

INDIA IS READY FOR ONLINE DISPUTE RESOLUTION IN CONSTRUCTION INDUSTRY

By

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1.0. Introduction

- Traditionally construction has favoured ADR over formal litigation
- Construction arbitration has its rising costs and growing delays. Therefore, there is an immediate need to develop new methods of resolving construction Disputes
- Parties fears that the ODR- System if adopted may be more injurious & damaging than the conventional method.
- Study reveals that the Arbitral Institution would play an effective role for the implementation & success of the ODR - Mechanism.

1.1 Definition of ODR

- ODR is defined as the deployment of applications and computer networks for resolving disputes with ADR methods.

1.2 Difference Between ODR & ADR

- ODR differs from ADR where the characteristics of the space in which parties meet are not important for ADR,
- While the nature and design of the virtual space in which ODR occurs are extraordinarily important and.
- critical **Technology can be described as the “fourth party”**,

1.3 Advantages of ODR

- The advantages of ODR are discussed here under: -

(a) Economically viable

- All document exchanges can be done online.

(b) Efficiency, speed, and flexibility

- **A virtual Arbitral Tribunal's Chamber can be opened instantaneously** and
- Arbitral Tribunal can be engaged from anywhere in the world.
- online dispute resolution is simple, accessible, and affordable.
- Internet diminishes the communication problems
- Most online ADR providers provide functions 24 hours/day.

(c) Asynchronous interaction

- Where a response is not expected immediately,
- Parties have the option of stepping back and reflecting before they respond.

(d) Non-confrontational/power differentials

- With the nature of asynchronous communication, there is less likelihood of emotional outbursts.

(e) Thought

- The participants may have a new considered thought during the proceedings to conduct research in the middle of the process and
- Then share that new thought by providing a Web address to either confirm or disprove statements made.

(f) More reflective communication

- In Online communication people ask the question as their comments are written.

(g) Self-disclosure

- **ODR offers the opportunity for one to “Self Represent”**

(h) Convenience

- largest costs in the arbitration hearing process is logistics which is minimised in ODR.

(i) Access to better arbitrator with more subject-matter expertise

- By using ODR, the parties can retain a arbitrator regardless of where he or she resides in the world,

(j) Facilitates record-keeping/data archiving

- ODR facilitates the process of recording correspondence, pleadings, statements and any other written, oral or visual communication transmitted electronically.

(k) Full-search and document management

- Online file folders can assure all parties that they are using the most up-to-date document.

(l) Arbitrator forum

- Sometimes a traditional arbitration may take place at the office of either **party or that party's** lawyer
- An Arbitrator location removes this power imbalance and the Internet offers this Arbitrator location advantage

1.4 ODR- is Suitable for Construction Disputes

- Certain people spread myth about ODR for its non-suitability for Construction Industry, which is not correct as discussed here-under:-

(a) Archived communication

- Putting sensitive confidential information into an e-mail or text form can be disconcerting to many parties. Remedy is to encode a message so that no one can decode it without the appropriate key.

(b) Authenticity

- Not easy to verify the authenticity of the messages received. Digital signatures are embedded in a message to verify the identity of the other party

(c) Privacy and confidentiality concerns

- **E-commerce emerged and still largely exists as “stranger-to-stranger”** commerce, thereby making transaction and communication security and confidentiality one of the biggest concerns.
- One solution which is used in consumer e-business is the Trustmark,

- Sometimes known as a web seal, which is a logo or symbol displayed on the website of an e-business
- Which informs the consumer that the e-business has committed to compliance with qualitative standards or best practices.
- Another **method of protecting a party's information is by use of user names and passwords.**
- Online providers should mandate that parties use digital signatures in their online communication.
- The purpose of the digital signatures is two fold: (1) it encrypts the online message or document, thereby providing security to the transmission, and (2) it allows the receiver to verify the authenticity of the message.

(d) No Check to Stop Communication once issued

- To be cautious & alert while sending communication.

(e) Dropping out or stonewalling

- There is no possibility for a party to drop out or stonewall the other side because it is very difficult for a an arbitrator to control online, hence the parties need to be vigilant.

