and has the power to modify or reverse an award based on errors in the application of the applicable law, manifest errors in appreciation of the facts or if parties reach a settlement post the issuance of the award. As arbitration is based on party autonomy, parties opting for Sama impliedly choose to have an appellate tribunal after rendering the award. The Arbitration and Conciliation Act, of 1996 does not prohibit parties from resorting to appellate arbitration. This has been clarified by the Supreme Court in the case of *Centrotrade Minerals and Metal v. Hindustan Copper*.⁴⁰

Even though there are two different parts for Conciliation (Part III) and Mediation (Part IV) under the Sama Rules and Procedures, 2021, choosing Conciliation over Mediation is a better option as the Arbitration and Conciliation Act, 1996 recognizes conciliation settlement agreements⁴¹ but there is no specific law recognizing the mediation settlement agreement. It is important to note the success story of Sama's one-month e-conciliation camp in March 2021, Udaan (B2B e-commerce platform) resolved over 1800 payments with an average of 126 minutes spent on each case.⁴²

In addition to arbitration, conciliation and mediation services, Sama also provides technical support to Online Lok Adalats. It has assisted the State Legal Services Authority of Delhi, Rajasthan, Gujarat, Bihar, Maharashtra, and Madhya Pradesh. More than 10 lakh cases have been filed in these Lok Adalats with a total settlement value crossing Rs. 648.3 crores.⁴³

From the above numbers, it is observed that online dispute resolution is neither a dream nor a distant reality. In fact, online dispute resolution is a reality if it is done with proper procedures

³⁹ Rules and Procedures, 2021 < https://www.sama.live/rules_and_procedures-2021.php > accessed 2 July 2022.

⁴⁰ 2020 SCC OnLine SC 479.

⁴¹ Arbitration and Conciliation Act 1996, s 30.

⁴² 'Faster, Cheaper and Easier: Online Dispute Resolution Can Transform Your Business' <<https://disputeresolution.online/>> accessed 23 July 2022.

⁴³ See n 5.

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and mechanisms. This ODR platform is operating in more than 437 plus cities and covers 31 plus languages.⁴⁴ As of now, individuals can sign up for an ODR platform and resolve their disputes using the internet without resorting to courts, this eventually increases access to justice for individuals. Consequently, this helps in reducing the burden on the courts.

Centre for Online Resolution of Disputes

CORD is another ODR Platform which facilitates fast and fair dispute resolution through a secure online platform. This platform provides for arbitration and mediation. CORD Rules for Appointment of Arbitrators provides for the procedure of appointment of arbitrators, challenge to arbitrators and arbitrator fees.⁴⁵ Schedule of fees, Schedule A of the Rule provides detailed guidelines on arbitrator fees in priority and non-priority sectors. For the appointment of arbitrators in the priority sector, the institution fees are Rs. 500 per case and the Arbitrator fees in the priority sector are Rs. 2,000 (ex parte case) and Rs. 5,000 (contested cases). However, the fees in the non-priority sector are considerably higher than the fees levied in the priority sector. CORD Rules of Arbitration provides detailed procedures for conducting arbitration and timelines for different stages of arbitration.⁴⁶

Legal Framework of ODR in China

India and China are two giants in Asia. After knowing all the problems related to ODR in India, we will now look into how China is tackling this issue. Like India, there is no specific law for ODR in China. In absence of regulations on ODR, guidance can be seen in laws relating to ADR. In China, the law relating to ADR constitutes two ADR techniques, arbitration and mediation. The Arbitration Law of the People's Republic of China (PRC Arbitration Law) came into force in 1995 with the rules of international commercial arbitration.⁴⁷ The People's court has a different threshold for domestic awards and foreign awards. In other words, the supervisory role is wider in the domestic award and narrower in foreign awards.

⁴⁴ (Sama: Space for Resolution) < <https://www.sama.live/>> accessed 20 August 2022.

⁴⁵ 'CORD Rules for Appointment of Arbitrators' (Resolve on CORD) <<https://resolveoncord.com/wp-content/uploads/2019/09/CORD-Rules-for-Appointment-of-Arbitrators.pdf>> accessed 20 August 2022.

