



Is India Ready for Online Dispute Resolution?

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Abstract

The Indian judicial system is marred by delays. Businesses suffer because disputes are not resolved in a reasonable time. Even with the use of methods of alternative dispute resolution a fair number of high value disputes end up in a court. Thus, courts hardly have any time for taking up disputes of lower value. Also, in a country of continental dimensions, every disputant cannot afford to travel and contest in a court of law. Online Dispute Resolution (ODR) has emerged as a new method which may be beneficial in a geographically large country and also where a large number of B2B or B2C disputes are significantly of low value. ODR is the best available method for resolving such business disputes. But there are a number of hurdles like access, technology, cultural and language issues, and above all trust with a new un-tested system. Of late, ODR has been successfully used by the National Internet Exchange of India (NIXI) and the judiciary has also shown perceptible shift towards use of new technology and methods in resolution of disputes. The paper examines the hurdles faced by ODR in India, discusses its future and makes a few suggestions for its success.

Keywords:

Online Dispute Resolution, India, Arbitration, Business Disputes

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Introduction

There is inordinate delay in the judicial system in India. Many a time delay frustrates litigants and they resort to extra-legal methods for resolving their disputes. This phenomenon has serious impact on the social, political and economic scenario of India. Methods of alternative dispute resolution have been tried to expedite the process but with little success. The emergence of Online Dispute Resolution (ODR) has kindled a new hope but it is not going to be smooth sailing. Umpteen problems exist. Despite these hurdles, ODR is being used quite effectively in National Internet Exchange of India (NIXI), on the lines of the World Intellectual Property Organisation (WIPO) Domain name dispute settlement mechanism. This success coupled with a perceptible shift in judicial thinking – emphasis on methods of alternative dispute resolution (ADR) – particularly with regard to business disputes is the light at the end of the tunnel.

As developments in ODR are in neophyte stage, not much literature has been published in India. A lot of foreign literature is available, however, there is hardly anything pertaining to India.

The purpose of this paper is to highlight the monumental problem of delay in the judicial system in India, examine the use of ODR as an effective tool in resolution of disputes, investigate major hurdles in implementation of ODR, study the ODR model being used by NIXI, and finally discuss the future of ODR in India. The contribution of this paper lies in the fact that it shall probably be the first of its kind in India to understand the usefulness of ODR for business disputes in particular and other disputes in general.

Delay in Indian Judicial System

With a population of more than one billion, a huge middle-class with substantial purchasing power, fast growing economy, and a market of continental size, India, today, can not be ignored. Along with these factors, democracy, rule of law and independence of the judiciary make India an attractive place to do business. The judicial system based on the English model, provides the much needed confidence to the foreign investors and business community. However, the delay associated with the judicial system, particularly at the level of lower judiciary, has prompted many commentators to say that the judicial system has collapsed in India. The clichéd saying, “justice delayed is justice denied” has been quoted so often that it has lost its meaning. This, however, is not a recent phenomenon. In 1952 Mr. Motilal C. Setalvad, the first Attorney General of Free India, wrote, “*A burning problem which the citizens, lawyers and judges face alike is that of the congestion of Courts of law and the consequent inordinate delays in the administration of justice...*” [1]

Three and a half decades later, on November 26, 1985, in his Law Day (the day Indian Constitution was adopted by the Constituent Assembly in 1949) speech, the then Chief Justice of India painted a very dismal picture. He said, “*I am pained to observe that the judicial system in the country is almost on the verge of collapse. These are strong words I am using but it is with considerable anguish that I say so. Our judicial system is creaking under the weight of arrears.*” It was quoted by Mr. Ashok Desai, Attorney General in 1996, when the situation was no different from 1985. [2]

Things have not changed much since then. Delay has become almost synonymous with judiciary in India. The courts are seen to be so preoccupied with procedural matters that

trials only commence after long delays and, once begun, are conducted at a snail's pace. Monetary claims and commercial litigation that does not involve interim relief can take many years to decide, and judges are reportedly reluctant to award costs or realistic interest.

