Online Dispute Resolution

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What is ODR?

- ODR is essentially a branch of Alternative Dispute Resolution ("ADR") using technology to facilitate dispute resolution through negotiation, mediation and arbitration and/or a combination of these approaches.
- Often referred to as Internet electronic dispute resolution, the online portion essentially involves conducting the process (including the filing and the managing of the claim) online. ODR is frequently seen as the solution to resolving electronic commerce ("e-commerce") or Internet-related disputes which are cross-border in nature and can be too costly to be dealt with through traditional forms of dispute resolution system.
- It is no surprise therefore that most existing ODR systems, as well as discussions on ODR have been singularly focused on electronic commerce and/or Internet-related disputes. (eBay today resolves through ODR about sixty million disputes per year and more than 90% of those disputes are resolved without a third-party mediator.)

A History of ODR

- ODR emerged in the 1990s in tandem with the proliferation of e-commerce. At its inception, ODR was essentially online resolution for commerce disputes – following the Alternative Dispute Resolution (ADR) principle of fitting "the forum to the fuss."
- The online forum was particularly well-suited to addressing the issue of distance between buyers and sellers who were often thousands of miles and many time zones apart. ODR was also appropriate for the size of the disputes: most of the issues at stake were quite small in terms of total value.
- A quick, easy, low-cost process was essential to the economic model. Initial ODR platforms were meant to help two private individuals resolve a dispute and come to a fair outcome. Primarily used by large companies such as Ebay, Amazon, and others, ODR was most valuable if the system itself could guide the parties to a resolution.

- With customers in geographically distant areas and the potential for an ever increasing number of disputes correlated to business growth, large companies had a strong financial incentive to resolve issues without using human mediators. Speed and reliability were essential for these small, similar, and numerous disputes.
- Though each dispute was unique, all were commercial and financial in nature, between a buyer and seller, and brought about by a discrete number of relevant circumstances. In its simplest form, this process consisted of one party filing a complaint online where the other party could see and respond to it.
- If the two parties were unable to come to an agreement, a mediator could be assigned. Otherwise, no intermediary was necessary and the dispute could be resolved promptly and efficiently using automation.
- ODR is often confused with, or seen as simply an online form of, alternative dispute resolution (ADR).

- ADR refers to tools and processes that allow parties to resolve their disputes outside of what is typically considered to be a courtroom and without a magistrate, judge, or other government-provided decision-maker.
- ADR connotes private parties agreeing to work outside of the traditional adversarial format of the courts, using mechanisms such as arbitration or mediation to resolve issues. Often ADR enlists the assistance of a neutral intermediary in the resolution process.
- Early on, ODR was categorized as a form of ADR used "for disputes arising from an online, e-commerce transaction, or disputes arising from an issue not involving the Internet, called an "offline dispute."
- However, it is now its own distinct category of dispute resolution mechanism encompassing a broad array of artificial intelligence capabilities used to resolve a variety of dispute types. Originally limited to non-binding, out-ofcourt dispute resolution between private parties,
- ODR has grown to encompass minor criminal cases such as traffic violations or code enforcement violations, online mediation, and binding resolution of disputes of many types including landlord-tenant, small claims, and domestic disputes

Stages of ODR

There have essentially been **four phases** in the development of online dispute resolution (ODR) (Tyler, 2003).

- The first, which ran from 1990 to 1996, was an amateur stage in which electronic solutions were in a test period.
- In the ensuing years (1997–1998, Second Stage), ODR developed dynamically and the first commercial web portals that offered services in this area were established.
- The next phase (business) ran from 1999 to 2000. Given the favourable period of economic development, especially in IT services, many companies initiated projects based on electronic dispute resolution, but a large number no longer operate on the market.
- The year 2001 marked the beginning of an institutional phase, during which ODR techniques were introduced into institutions such as the courts and administration authorities.

ODR's Legality in India

- The Indian legal framework, through Section 89 of Code of Civil Procedure, 1908 promotes use of alternative dispute resolution between parties.
- Similarly, Order X Rule 1A confers powers on the court to direct the parties to a suit to choose any Alternative Dispute Resolution (ADR) method to settle its disputes. This can include ODR as well.
- Let's now look at some specifics. ODR follows the *Information Technology Act, 2000,* as well as the *Arbitration and Conciliation Act, 1996:*
- The first and foremost necessity for ODR is that the parties must unequivocally decide that they are going to resolve their disputes online. The Arbitration Act specifies that the parties are free to choose the place where the hearing would take place, which could be online as well.

