

NEED FOR ONLINE DISPUTE RESOLUTION (ODR) IN INTERNET AGE: A LEGAL PERSPECTIVE

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Abstract

The evolution of the ODR mechanism from the Alternative Dispute Resolution (ADR) is discussed, focusing on the internet and communication technology which have triggered the growth of ODR. The prominent ODR service providers and widely accepted standards of practice are elucidated. The advantages and limitations of the ODR mechanism are discussed, with emphasis on enforceability of decisions arrived through ODR; conflict of laws due to overlapping of jurisdiction; building of trust; protection of rights of consumer in B2C transactions; the role of Government and the importance of self-regulation in ODR.

The paper dwells upon the legal dimensions of ODR and sheds light upon the current laws, regulations, guidelines, directives, and international conventions dealing with the subject. The current position in India is discussed, elucidating the details of internet, ecommerce in India and the legal perspective of ADR and ODR in India, analyzing the possible future growth of e-commerce and the need of ODR for proper regulation of e-commerce. It advocates for development new rules/laws regulating ODR mechanism in India.

This paper examines the relevancy, suitability and significance of the Online Dispute Resolution (ODR) for the Cyberspace. It analyses the typical features of cyberspace and the challenges/impediments faced for settlement of disputes arising therein by application of the traditional dispute resolution mechanism. It emphasizes on the necessity of an effective online dispute resolution mechanism, by imbibing trust and confidence in the parties to the online transactions.

Conclusion is drawn while making suggestions for developing harmonized procedure and rules for governing the ODR mechanism in order to achieve the enforceability of decisions arrived through ODR and building trust among the users in the ODR. Some recommendations are made to enhance the quality,

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efficiency and effectiveness of the ODR, advocating for the development of a uniform ODR mechanism.

Introduction

The advent of the Internet and subsequent development of the World Wide Web (or “The Web”) ushered in a new era of understanding about the world in which we live and forever changed peoples’ conceptions of human interactions¹. Today, individuals can communicate their ideas across continents, retrieve their news from multiple sources simultaneously, and conduct their business in a global marketplace. However, just as disputes can arise in the context of real world interactions, so too can they arise in the context of online-world interactions².

The disputes arising in the online context can vary considerably and are often extremely difficult for courts to handle for a number of reasons, including: the high volume of claims; the contrast between the low value of the transaction and the high cost of litigation; the question of applicable law (in both e-commerce and consumer protection contexts); and the difficulty of enforcement of foreign judgements. For years, courts all over the world have been promoting the use of Alternative Dispute Resolution (“ADR”) as an effective, and even preferred, substitute for litigation. ADR has been praised for its speed, flexibility, informality and its solution-oriented (as opposed to blame-oriented) approach to conflict resolution. However, traditional ADR methods, such as arbitration, have proven to be less than helpful tools for addressing the complications inherent in judicial resolution of web-based transactional disputes. For that reason, it is necessary to come up with a way of settling disputes in a way that is more adapted to the cyberspace. Therefore, future growth of e-commerce depends on providing consumers and businesses with greater confidence, which in turn necessitates a possibility to access justice and a predictable outcome of disputes arising in the online environment.³

¹ Colin Rule et al., *Facilitating Expansion of Cross-Border Ecommerce-Developing a Global Online Dispute Resolution System*, available at <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=10048&context=jlia>.

² Ethan Katsh, *The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace*, available at <http://www.umass.edu/dispute/ncair/katsh.htm>.

³ V. Bonnet, K. Boudaoud, J. Harms, *Electronic Communication Issues Related to Online Dispute Resolution Systems*, available at www2002.org/CDROM/alternate/676/ page 1.

A Brief History of Online Dispute Resolution

While the Internet began in 1969, a need for ODR did not emerge until the early 1990s. For its first two decades, the Internet was used by a limited number of people in a limited number of ways. Those with Internet access were associated either with the military or with academic institutions, and even in those environments relatively few computers had Internet access. Until 1992, the Internet was largely a US-centered network, and commercial activity was banned by the country's National Science Foundation's acceptable use policy.⁴ The Internet was used mainly by those in academic institutions. Subsequently, in 1992 the internet was commercialized and disputes related to online commerce began to surface. The first case of spam occurred in April, 1994 and the Federal Trade Commission brought its first Internet fraud case in 1994.⁵