⁴⁶ 'Rules of Arbitration' (Resolve on CORD) https://resolveoncord.com/wp-content/uploads/2021/01/CORD_Rules_V1.pdf accessed 20 August 2022.

⁴⁷ The Arbitration Law of the People's Republic of China, (1994) Order No. 31 of the President of the People's Republic of China.

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In 2010, a special law on mediation came through the promulgation of the People's Mediation Law (PML) of the PRC.⁴⁸ The guiding principles of this mediation law were voluntariness, legality and respect for parties' rights.⁴⁹ People's mediation constitutes a people's mediation committee which resolves disputes among the individuals of the public.

Taobao ODR system emerged in 2010 and it was based on eBay's ODR model. In the beginning, it was a text-based negotiation between the buyer and the seller. In case of a complaint against the seller, the Taobao Centre makes a decision within 10 days timeline. Later on, there was an option for the complainant to choose from a Taobao employee or a jury-like panel to adjudicate the matter.⁵⁰ The jury decides the case on the majority voting process.

Dian Su Bao, an Online Mediation Platform, provides an online forum where complainants can file their complaints online. The platform engages third-party neutrals to resolve the complaint. There is a strict feedback system for the neutrals displayed on their website. In 2005, the Guangdong Arbitration Commission introduced the China Commercial Arbitration website and provided a choice of online arbitration to solve e-commerce disputes.⁵¹

Global Scenario of ODR

UNCITRAL Technical Notes on Online Dispute Resolution

The United Nations Commission on International Trade Law (UNCITRAL) attempts to develop a cross-border legal framework for international trade and provide model laws on a topic related to international trade. One of the most successful model laws by UNCITRAL is UNCITRAL Model Law on International Commercial Arbitration, 1986.

As there has been a substantial increase in online cross-border transactions, UNCITRAL agreed in its forty-third session to work in the field of online dispute resolution. As result, UNCITRAL adopted the Technical Notes on Online Dispute Resolution at its forty-ninth session in 2016. The Technical Notes are soft laws, non-binding, form of a descriptive document and reflect the

⁴⁸ People's Mediation Law of the People's Republic of China, (2010) Order No. 34 of the President of the People's Republic of China.

⁴⁹ *ibid*, Art. 3.

⁵⁰ Lizhi Liu and Barry R Weingast, 'Taobao, Federalism, and the Emergence of Law, Chinese Style' (2018) 102 *Minnesota Law Review* 1563, 1583.

⁵¹ Qisheng HE and Jiping Song, 'A Global Online Dispute Resolution System: Is China Ready to Join?' (2011) 7 *Asian Business Law Journal* 75.

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components of online dispute resolution.

Para 24 of the Technical Notes defines ODR as a “mechanism for resolving disputes through the use of electronic communications and other information and communication technology”

The definition is not exhaustive as it provides “ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others)”.⁵² ODR proceedings shall apply principles of fairness, transparency, due process and accountability.⁵³ The rules applicable to offline dispute resolution relating to due process and confidentiality also apply to online dispute resolution.⁵⁴

Section III of the Technical Notes provides for three stages, negotiation, facilitated settlement and a third final stage. The first stage is negotiation with the assistance of technology. In the second stage, it is a settlement with the involvement of a third party (conciliator/ mediator). If both the stages fail, the parties move to the third stage where “the ODR administrator or neutral informs the parties of the nature of the final stage, and of the form that it might take”.⁵⁵ For instance, the third stage can be binding arbitration.

The Technical Notes missed the opportunity of including provisions on the cross-border enforcement mechanism of ODR outcomes, laying down the minimum standards for ODR platforms. To conclude, the Technical Notes provide the basic elements and understanding of ODR in general. Even though the Technical Notes are of non-binding nature, at least this provides some guidance to the States, ODR platforms, neutrals and parties.⁵⁶

Online Dispute Resolution in European Union

To strengthen the European Union (EU) consumer market, the EU adopted two legal instruments⁵⁷, The ADR Directive 2013/11⁵⁸ and the ODR Regulation 524/2013⁵⁹. Both the

⁵² UNCITRAL Technical Notes on Online Dispute Resolution, para 2.

⁵³ Ibid, para 7.

⁵⁴ Ibid, para 53.

