

ARBITRATION

MEDIATION

CADR JOURNAL OF DISPUTE RESOLUTION

*Raising Awareness on Alternative Methods of
Dispute Resolution*

NEGOTIATION

CONCILIATION

Volume I Issue I 2021

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Thanks are due to our Editorial team and our volunteers – Prof. (Dr.) Ruhi Paul, our Editor-in-Chief, to our Managing Editors, Abhinav Hansaraman and Hardik Baid, and our Editors – Akanksha Mathur, Abhishek Jain, and Sanchita Bhat.

EDITORIAL NOTE

We are delighted to introduce Centre for ADR's new Journal of Dispute Resolution (CJDR). CJDR is the first online Journal of the CADR and it aims to publish truly interdisciplinary research on issues related to dispute resolution and settlement. In 2017, ADR Society of NLU, Delhi has been reorganized as the Centre for ADR. CADR has been working towards promoting ADR methods through training students and undertaking other activities.

Disputes are inevitable part of human relations and methods of its efficient resolution is continuously evolving. Across the world people are involved in research as to how disputes can be resolved effectively and thereby relationships can be improved. CJDR is a humble attempt on part of CADR to contribute towards this larger global agenda. CJDR will provide a platform for sharing up-to-date, high-quality and original research papers alongside contemporary and insightful reviews. This is a biannual online Journal. In the coming editions all types of papers will be subject to the Journal's double-blind review process. However, the pieces in this edition are only by invitation.

In this Issue of the Journal, we present to you articles on various issues of contemporary relevance like issues regarding pre-arbitral steps, online Mediation in India, appointment of arbitrators, conflict of interest of arbitrators, attributability of wrongful conduct in Investment Arbitration and fundamental concepts in arbitration and issues of non-signatories. We hope this Issue of the Journal will be able to excite your mind to explore the realm of ADR further.

We invite you to be a part of our journey to take the research in this area a notch higher by submitting your papers, case comments, book reviews, either individually or collaboratively. We thank you in advance for your contribution to the Centre for ADR Journal of Dispute Resolution.

- *Editor-in-Chief*

FOREWORD

WHY ADR, AND WHY NOW?

- *John G. Shulman**

Let's say you have a dispute, and you believe you need a lawyer to help you "win" the dispute. Perhaps your dispute is over land. Or maybe it involves an important environmental or human rights issue. Or it could be a business dispute, or a family dispute. Fair enough, sounds like you need a lawyer.

But before we dive into the legal issues that may help determine the outcome of your dispute in the legal system, there are some questions you may want to consider...

For example, do you have a lot of extra money to spare? The legal system is costly, and you will most likely be asked to do your part to pay for your exposure to the legal system.

Also, are you ready to ride waves of emotions, like frustration, outrage and anger? If you think you are angry now, just wait to see what the legal system can do to turn your dispute (and your already bad relationship with the other party) even worse.

You will have plenty of time to absorb these negative emotions since you will most likely have to wait a decade or more to get a "final" decision from the legal system that purports to resolve your dispute – the judicial decision may help you remember what the original dispute was about so many years ago.

Perhaps you will be satisfied by the decision and call it — as the legal system does — "justice."

But as likely, after paying all that money, and waiting all that time, you may lose your case. And the legal system will also call your loss, "justice."

So you gambled a lot of money and got a lot older while your case was pending. But regardless of what the legal system decides with regard to your dispute, will you really be any wiser?

* John G. Shulman is JD, Harvard Law School and President of Alignor. If you would like to collaborate with or correspond with the author, he can be reached at jshulman@alignor.com.

These questions may seem provocative, and even cynical or impertinent, especially coming from a lawyer. But I have been around long enough and seen enough in a career as a human rights lawyer to believe that we as a profession had better start considering these questions and yes, start answering them. If we do not, we will render ourselves obsolete when people decide how best to resolve their disputes.

Before we go further, I will be the first to say we do need lawyers and a functioning legal system. In fact, for the most vulnerable among us, for those courageous enough to challenge the abuses by those with power, the legal system may be our only and best chance for meaningful justice.

Yet the courts should not, indeed cannot, be our only avenue for seeking justice and resolving disputes. We as lawyers must become advisers who help our clients solve problems in innovative, timely, effective ways. For example, rather than take a business dispute to court, why not try to negotiate a resolution first? Or if a family has conflict over land, why not bring in community elders or a mediator to help family members talk and listen to each other? While some forward-thinking lawyers are indeed already doing these things, more of us should begin to think this way.

