

Online Dispute Resolution –Feasibility to Settle Disputes Effectively.

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Discourage Litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser”-Abraham Lincoln.

Abstract

The paper begins with an analysis of dispute resolution mechanisms. The public is aware of the alternative dispute resolution mechanisms, but unaware as to how best the same can be utilized for settling disputes in online and offline. Hence paper addresses the significance of alternative dispute resolution mechanisms and clubbing alternative dispute resolution process with the information and communication technology. Later highlighting the significance of online dispute resolution and pointing out the issues in implementing the same in the present society. Identify the significance of online dispute resolution process and suggestion to improve the same.

Key words: Online dispute resolution, Mediation, Negotiation, Conciliation, Arbitration.

Introduction

Alternative dispute resolution as the name specifies is the alternative to normal Court proceedings. Traditional legal response to disputes between the parties is lawyers will initiate the process by filing complaint or plaint. Different people handle the dispute according to their attitude, capability and nature. Quite large number of people are scared to approach Court due to lack of legal awareness of rights, want of resources to furnish surety, lack of legal assistance regarding proceedings in the Court , fear to face the trial.

Objective of justice is twofold, one is to determine the rights of the parties and to provide justice. Justice must be effective, speedy and less costly. Drawbacks of our justice delivery system include procedural delay in disposing justice, Complicated procedure which frightens the parties to approach the Court, high cost and limited number of judges..

Arbitration as a dispute settlement mechanism has developed a lot in India. Even govt. through various schemes had started recognizing the significance of ADR and tried to adopt the same in Government departments. Online dispute resolution mechanisms include different aspects as negotiation, mediation, arbitration and conciliation. Negotiation is where parties with the help of a service provider can negotiate the subject matter and settle the dispute. Mediation is the most effective aspect of dispute resolution, if the parties failed to identify a solution for the dispute they can rely on third party to settle the dispute. Where the 3rd neutral party will act only as facilitator for the entire process. He doesn't have the right to suggest solutions. Various online dispute platforms have been created where parties can submit their complaints and the mediators who are interested in the matter can facilitate the case by contacting the parties. This can be facilitated easily through online platforms. Conciliation is method where third party after hearing all the parties to the dispute can give suggestions, for settling the dispute. Arbitration process begins when parties agree to rely on the decision taken by a third person. In most of the cases it can be through an arbitration agreement. Third party after relying on the claims and evidences submitted by both the parties will take the decision.

Government and private institutions are actually promoting alternative dispute resolution process. ADR procedures include Negotiation either Assisted negotiation or automated negotiation. It is a Voluntary, Non-binding procedure, where settlement is initiated without the intervention of a third party. Mediation is impartial as neutral third party assist the parties to a dispute to settle. Mediators hold private sessions & joint sessions for settling disputes, can be considered as an assisted negotiation. Conciliation, is where third person assist the parties to a dispute. It is an Evaluation, or determinative processes or a non-binding assessment of disputes, which help in studying the root cause of the disputes.

The motives to have ADR includes saving time and money, more open ,flexible and responsive to unique needs of the participants, helps in achieving the better needs of participants, enhancing

community involvement in dispute resolution process, broadening the concept of access to justice.¹

Causes for the growth of ADR include case load in Court's & expenses in Court's, where ADR had proved to save time and Cost, provide speedy settlement of disputes, improve public satisfaction with the justice system, encourage resolutions that are suited to the parties, increase voluntary compliance with the resolutions, restore the community values, to provide accessible forums to the people with disputes²

Barriers to ADR

Dispute resolution is for speedy settlement of disputes. The different dispute settlement mechanism used for providing justice is arbitration, mediation, conciliation and negotiation. The main barriers to ADR include inadequate planning and preparation by the parties and the 3rd neutral person, Failure to communicate properly and less patience to listen, Insufficient focus on underlying interest, Misunderstanding the loss or risk analysis, failure to give respect and dignity to the opponents.

Development from alternative dispute resolution to online dispute resolution

Position and interest plays an important role in settling disputes. Rather than relying on the actual position of the parties alternative dispute resolution process gives more significance to underlying interest. Right in personam can be settled through ADR as it is in a way connected with the public rights. Parties will take genuine efforts to settle the disputes.

