International Journal for Multidisciplinary Research (IJFMR)
E-ISSN: 2582-2160 ● Website: www.ijfmr.com ● Email: editor@ijfmr.com

Protection of Confidentiality and Security of Parties in Online Dispute Resolution

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ABSTRACT

The rapid evolution of the Internet has transformed the global marketplace, enabling seamless international business transactions. As e-commerce continues to expand, Online Dispute Resolution (ODR) has emerged as a significant mechanism for resolving disputes in the digital economy. ODR integrates traditional Alternative Dispute Resolution (ADR) methods such as arbitration, mediation, and negotiation with modern technology, including videoconferencing, email, chat platforms, and electronic signatures. While ODR is celebrated for its efficiency, cost-effectiveness, and accessibility, it faces notable challenges that hinder its widespread adoption. Key concerns include the lack of face-to-face interaction, data security risks, and confidentiality issues in e-arbitration agreements and judgments.

This paper investigates viable solutions to critical issues in ODR, particularly focusing on the "seat of arbitration," "secrecy of e-agreements," "consent of parties," and the "enforceability of arbitral awards." By exploring these challenges, the study aims to evaluate the feasibility of ODR as a credible and effective dispute resolution model in India. The findings suggest that with proper legal frameworks, enhanced security protocols, and improved technological infrastructure, ODR can emerge as a reliable alternative to traditional ADR and litigation, ensuring faster and more accessible justice for cross-border e-commerce disputes.

Keywords: Online Dispute Resolution (ODR), Arbitration, Alternative Dispute Resolution (ADR).

INTRODUCTION

The Internet has, in effect, developed as a truly world, borderless global market place where anyone with access to a computer which is connected to the World Wide Web can participate in some form of international business transaction. Instead, high-tech retail is newly replaced by electronic commerce and the Internet has become a revolutionary, rapidly developing medium of communication and a really new tool for business.

ODRS have been around gathering steam since its birth and several instances of online conflict resolutions have, in particular, sought to resolve issues in e-commerce. Like its traditional equivalent, ODR makes use of ADR methods including arbitration, mediation, and negotiation. The only difference is that ODR is online. Many international organizations and commercial entities have expressed interest in virtual arbitration, one form of ODR.

Online arbitration functions similarly to traditional arbitration, except that disputes are resolved using modern technology such as videoconferencing, e-mail, chat and electronic signatures (e-signatures). The ODR model has been praised for its legibility, efficiency, and cost-effectiveness compared to traditional ADR and litigation.

The ODR approach has been heavily criticized for other reasons, such as the absence of face-to-face interactions and security and confidentiality problems with e-arbitration agreements and judgments. What most importantly stands out about these ODR challenges is that most of them have plausible solutions that, if carried out properly, would render ODR as a feasible online alternative dispute resolution solution. This paper primarily focuses on the search for viable solutions to issues such as "seat of arbitration", "Secrecy of e-agreements", "consent of parties" and "enforceability of arbitral awards. Through this paper we aim to find out whether these problems can be addressed, if the efficiency of the online conflict resolution process can be increased and whether such a system is feasible for India.

PARADIGM SHIFT IN THE FIELD OF ONLINE DISPUTE RESOLUTION

While the initial ODR programs date back over a decade, the practice of ODR is in its infancy. To date, no theory (i.e., a systematically organized set of concepts proposed to explain a phenomenon) has been developed for ODR. There are not many writers who have published around the theory of online dispute resolution: the part named, "The Theory of ODR"[1] in Katsh and Rifkin's state of the art book is two pages long. The absence of theoretical work on ODR is largely the result of ODR's novelty; it has not yet attracted significant attention.

A further major issue is that ODR includes a wide array of conflict resolution methods that cannot be reliably segmented and classified based on any uniform criteria and principles. As Rule notes, ODR processes include both an automated negotiating process run by a computer, and world-class specialists who conduct arbitration processes remotely. "ODR systems, like courts, can be legalistic and precedent-based, or they can be flexible exception-handling mechanisms that exist as an extension of customer service operations. ODR may be a multimillion-dollar customer relationship management system, or an often usable $75 website established to help a mediator manage the minor case. ODR is any use of technology to support, assist, or administer a dispute resolution process."[2]