The need for a mechanism to resolve disputes in the online scenario more effectively was realized in the 20th century itself. In response, the National Centre for Automated Information Research (NCAIR) organized the 1996 conference on online dispute resolution and provided funding for three ODR experiments.⁶ The Virtual Magistrate project was conceived by Johnson and several others, aimed at resolving disputes between Internet Service Providers and Users.⁷ The University of Massachusetts Online Ombuds Office hoped to facilitate dispute resolution on the Internet generally.⁸ Finally, the University of Maryland proposed to see if ODR could be employed in family disputes where parents were located at a distance.⁹ Starting in 1999, ODR began to take advantage of tools that did more than communicate online and, as a result, began to differentiate it from its offline relatives. With this ODR industry begun to emerge, and

⁴ Kesan J.P. and Shah R.C. (2001). Fool us once shame on you-fool us twice shame on us: What we can learn from the privatizations of the Internet backbone network and the domain name system. WASHINGTON UNIVERSITY LAW QUARTERLY 79: 89.

⁵ *Dispute resolution and Borders* by Ethan Katsh, PEER-REVIEWED JOURNAL ON THE INTERNET, available at http://www.firstmonday.org/issues/issue11_2/katsh/index.html#author.

⁶ Papers from the Conference are accessible at <http://www.odr.info/ncair>.

⁷ Robert Gellman, *A Brief History of the Virtual Magistrate Project: The Early Months* (1996), <http://www.odr.info/ncair/gellman.htm>.

⁸ Ethan Katsh, *The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace* (1996), <http://www.odr.info/ncair/katsh.htm>.

⁹ *Dispute Resolution and Borders* by Ethan Katsh, PEER-REVIEWED JOURNAL ON THE INTERNET, available at, http://www.firstmonday.org/issues/issue11_2/katsh/index.html#author.

governments also started recognizing that online resources can be a solution for many problems that originate in the online environment. Presently, there are a number ODR companies and providers working. Ex: www.modria.com, www.ebay.in, www.odrindia.com, www.juripax.com, www.mediate.com, etc.

The real driver for the expansion of ODR has been commerce. The e-commerce has grown exponentially in the past decade, due to the huge number of individuals connected through Internet. In the late 1990s roughly between 2% and 5% of the world's population used the Internet. According to Google, by 2010, 22% of the global population had access to computers with about 1 billion searches per day on Google, blogs read by 300 million Internet users, and 2 billion videos viewed per day on YouTube. Further, by 2014 the Internet users in the world exceeded 3 billion or 43.6% of world population.¹⁰ The acceptance of the Internet as a commercial trading platform also increased and continues to increase as the number of commercial transactions that consumers complete online continues its meteoric rise, so too does the amount these consumers are spending¹¹.

Till now heavy reliance was placed on rule-based litigation, the shortcomings of which become rather apparent where there is an overlap of jurisdiction and identity is fluid. Hence, there is need to devise techniques, methods, which would find effective answers in pressing situations involving cross-border trade or otherwise for situations where the dispute types are of the nature that is very difficult in real-world courtrooms.

Online Dispute Resolution (ODR): Definition & Meaning

ODR is a branch of dispute resolution which uses technology to facilitate resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or combination of all three. It can be seen as an online equivalent of Alternative Dispute Resolution (ADR) and was born as synergy between ICT and ADR¹². Online dispute resolution can take place either entirely or partly online and concerns two types of disputes: 1)

¹⁰ "Google Earth demonstrates how technology benefits RI's civil society, govt.", <http://www.antaraneews.com/en/news/71940/google-earth-demonstrates-how-technology-benefits-ris-civil-society-govt>.