- The IT Act enumerates that electronic records and signatures can be introduced as evidence and given legal recognition under the Indian legal system (S. 4, 5 & 65-B of Evidence Act).
- In *State of Maharashtra vs. Dr. Praful B. Desai* (2003 4 SCC 601), the Supreme Court acknowledged the use of video conferencing to record witness statements. Therefore, the submissions and the proceedings can take place online.
- For this, the International Chamber of Commerce has laid some guidelines which ought to be followed for uniformity. These include agreeing upon the time zone, format of documents and other paraphernalia.
- Finally, when the award is declared, as per S.31 of Arbitration Act, it can be exchanged via emails by sending scanned copies. The original copy can be sent later via post. This completes the procedure and the only thing left is the enforcement of the award, a decree for which can be easily obtained in a court.

- Therefore, the crux of the matter is that practicing ODR is perfectly valid in India. It is even being used currently by the National Internet Exchange of India (NIXI) for domain name dispute resolution. It is similar to traditional arbitration but the only difference is that it is conducted over the internet. Therefore, the law applicable to traditional arbitration is to be applicable to ODR also. Just as ADR is legal in India, so is ODR.
- There have been instances where the parties have decided upon arbitration through emails (*Shakti Bhog Foods Ltd. V. Kola Shipping Ltd.,* (AIR 2009 SC 12); *Trimex International FZE Ltd. v. Vedanta Aluminium Ltd.* (2010) 3 SCC 1).
- In *Grid Corporation of Orissa Ltd. vs. AES Corporation* (2002) 7 SCC 736), the Supreme Court explicitly mentions 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 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".

The Seat and ODR Conundrum

- When a virtual ODR meeting takes place, one of the concerns that arbitrators of the yester-era would encounter is how we can interpret the "Seat of Arbitration". After the Balco judgement of the Supreme Court, and the subsequent jurisprudence as well as the new amendment, some are vary that if the seat of arbitration is ambiguous, that in itself can lead to a judicial intervention and delay the proceedings
- The concern is justified since any omission of the specific mention of the "Seat of Arbitration" in the arbitration contract can result in the arbitral proceedings becoming a subject of jurisdiction of the venue of the arbitration.
- Even though the governing law of the contract might have been determined in the contract, it is necessary that the Arbitration clause mentions the "Seat of arbitration" which can determine the jurisdiction of the Courts in a litigation on the arbitral proceedings.
- While the "Venue" of an arbitration can be different from a "Seat", if there is no mention of the "Seat" then "Venue" may be implied as the "Seat".

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- While a specific mention to the effect "The Seat of the Arbitration shall be India" can remove any doubts in this regard, it is interesting to note that there is some concern when no such specific "Seat Clause" is included in the contract or the arbitration clause.
- However, in India there is guidance in the ITA 2000/8 of how the intention of the parties is to be interpreted when a contract is consummated in cyber space
- In the case of a Virtual ODR, the arbitration is deemed to be held in Cyber Space. Cyber Space does not belong to any specific country since it is an "Imaginary transaction space created by binary documents".
- If therefore a dispute on a cyber space transaction has to be adjudicated by the physical judicial authorities, we need to agree upon the appropriate method to choose the jurisdiction of the Courts.

- Under ITA 2000/8, whenever an electronic communication is sent, it is deemed to be sent from the place of usual residence of the sender (unless there is an agreement to the contrary in the contract). If therefore we consider an electronic contract where an offer is sent and an acceptance is give, the place where the acceptance is given becomes the place where the contract is effectively consummated and becomes one of the factors that may determine the jurisdiction in the disputes arising out of the contract.
- If therefore the "Virtual ODR" is set up based on a contract struck in India, it becomes a subject matter of Indian Courts. (Unless there is a contract to the contrary).
- If therefore a virtual ODR is conducted on the platform such as odrglobal.in and the request is initiated by Mr X and responded to by Mr Y, the acceptance that concludes the contract may be the "Usual Place of Residence" of Mr Y subject to how the "Offer" is structured. If the "Offer" is structured with the prior condition that it shall be deemed to take place in India, then it obviously determines the seat of arbitration as India.
- If however the parties want the seat of arbitration to be other than India, they are free to state so in the Arbitration Clause or in the correspondence while accepting the platform.

- When the seat of arbitration is India, the procedures of ODR determined by the Indian company administering the ODR will automatically be subject to dispute resolution with the intervention of the Indian Courts. Then the acceptance of Section 65B (Indian Evidence Act) certification should also be easy to presume.
- However, when the seat of arbitration is outside India and the procedures of ODR are subjected to the scrutiny of a foreign country, then it becomes essential to refer to the laws in the specific countries which may determine the evidentiary value of the certified record of the proceedings or other regulations adopted by the ODR platform or the arbitral tribunal using the ODR process.
- It is in this context that the UNCITRAL Model Law on ODR becomes relevant to those using the ODR platform for international arbitrations. If the platform such as odrglobal.in is compliant with the UNICTRAL Model law, then the possibility of the ODR process being a subject matter of dispute is reduced or even eliminated.
- The arbitral tribunal however needs to adopt its procedures which are unimpeachable from the view point of the law applicable to the seat of arbitration.