In normal litigation process parties will not have direct control over the outcome. In ADR neither the parties nor the third neutral party is compelled to follow the strict procedure. Flexibility is allowed in the process. Parties have a direct control over the procedure and the outcome. If they didn't wish to continue with process, they can walk out at any time. All civil disputes can be referred for any of the ADR process unless barred by specific legislations.

Technological advancement had grown to such an extent that it is influencing each and every aspect of a man's life. Society rely on technology for buying and selling products. Amazon, e-

¹Professor Riskin & Westbrook, "Dispute Resolution and Lawyers", West; 4th Abridged edition (2009)

²Stephen B Goldberg, "Dispute Resolution: Negotiation, Mediation and the other process" Wolters Kluwer; 6 edition (2012)

bay, flipkart, OLx had influenced man's life. Dispute which occurs offline can be settled through normal Court proceedings or dispute resolution process. For settling the disputes which occur online society was compelled to identify more convenient mechanism. Our judiciary is overburdened with cases .There is a huge delay in disposing the cases due to various reasons as adjournments, non-production of documents on time, and non-appearance of parties. Dispute resolution mechanisms outside the Court has been proved to be effective way to provide justice to the parties on time. Initiatives have to be taken to make people aware of their rights for speedy disposal of matters, significance of dispute settlement mechanisms and the relevance of digital knowledge.

Advantages of ADR include speedy relief, can be used at any stage of a litigation, more time saving, reduce burden of the court, parties have the right to arrive at the normal Court's when they fail to arrive at a solution, statements of parties cannot be used as an admission in the court proceedings if they fail to arrive at a solution, presence of lawyer is not necessary ,Parties are the best judge to resolve the disputes, procedure is flexible, technicalities of procedural law and rule of evidence have no place in Alternative dispute resolution, parties can appoint the neutral person,parties maintain a control over the disputes, sessions take place in private,freedom to negotiate, and it is voluntary. Legislations on ADR include, The Code of Civil Procedure,1908,Sec.89[CPC (Amendment)Act,1999],Order X,rr.1A,1B,1C of Civil procedure code, The Arbitration and Conciliation Act,1996. The129th Law Commission Report-made it obligatory for the Court to refer the dispute after framing issue under sec.89 of CPC.There exist no specific legislation which speaks about procedure to be followed for mediation. The Alternative dispute Resolution and Mediation rules, 2003 has been drafted after Salem Bar Association case. These rules can be relied on by the High Courts for drafting rules for mediation.

Since the beginning of 21st century the use of internet has grown at a rate of 566.4%³.The number of commercial activities has increased and the disputes has also increased. Alternative Dispute Resolution mechanism has proved to be success by that time. The e-commerce transactions has also increased and issues have started raising between the business entities, on

³ Maria, Mercedes Albornoz, " Feasibility analysis of online dispute resolution in developing countries",44 U. Miami Inter-Am. L. Rev. 39 (2012) ,Available at: <https://repository.law.miami.edu/umialr/vol44/iss1/4>

the basis of e-contracts, between vendors and the suppliers, where the parties find it very difficult to identify the proper forum to approach. The biggest challenge faced was to link ADR with ICT? ODR has wider scope in today's world .Ability to resolve dispute online is the greatest challenge to legal profession. ODR services are managed by 3rd parties or institutions.ODR services use technology to resolve disputes. The growth of internet was at a fast rate. The disputes occurring online and offline can be settled online.Legal profession has to go ahead of the technologies to adapt to the changes. Uniform laws are the need of the day for protecting rights.

Alternative dispute resolution mechanisms requires communication between parties, managing the flow of information, evaluation of information and finding solution to the dispute⁴. ODR is an online extension of ADR.In European Union ODR is regulated by European Small Claims procedure [ESCP] which is an interface between dispute resolution process and conventional litigation⁵.