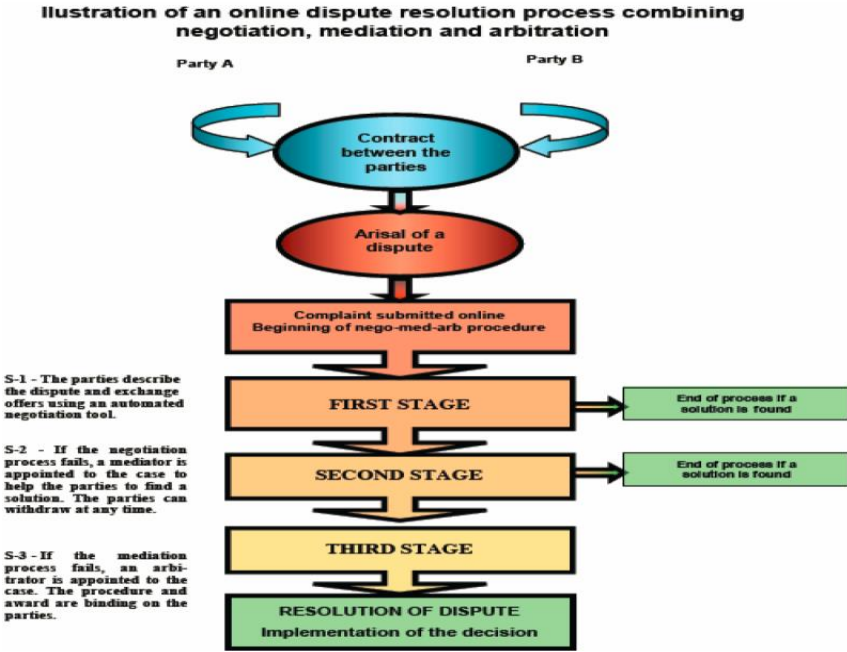
¹¹ Available at <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=10048&context=jlia>, *Facilitating Expansion of Cross-Border Ecommerce—Developing a Global Online Dispute Resolution System*, Colin Rule et al.

¹² E. KATSH & J. RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 9* (San Fransisco: Jossey-Bass, 2001).

Disputes that arise in cyberspace and 2) Disputes that arise offline. According to the Article 2 of the ‘Online Dispute Resolution for cross-border electronic commerce transactions: draft procedural rules’ given by the Working Group III of UNCITRAL: “ODR is a system/mechanism for resolving disputes through an information technology based platform and facilitated through the use of electronic communications and other information and communication technology”.

ODR Mechanism

In ODR, the information management is not only carried out by physical persons but also by computers and software. The assistance of ICT has been named by experts as the ‘fourth party’ because it is seen as an independent input to the management of the dispute. The fourth party embodies a range of capabilities in the same manner that the third party does. While the fourth party may at times take the place of the third party, i.e. automated negotiation, it will frequently be used by the third party as a tool for assisting the process¹³. **Figure:**¹⁴



¹³ E.Katsh and Wing, *Ten years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 (2006).
¹⁴ *Online Dispute Resolution* by Karim Benyekhlef and Fabien Gelinas *Lex Electronica*, vol.10 n°2 (Été/Summer 2005), p. 53. Available at http://www.lex-electronica.org/articles/v10-2/Benyekhlef_Gelinas.pdf.

The following are the most common methods of ODR are¹⁵:

1. Automated Negotiation: The two parties agree in advance to be bound by any settlement reached, on the understanding that once blind offers are within a designated range of each other (typically 30%), they will be resolved by splitting difference. The software keeps offers confidential unless and until they come within this range, at which point a binding settlement is reached. There are two forms of automated negotiation, Double Blind Bidding, which is a method for single monetary issues between two parties, and Visual Blind Bidding, which can be applied to negotiations with multiple parties and issues.

2. Facilitated Negotiation: In Facilitated Negotiation the technology assists the negotiation process between the parties. The technology has a similar role as the mediator in mediation, but unlike automated negotiation, no computer formula is used to guide the process. The role of the technology may be to provide a certain process and/or to provide the parties with specific evaluative advice. The major advantages of these processes, when used online, are their informality, simplicity and user friendliness. Even Face-to-Face (F2F) interaction is made possible through modern technologies like Skype.

3. Online Arbitration: Arbitration is a process where a neutral third party (arbitrator) delivers a decision which is final, and binding on both parties. Currently, most arbitration providers allow parties to carry out online only part of the arbitration process, e.g. parties may download claim forms, the submission of documents through standard email or secure web interface, the use of telephone hearings, etc.

The WIPO Domain Name Dispute Resolution mandated through International Corporation for Assigned Names and Numbers (ICANN) by application of Uniform Domain Dispute Resolution Policy (UDRP) and its mechanism, has been most effective ODR Provider especially of Online Arbitration since more than a decade and presents a live example of effectiveness of ODR Mechanism, which provides enforcement through self-regulation and sets the tone for development of Global ODR Mechanism.

The large majority of UDRP cases are processed by two providers, the World Intellectual Property Forum and the National

¹⁵ According to Colin Rule in *Online Dispute Resolution for Business: B2B, Ecommerce, Consumer, Employment, Insurance and Other Consumer Conflicts*, Josey-Bass Publication, 2002.

