

THE INDIAN COUNCIL OF ARBITRATION

Alternative Dispute Resolution to Online Dispute Resolution Karnika Seth, Attorney at Law & Partner, Seth Associates

As our modern day civilization witnesses a revolution brought about by the technological phenomenon termed 'Internet', it has created a unique virtual world of its own connecting people globally and instantaneously. Internet has rendered the temporal and spacial barriers insignificant, and people across the world are realizing its immense potential as a medium of communication, information dissemination, and a fillip for e-commerce. The accelerated and multifarious interaction amongst the individuals facilitated by internet has raised new issues to the fore and inevitably myriad nature of e-disputes. In simple words, e-disputes encompass the conventional disputes relating to Sale/purchase of goods, auctions, software development, copyright, defamation, fraud, privacy, deceptive trade practice, etc although with an added dimension to the specific issue owing to the peculiar nature of internet as a medium of communication. On the same lines, "Online dispute resolution" involves the conventional concept of Alternative dispute resolution with the key difference being that the entire process is carried out through the use of internet and not across the table in a face to face situation.

This write-up aims to explain these two concepts, their sub-categories, applicability, methodology along with their similarities, differences, advantages, and the current trends to resolve disputes by means of these concepts. For a lucid comprehension of the subject our discussion on the two concepts has been divided into two parts, the first part deals with the alternative dispute resolution hereinafter referred to as ADR and the second part with the online dispute resolution, hereinafter referred to as the ODR.

Alternative Dispute Resolution

To begin with, alternative dispute resolution process is qualitatively distinct from the judicial process. It is a process where the disputes are settled with the assistance of a neutral third party generally of parties own choice, where the neutral is generally familiar with the disputes of that nature, where proceedings are informal, without procedural technicalities and are conducted by and large, in the manner agreed by the parties, where the dispute is resolved expeditiously and with less expenses, here decision making process aims at substantial justice ,where the confidentiality of subject matter of the dispute is maintained to a great extent. In substance, ADR process aims at rendering justice in the form and content that not only resolves the dispute but also brings back harmony in the relationship of the parties.

ADR techniques are extra-judicial in character, they can be used to resolve any matter, under law, by agreement between the parties. They have been employed to settle myriad subject categories of disputes, especially civil, commercial, industrial, and family disputes. In particular, these techniques have achieved success in the case of business/commercial disputes such as banking ,contract performance, and interpretation, construction contracts, intellectual property rights, insurance coverage, joint ventures, partnerships differences, personal injury product liability, professional liability, real estate and securities.

Needless to say, that ADR offers the most efficacious solution in respect of commercial disputes of an international nature. However, Alternative dispute resolution is not intended to supplant altogether the traditional means of resolving disputes by means of litigation wherein there is an adjudication or final determination of a dispute which is binding on the parties thereto. ADR techniques offer only

alternative options to litigation and their desirability increases as they are instrumental in avoiding vexation, expense, and delay. However, there are disputes pertaining to a number of important areas, including constitutional law and criminal law which cannot be resolved without resorting to litigation. ADR may not be appropriate for every dispute even in other areas or even if appropriate, it cannot be invoked unless both the parties to a dispute are willing and agree to adopt ADR.

Techniques of ADR

The ADR procedures consists of Negotiation, Conciliation, Mediation, Arbitration and array of hybrid procedures including last offer arbitration, medola , minitrial, med-arb, and neutral evaluation. In countries like U.S.A several federal and State judges have incorporated ADR techniques in their court room practice and encourage litigants to adopt them. Legislations were also enacted to promote the use of ADR by state instrumentalities. A number of ADR procedures are hybrids that combine two or more well established ADR procedures. ADR procedures can be broadly divided into two categories namely, adjudicatory and non adjudicatory. The adjudicatory procedures such as arbitration and binding expert determination lead to a binding ruling that decides the case. The non-adjudicatory procedures contribute to resolution of disputes by agreement of the parties without adjudication. Mediation is different from conciliation only in that in the former the neutral third party plays a more active role in putting forward his own suggestions for the settlement of the dispute.

A brief description of ADR procedures widely used is as follows :

Negotiation : A non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute.

Conciliation Mediation : A non-binding procedure in which an impartial third party, the conciliator/mediator, assists the parties to a dispute in reaching a mutually satisfactory and agreed settlement of the dispute.

Med-Arb : A procedure which combines sequentially conciliation/Mediation and where the dispute is not settled through conciliation/mediation within a period of time agreed in advance by the parties, arbitration.