Using ADR as it has been acquired in depth to the phenomena of on line dispute resolution Suggests that ODR can be categorized as many "traditional" kinds of conflict settlement methods. Whereas certain ODR processes may be considered as "procedures of agreement" (e.g. online mediation), others are considered as "procedures of advice" (e.g. negotiation assistance tools) and "procedures of decision" (e.g. online arbitration). A role of an ODR neutral can occasionally be facilitative and non-judgmental, while at other times their role may be one where it has "decision making power on all matters". ODR can happen ad hoc but also according to a prior decision (either a dispute resolution program or—maybe in the future—statutory law or government mandate). Although others have prescribed integrative (cooperative)[3] issue solutions that enable parties to work together to create joint value for each side, such as automated blind bidding, are intended only to split a difference. Finally, in trying to solve a problem in cyberspace, as in physical space, parties may rely on both their interests as well as their rights or authority. Indeed, enabling individuals to view dispute resolution process from an interest-based perspective rather than a right or power-based perspective, as identified by Bordone, is not necessarily easy to do — whether the dispute is resolved offline or online.

[1] Katsh, E and Rifkin, J. 2001, Online Dispute Resolution: Resolving conflicts in cyberspace. Jossey-Bass: San Fransico at p. 93-117.
[2] Supra Note 1
[3] Genevieve A. Chornenki, The Corporate Counsel Guide to Dispute Resolution (Canada Law Book Inc., Aurora, 1999) at 7-10

The ODR phenomenon encompasses all sorts of techniques on how to prevent, treat or resolve dispute in online world. It surely is not easy to frame them in an overall theoretical framework suitable for conflict resolution. Still, considering that conflict resolution is seen as often just a "set of informational exchanges," or more accurately "a complex process of information management, information processing and communication,"[4]

Various scholars argue that it is well suited to this purpose: information and communication technology. What's exciting, and new about ODR as opposed to human information exchanges is that some of these exchanges are between humans and machines rather than between humans. The ODR phenomena are the new approaches to conflict resolution that will have to find their way into the dispute resolution space and into its governing theories eventually. Theoretical work on online conflict resolution remains in its infancy.

ONLINE DISPUTE RESOLUTION IN INDIA

And once the above legislation was in place, the foundation was set for ODR to take off now that we have an ADR friendly civil procedure and the technology and legislative recognition of its usage. What we now need is for more and more courts to make serious efforts to make the best use of the provisions of Section of the Code, and for more and more trained Dispute Resolution Service Providers (DRSPs) — both individuals and institutions — to deal with the disputes that have been referred to them by the courts for resolution.

Whenever a voyage into a new area is undertaken, uncharted paths need to be followed. So is ODR, as employing technology as the "fourth party" in dispute resolution is a new dimension for India. This way, while installing ODR systems, we would be asking questions of concerns about different parts and the counter argument will be more about "there is no precedence to it". Like everything else, ODR problems in various arenas will arise from time to time. The first, which can be described as the more general question of the legality of electronic media and electronic media communication based on the 2000 Act, is already answered. The use of technology in dispute resolution has found approval even from the Supreme Court. In a more recent case, it ruled that the option to videoconference a witness for taking evidence could be exercised.[5]

In that case, one party sought a court order requiring the testimony of a witness residing within the United States of America. Although a lower court had found the evidence could be taken through videoconferencing, the relevant High Court quashed that decision, saying the law mandated the evidence be taken in the presence of the accused. That order was affirmed by the High Court's Appeal Bench. Supreme Court set aside the judgment of High Court and observed that recording of evidence is within the purpose of section 273 of Code of Civil Procedure which states that the evidence shall be taken in the presence of the accused. The Court said when discussing the benefits of videoconferencing: "In fact, the Accused may be able better to see the witness than he would have been able to see had he been sitting in the dock in a crowded Courtroom." They know by the manner in which he or she behaves. Replaying would provide insight into demeanour. "They can listen and replay the witness' deposition." In response to varying representations brought to it, the Court observed that "virtual reality is a condition with which one is compelled to feel (or) to hear (or) to imagine what does not even exist. Videoconferencing and

[4] Ethan Katsh, "Online Dispute Resolution: Some Lessons from the E-Commerce Revolution" (2001) 28 N. Ky. L. Rev. 810 at 817 [Katsh, Online Dispute Resolution].
[5] State of Maharashtra v. Dr. Praful B. Desai (2003) 4 SCC 601

virtual reality are two entirely different things. Video-conferencing is a scientific and technological innovation that enables you to see, hear and talk to someone who is far away as the same simple and discreet manner, in which you would do if he were present in front of you that is, in presence." "This is not virtual reality, this is reality." The Order makes a number of interesting observations, which reflect a strong endorsement for the use of technology, in particular videoconferencing, in the justice delivery system.