Simply put, a lawyer's skills should extend beyond writing briefs, arguing in court and reassuring our clients that justice will be done if only they are patient and believe...We as a profession should develop and promote the skills required for resolving conflict, and promoting social justice and human rights.

And before you object that a lawyer's pecuniary and professional interests will be harmed by helping clients solve difficult problems in innovative, timely and effective ways, I can show you scores of lawyers who are making a good living, and more important "living good," employing these skills.

If we are truly to address the conflicts, disputes and injustices – big and small – that plague and bedevil us individually and as societies, then we must find new (and rediscover some old) ways to listen and understand each other, explore creative solutions, and understand the risks (and opportunities) associated with conflict.

While courts will undoubtedly play a role, it will still take legions of empowered advocates using wide ranging processes of negotiation and informal conflict resolution to address global climate change, social and economic inequality and injustice, racism, sexism and the manifold other conflicts and pressing issues of our time.

In sum, we as lawyers must develop and share the skills required of us *and our clients* to become proficient negotiators and problem solvers. We must partner with and empower our clients to become full participants in the resolution of their conflicts and disputes. Only in the legal profession, do we describe such skills as “alternative” dispute resolution.

The rest of the world calls it “*life*.”

ONLINE MEDIATION IN INDIA

- Sahil Kanuga & Aparimita Pratap*

ABSTRACT

Online Dispute Resolution (“ODR”) has been the disruptive technology of the decade that has gained even more prominence with the world going into lockdown due to the COVID 19 pandemic. The year 2020 experienced an international exodus from the traditional forms of dispute resolution to ODR on virtual platforms. India too realized the need to strengthen ODR in order to make dispute resolution accessible to all and to reduce the burden on courts. The Niti Aayog Expert Committee on ODR released its draft report “Designing the Future of Dispute Resolution: The ODR Policy Plan for India” (“**Niti Aayog Draft Report**”), in October 2020 for further discussions.¹ The Niti Aayog Draft Report is reflective of the future changes that the judiciary and the government may bring to further the development of ODR in India. This article focuses on understanding the changing landscape of dispute resolution to online platforms,² ODR and specifically online mediation (“**Online Mediation**”).

This article also aims to understand Online Mediation, its development and contemporary usage, probable benefits, drawbacks and solutions for the problems determined. In the absence of a central legislation governing mediation, concerns have been raised regarding the future of practices like Online Mediation. The ambiguity should be resolved and the central legislation on mediation that is currently being drafted, should incorporate structural changes required to accommodate Online Mediation.

* Sahil Kanuga is Co-Head, International Dispute Resolution & Investigations Practice at Nishith Desai Associates; Aparimita Pratap is Member, Dispute Resolution Team at Nishith Desai Associates

¹ Niti Aayog Expert Committee on ODR, *Designing the Future of Dispute Resolution: The ODR Policy Plan for India* (2020)

² Shreya Tripathy and Tarika Jain, ‘Caseload During COVID-19 (April 2020): A Look at the Numbers’ (*Vidhi Centre for Legal Policy*, 20 July 2020) <<https://vidhilegalpolicy.in/research/supreme-courts-caseload-during-covid-19-april-2020-a-look-at-the-numbers/>> accessed 5 April 2021

I. INTRODUCTION TO ODR AND ONLINE MEDIATION

ODR is the use of information and communication technologies (“**ICT**”) as a primary platform to enable parties to resolve their dispute.³ ICTs include audio-visual tools such as *telephones, smart phones, LED screens, spread sheets, e-mail and messaging applications* that *collect, store, use and send data electronically*.⁴ ICTs used in ODR are required to be of a standard that can conduct the dispute resolution process without requiring the parties to meet physically.⁵ However, the Niti Aayog Draft Report has observed that in the context of India, virtual courts do not come under the ambit of ODR as ODR is a process that is used before a dispute is taken to court for adjudication.⁶ It was also observed that ODR does not have one formalized process and any of the Alternative Dispute Resolution (“**ADR**”) mechanisms outside of courts can be considered to be ODR if they are conducted with the use of ICTs.

Mediation is a popular form of ADR that is once again gaining popularity around the globe. There is no one definition of mediation that is globally accepted; it is often defined using the basic tenets of how it is practiced. Mediation is a confidential interest-based private process of resolving disputes through a neutral third party that facilitates discussions between the parties in conflict, to reach an amicable settlement. A mediator is often compared to a facilitative tour guide, who holds the map of the place, but the decision on what places to visit is self-determined by the tourists.⁷ The distinctive trait of the process of mediation is that parties usually choose this process voluntarily, i.e., if at any point either of the parties wants to discontinue the process, they will be allowed to do so without prejudice. Further, the role of the mediator is not adjudicatory and therefore, a settlement can only be reached by the parties themselves.