MEDOLA : A procedure in which if the parties fail to reach an agreement through mediation, a neutral person, who may be the original mediator or an arbitrator, will select between the final negotiated offers of parties such selection being binding on the parties.

Mini-Trial : A non binding procedure in which the disputing parties are presented with summaries of their cases to enable them to assess the strengths, weaknesses, and prospects of their case and then an opportunity to negotiate a settlement with the assistance of a neutral adviser.

Arbitration : A procedure in which the dispute is submitted to an arbitral tribunal which makes a decision (an 'award') on the dispute that is binding on the parties.

Fast track Arbitration : A form of arbitration in which the arbitration procedure is rendered in a particularly short time and at reduced cost.

Neutral listener Agreement : Parties to a dispute discuss their respective best settlement offer in confidence with a neutral third party who, after his own evaluation, suggests settlements to assist the parties to attempt a negotiated settlement.

Rent a judge : Disputing parties mutually approach a referee, usually a retired judge, before whom they present their case in an informal proceedings. The referee judge gives his decision which is

enforceable in a court of law. The fee of the referee is paid by the parties.

Final offer arbitration : Each party submits its monetary claim before a panel who renders its decision by awarding one and rejecting the other claim.

Important Characteristics of ADR

The most attractive characteristics of ADR are that it can be used at any point of time, even when a case is pending before a court of law, it can be used to reduce contentious issues between the parties and (except in the case of binding arbitration) it can be terminated at any stage by any one of the disputing parties. Parties are free to decide how they wish to resolve their dispute either before the dispute arises e.g. in a dispute resolution clause contained in their commercial contract or after the dispute arises e.g. in a subsequent agreement to arbitrate the dispute. Parties can agree on the law governing the contract, including how conflicts of laws are to be resolved, the tribunal hearing the dispute, and whether the tribunal will have exclusive jurisdiction to deal with the dispute and where the tribunal is not a traditional court-where the tribunal will sit and hear the dispute the procedural rules which the tribunal will apply where the parties fail to agree on any of the above, the tribunal may decide what is the proper law governing the dispute, the rules, it will use and even the extent of its own jurisdiction.

The advantages of ADR as against litigation have been variously indicated to be

- (a) The parties can choose their own rules or procedure.
- (b) There is greater scope for minimizing acrimony.
- (c) The costs can be kept low.
- (d) The times and places of hearing can be chosen according to convenience.
- (e) Saving of time.
- (f) The ability of the parties to choose their own judge permits choice of an expert in the field.
- (g) ADR can be used with or without a lawyer
- (h) It allows parties to keep private the details of dispute.

ADR is by no means a recent phenomenon, though it has been organized and systematized, expressed in clearer terms, employed more widely in dispute resolution in recent years than before. In earlier times, disputes were peacefully decided by intervention of kulas (family or clan assemblies), srenis (guilds of men following the same occupation), parishads (assemblies of learned men who knew law) before the king came to adjudicate on disputes. There were Nyaya panchayats at grass root level before the advent of the British system of justice. Later on, Lok adalats (people's court) have provided speedy and inexpensive justice in both rural and urban areas in India. The increased volume of cases in the courts, as also the imperative need to provide for their expeditious disposal propelled major reforms in the law of arbitration in India in order to remove the deficiencies and to make arbitration an effective ADR mechanism. Accordingly, the Arbitration and Conciliation Act, 1996 was enacted. This Act is more responsive to contemporary requirements and is on the pattern of model law on International commercial Arbitration adopted by United Nations Commission on International Trade Law (UNCITRAL) in 1985 and UNCITRAL set of Conciliation rules adopted in 1980. An important feature of the said UNCITRAL Model law and Rules is that they have harmonized concepts on Arbitration and Conciliation of different legal systems of the world and thus contain provisions which are designed for universal application. It was widely felt that our economic reforms in India may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes such as the Arbitration Act, 1940 remains outdated. Therefore, the Arbitration Act 1940 was amended and is now known as the Arbitration and Conciliation Act, 1996 which has consolidated and amended the law relating to domestic Arbitration, international commercial arbitration and enforcement of foreign arbitral awards and has clearly defined the law relating to Conciliation. This enactment has been a welcome change in the Indian economic-legal scenario and the most reliable and effective technique of ADR in India. While the other forms of ADR also exist in India, the Arbitration and conciliation have been so far most popular to resolve private

disputes especially business/commercial disputes.