(f) Exhibits

- ODR if adopted in the construction industry would fail because there are too many documents to be tracked and view while the arbitration is proceeding,
- Not maintainable. If the ODR is conducted through a well-established & Competent Arbitral Institute of Repute.
- Computers today allow split screens, thus allowing multiple documents to be up and visible at one time.

(g) Transcripts and notes

- It is considered that in case of conventional method of arbitration, it is not feasible to track a **witness's** testimony, again, while in electronic exhibits, software such as Live Note allows all parties to be able to see a **witness's** testimony in real time and.
- Provide the ability to either mark, take notes, or even to send notes between counsel with the ability to either mark, take notices or even to send notes between counsel with the ability to create a **“fire wall”** between opposing Counsel and / or the arbitrator/tribunal

(h) Strategic communication

- In online communication people are more likely to lie during online communication. Thus people do not trust of information they receive online but there is no solution to the statement, “**Trust Me.**” While in video conferencing the arbitrator(s) can see the witness testifying and be able to ascertain the credibility of the evidence being given.

(i) Miscommunication/lack of body language and non-verbal cues

- The lack of face-to-face communication and the impersonal nature of the Internet could cause miscommunication between the parties. Even if a sender is able to express adequately in writing, the recipient may still misinterpret the message especially when parties are located in different countries and speak different languages.
- The video conferencing may also include a dual-screen thus allowing the Arbitrator to view the entire room in addition to the witness providing testimony.

(j) Lack of human interaction/building rapport

- In construction disputes where parties have a continued relationship, the rapport building can be crucial

- Thus, parties entering into an ODR process must be willing to make allowances for the likelihood of greater misunderstanding

(k) Power corrupts

- The arbitrator has control of the hearing process. In the online process this power diminishes as it becomes more difficult for arbitrator to direct a party to focus on a particular issue and the control of the arbitration process may revert to one of the parties.

(l) Insufficient accessibility and user sophistication

- Prior to embarking on any decision to move forward with arbitration via an ODR process, the arbitral institution and arbitrator must ascertain whether both parties are equally equipped to participate in an ODR process,

(m) Enforceability

- If arbitration is conducted through the Internet, it meets the general requirements needed to enforce awards. The award is prepared and processed in the same manner as any other award.

2.0 Role of Arbitral Institution in Development of ODR system for Construction Industry

- Number of online companies exist to handle disputes in India & abroad, but these types of companies do not lend themselves well to handle construction disputes.
- Arbitral Institutions dealing with ADR are considered best to administer the ODR for Construction Industry.
- Online technology if adapted by the Competent Reputed & Well Equipped Arbitral Institution would be highly successful.
- Technology would speed up and reduce the cost of international arbitration proceedings and
- Remove the need to send large quantities of paper through courier services and

- Replace face-to-face meetings by cheaper and easier online video conferencing.
- For development of the ODR system, the Arbitral Institution responsibility interalia would include:-

2.1. Design of ODR System

For Designing of ODR - system, Three Issues are to be considered such as

- (i) Consent of the parties
- (ii) Procedures to be adapted
- (iii) Enforceability

- Construction disputes are typically document intensive.
- While documents can certainly be uploaded to a particular site for all the parties and arbitrators to have access.

2.2. Implementing ODR

❖ Appointment of Service Provider

- To ensure fairness, number of codes of conduct and guidelines are to be drafted setting out the fundamental principles of online justice by the Arbitral Institutions.
 - a. Transparency: covering information given to users on the procedural rules and the outcome of the process.
 - b. Accessibility: due to the delocalised nature of the online medium, accessibility is one of the main assets of ODR.
 - c. Independence: traditional requirement.
 - d. Timeliness: speed is another benefit of ODR.
 - e. Fairness: with independence, this constitutes the essence of procedural guarantees.