³ UNCITRAL, *Technical Notes on Online Dispute Resolution* (April 2017) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf> accessed on 31 March 2021

⁴ cf Niti Aayog Draft Report (n 1) 4

⁵ cf Niti Aayog Draft Report (n 1) 6

⁶ cf Niti Aayog Draft Report (n 1) 10

⁷ Thomas H. Smith, ‘Do the Experts Mean What Their Metaphors Say? An Exploration of Metaphor in Mediation Literature’ (2003) First International Biennale on Negotiation, Paris

Online Mediation is a form of ODR and is not a novel concept internationally.⁸ It dates back to July 1996, when a web-page was created by a local in the state of Kansas, USA, who published news by copying it verbatim from the radio, television, newspapers. The editor of a local media house accused him of copyright infringement. The Massachusetts Information Technology and Dispute Resolution Center acted as a mediator in this dispute and facilitated the parties in resolving their dispute through only electronic means like e-mail, Skype, etc.⁹ Since the advent of Online Mediation, it is widely practiced across the world and is developing expeditiously.¹⁰

Part **II** of this article expounds on the definition of ODR and its distinctiveness from ADR on the basis of the primal role played by technology in ODR processes. Part **III** traces the development of ODR and Online Mediation internationally as well as in the Indian context and provides an understanding of the functioning of various ODR and Online Mediation platforms. Part **IV** expands on an overview of the legislative framework surrounding mediation in India. Part **V** discusses the probable benefits of Online Mediation including cost and time efficiency, elimination of bias etc. Part **VI** discusses the drawbacks and challenges faced by Online Mediation, including the enforceability of private mediation settlement agreements, protection of data security and low accessibility and digital literacy. Part **VII** presents a conclusion on the topic with some policy recommendations that can be implemented.

II. ADR VIS-A-VIS ODR

ADR is commonly understood as a process of resolving disputes outside of traditional court room litigation.¹¹ It includes arbitration, conciliation, negotiation, mediation and other formal or informal mechanisms such as through an ombudsman.¹² Therefore, ODR is comprehended to be

⁸ Noam Ebner, 'e-Mediation' in Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy, *Online Dispute Resolution: Theory And Practice - A Treatise On Technology And Dispute Resolution* (1st edn., Eleven International, 2011) 369, 370, 397

⁹ Irakli Kandashvili, 'Mediation and Online Dispute Resolution (ODR) as an Innovative Form of Dispute Resolution' (2018) *J Law* 94; Christopher N. Candlin, Vijay K. Bhatia, *Discourse and Practice in International Commercial Arbitration: Issue, Challenges and Prospects* (1st edn., Routledge, 2016) 213

¹⁰ *ibid.*

¹¹ Cornell University, 'Alternative Dispute Resolution' <https://www.law.cornell.edu/wex/alternative_dispute_resolution> accessed 5 April 2021

¹² *ibid.*

an ADR process that is primarily conducted using ICT platforms.¹³ The level of involvement and dependency on the ICTs demarcate e-ADR and ODR as documented in the Niti Aayog Draft Report.¹⁴ The role of ICTs should be such that without their aggregate usage, the dispute resolution process cannot be conducted.¹⁵ Ancillary use of ICTs, such as a few hearings or meetings conducted online, exchange of emails in support of the primary form of physically conducted dispute resolution, etc., would not ideally qualify as ODR.

Legal scholars such as E. Katsh and J. Rifkin have referred to technology as a “*fourth party*” in the ODR process, following the two dispute holders and one facilitator.¹⁶ This school of thought propounds that technology performs an exclusive and distinct role in ODR processes, therefore are *not just used* but in fact *function independently*.¹⁷ A similar school of thought asserts that mainstream technologies such as email or Skype and more sophisticated technologies/platforms created specifically for ODR processes should be treated differently, with only the latter falling under the ambit of ODR.¹⁸ The reason behind the same is that unlike traditional ICTs, ICTs created to cater to the specific needs arising in ODR processes would generate added value to the ODR process. There are technologies such as The Mediation Room that are friendlier for ODR processes and provide services such as breakout rooms for private caucuses, artificial intelligence moderated software to assess proposals, etc.¹⁹

However, in the Indian context, it is important to understand the constraints caused due to low accessibility of ICT infrastructure and abysmally low statistics on digital literacy. Due to these, a strict understanding of ODR may not be entirely applicable in India and a hybrid system