Government contracts generally provide for compulsory arbitration in respect of disputes arising thereunder. And there is also a permanent machinery of arbitrators constituted by the Government of India to settle all current and future commercial disputes between public sector undertakings inter se as well as between public sector undertaking and a government department. Statutory arbitrations are conducted in accordance with the provisions of certain special Acts which provide for arbitration in respect of disputes arising on matters covered by those Acts e.g the Land Acquisition Act, 1894, Indian Electricity Act, 1910, the Railways Act, 1890, etc. On the international scene, India has recently entered into bilateral investment protection agreements with the United Kingdom, Germany, Russian federation, Netherlands, Malaysia and Denmark. Each agreement makes provision for settlement of disputes between an investor of one contracting party and the other contracting party in relation to an investment of the former through following the ADR procedures : Negotiation, Conciliation and Arbitration. There are a number of international agreements in various sectors to which India is a party containing provisions for dispute resolution through ADR procedures. Considering the importance of Arbitration Act, 1996 in the current Indian legal scenario it is pertinent to enlist some important features of the Arbitration and Conciliation Act, 1996. They can be enumerated in brief outline as under:

(a) The Act provides for transparency in the matter of decision-making by arbitral tribunal by providing that the arbitration tribunal must give reasons for its arbitral award (section 31[3])

(b) Delay on the part of the arbitrator is made a ground for termination of the mandate of the arbitrator. (section 14 [1][a])

(c) The courts can intervene only after the award is made by the arbitral tribunal (section 5 and 16 [6]) The Act enables an arbitrator to decide the objections to his continuance as an arbitrator as also on the extent of his jurisdiction. The arbitral tribunal could also rule on any objection with respect to the existence or validity of the arbitration agreement.

(d) The Act permits an arbitral tribunal to use mediation, conciliation, or other procedures during the arbitral proceedings to encourage settlement of disputes. (section 30)

(e) The Act provides clear provisions with regard to the award of interest by the arbitrators. (section 31 [7])

(f) The grounds for challenge in the award are made more specific in the Act (section 34 [2])

(g) The Act also makes it clear that all awards given within India are domestic awards and all awards given in foreign countries are foreign awards. (Section 2 [7])

(h) The Act repealed the Arbitration (protocol and convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

Apart from a good law that provides for resolution of disputes, it is rudimentary to extend or create facilities, services, and infrastructure that shall enable the implementation of such rules and lead to effective ADR practice. The specialized firms or organizations are certainly more promising and reliable in this sphere and people choose to consult them and engage their services for dispute resolution. There are some important organizations making significant contribution in promoting ADR services in India which need a special mention herein namely ICA and ICADR, the Federation of Indian Chambers of Commerce and Industry, Indian Chamber of Commerce, the Bengal Chambers of Commerce and Industry. The Indian Council for Arbitration (ICA) established on April 15, 1965 provides arbitration facilities for all types of domestic and international commercial disputes and conciliation of international trade complaints received from Indian and foreign parties, for

nonperformance of contracts or noncompliance with arbitration awards. It maintains comprehensive international panel of arbitrators with eminent and experienced persons from different lines of trade and professions for facilitating choice of arbitrators. The council has launched on internet a special web site called COMLAWNET to provide information on arbitration and commercial laws. We need more organizations such as the ICA, ICC and FICCI that render specialized services and promote ADR. One would agree that these organizations have a vital role to play in resolving disputes, in particular, commercial disputes across the globe!

With this background knowledge of concept of ADR understanding the concept of ODR becomes fairly simple. In broad terms, ODR is same as ADR except that the dispute resolution process is carried out completely online i.e through the use of internet. We shall now deal with the second part of our discussion with the aim to explain ODR and highlight the differences between the two!

Online Dispute Resolution

With the unprecedented growth of e-commerce and facilitated global consumer transactions over the internet, a number of disputes have resulted which often involve parties from different jurisdictions. To resolve such disputes, Mediation and the like methods can be extremely useful mechanisms. E-commerce disputes that cannot be informally resolved call for dispute resolution methods that are enforceable internationally. The European parliament has also indicated that online dispute resolution should be a priority, to be linked with any progress to be made on the proposal for a council regulation (EC) jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

In quintessence, ODR System is the same as the traditional dispute resolution model. The key difference in the two concepts lies not in the substance of the concept but in the mode/medium of practice. ODR system is entirely internet based, meaning that the users may conduct the procedures through a website, or that of a service or content provider. Digital communication tools allow the parties to file requests by completing electronic forms and to exchange information online through secure channels. The parties and neutrals communicate electronically, also through audio and video facilities. The system includes such functions as automatic notifications.