It's not the first time that the Supreme Court has taken the side of technology. It had earlier held that "when effective consultation could be arrived at through electronic media and remote conferencing, it is not a requirement that the two persons required to act in consultation with each other shall necessarily sit together at one place unless it is a requirement of law or of the contract governing the parties." In the present case, the argument was that the two arbitrators appointed by the parties should have conducted their meeting in person to choose a third arbitrator.[6]

Yet another judgment expanding the use of technology available, the Supreme Court said "technological advancements like facsimile, Internet, e-mail, etc., were advancing even fast before the Bill for Amendment Act was passed by the Parliament." So when Parliament contemplated the giving of notice in writing, we cannot ignore the fact that Parliament knew of modern arrangements and facilities that were already in existence."[7]

CONFIDENTIALITY AND SECURITY IN ODR

Sensitive documents are exchanged in commercial transactions and this is considered an important topic in online dispute resolution. Many academics have asked whether ODR can keep parties' conversations and decisions private. The one major concern is the security of the data provided and how can one be assured that the data received did not get altered by any third party or any unauthorized person? A particular characteristic of ADR is the "secrecy," and as long as you have a good confidential process, you will have a very good assurance of confidence between the parties.

It is essential to protect trust and the conversation process in ADR, according to Katsh, as parties are more likely to speak freely when they are confident their comments will not be wielded against them. Thus, the ADR is at stake if one party does not fully trust the other. The issue of insecure ODR is significant. Such is not the best guarantee of secure documents and information, because anyone (internet hackers) can readily break into website databases, print, and post for instance, e-mail communications without their knowledge or permission.[8]

In the absence of security, the confidentiality of the parties is at stake in such proceedings, which is the first principle of Alternative Dispute Resolution. This discourages people from going through Online Dispute Resolution. To overcome this sort of issues, there are multiple security measures taken by the institution like Digital Signatures, which maintains the integrity and non-repudiation of data exchange and increase confidence between the parties, Authenticity. It is an authentication method that uses public-key cryptography. Many countries have enacted laws that authenticate electronic signatures, conferring the same legal validity on them as on documents on paper and in ink. One of these is the United States of America. In the United States, the "Electronic Signatures in Global and National Commerce Act" was signed into law by President Clinton in 2001. The Act gives a digital signature or record the same legal

[6] Grid Corpn. Of Orissa Ltd. V. AES Corpn. 2002 A.I.R. (S.C.) 3435
[7] Sil Import, USA v. Exim Aides Exporters, Bangalore (1999) 4 SCC 567
[8] Katsh E., 1995 Dispute Resolution in Cyberspace, 28 CONN. L. REV. p. 971

validity as that of a printed document.[9]

To prevent database hacking in cyberspace, many countries have enacted laws that punish database hacking and provide remedies to the injured party. The U.S. did, passing the Digital Millennium Copyright Act (DMCA) to solve similar problems. This decreases the parties' anxiety in cyberspace and builds trust in the ODR process.

Electronic file management software, for example, which can also be used for moving through complicated and large-scale online arbitration, is another useful application that may be able to be implemented efficiently. The software protects the security of emails and transcripts shared through encryption and other methods. Electronic file management software can be used to quickly access, display or print, cross-reference, compare, annotate, and search for keywords in individual papers or passages. File Management in Practice Electronic file management is often used in practice since it is more secure.

CONSENT UNDER E-ARBITRATION AGREEMENTS

An arbitration agreement is a written agreement in which two or more parties agree to resolve a disagreement through arbitration rather than in the courts. The arbitration agreement is normally a term within a larger agreement. Thus, the signing of an arbitration agreement means a party has expressly agreed to arbitrate any potential issue. The same thought is closely related to the e-arbitration arrangement In essence, the key distinction between e-arbitration and conventional arbitration agreements, is a party consenting to online resolution of disputes via electronic arbitration. In most cases, this is as simple as a few clicks of “I agree” or “I accept” while completing an online consumer agreement form.[10]

The other difference is while traditional arbitration agreements are written, signed by the parties, e-arbitration is conducted over the Internet, so there is no requirement of writing, just agreement by clicking on "I approve" or "I accept". This tactic led to several issues in the legitimacy of this type of agreement. Since the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards — commonly termed as New York Convention — stipulates a written agreement to enable the enforcement, will an electronic arbitration agreement be deemed to crystallize in writing? Is it assumed to be the case under the New York Convention?

Article 2 of the New York Convention provides that[11]:

“Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which may have occurred or which may occur in the future arise out of, or in connection with, a defined legal relationship”.