Courts in India, particularly the higher courts, are usually perceived as impartial. Trial courts, however, are under great stress. The judicial officers (Judges and Magistrates) at this lowest judicial level are government servants of the province in which the court is situated. Hence, these judges do not have absolute (as compared to High Court and Supreme Court judges) financial and otherwise independence. They work often under the Damocles sword of the executive of the state, which has the power of transfer and controlling other service matters. Therefore, corruption, mal-practices and abuse of power are not uncommon. Decisions may be swayed by political, official or other pressures or because of lure of lucre or threats to cause damage to judge's property or person. Adequate protection is not provided to the officers of the state judiciary. Moreover, the workload (number of cases per judge) is extremely high. This often results in poor quality of judgments, low morale of the judicial officers and absence of real system of justice at the District level.

Unsurprisingly, on his recent visit to India, Mr. Timothy Adams, the US Treasury Under Secretary for International Affairs, mentioned that the US businessmen were bullish on India but added that they were worried about the pace of the country's dispute redressal system [3].

This does not augur well for business community in particular and the populace in general.

Resolving Business Disputes

For business, time is money. Disputes are like cancer which should be stopped from spreading as soon as possible. The business disputes may be business to business (B2B) or business to customer (B2C). For both type of disputes, litigation is the least favoured method of resolution for a variety of reasons – delay being the foremost. ADR methods provide the solution. Methods like negotiation, mediation, conciliation, arbitration and a mix of these have been used and are currently becoming popular for resolution of business disputes. However, the limitation of these methods, particularly, physical presence of both the parties and the arbitrator/conciliator/mediator at one place at a number of meetings, makes even ADR methods quite cumbersome and ineffective.

Technology provides the solution

History tells us that technology has provided the answer on most of the occasions of difficulty. Internet has emerged as one of the most significant and revolutionary inventions of our time. It has a large number of applications. Dispute resolution is also one of them. With increase in globalisation of business, the business disputes are also getting more and more global in character. The traditional methods of resolving such business disputes have become very expensive and consume a lot of time. Litigation was never the method of choice for resolution of international business disputes. ADR methods were favoured. With the use of internet, a new method has evolved – Online Dispute Resolution. According to the American Bar Association Task Force on E-Commerce and ADR, “Online Dispute Resolution has only one overarching feature – it takes place online.” Further, “ODR encompasses many forms of ADR and court proceedings that incorporate the use of the Internet, Web sites, e-mail communications,

streaming media and other information technology as part of the dispute resolution process.”

There are three current approaches to ODR: cyberspace, non-adjudicative ADR, and arbitration. The first centres on the Internet and information technology. The principle underlying the cyberspace approach is to find better, faster and cheaper ways to resolve disputes with the aid of technology. The non-adjudicative ADR approach to ODR focuses mainly on negotiation and mediation, and how to improve both communications and relationships between parties. The arbitration approach emphasises rights and applications of law to resolve the dispute with an arbitrator’s decision. The impetus behind this approach is the success of traditional arbitration. If it works so well offline, then it should be adapted online, the reasoning goes [4].

The major players in ODR are: business community, consumers, government and ADR institutions. Business community favours ODR because it is private, fast and inexpensive. It also encourages consumer trust. For consumer organisations, ODR enforces consumer rights. Governments see ODR as a tool to provide access to justice that courts are not yet equipped to provide, decrease court congestion and further the e-commerce economy. ADR institutions see ODR as an opportunity to gain the competitive edge. The application of information communication technology (ICT) is evolving as an important means for future resolution of certain types of conflict. ODR will become an increasingly important component of the infrastructure required if online business and other relationships are to realise their full potential [5].

Globally, the use of ODR is growing and has been well documented over the years and consumer disputes are seen as the main area of growth, together with human resources, government and employment disputes also a fertile ground for this type of technology [6].