Arbitration Forum. The processes employed are interesting in a number of ways. First, UDRP dispute resolution occurs without face-to-face meetings and, except in rare instances, without telephone communication. It is, in short, dispute resolution at a distance. Second, the UDRP is not classic arbitration in that the decisions are not binding or enforceable in court. UDRP arbitrators are referred to as *panelists*, since the word *arbitrator* denotes someone who can make a binding decision enforceable in court. UDRP panelists are empowered by terms in the contract agreed to when a domain name is registered. The decisions of arbitrators are enforced by making necessary changes in the domain name registry. This is an efficient although somewhat unorthodox process, and not without controversy.¹⁶

Advantages of ODR:

- Inexpensive
- Fast and Accessible from home
- Flexible
- Efficient
- Avoidance of complex jurisdictional issues
- Reduction of burden on judiciary

Limitations of ODR:

- Trust
- Enforceability
- Impersonal
- Confidentiality concern

The consumers who are aggrieved by their e-commerce transactions can file complaints in these websites online. After the receipt of the complaints the organization initially tries a form of simple conciliation and if it does not work a simplified mediation process is started using e-mail correspondence or telephone. The system is semi-online. The International Consumer Protection and Enforcement Network (ICPN), European Consumer Centers Network (ECC-Net), eConsumer.gov, Economic research institute for ASEAN and East Asia (ERIA), International Consumer Advisory Network (ICA-Net) are some of the efficient online complaint handling organizations.

The main challenge for ODR mechanism is of enforcement and trust. A debate which has evolved with time is '*Self-regulation v.*

¹⁶ UNCTAD E-Commerce and Development Report, 2003.

Government Intervention' in ODR¹⁷. Self regulation was questioned by consumer groups for lack of authority and trust which brought in the government's role in ODR process. Thomas Schultz¹⁸ is of the opinion that government's role is more important as compared to the self regulation approach. Schultz opines that, the 'symbolic capital' i.e. the social reputation of an ODR provider, renders credibility and authenticity to an ODR process, which the government is capable of providing. The government also grants financial aids to ODR projects and assists in creating the technical and administrative infrastructure required to set up an ODR process. In addition, accreditation is an essential function played by an ODR service provider who acts as a certifier, a clearing house that assists parties in choosing a service provider and facilitating e-filing of forms and supervising an ODR process. Similarly, Colin Rule states, "To a large extent, government is the ideal host for dispute resolution, because government has a strong incentive to resolve disputes to keep society functioning smoothly. Government is also a good host for dispute resolution because it usually has no vested interest in the outcome of most of the matters it is in charge of deciding."¹⁹

On an analysis of the two approaches, it can be derived that the growth of ODR can achieve its full potential using public-private partnership. The role of government will be to impart trust and authority and the private sector will contribute advanced technology. In public-private partnership, best practices in ODR can be successfully established and implemented; greater awareness and participation in ODR process can be materialized. In USA, Australia, New Zealand, Singapore, Canada, U.K. special funding is granted by the government to initiate ODR projects. In Netherlands, the electronic commerce platform is a joint initiative by the business community and the Dutch ministry of Economic affairs that drafter the Code of Conduct of electronic commerce.²⁰ In Singapore, eADR was launged which is jointly operated and supervised by Singapore Subordinate Courts, Ministry of Law, Singapore Mediation Centre and Singapore International

¹⁷ Karnika Seth, *Online Dispute Resolution (ODR) with Case Studies*, Presentation at International Conference on "Emerging Trends in International Commercial Arbitration".

¹⁸ Thomas Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, North Carolina Journal of Law & Technology.

¹⁹ Colin Rule, *Online Dispute Resolution for Business: B2B, e-commerce, consumer, employee, insurance and other commercial conflicts*, Jossey-Bass.

²⁰ www.ecp.nl/english/index.htm.

Arbitration Centre, the Trade Development Board and Economic Development Board to resolve e-commerce.

Legal Dimensions of ODR

The majority of legal studies on ODR including online arbitration agree that, neither law, nor arbitral principles, prevent ODR from taking place online. However, there may be several aspects in ODR that need to be regulated. The UNCITRAL recognizing the prospects/importance and the vast domain of ODR which overlaps territorial boundaries has allocated Working Group-III for making study on ODR in 2010, which has also submitted draft procedural rules regarding ODR for cross-border e-commerce transactions. It provides that the claims which ODR would deal should be B2B and B2C low-value, high-volume cross-border electronic transactions, and the procedure given is first negotiation, then facilitated settlement or arbitration through a neutral, whose decision would be final and binding on both parties.