In 1996-David Johnson [Lawyer] &Henry.H. Peritt [Professor] Designed online arbitration process-*virtual magistrate* for solving dispute between internet service providers and subscribers. In 1999- Ombuds office –project for online auction site e Bay mediated cases, In 2004, more than \$34.1 billion in business was transacted via the dominant online trading firm, eBay. eBay's customer service page directs dissatisfied buyers or sellers to SquareTrade, a "dot.com" that provides online dispute resolution services⁶. Cyber tribunal developed in 1996 by University of Montreal is an ADR mechanism in online environment. It was the first project to combine mediation & arbitration.Service ended in 1999. This marked the beginning of online dispute resolution mechanisms.By 2004 more Online Dispute Resolution services had been launched, forsettling more cases online.ODR offers technological support to solve the disputes. Online companies such as Modria.com, ResolvNow (rezoud.com), and Youstice (youstice.com) have

⁴Jeffery. M. Aresty, " Internet and ADR : Educating lawyers about ODR"

⁵Online Arbitration: Emerging Trends With Examples' <<https://blog.ipleaders.in/online-arbitration-emerging-trends-examples>

⁶STICKS AND STONES: LANGUAGE, FACE, AND ONLINE DISPUTE RESOLUTION JEANNE M. BRETTNorthwesternUniversityMARAOLEKALNSUniversity of MelbourneRAYFRIEDMANVanderbiltUniversityNATHANGOATESShippensburgUniversityCAMERONANDERSONUniversity of California, BerkeleyCARA CHERRY LISCOSquareTrade Dispute Resolution Service, Academy of management Journal, 207, Vol.50,No.1 ,85-99.

packaged several of these technologies into ODR platforms and are marketing their services not only to business and governments but to law firms themselves⁷.

ODR employs wide variety of techniques. Square trade a specially designed website helps parties to negotiate and settle disputes. Assisted negotiation technique is used, where plain negotiation between the parties occurs. Technology assist the settlement. Cyber settle- uses blind bidding process to encourage parties to make settlement offers online, It is an Automated negotiation limited to monetary claims. Proceedings are conducted online without human intervention. Each party makes a confidential bid, if the system identifies that the offer of the parties are same or less than the demand, the case is automatically settles. Disputes over domain names are settled through arbitration [dispute resolution policy of ICANN]. Software allow parties to identify interest of the parties, if resolution is reached, it suggest combination of solutions. Online mediation is voluntary in nature where parties use internet with the assistance of 3rd person to settle disputes. Online arbitration is the process where assistance of 3rd party is taken, face to face interactions can happen if the parties decides so and the notice of the award will be send by the 3rd party to the parties. ODR services are managed by 3rd parties or professionals or institutions. Assisted negotiation- direct negotiation between parties. Square trade, Modria are the prominent example for the same. Automated negotiation- blind bidding [used only monetary claims]. Online mediation is voluntary with neutral 3rd person, Juripax, Modira proved to be a success in this filed. Online arbitration- award may be binding.

The Centre for Information technology and dispute resolution at Massachusetts university received grant for 3 years from NMB [National foundation] to see if ODR can be extended to Govt. agencies. The American Arbitration Association and cyber settle settled dispute through arbitration, mediation or conciliation. American Arbitration Association webfile was introduced in 2001 for filing cases and keeping records⁸.

⁷Jeff Aresty, Daniel Rainey and Robin Page West, Expand Your Practice with Online Dispute Resolution Technology, pp. 22-24, 26, American Bar Association, <https://www.jstor.org/stable/24632519>

⁸ Ethan Katish, " Nuts and Bolts of ADR"

Internet as a global medium is promoting the use of ODR in many countries. Benefits of ODR include transparency, fairness, accountability, simple, efficient, effective, system must be simple to assess, should be uniform, agreement must be binding.

ODR involves adopting ADR mechanism to information technology. ODR along with ADR is an actual alternative to traditional litigation. Two features of the dispute that has to be taken into consideration is the origin of the dispute whether it is online or offline and whether the dispute is domestic or International in nature.

Significance and Challenges of Online Dispute Resolution

Advantages of ODR are many. The process is informal, flexible, not regulated by strict rules of procedure and evidence, reduce cost of litigation, charge or fee given to evaluator are born by all parties, reduces geographical distance between parties, confidential unless agreed by parties, speedy resolution, easy access to data's online, neutral forum decided by the parties, eliminates jurisdictional and applicable law problems. Speedy settlement of disputes, not necessary to meet at a convenient place, even if the parties are at two different places or nations as per their convenience they can visit the site and upload their suggestion or respond to the claims of the opposite side. Parties can have video conference or interact through skype. Court fees and Advocates fees can be avoided, travelling expenses can be avoided, and payment to expert witnesses can be avoided. Scope of ODR include e-commerce, family law, consumer protection, developed countries are a step ahead of developing nations in case of Information and technology⁹.