⁵⁵ Ibid, para 45.

⁵⁶ Nadine Lederer, 'The UNCITRAL Technical Notes on Online Dispute Resolution –Paper Tiger or Game Changer?' (Kluwer Arbitration Blog, 11 January 2018)

<<http://arbitrationblog.kluwerarbitration.com/2018/01/11/new-found-emphasis-institutional-arbitration-india/>> accessed 30 July 2022.

⁵⁷ Emma van Gelder, 'The EU Approach to Consumer ODR' (2019) *International Journal of Online Dispute Resolution* 219.

⁵⁸ Directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR), OJ L 165, 18.6.2013.

⁵⁹ Regulation (EU) No 524/2013 of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR), OJ L 165, 18.6.2013.

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legal instruments are legally binding throughout the EU. The Consumer ADR Directive solved the issue of differences in the availability of ADR service providers in different member states of the European Union.

The ODR Regulation 524/2013 came into force in February 2016 and was supplemented by the Consumer ADR Directive 2013/11. The ODR Regulation provides for a pan Europe ODR program for domestic as well as cross-border online transactions. There was a vacuum between the consumers and the traders in the EU with respect to dispute resolution. This vacuum filled up this ODR regulation by creating a platform which connects the consumers to traders via a nationally certified ODR platform. In the EU ODR platform, consumer files an online complaint form which is available EU ODR website.⁶⁰ Once the complaint is filed, there is a notification sent to the trader via the platform.⁶¹ The trader may choose not to participate in the ODR process. If the trader chooses to participate, the trader may try to resolve it directly with the consumer or resolve the claim through the ODR platform. As ODR is based on the consent of both parties, after both parties consent to resolve it bilaterally, there exists a thirty-day deadline to close the complaint. In case the complaint reaches the ODR platform after receiving the consent of the parties, the parties shall resolve the complaint within 90 days.⁶²

Internet Corporation for Assigned Names and Numbers and Uniform Domain Name Disputes Resolution Policy

Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit organisation established to manage domain names on the internet. ICANN has a dispute resolution system known as Uniform Domain Name Disputes Resolution Policy (UDNDRP).⁶³ In case there is a dispute related to domain names, one can file complaints under the Uniform Domain Name Disputes Resolution Policy which can be submitted to any approved dispute resolution provider and resolve the dispute fully online.

⁶⁰ 'Online Dispute Resolution' (European Commission)

<<https://ec.europa.eu/consumers/odr/main/?event=main.home2.show>> accessed 4 August 2022.

⁶¹ ODR Regulation 524/2013, Art. 5.

⁶² ODR Regulation 524/2013, Art. 9(8); Consumer ADR Directive 2013/11, Art. 8(e).

⁶³ Uniform Domain-Name Dispute Resolution Policy <<https://www.icann.org/resources/pages/help/dndr/udrp-en>> accessed 27 July 2022.

Obstacles to Online Dispute Resolution

Infrastructure

Online dispute resolution is based upon the premise of solid technology infrastructure across the country. The consumers of ODR shall have access to the internet and smartphones or computers. This is required to participate in a different stage of online dispute resolution. Those individuals who do not have access to the said infrastructure will be in a disadvantageous position and face difficulty in participating in the ODR process. In addition to infrastructure, digital literacy is another issue relating to ODR. There may be a case that senior citizens/ women may have the necessary infrastructure but they are not updated with the technology which restricts them to file a consumer complaint on an ODR platform. It is important to note, that the digital divide exists in India. The digital divide is visible across class, caste, age, gender and geography. For instance, only one-third of internet user comprises of women. Individuals who are forty-plus years of age constitute only 15 per cent of internet users in India.⁶⁴

To spread the use of ODR in India, there needs to campaign on digital literacy. For instance, Pradhan Mantri Gramin Digital Saksharta Abhiyaan (PMGDISHA) will help in training villagers with basic technology skills. Once the marginalised segments of society learn these basic skills, they will be ready to take part in online dispute resolution.