ODR is ideal for India

All the three approaches mentioned above may be used in India. However, currently the third approach – arbitration approach – is used by NIXI and with success. The other two approaches may work when the system develops and the thinking evolves. At present, there is no use of these approaches in India. The use of ODR shall be to supplement the offline dispute settlement system [7].

For a large number of business disputes with low value and having disputants at geographically far places, ODR seems to be the best bet. The salient features of ODR which make it ideal for such business disputes in India are:

Speed

One of the most attractive features of ODR is its speed. Litigants in India are used to getting matters resolved through the court system in years or decades. Even a suggestion that this can be done by ODR in months or weeks is music to their ears. Businesses will do anything to get their matters resolved speedily. And, this is precisely the reason why business litigants use the services of extra-legal institutions (even mafia) to get a speedy settlement. Private Banks are known to use the services of muscle-men to get the loan amounts back. It was noticed by the Supreme Court and it came down heavily to hold that banks or for that matter no one can use force to get the money back.

Convenience – Necessity

ODR is surely much more convenient than the normal ADR or litigation. It would be a very attractive feature for the people who already have access to the other systems of dispute resolution, for instance, ADR and litigation. However, for have-nots, who do not have access to justice due to several reasons – poverty, illiteracy, lack of awareness, etc. – convenience is not the deciding factor. They want to get their disputes resolved and for them speedy and efficacious decision is much more important than convenience. Thus, convenience is an additional advantage for the elite class of the society. However, in case ODR achieves tremendous success vis-à-vis business disputes in India, it is sure that this convenience shall become a necessity.

Ease of access

Anyone with access to internet can have access to ODR. And for access to internet, one does not have to have a computer and internet facility at home or business. Access is available through a very large number of cyber cafés, which are mushrooming in every nook and corner of India. The charges are as low as Rupees 10 for an hour (approximately 20 cents). There are plans by the government to have internet facility in each and every village. Local Self Government is the model to be followed after amendments in the Indian Constitution about fifteen years ago. The 73rd and 74th amendments to the Indian Constitution in 1992 are milestones in establishing democratic decentralised administration through local self government in India. Even a low cost simple computer – called ‘Simputer’ – has been developed for use in remote areas where even electricity is not available. Indian computer companies are selling a few models of the usual desktop for even less than Rs. 10,000 (approximately USD 200) and used desktops are available for as low as USD 40. These can very well be used by ‘Gram

Panchayats' (local governing body in villages) for providing access to internet. Several telecommunications companies have made the latest technology available for internet through cellular phones. Thus, access should not be such a major problem in the years to come. However, it will definitely take some years, may be five, before it can be said with confidence that internet is available to the remotest village in India.

Efficient time management

In face to face (F2F) proceedings, the disputants with their lawyers have to be physically present at every date scheduled in the court or other tribunals. ODR does not require travel and attendance, hence, the business executives are available for the company. The same is true for customers or even in non-commercial disputes for other persons. This flexibility allows efficient time management and also gives a chance to prepare the case well and make an argument as compared to the court where oral arguments have to be made and rebutted at the same time.

Cost Savings

Since, no travel is required in ODR, there is a significant saving in travel costs directly and a more significant saving indirectly in terms of availability of the disputant for the major portion of time which would have otherwise been lost in travel. This saving is most evident in cases involving international business disputes. Additional costs of board and lodging in another city where the court is situated are also saved from being incurred.

Easy storage of digital data

Storage of documents is pathetic in lower courts in India. With rooms and rooms full of papers from floor to ceiling, it often becomes impossible to find a particular file in time.

There have been instances when court files have been destroyed by termites, seepage of rain water, excess humidity through the walls or destroyed due to short circuit of electric wires resulting in avoidable fire. Not to mention the natural calamities like floods which recently happened in Mumbai in 2005. Thus, this is not a phenomenon in villages of small towns but can also happen in a metro like Mumbai. Digital storage shall secure the data in a neat manner and can be retrieved as and when required. With a large number of software engineers and computer companies, there is no dearth of talent or hardware for such storage.