“The term agreement inwriting shall include an arbitral clause in a contract or an arbitration the agreement signed by the parties that is contained in an exchange of letters or telegrams”

Logically to this end the New York Convention did not cover electronic forms as a method of concluding an arbitration agreement. Some historians argue that the Convention is an archaic treaty that did not predict the advent of high-tech communications instruments like the Internet. Hence, steps have been taken to modernise the Convention. Hill argued that e-mail had the same legal standing as a fax or a telegram, and noted that the New York Convention referred to fax and telegraph.

[9] Available at http://www.njleg.state.ng.us/2000/Bills/Plo1/116_.PDF
[10] Nwandem osinachi , 'Online Dispute Resolution: Scope and Matters Arising' [2015] 1(1) SSRN Electronic Journal 1
[11] Article II New York Convention 1958. Available at http://www.arbitrationicca.org/media/0/12125884227980/new-york_convention_of_1958_overview.pdf

This is surprisingly handled by UNCITRAL's Model Law on Electronic Commerce 1996[12]. An e-arbitration agreement shall have the same legal character as an arbitration agreement and shall become valid under the terms provided by Article 6.1[13]. Moreover, UNCITRAL has developed standards to make e-signatures and e-documents equivalent to paper ones, and also many countries adopted legislation to govern electronic trade.

For example, the U.S. government created the Uniform Electronic Transaction Act (UETA) in 1999 to regulate e-commerce and the Electronic Signature in Global and National Commerce Act in 2000 75 to regulate electronic signatures. The Electronic (Amendment) Act (ETA) was enacted in Australia in 2011 to support e-commerce. In 2002, New Zealand enacted the Electronic Transactions Act. Malaysia soon subsequently enacted the 2006 Electronic Commerce Act for electronic messages in business transactions and the 1997 Malaysia Digital Signature Act for e-signatures.

Nigeria does not currently have e-commerce law or e-signature law. In response, a new bill has been introduced to Nigeria's National Assembly. The law is called the "Electronic Commerce" law (Legal Recognition Provision Act 2011). E-signature was recognized in Nigeria as there was no e-signature law in the country. His recognition is provided for under the Evidence Act 2011, where e-signature is categorized as a computer document, which is admissible in evidence pursuant to the provisions of Section 84 of the Nigerian Evidence Act 2011.[14]

Below are a few key reasons why electronic signatures are legally recognised in Nigeria: A document which originates from an electronic process is also a computer document; and therefore an electronic signature can be safely acknowledged and recognized as a paper document. This means that incorporating electronic signatures is not an arduous task. It is a mechanism that will help resolve consent issues in the context of online arbitration and be useful for all countries that use online dispute resolution.

CONCLUSION AND SUGGESTIONS

There are critics and proponents of online dispute resolution. Sceptics counter by suggesting that, since ODR has not revolutionized the way we resolve conflicts, it is at best a passing fad. Supporters believe that we can, through the sharing economy, build fresh mechanisms to more effectively help people settle disputes than they settle them today, and they contend that the Internet and ODR are still in the early state of developing institutions, and that while creating those resources and organizing systems could take longer than initially anticipated, eventually someone will need to come along and develop a global ODR system.

Internet law in India and many other countries has grown immensely over the past decade, with the introduction of new privacy, e-commerce, and copyright laws. But one thing has remained steady: government support for a hands-off, self-regulatory framework for resolving conflict online. In light of these disappointing results from this approach, the time for revaluation is now. It remains to be seen whether this ODR regulatory approach will win out, but it is important to observe that the advent of the Internet has changed the dynamics of regulation of the environment. From the standpoint of reasonable policymaking, all regulatory mechanisms should be examined carefully.

[12] Nwandem osinachi , 'Online Dispute Resolution: Scope and Matters Arising' [2015] 1(1) SSRN Electronic Journal 1

[13] Article 6(1) of the UNCITRAL Model Law on Electronic Commerce provides: “where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.

[14] Nwandem osinachi , 'Online Dispute Resolution: Scope and Matters Arising' [2015] 1(1) SSRN Electronic Journal 1

This co-regulation, the best solution and also the last resort, is the collaboration of corporate, national and international organizations in order to create the best regulatory network for resolving online conflict. Second, more and more ODR providers have emerged quickly, showing that ODR is a much more effective alternative for resolution in online disputes than traditional ADR processes or litigation. Governments, consumer organizations and the online sector can work together to build a roadmap for effective quick and low-cost ODR mechanism.

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1. As Rupert Wesley (2017) explains, online dispute resolution (ODR) mechanisms are becoming increasingly relevant in today's digital environment. Further, as noted by Nwandem (2014), the scope of ODR has expanded to address diverse types of disputes [1, 2].
2. Katsh (1995) provides a detailed discussion on how the law adapts to digital technologies, highlighting the potential for transformation in legal processes [3].