Behaviour towards ODR

There is a lack of awareness regarding ODR processes, ODR platforms and ODR Neutrals in the public at large. The individuals do not trust the ODR process as there is scepticism regarding the use of technology.⁶⁵ It is evident to note that people rely more on courts and keep a safe distance from ADR because of outcome enforceability issues, in that case, it will be difficult to introduce ODR.⁶⁶ If the government can introduce ODR to resolve their disputes, it will provide certain confidence in the minds of the individual takers of ODR. Unless individuals have confidence in the ODR process, the individuals will not consent to the ODR.

⁶⁴ 'Digital in India 2019 – Round 2 Report', (Internet and Mobile Association of India, 2019) <<https://reveriainc.com/wp-content/uploads/2020/09/IAMAI-Digital-in-India-2019-Round-2-Report.pdf>> accessed 27 July 2022.

⁶⁵ Ishana Tripathi, 'E-Mediation', in Gracious Timothy (ed), *Conciliation and Mediation in India* (Kluwer Law International 2021) 277.

⁶⁶ Judit Glavanits, 'Obstacles of ODR in Developing Countries' (2017) UNCITRAL Furthering the Progressive Harmonization and Modernization of International Trade Law Conference, <https://www.academia.edu/35617479/OBSTACLES_OF_ODR_IN_DEVELOPING_COUNTIES> accessed 1 August 2022.

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As ODR is based on the consent of the parties, there is no way that the case will go towards resolution. In other words, the cases where there is no consent will be marked as 'non-starters'. The awareness is also low amongst the legal circle including lawyers, judges, law students, law consultants, in-house counsels, ADR practitioners, ADR institutions, and law professors.

Neutrals Availability

ODR will generate a great demand for ODR Neutrals to help the parties resolve their dispute. There needs to be training and accreditation of Neutrals and a Panel of Neutrals displayed on the different ODR platforms from which the parties can choose their preferred Neutrals. This will give an opportunity to the young lawyers to empanel as an arbitrator, mediators, and conciliators in the ODR platform. Consequently, this will increase the pool of Neutrals across the country covering different cities and languages.

Confidentiality

For private companies, the confidentiality of proceedings is of utmost importance as it will affect the brand value of their companies. This is one of the reasons why companies resort to ADR. However, choosing ODR flags the confidentiality concern again, as there may be some lapse of cyber security and safety of the communications happening in the ODR platform.⁶⁷ Therefore, the ODR platforms should have a robust ODR framework which requires data protection that can help in securing confidentiality.

Conclusion

The country is in dire need of a complete ODR system for which we need to establish certain amendments in the current legislation to accommodate the online dispute resolution. Section 2 (1) (a) of the Arbitration and Conciliation Act provides for the definition of arbitration. This shall be amended to include online arbitrations, and arbitrations conducted on ODR. Section 61 (1A) shall be inserted which will recognise the conciliations conducted on online platforms. Some more amendments are required under this Act to provide room for online hearings, online appointments, online exchange of documents, and the passing of electronic awards. Having said that, Section 89 (1) of the Civil Procedure Code is to be amended so as to include ODR for all the categories mentioned in the provision. Likewise, the High Court rules need to be

⁶⁷ Gauthier Vannieuwenhuyse, 'Arbitration and New Technologies: Mutual Benefits' (2018) 35(1) *Journal of International Arbitration* 119.

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amended in a way to recognise Section 12 A of the Commercial Courts Act, 2015 shall be amended to recognise the use of ODR for pre-institution mediation and settlement. Rule 11 and 25 of Companies (Mediation and Conciliation) Rules, 2016 shall be amended to provide for an electronic mode for conducting conciliation and mediation, and introduce an electronic or Aadhar signature. Section 2 (25) of the Consumer Protection Act, 2019 shall be amended to include online mediation. Section 79 shall be amended to include mediation conducted through an online platform. Section 9 of the Family Courts Act, 1984 shall be amended to recognise ODR as a means of dispute resolution.

Similarly, there needs amendments on these lines in Industrial Relations Code, 2020⁶⁸ and (Draft Rules) The Industrial Relation (Central) Rules, 2020⁶⁹, Insolvency and Bankruptcy Code, 2016⁷⁰, Insurance Ombudsman Rules, 2017, Legal Services Authorities Act, 1987⁷¹ and National Legal Services Authority (Lok Adalat) Regulations, 2009⁷², Micro, Small and Medium Enterprises Development Act, 2006⁷³, Motor Vehicles Act, 1988, Negotiable Instruments Act, 1881⁷⁴, Real Estate (Regulation and Development) Act, 2016 and Rules made thereunder by the Central Government and State Governments, Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002⁷⁵.