Online transaction includes number of factors as place of access to vendors, website, place of delivery of Goods, buyers place of residence, vendors place of residence, language, place of issuance of credit card. Identifying the proper forum to approach is the issue faced by the parties to dispute. . Issues with regard to jurisdiction is the important problem. Parties and the neutral third party should have adequate level of digital literacy.

⁹María Mercedes Albornoz and Nuria González Martín Feasibility Analysis of Online Dispute Resolution in Developing Countries, The University of Miami Inter-American Law Review, Vol. 44, No. 1 (Fall 2012), pp.39-61, <https://www.jstor.org/stable/23645500>

Majority of the people from rural areas are ignorant about the use of computer or internet. In case of online arbitration the seat of arbitration plays an important role. Seat determines the law applicable. If parties are from different nations and they don't agree to a common law applicable to both, settling matter online will be an issue. In case of mediation and negotiation if parties are approaching the Court for specific performance of the contract, as the agreements reached can be considered only as contract, the proper forum to approach will be the future dispute between the parties. For filing execution petition parties have to identify competent Court to entertain the dispute. Confidentiality is the plus point of the entire dispute resolution process. In case of online platforms the privacy of the data's submitted is another significant issue to be sorted out. Unauthorized person could get communication transmitted over internet. Language barrier is another issue, trust and confidence is the crux of the entire dispute resolution process. Proper research is needed to find out a solution for building trust and confidence among the parties, either through terms and conditions in an online agreement. Lack of legislations which speaks about ODR is the major drawback which can be considered as a single reason why people are not willing to go-ahead with this process. Enforcement of online decisions is another issue, as it will be difficult to locate the party and there assets.

On December 2016 UN general assembly adopted resolution based on report given by 6th Committee which drafted the technical notes on ODR on international trade. The note gives more significance to transparency, due process and accountability in online dispute resolution process. On August 2017, India Govt. had identified 12 ADR agencies across India to reducing litigation. And requested all Govt. agencies to avail online mediation or arbitration facility to resolve disputes in the departments. We are aware of the significance of an alternative mechanism to settle dispute either online or offline. The way to effectively implement the same is not yet identified properly.

Conclusion and suggestions

Technology has advanced. Legal community is lagging behind in establishing necessary mechanisms to adapt to changing technologies. Online platforms can benefit the public if it is utilized in an effective and efficient manner. How to build trust and provide proper justice to clients is the first question to be addressed effectively. Lawyers, Government and even the law students have a major role to play in this. Make the public aware about the significance of online

and offline dispute resolution mechanisms. Clients were looking for a system to protect their rights efficiently. Lawyers have to enhance their skills. Trust and expertise is needed for the same.

Trusted process must be built by giving more significance to security, privacy, confidentiality, authenticity. Provisions of the Arbitration & conciliation Act & mediation rules has to be extended to ODR. Analysing the existing legislation of offline ADR mechanisms and adapting the same with sufficient modification suited to online will also serve the purpose. Amendments can be made in the existing legislations. Creation of a uniform convention on ODR is the need of the day. Information Technology Act, 2000 has already validated the use of electronic documents and signatures. Enforcement of online decisions is a significant question which needs to be addressed properly. In case of enforcement of arbitration UCITRAL rules and the reciprocal contracts between the nations plays an important role, in matters related to mediation and negotiation lacuna is still there if it contract between parties in two different nations. Compulsory online literacy for the lawyers, high quality service providers, statutory recognition for ODR in any legislations are the important aspects to be taken into consideration. The ODR system must be simple for parties to a dispute to assess easily, agreements reached by the parties should be binding and there needs to be a uniformity in the procedure followed. Secure payment methods have to be identified for payment to the 3rd neutral parties and the payments on the basis of the agreements reached. Justice delayed is Justice denied. Utilize the alternative dispute resolution mechanisms both online and offline to provide proper and timely justice to parties.