The British Columbia's Civil Resolution Tribunal Act, Bill 44 of 2012 was passed by the Legislative Assembly on May 30, 2012. It provides for online non-facilitated and facilitated dispute resolution aimed at resolving civil and family disputes, with the final stage being a tribunal hearing, which could take place online, and give binding decisions. It is the first substantive enactment directly dealing with providing Online Dispute Resolution to its citizens. It was amended by the Civil Resolution Tribunal Amendment Act which was enacted on May, 14 2015. The Civil Resolution Tribunal is planned to open in 2016 for British Columbians, and can be used 24 hours a day, seven days a week, from a computer or a mobile device that has internet connection.²¹

The EU Regulation on Online Dispute Resolution for Consumer Disputes, 2013 provides for a setting up a uniform ODR mechanism across the European Union for the settlement of the Consumer Disputes in Online Transactions and is planned to become operational from January, 2016. Further, the ODR Advisory Group to the Civil Justice Council in the United Kingdom, in its report in February, 2015 has advised for setting up an Online Court, provisionally calling it Her Majesty's Online Court (HMOC), for resolving low value civil claims.

²¹ Available at <https://www.civilresolutionbc.ca>.

Apart from the above the following international conventions, model laws and instruments directly or indirectly have an impact on ODR:

- **The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York [1958]:** It is recognized as one of the most important international instruments with an impact on international trade. According to this Convention, parties may agree to undertake and submit to arbitration all or any differences which may have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. In this case, courts of a contracting state shall, at the request of one of the parties, refer the parties to arbitration, unless they find that the said agreement is null and void, inoperative or incapable of being performed.
- **The UNCITRAL Model Law on International Commercial Arbitration [1985]:** It recognizes the value of arbitration as a method of settling disputes arising in international commercial relations, and in view of the desirability of uniformity of the law of arbitral procedures, sets out a legal framework to improve and facilitate the modernization of national laws on arbitration proceedings, taking into account their traits and special needs.
- **The UNCITRAL Model Law on International Commercial Conciliation [2002]:** It has recognized the value for international trade of methods for settling commercial disputes in which the parties request a third person to assist them in their attempt to settle the dispute amicably. The United Nations considers that these methods (conciliation, mediation and others of similar importance) deliver significant benefits such as reducing the cases where the dispute leads to the termination of a commercial relationship and reducing costs in the administration of justice by the states.
- **The UNCITRAL Model Law on Electronic Commerce [1996]:** It is intended to facilitate the use of modern means of communication and information when bargaining. It creates a functional equivalent for electronic documentation and it adapts some basic traditional concepts such as the notion of “writing”, “signature” and “original”. Where the law required information to be in

writing, that requirement is considered to be met by a data message if the information contained therein is accessible so as to be usable for subsequent reference. As to the originals, where the law requires information to be presented or retained in its original, that requirement is considered met by data messages if there exists a reliable assurance as to the integrity of the information the time when it was first generated as a data message, and, where it is required that the information be presented, that information can be displayed to the person to whom it is to be presented. This Model Law also determines in the context of contract formation, an offer and the acceptance of an offer may be expressed by means of data messages and that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose. It also defines rules to determine the legal status of e-mail communications and contains provisions for electronic commerce.

- **The United Nations Convention on the Use of Electronic Communications in International Contracts [2005]:** It sets out criteria for the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different states. It reinforced the idea that the fact that the parties have their places of business in different states is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.
- **The UNCITRAL Model Law on Electronic Signatures [2001]:** It strengthens the legal certainty of trade via the use of electronic signatures by providing the presumption that an electronic signature that meets certain criteria of technical reliability is comparable to a handwritten signature. It has adopted a criterion of technical neutrality to favour the use of any appropriate technology and also defines certain rules of conduct that are essential and may serve as guidance for assessing the duties and responsibilities of the signatories.