2.3 Training of Arbitrators

- The ODR arbitrators cannot merely be trained in the traditional forms of ADR processes, but must be trained of cyberspace norms and customs. The Arbitral Institution would require to publish the Guidelines describing how arbitrators and the service provider, should function in their roles in filing during arbitration proceedings including jurisdiction and enforceability. Arbitral Institution should formulate and implement a privacy policy\

2.4 Establishment

- Arbitral Institution undertaking the ODR for Construction Industry are required to establish & ensure that.
 - a. accessibility: visible, party control, traceable, availability and timeliness, multilingual services, affordable, interoperability and integrated services.
 - b. trustworthiness: authentication, security, confidentiality.
 - c. adaptability: adaptable to ADR Centres and Rules and adaptable to party autonomy

2.5 Entering Into on ODR

- Under the model, the claimant would contact an approved Service Provider for submission of his claims & other relevant document who would first create a private chat room for the dispute
- Only the parties and any third party who becomes involved in the case (e.g., arbitrator) would be given a password to enter the chat room, creating a confidential environment for the exchange of information regarding the dispute.
- Once the claims are received, the Service Provider would offer the parties a number of options for resolving the disputes, according to the rules of the Arbitral Institution which could include online negotiation, online mediation and/or online arbitration.
- Once the option is finalised, the parties enter into the ODR process as per rules of the Arbitration of the Arbitral Institution through Service Provider.

2.6 Specific Responsibility of the Arbitral Institution

- Arbitral Institution dealing with ODR for Construction Industry be soley Responsible to ensure that
 - a. Initially the process will be supervised & Controlled by the arbitral institution but once the tribunal has been appointed the direct supervision of the process would passes to the arbitrators strictly in accordance with the Arbitration Rules of the Institution.
 - b. The initial procedure will be defined by the arbitral **institution's** rules but once the tribunal have apprised themselves of the issues and the **parties'** agreements on procedure the tribunal shall follow the same provisions, which are not in Contradictory to the Arbitral Institution Rules

- c. Once the tribunal has received or heard all the arguments and evidence it moves to making an award. The Tribunal shall ensure that no rules of the Arbitral Institution have been Ignored & the award is made after review of the Arbitral Institution if so provided in the Rules.
- The ODR arbitration would be primarily through a secured and dedicated platform and server designed by the Arbitral Institution.
 - All documents from the parties would go to the Registrar where they would be logged into the server on a secure site
 - Which could then be accessed by the parties and arbitrator through individual identities and passwords,
 - Including firewalls which can only be entered via authenticity logins.

2.7 CIAC - Model Arbitration Clause

- In drawing up contracts, we recommend that parties include the following arbitration clause in their agreement for Institutional Arbitration Through Construction Industry Arbitration Council (CIAC) which is approved & notified Arbitral Institution by the Department of Justice, Ministry of Law Justice, Govt. of India.
- **“All** and any dispute arising out of or in connection with this contract, what-so-ever arising between the parties relating to the construction, meaning, scope, operation or effect of this contract or its existence, validity or termination, shall be referred to and finally resolved through Alternation Dispute Resolution (ADR) i.e. Mediation, Conventional or/ and Arbitration as Institutional Arbitration - On-Line or Conventional Method in India/ Foreign country in accordance with the Arbitration Rules of the Construction Industry Arbitration Council 2013 with amendments up to 31.8.2016 or onward ("here in after called CIAC -Arbitration Rules-2013") in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this clause, and the award made in pursuance thereof shall be binding on the **parties”**

- * Choose as appropriate - If the matter is domestic (between Indian parties) then New Delhi or any other place in India can be chosen. If the matter is International (between an Indian party and foreign party or between two foreign parties) then any country as per agreement or as decided by the chairman of CIAC.
- ❖ Parties may have to consider adding the followings.
 - i. The number of Arbitrator (s)/conciliator(s) shall be..... (State an odd number).
 - ii. The language of the arbitration/ conciliation shall be English.
 - iii. Specific qualifications of the arbitrator(s) / conciliator(s) including Technical qualifications & Experience.
- ❖ Governing Law Clause
The governing law clause should be drafted under legal advice. The following are simple model clauses

i. Where the place of arbitration is New Delhi or any other city in India: -

“This contract is governed by the laws of India.”

ii. Where the place of arbitration is International: -

“This contract is governed by the laws of the country as laid down in the agreement or as decided by the Chairman, CIAC.”