Additionally, there need to be amendments to facilitate and aid the ODR process. Section 65 B of the Indian Evidence Act, 1872 shall be amended in a way that the production of a certificate is not mandatory. The Indian Stamp Act, 1899 shall be amended to exempt the stamping of the arbitration agreement and awards from stamp duty and amend the law to recognise electronic agreements. The Information Technology Act, 2000 shall be amended to accommodate an online exchange of documents, examination of a witness, and passing of awards. There need to be amendments in The Notaries Act, 1952 and The Notaries Rules, 1956 so as to permit online notarisation of documents.

The process of dispute resolution in India is a long process and incurs high expenses. This affects the approach of the parties and slowly parties have looking for alternatives to

⁶⁸ Industrial Relations Code 2020, Ss 4, 42, 49 and 53.

⁶⁹ (Draft Rules) The Industrial Relation (Central) Rules 2020, Rule 5, Rule 17, Rule 22.

⁷⁰ Insolvency and Bankruptcy Code 2016, S 100 (2).

⁷¹ Legal Services Authorities Act 1987, Ss 2 (1) (d) and 22.

⁷² National Legal Services Authority (Lok Adalat) Regulations 2009, Regulation 8.

⁷³ Micro, Small and Medium Enterprises Development Act 2006, S 18.

⁷⁴ Negotiable Instruments Act 1881, S 143.

⁷⁵ Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2005, S 13.

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litigation.⁷⁶ To enable a speedy dispute resolution online, widespread access to digital infrastructure is a pre-condition. Access to digital infrastructure is not limited to physical access to the internet and smartphone, it includes the utility of the digital infrastructure. Parties shall be able to use the technology and become digitally literate. The access should spread over gender, caste, class, and age. The Government is introducing a nationwide campaign for filling the gaps in society over access to technology and the digital divide. Importantly, the Government has launched certain schemes in line with these objectives, namely Digital India, National Broadband Mission, PM WANI (Prime Minister Wi-Fi Access Network Interface), Pradhan Mantri Gramin Digital Saksharta Abhiyan (PMGDISHA). All these schemes will help individuals accumulate confidence in technology and help in onboarding parties to online dispute resolution.

As the role of technology increases in our daily life, the future of online dispute resolution is online dispute resolution. It can be the best fit for commercial parties based in two different locations who do not want to go into litigation. Using ODR, the commercial parties will be able to enforce the contracts. If this model is successful in India, the pendency of cases eventually drops as there will be a lesser number of cases filed by the commercial parties. Eventually, this will also result in bettering 'Ease of Doing Business' Index Ranking especially on the 'enforcement of contracts' parameter, thereby bringing in greater investment to the country.⁷⁷ In India, there have been solid developments in the ODR field by Indian startups. There has been a substantial number of cases being resolved through a fully online medium. But, this is only a starting point, there is a long way to go for online dispute resolution in India. The Government is also active in developing an ODR policy for India.⁷⁸ The Government may consider a more active role by introducing a nationwide ODR regulation including accreditation and auditing mechanism. This will bring more uniformity and transparency to the ODR sector. In totality, online dispute resolution provides an easy and efficient method of resolving disputes. Online dispute resolution is not the future, the time has come for Online Dispute Resolution, and now it's the time.

⁷⁶ Christian Tautschnig, 'The Arbitration Agreement and Arbitrability, Legal Challenges and Opportunities for the Next Generation of Online Arbitration', in Christian Klausegger, Peter Klein and others (eds), *Austrian Yearbook on International Arbitration 2015* (Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2015).

⁷⁷ NITI Aayog, 'Unlocking Online Dispute Resolution to Enhance the Ease of Doing Business' (Press Information Bureau, 08 August 2020) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=214473>> accessed 15 July 2022.

⁷⁸ NITI Aayog, 'Designing the Future of Dispute Resolution: The ODR Policy Plan for India' (October 2021) <<https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>> accessed 22 Aug 2022.