Also, procedural rules have been framed by organizations providing ODR in their respective specialised areas of e-disputes. This institutional dispute resolution practiced online has attracted public confidence and provided an efficient alternative to litigation in national courts, especially in case of e-disputes wherein parties to a dispute, are often from different jurisdictions and the issue of jurisdiction itself becomes a point of preliminary objection. However, this point of contention never arises in ODR as parties mutually agree to resolve their cross border e-disputes employing the mode and the manner they both agree on. The parties may have entered into an agreement containing an arbitration clause providing that in the event that a dispute arises between the parties it shall be resolved by means of arbitration conducted electronically, OR later as and when the dispute arises they may agree to resolve it through ODR. Many parties wish to incorporate organizational rules to ensure that all the important clauses have been inserted and a fair and secure agreement is arrived at.

The following organizational rules are the most common rules which serve as model clauses for the parties-

ICC Rules of Arbitration and ICC Rules of Optional conciliation

International Center for settlement of Investment Disputes model clauses

WIPO's Arbitration and Mediation rules.

UNCITRAL Arbitration and Conciliation Rules

London Court of International Arbitration's model clauses for arbitration rules.

American Arbitration Association`s model clauses for arbitration rules

While there are several advantages of resolving disputes through ODR , the important advantages could be listed as under:

- (1) Parties can choose arbitrators/mediators from around the world.
- (2) Greater quality and satisfaction at reduced cost.
- (3) Professional and institutional administration by ODR service providers.
- (4) Greater speed, saving of time, easy accessibility.
- (5) More convenient as physical presence and face to face meetings are not required.
- (6) Higher probability of bringing back harmony in the relationship of the parties.
- (7) Encryption ensures secure data communication.

E-disputes that can be resolved through ODR are of diverse categories namely, Sale/ purchase disputes, auction, software development, construction license agreement, cyber squatting, consumer complaints, copyright, defamation trade secret, and could involve issues like censorship, access, privacy, fraud, deceptive trade practice and so on and so forth. The methods or techniques of ODR are basically same as ADR although we could prefix an "E" to them and they could be called as e-mediation, e-conciliation, e-arbitration, e-minitrial, and so on and so forth. The Swiss Supreme court has decided that arbitrators need not meet in person and are free to conduct deliberations by electronic means, including e-mail, provided precautions are taken " the only mandatory requirement is that all the arbitrators must participate in a real way in each discussion and decision."

E-mediation has been quite successful (Jeffrey K Adjunct professor at Pepperdine University Law School and a Private Mediator recounts a case he handled a few years ago, CPR news monthly alternatives, Vol. 4, No 10 Nov 96). The online ombudsman office in Massachusetts also reports experience of online mediation since it was set up in 1996. Several other online mediation services have also been established recently in U.S and Canada including the Cyber Tribunal in Montreal whose services are offered free of charge. At present, there are already a number of ODR service providers conducting ODR successfully in a wide range of E-disputes. In the U.S the first website to offer online settlement of financial claims was [cybersettle](#), followed by [clicknesttle](#).. [cybersettle](#) deals with insurance claims, [clicknsettle](#) with any type of monetary claims. BBB Online is developing the online handling of consumer complaints in the U.S. Gimmeabid dealer auction site, [www.gimmeabid.com](#) provide services to facilitate dispute resolution between buyers and sellers. There are web sites like [www.mediate.com](#), [www.novajorum.com](#), [www.icaarhouse.com](#), [www.etricubunal.com](#), [www.hellobrain.com](#), [www.virtualmagistrate.org](#) Providing ODR services across the globe effectively pertaining to multitude of e-disputes. [www.emediator.com](#) is first online dispute resolution service provider pertaining to business/commercial and personal disputes.

WIPO has already developed an ODR system for administering commercial disputes involving intellectual property. To be administered by WIPO Arbitration and Mediation center, The WIPO system is used for disputes involving internet domain names. Domain names, in simple words, are an easy to remember alias which point to a specific IP address. It is a unique name used to identify,

among other things, a specific website, e.g. www.indiaonline.com WIPO has framed the Uniform Domain name dispute resolution policy which was adopted by Internet Corporation for Assigned Names and Numbers on 26 August, 1999.

Although the policy provides that most domain name disputes will be resolved by the courts, it also calls for administrative dispute resolution proceedings to enable streamlined economical resolution of disputes arising from alleged abusive registrations. Under the policy, each administrative proceeding will be administered by a dispute resolution service provider approved by ICANN. At present, there are four domain name dispute resolution service providers that have been approved by ICANN, namely, WIPO, National arbitration forum, e-Resolutions, CPR institute for dispute resolution. These service providers give effect to UDRP policy and in addition to it follow their own supplemental rules to administer and provide arbitrators for disputes alleging abusive registration. WIPO Arbitration and Mediation Center and ICANN were recently awarded the 2000 CPR award for excellence in ADR for its Domain name dispute resolution service.