➤ In case of existing dispute, where there is no CIAC arbitration clause in the contract agreement the Department can still refer the dispute to the CIAC for Institutional Arbitration conventional Method or ODR after execution of the agreement by both the parties as given here under: -

➤ RECOMMENDED ARBITRATION AGREEMENT

Parties to an existing dispute who have not included an arbitration clause in their underlying contract may agree to refer the dispute to CIAC for arbitration under CIAC Arbitration Rules in the following terms:

We, _____, the undersigned, hereby agree that all disputes and differences arising under, out of, or in connection with the following contract: [Brief description of the contract under which the disputes have arisen or may arise]

Be referred to and finally resolved by arbitration in [India/Foreign Country*] in accordance with the Arbitration Rules of the Construction Industry Arbitration Council ("CIAC Arbitration Rules") in force at the commencement of the arbitration.”

The Tribunal shall consist of _____* arbitrator(s) to be appointed by the Chairman of the Construction Industry Arbitration Council.

Choose as appropriate - If the matter is domestic (between Indian parties) then New Delhi or any other place in India can be chosen. If the matter is international (between an Indian party and foreign party or between two foreign parties) then the country as per agreement of the parties is to be chosen or as decided by the Chairman.

❖ Parties may consider adding the followings.

The number of Arbitrator (s)/conciliator(s) shall be..... (state an odd number).

The language of the arbitration/ conciliation shall be English.

Specific qualifications of the arbitrator(s) / conciliator(s) including Technical qualifications & Experience.

This Agreement has been signed this the _____ day of _____ year
_____ at _____ by:

1. _____ for and on behalf of _____
(Name and Address of the Party to be given)

2. _____ for and on behalf of _____
(Name and Address of the party to be given)

3.0 Indian Law & ODR

3.1 Indian Legal Frame Work & ODR

- Information Technology Act, 2000 based on UNCITRAL Model Law of e-commerce 1996
- Section 4- Legal recognition of electronic records
- Section 5- Legal recognition of electronic signatures
- Section 10A Validity of contracts formed through electronic means
- Section 11-13- Attribution, acknowledgement and dispatch of electronic records
- Section 14 - Secure electronic record
- Section 15- Secure electronic signatures
- Chapter IX on cyber contraventions and Chapter XI on offences
- Section 72 A Punishment for disclosure of information in breach of lawful contract

3.2 Other Supporting Legislations

- Indian Evidence Act, 1872 - Section 65A, B- Admissibility of electronic records
- Indian Arbitration (Amendment) Act 2015 permits an arbitral tribunal to use mediation, Conciliation or other procedures during the arbitration proceedings to encourage settlement of disputes (S.30)
- Section 89 of Code of Civil Procedure, 1908 promotes ADR, Order X Rule 1 A
- Legal precedents encouraging ODR-
- State of Maharashtra VS Dr. Praful B. Desai, Grid Corporation of Orissa Ltd. VS. AES Corporation.

4.0 How to Encourage ODR in India

- Financial Support to Arbitral Institution For ODR Mechanism
- Creating cadre of licensed / trained service providers
- Need more awareness & Training
- More funding to set up ODR
- Creating Uniform standards and rules for ODR
- Low Cost internet access
- Trust seals by a government/ private entity
- Need clear Law on Internet surveillance
- Need stronger security mechanisms

Conclusion

- The concept of ODR for construction dispute resolution appears to be possible and realistic.
- The parties also have the ability to choose ODR arbitration instead of a face- To-face arbitration, especially if cost and time are major considerations.
- Parties feel that ODR - Mechanism is not considered suitable for construction Industry due to its nuances and complexities, which is not maintainable.
- Initially no one was confident that e-commerce and consumer business disputes through ODR Arbitration shall work successfully, which is not maintainable.
- Study conducted at the International level reveals that there is a need for an Established, Reputed Arbitral Institution to take initiative to develop a platform for Implementation of the Process to facilitate ODR for Complex Construction Disputes
- CIAC has taken the lead not for awareness, but under took this job with firm determination.
- CIAC - well established & Reputed Arbitral Institution has come up with a **“PORTAL”** Design for ODR in Construction Industry which is probably the first attempt at National Level

Thank You