No geographical barriers

In India, the Supreme Court has its seat in New Delhi and the High Courts have their Principal Seats and Benches in the capital or another important city of the provinces. Besides these higher courts, each district has a District and Sessions Court which is the highest court in the lower judiciary. Many times, it becomes very difficult for litigants to travel from remote villages even to the district courts, what to talk of the High Courts and the Supreme Court. The inconvenience of frequent travel to the courts without any or very little forward movement in the matters has a toll on the litigants and a large number of them get frustrated by sheer waste of time, effort and money. Thus, more often than not, it results in not having access to justice for a large section of the Indian population. Moreover, for disputes having subject value too low, disputants are not even interested to waste their resources knowing it fully well that it is better to 'forgive and forget' rather than be 'penny wise and pound foolish'.

Since ODR does not require any travel, a disputant living in the remotest area of India can take part in the proceedings from his home itself, provided internet is accessible. This

feature of ODR makes it one of the most easily available systems of dispute resolution. It is also true for international disputes. Thus, availability of getting disputes resolved by ODR shall encourage disputants to get their disputes resolved rather than suffer silently.

Problems ODR faces in India

The road for ODR in India is bumpy. ODR may have a number of advantages and unique features which can help resolution of disputes in India, there are a number of problems in using ODR for dispute resolution. Some of these problems are as follows:

Trust and Confidence

Trust is the *sine qua non* of any dispute resolution system. India's Supreme Court and High Courts are independent and command enormous respect. This respect emanates from the trust the citizenry have in them. It is not sure how much trust and confidence the people have for ODR institutions.

Technology

People in general have distrust in technology. Some people in India do not even use bank ATMs as they fear that in case the machine does not give them the correct amount, there is no person available at that time to whom they can complain. There is a phobia for technology also because of unfamiliarity and a sense of foreign involvement. It is true that ODR system was not devised in India and hence, the technology associated with it also comes from west. This feeling gives a sense of insecurity and fear that one may become a slave to this technology. This is truer for the older generation. Younger people are more adept at using technology. They are much more confident as they, in fact, create

this technology. Indian software engineers write a substantial amount of global software including legal software. Thus, there is a clear case of age bias.

Lawyers

Shakespeare had written in one of his plays, 'The first thing we do, let's kill all the lawyers'. Advocates of ODR will surely agree with it. The lawyers are one of the biggest hurdles with their mindset of adversarial methods of dispute resolution. Also, there is a potential conflict with the fee earning of lawyers if ODR is followed. Lawyers in general are not trained for ODR in law schools. This makes the task difficult for the disputant to take a decision to go for ODR when the lawyer is strongly in favour of litigation. The primary task of a lawyer is to advise his clients on appropriate remedies and courses of action. Advice by lawyers is fine for the court matters, but without any proper training for ODR, who will advise them for ODR mechanisms. Thus, dependence on lawyers should be reduced which means more awareness for the businessmen and masses.

Virtual world

There is no face-to-face interaction, which makes it difficult to fix an identity in mind. One never knows whether the person on the other side is male or female, young or old, naïve or experienced, etc. Such information makes a lot of difference in court rooms and matters have been won or lost on the degree of capability or personality of one's counsel or disputant himself. The virtual world has an environment of anarchy. There may be method in madness but it is quite chaotic. In such a virtual world the uninitiated feels lost and it has a tremendous negative effect on his psyche. It results in lowering of confidence and thereby results in loss of trust. There is a much greater chance of such a thing happening in India with almost half of its population illiterate.

Access

The digital divide between IT haves and IT have-nots makes access at this time more difficult for the weaker sections of society. Issue of access to ODR shall broaden this gulf. People with all the resources generally have familiarity with the system and they can with some effort use the system for their own use. This makes the case for empowerment of the weaker sections by providing them access stronger.