At this point it is pertinent to note the main features of the ICANN policy. The ICANN policy is between the registrar and its customer. Thus, the policy uses "we" and "our" to refer to registrar and it uses "you" and "your" to refer to domain name holder. This policy has been adopted by all accredited domain name registrars for domain names ending in com, net, org. It has been adopted by certain managers of country code top level domains (e.g. nu, .tv, .ws)

Main Features of ICANN Policy

1. Registrars receiving complaints concerning domain names they have registered on trademarks or service marks will take no action (i.e cancellation, transfers, changes to domain names) until they receive instructions from the domain name holder or any order of a court arbitrator, or other neutral deciding the parties dispute.
2. There is a mandatory administrative proceeding in the event that complainant asserts to ICANN approved service provider that domain name of the party is identical or confusingly similar to a trademark or service mark in which the complainant had rights, and the party has no rights or legitimate interest in respect of domain name, or domain name of the party has been registered and is being used in bad faith.
3. Neutral persons selected from panels established for it decide the dispute which is entirely administered online by the approved dispute resolution service providers.
4. Procedure is handled online- takes less than 45 days- costs about dollar thousand fees to be paid to entities providing the neutral persons.
5. Parties to a dispute can also opt to go to a Court (before administrative proceeding commences) to resolve their dispute or contest the outcome of the procedure within 10 days from the date of its decision.

The world today acknowledges the accomplishment of WIPO online dispute resolution system. It has extended to thousands of internet users easily accessible and reliable means of dispute resolution and delivered substantial justice in a very short span of time. There are a number of cases of domain name disputes which have been successfully resolved online. A land mark case in the Indian context is the TATA case wherein WIPO Arbitration and Mediation center in its administrative panel decision held that the domain name "tata.org" standing in the name of the Advanced Information Technology Association, Mumbai should be transferred to the complainant being Tata Sons Ltd. As it was a bad faith registration. Another recent case decided by WIPO is the Maruti Udyog Limited v Maruti Software Pvt Ltd wherein it was held that the respondents domain name "marutionline.com" is identical to trademark name MARUTI in which complainant has rights, the respondent has no

legitimate interest in domain name and it is a bad faith registration. The panel decided, that the domain name "marutionline.com" should be transferred to the complainant. In this way many e-disputes in the present times are being amicably settled without having to resort to cumbersome process of litigation and the same is done expeditiously at more convenience and at reduced costs.

Conclusion

It is definite that this journey from ADR to ODR has been extremely fascinating. While it invokes an ever challenging thought process in each one of us, it stimulates us to ponder over certain issues that are currently emerging and will very soon aid in improvisation and extension of ODR system application to new areas worldwide. Law which exists as of today in its binding force can be categorized in three layers. The basic layer which can be said to constitute the first layer is the domain of National/domestic law which is bound by territorial/physical boundaries. The third layer can be said to comprise of International legislative texts which serve as model laws and help nations modernize adapt or adopt or amend or make more uniform their domestic laws e.g UNCITRAL has framed laws on procurement of goods, construction and services, law on International credit transfers and laws that are more procedural laws by nature as that of International commercial arbitration. The second layer is a new and emerging layer that has helped bring about uniformity of laws worldwide and has a binding force and is enforceable everywhere such as the Uniform dispute resolution Policy adopted by ICANN for resolution of domain name disputes.

With the world becoming closer and free of physical boundaries through the virtual world of cyberspace and internet, there is certainly a great scope of bringing about uniformity in laws and their application and uniformity in procedures adopted to resolve disputes between individuals across the globe. Apart from success of ODR mechanisms, it would not be a far fetched idea to conceive of an online International Court of justice to meet the demands of e-disputes though it would require political reconciliation between main trading blocks and will take some time. Within European Union there have been already developments to examine provision of mediation and arbitration services for electronic commerce through National Chambers of Commerce. In some time, an organization or system of law could find its way to regulate and determine the bulk of e-disputes through uniform means. Considering the effectiveness and desirability of ODR, online arbitration/mediation should be introduced in all model international legislative texts, national laws as an internationally accepted uniform method of dispute resolution. To sum up in a sentence. ODR system in essence not only offers a promising mechanism of dispute resolution worldwide, but serves as a facilitator of global harmony and a wholesome e-commerce interaction and growth!