- Apart from this, it may be noted that the Amended Arbitration Act provides under section 2, that

  "… that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

- Section 9 refers to the interim measures in which a Court can intervene. Section 27 refers to assistance of court for taking evidence and section 37(1) and 37 (3) refers to appeals.
- In view of the above, in a virtual ODR process, the parties are free to declare a specific seat of arbitration or proceed with the implied seat as India and if they do not do so, they may come under the jurisdiction of India by default irrespective of the Governing law.
- I suppose this clears the concerns that some may have on the use of Virtual ODR which is otherwise considered as the "Future of ADR" and India is one of the first countries to have taken a decisive step in bringing the Virtual ODR service to a usable platform.

ODR tools

Email

- Email is an obvious modern method for communication among the tribunal and the parties for filings, applications, notices and the like. It is fast and inexpensive, essentially instantaneous and free, and provides both a complete electronic record of all the filings and the ability to transmit them in electronic form. Its use, however, is not without some issues.
- First, some arbitral administering bodies, for example the American Arbitration Association (AAA), require the parties to agree in writing to the AAA email protocol before email can be used directly between the parties and the tribunal. In the absence of such consent, all communication could still be made via email but must be directed through the administrator, with the resulting possibility of a significant decrease in the speed of communication.
- Even if the parties have consented to direct party-tribunal email communications under the AAA protocol, all such emails must be copied to both parties and the administrator, and ex parte email communication must be avoided.

Hearings by video conference

- In today's flat world, witnesses can be scattered all over the globe, even if most are located in or near one place. Also, arbitrators with the requisite background and experience may be distant from the location of the hearings agreed upon by the parties. Of course, one can require the arbitration participants to travel to the hearing site, but this can be expensive and time consuming. Travel may only be justified for large cases or important witnesses.

- Fortunately, the ability to use IT to take live testimony from remote locations has greatly improved in recent years, while at the same time the cost of doing so has significantly decreased. Not too many years ago it was impossible to take remote testimony other than by phone. And although video conferencing predates the internet, its use then was complicated and expensive.

- With the advent of the internet, particularly with increases in transmission speeds and the constant improvement in equipment, together with lower costs for both the service and the equipment, live testimony by video conference over the internet has become a genuine tool for efficient and cost-effective arbitration. But as with email there are precautions, some mandatory and some merely recommended, applicable to video conferencing.

- Thus, the parties and the tribunal should be aware that the local laws regarding the taking of testimony, particularly from third-party witnesses, can vary by location. Everybody should be operating under commonly shared expectations regarding the applicable law.

- To avoid ex parte communications with the tribunal or the possibility of improper witness coaching, neither witnesses nor the tribunal should be alone with only one party at any location. To protect the confidentiality of the proceedings, the video feed must not be subject to intrusion. If more than two locations are in play, a log should be kept as well as a list on the record of all who sign on and all who are in attendance and where they are.

E-briefs

- Reasoned awards—an arbitral award that states the reasons for the result—are commonplace in international arbitration and more and more common in domestic arbitration as well. A reasoned award may be a simple, short statement of reasons or something as complicated as a full "judicial" opinion with findings of fact and conclusions of law. For a tribunal confronted with lengthy briefs and a substantial evidentiary record, preparing a reasoned award and verifying that the parties' positions in their briefs are supported by the actual hearing transcript or documentary evidence can be no small chore.

- Bouncing between the briefs, on the one hand, and the transcript as well as multiple evidence binders, on the other, is time consuming and tedious. On top of this, one must also check the parties' descriptions of the law against the actual authorities to which they have referred.
- The solution to this is e-briefs. An e-brief is much more than a searchable electronic or software copy of the brief. To be sure it is that. But, in addition, it also provides the back-up documents to which the brief refers, linked to the textual references to those documents.
- In other words, each reference in an e-brief to the record or authority is a "hot" link on which the reader can mouse click, causing the record or authority in question to pop up in a separate window. There is no need to go back to the record itself or to dig out the legal authority; they are instantly available by just a mouse click.

- Unfortunately, as they say, there is no free lunch. And that is true of e-briefs, for they usually need to be prepared by an outside vendor and are quite expensive.
- Accordingly, they should not be considered except for large cases where both the size of the record and the amount in controversy justify their use. In addition, one should be mindful that the parties may have unequal resources and that the cost of an e-brief, while justified by the size of the matter, may still be a burden, perhaps unbearably so, to the smaller party.
- ODR represents a transformation in the practice of the legal profession. ODR technology is a reality and is on the rise.
- It further highlights that there are amazing possibilities that ODR offers beyond email and telephony.