Further, the electronic communication has been recognized as a valid mode of communication and also has been introduced in the UNCITRAL Arbitration Rules and also in Arbitration and

Mediation Rules of major international ADR institutions, like International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC). The OECD Guidelines for Consumer Protection in the Context of E-Commerce (1999), OECD Recommendations on Consumer Dispute Resolution and Redress (2007) Uniform Domain Name Dispute Resolution Policy (UDRP) and Rules for Uniform Domain Name Dispute Resolution Policy also have provided the frame work which deals with regulating the transactions in the internet.

Some of the international institutions have recognized ODR as an effective solution and also providing ODR and have laid down ODR Standards of Practice. Such standards act as guide for developing harmonized standards. The prominent institutions are:

- National Centre for Technology and Dispute Resolution
- US Federal Trade Commission and Department of Commerce.
- Canadian Working Group on Electronic Commerce and Consumers
- Australian National Alternative Dispute Resolution Advisory Council (NADRAC)
- Global Business Dialogue on Electronic Commerce
- Transatlantic Consumer Dialogue
- Consumers International
- European Consumer's Organization (BEUC)
- International Chamber of Commerce (ICC)

From international arena to the various domestic legal systems, organizations and states have acknowledged a range of commonly accepted principles and standards applicable to the ODR. These include the following²²:

- Freedom or Private Autonomy;
- Confidentiality and Information Security;
- Impartiality and Independence;
- Fairness of Procedure;
- Efficiency (effectiveness, speed, low cost);
- Transparency;
- Legality;
- Qualifications and Responsibility of Neutrals; and in some of them
- The principle of neutrality and adversarial process.

²² Aura Esther Vialta, *ODR and E-Commerce*, Online Dispute Resolution: Theory and Practice.

Position in India

According to Internet and Mobile Association of India (IAMAI) and Interlink Advisors, about 150 million people in India, or around 75 million households, are ready for e-commerce. The report says the 'core' potential for consumer e-commerce is likely to increase to 230 million households by 2024-25. As such, it can be said that the ground has been set for the deployment of the ODR in India and the international conventions, model laws, rules and the laws of other countries can be studied and analyzed in building a harmonized law or procedure and it shall also help in reducing the burden on the judiciary.

Online Dispute Resolution (ODR) in India is in its infancy stage and it is gaining prominence day by day. With the enactment of Information Technology Act, 2000 in India, e-commerce and e-governance have been given a formal legal recognition in India. Even the Arbitration and Conciliation Act, 1996 is in place, which is in line with the UNCITRAL Model Law on International Commercial Arbitration, and the Code of Civil Procedure, 1908 has also been amended and Section 89, Order-X Rules 1A, 1B and 1C have been introduced to provide methods for alternative dispute resolution in India. The Arbitration and Mediation Rules of major institutions like Indian Council of Arbitration (ICA), International Centre for Alternative Dispute Resolution (ICADR) and the rules for mediation laid down by Supreme Court of India and High Court are governing the ADR process. The e-courts project has been started by the National Informatics Centre (NIC) in February, 2007 for the ICT enablement of the Indian Judiciary, covering the Supreme Court and all the 21 High Courts and even the entire lower judiciary and significant progress is taking place. The first completely paperless e-court was inaugurated in Delhi in December, 2009 and a second one in February, 2010. As a part of the said project judicial centres have been opened in many district courts, which provide information about the case status etc. to the public.

Further, in *State of Maharashtra v. Dr. Praful B. Desai*²³, the Supreme Court of India established that Video Conferencing is an acceptable method of recording evidence for witness testimony. In *Grid Corporation of Orissa Ltd. v. AES Corporation*²⁴, the Supreme Court held that, "when an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that the two persons required to act in consultation

²³ (2003) 4 S.C.C. 601.

²⁴ 2002 A.I.R. S.C. 3435.

with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties”.

It has been established in *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.*²⁵ that, exchange of letters, telex, telegrams or “other means of communication” should signify an active assent by both the parties and a demonstrable meeting of minds as to the arbitration agreements, and then it can be treated to be a valid agreement. In *Trimex International FZE Ltd. v. Vendanta Aluminium Ltd.*²⁶, the Supreme Court of India held that, if the intention of the parties to arbitrate any dispute has arisen through offer and acceptance via e-mail, the dispute is to be settled through arbitration. Once the contract is concluded, the mere fact that a formal contract has to be prepared and initiated by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initiated.