Barriers

Educational barriers shall prevent the uneducated from accessing ODR. Language also becomes a barrier. English is generally the language used for internet and ODR, while a large portion of work in lower courts is done in vernacular. The preference for English shall put the locals at a disadvantage. Cultural barriers may also pose a problem. ODR system transcends national boundaries as well as different cultures. This fact must be taken into account. India – a country known for its ‘unity in diversity’ – is of continental dimensions and a large number of different cultures thrive under the common umbrella. This fact is taken care of in different courts in India, however, it is not certain how these differences shall be factored in ODR.

Personnel

Adequate number of qualified personnel to man the ODR institutions and provide counsel to consumers and businesses is one of the major obstacles. The lawyers who have been trained for decades together for the traditional form of practice would find it next to impossible to switch over to the new trend of dispute resolution called ODR. Arbitrators (decision makers in any role – negotiator, mediator, conciliator, etc.) in ODR need to be

specially trained for this special task. Teaching is not at all done for ODR in universities and professional schools. Even ADR lags behind. Law schools have very few courses on ADR and hence, it is difficult to get good law graduates with sufficient knowledge of ODR.

ODR not suitable for all disputes

Like ADR, ODR is also not suitable for all disputes. Questions of intricate legal complexity are best decided in a court of law. Matters of criminal nature, matrimonial disputes, and matters involving rights of citizens as against the State are some of the examples which cannot be decided by ODR system. The matters which can best be decided are business disputes – B2C and B2B. The rest of the disputes may be resolved in the years to come by some suitable modifications in the model used.

ODR and NIXI

NIXI (www.nixi.in) has used the ODR system for resolution of domain name disputes. The dispute resolution policy of .IN Registry (India's official domain name registry) has been formulated in line with internationally accepted guidelines, and with the relevant provisions of the Indian Information Technology Act 2000 and the Indian Arbitration and Conciliation Act 1996. Method of arbitration is used, with the entire proceedings happening online. The arbitrators are individuals with expert knowledge of law, particularly arbitration and experience in resolution of domain name disputes. As in any other arbitration, they are independent and impartial. The best thing which has happened is that the disputants have trust in the process which is evident from the fact that hardly any decision has been challenged in a court of law.

Perceptible Shift in Judicial Thinking

The courts in India have realised that it is not possible for the existing judicial system to cater to the dispute resolution demands of the citizens of India. Particularly with reference to business disputes the courts have emphasised to use ADR methods and also to go *Lok Adalats*, which are friendly courts officiated by sitting or retired judges and decisions are made on the basis of settlement. The decision of a *Lok Adalat* is final and binding on the parties and cannot be challenged in any court. The Supreme Court has also upheld the changes made in the procedural law to make decision making faster [8]. The courts are also encouraging the use of technology, like video conferencing, for speedier resolution of disputes. Thus, the judiciary is in favour of the use of latest technology. The only caveat may be that it should not widen the inequality in society.

Conclusion

The success of NIXI has given a shot in the arm to the advocates of ODR in India. It is agreed that parties having domain name disputes will not be facing any of the hurdles mentioned earlier, however, given the stage of infancy for ODR in India, even this much success deserves to be lauded. Besides NIXI's success, ODR is having a very bumpy ride in India. However, considering the potential of India as a country and Indians as people who have readily assimilated cultures and technology, the future looks bright for ODR. But a lot needs to be done. The foremost is to create awareness that people deserve speedy and inexpensive justice. And, that good quality justice at a low cost is available provided some effort is made. It is not Utopian. It is very much within their reach. A change in attitude is required for the judicial fraternity in general and lawyers in particular. Above all the politicians have to re-think their strategy of keeping new

methods of dispute resolution away from the masses for their vested interests. All over the world, liberalisation and power to the people has resulted in more peace, development and prosperity. And, India is no exception. For this, proper education and training is essential for a committed, knowledgeable workforce which can work with confidence for the resolution of business disputes using ODR methods. With political commitment and a concerted effort by judiciary, the day is not far when ODR would be the method of choice for resolving not only business disputes but other disputes also.

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