Some States have started receiving police complaints via email. Public grievance portals and receiving complaints via online or mobile means are now available. An SMS based complaint registry also exists where complaints can be registered via mobile phone. The ministry of consumer affairs has its Consumer Online Resource Empowerment (CORE) centre which accepts and resolves complaints end-to-end via a sophisticated online process. An interesting introduction of technology for grievance redress is by the Tamil Nadu Electricity Board which generates a unique ten-digit number for its consumers for redress of grievances. Software tied to SMS technology is used to notify complainants on status of complaints. Rural kiosks will also be leveraged.²⁷

Most of the B2C e-commerce websites in India have not incorporated the ODR mechanism into their websites and on the other hand, some are not even providing for the arbitration clause in their terms and conditions, and are subjecting their disputes to the jurisdiction of court of a particular city/state, which is not a good practice as the resolution of disputes in the context of e-commerce by traditional methods is not viable, especially for consumers. The existing practice in India is that of payment after delivery of the goods, which is unique to the Indian scenario, and

²⁵ A.I.R. 2009 S.C. 12.

²⁶ (2010) 3 S.C.C. 1.

²⁷ Zhao Yun, Timothy Sze, Tommy Li and Chittu Nagarajan, *Online Dispute Resolution in Asia*, Chapter-22 of ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE (2012), available at http://www.mediate.com/pdf/yun_sze_li_nagarajan.pdf.

the justification offered is that the dispute does not arise at all when the payment is to be made after the delivery.

Conclusion

Innovators and entrepreneurs tend to focus more on creating, building and marketing than on trying to figure out the social consequences of what they are building. Tim Berners-Lee, the inventor of the Web, wanted to further facilitate the distribution of information.²⁸ The main goal for subsequent developers of cyberspace, whether it was the creation of browsers, search engines, social media or anything else, was largely the same, to operationalize an idea and, in many cases, to operationalize the idea in a way that maximized financial return.²⁹ The lack of attention to dispute resolution in many entrepreneurial efforts is a flaw that is compounded by the irrelevance of courts for many if not most disputants. The late Karl Llewellyn, several decades ago, had written: "... what, then, is the law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential, disputes to be settled and disputes to be prevented, both appealing to law, both making up the business of law... This doing something about disputes, this doing off it reasonably, is the business of law." Today, however, the business of law seems less and less to include "doing something about disputes" and it is even more difficult to find examples of it being done "reasonably". As a result, we are in an age where "alternative" dispute resolution has become the primary model for responding to conflict. It is not unreasonable to look at the field of dispute resolution and conclude that it may also need to change "by an order of magnitude", something only ODR could provide.³⁰

It is imperative that issues like data security and privacy are taken seriously as the same have a direct impact on the trust and confidentiality of the transaction conducted online. Encryption techniques and digital signatures must be used by all ODR websites. Essential requirements for successful ODR ought to include the fundamental fairness principles. Attention should also be given to the seven principles that the European Commission mentions in the Recommendation on "The out of court settlement

²⁸ T. Berners-Lee, *Weaving the Web: The Original Design and Ultimate Destiny of the World Wide Web by its Inventor*, Harper, San Francisco 1999.

²⁹ Ethan Katsh, *ODR: A Look at History – A Few Thoughts about the Present and some Speculation about the Future*, Online Dispute Resolution: Theory and Practice.

³⁰ *Id.*

of Consumer Disputes'.³¹ These principles are minimum guarantees that out of court settlement bodies should offer their users. The guarantees are: independence, transparency, respect of the adversarial principle, effectiveness, legality, liberty and representation. The application of the principles in the EU Communication is limited to dispute resolution forms where a third party decides, like arbitration and consumer complaints procedures, but they should be taken into account when setting up any form of ODR³². Even Government shall take steps for framing necessary rules governing ODR, especially for the e-commerce, publicize ODR and lend authority and trust to the ODR Mechanism through accreditation and also setup technical and administrative infrastructure required to set up an ODR process. A public-private partnership in consonance with accepted standards considering the idiosyncratic features of cyberspace shall be developed and ultimately lead to the evolution globally accepted ODR Mechanism.



³¹ Commission recommendation on the principles applicable to the bodies responsible for out-of court settlement of consumer disputes (98/257/CE), see http://europa.eu.int/eur-lex/en/lif/dat/1998/en_398X0257.html.

³² Online Dispute Resolution as a Solution to Cross-Border E-Disputes an Introduction to ODR by E. Katsh in *Law in a Digital World*, available at www.oecd.org/dataoecd/63/57/1878940.pdf page 26.