¹³ cf UNCITRAL (n 3) 4 “*ODR requires a technology-based intermediary’ i.e. an ‘ODR platform’*”; Colin Rule, ‘Is ODR ADR’ (2016) 3 IJODR <<http://www.colinrule.com/writing/ijodr.pdf>> accessed 1 April 2021

¹⁴ cf Niti Aayog Draft Report (n 1) 10

¹⁵ Victor Terekhov, ‘Online Mediation: A Game Changer or Much Abo about Nothing’ (2019) 2019 Access to Just E Eur 33; L Zisis, ‘Disputes in the Digital Era: The Evolution of Dispute Resolution and the Model ODR System’ (2015) Universite de Toulouse 153

¹⁶ cf Terekhov (n 14) 37; E Katsh, J Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, 2001) 9

¹⁷ *ibid.* Terekhov (n 14) 37

¹⁸ cf Terekhov (n 14) 37

¹⁹ The Resolver <<https://www.theresolver.com/video>> accessed 5 April 2021

that assesses aggregated usage of ICTs in an ODR process would have to be accommodated while delineating ODR and e-ADR.²⁰

III. DEVELOPMENT OF ODR AND ONLINE MEDIATION

ODR was popularized when the e-commerce industry developed a dispute resolution model that preferred ODR, most commonly Online Mediation.²¹ The disputes in the e-commerce industry range from sales, purchases and other services and include both *business-to-business* and *business-to-consumer* transactions.²² The adoption of ODR by the e-commerce industry can be attributed to 1) the multi-jurisdictional consumers and business partners; 2) technological knowledge possessed by e-commerce websites; and 3) level playing field created between the consumer and the e-commerce business, as there is no face-to-face interaction, thus, eliminating chances of intimidation.²³ Consequently, some estimation projected thirty percent savings of time and money in Online Mediation.²⁴

One of the earliest programmes on Online Mediation was founded by the University of Massachusetts.²⁵ The programme generated conference rooms for parties online where they could communicate virtually in the presence of a neutral third-party ombudsperson.²⁶ Due to the widespread success of the programme, eBay partnered with the University of Massachusetts to develop a pilot program that would provide a mechanism for resolving disputes related to online auctions.²⁷ The pilot project successfully managed two hundred disputes in two weeks and by

²⁰ cf Niti Aayog Draft Report (n 1) 65

²¹ Dafna Lavi, 'Three Is Not a Crowd: Online Mediation-Arbitration in Business to Consumer Internet Disputes' (2016) 37 U Pa J Int'l L 871

²² A S Shetty, R R Pathrabe et al, 'Legal Issues in eCommerce' <https://www.academia.edu/8148042/LegalIssues_inE-Commerce/> accessed on March 31, 2021

²³ cf Lavi (n 20) 875-877

²⁴ cf Terekhov (n 14) 41

²⁵ Joseph A. Zavaletta, 'Using E-Dispute Technology to Facilitate the Resolution of E-Contract Disputes: A Modest Proposal' (2002) 7 J. Tech : & Pol'y 2 13

²⁶ cf Zavaletta (n 24)

²⁷ Katsh, Rifkin (n 15) 10

2010, eBay was managing over sixty million disputes per year.²⁸ Subsequently, programmes such as SquareTrade, Cybersettle, Smartsettle and the Mediation Room were developed to realize the potential of the ODR market.²⁹

Programmes for Online Mediation may use a computer program entirely as the mediator.³⁰ One of the examples is Cybersettle, a programme that uses a double blind-bidding format for mediation. Parties are required to file their claim online and provide confidential offers for settlement. The programme then sends an email to the opposite party notifying them of the claim and allowing them to file confidential counter offers. Thereafter, the programme evaluates the offers put forth by both the parties and in the event both the offers and counter offers are in the range of a mutually-acceptable settlement, the program offers a settlement that is average of the two offers which the parties may then choose to accept or reject.³¹ It is estimated that New York City saved over 11 million USD in a single year by using Cybersettle to reduce their backlog of cases, especially personal injury claims.³² It also reduced settlement time by eighty-five percent.³³

The Supreme Court of India's flagship e-Courts Mission Mode Project ("**e-Courts Project**") was instituted under 'National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary'.³⁴ The e-Courts Project aims to establish uniform ICTs throughout the country and across all levels of the judiciary. It has successfully

²⁸ Ethan Katsh, Janet Rifkin et. al. 'Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of eBay Law', (2000) Ohio SJ DR 705 <<https://pdfs.semanticscholar.org/952e/c0a7b70bb553ddb2cb15d8a28b977f9a6fcd.pdf>> accessed on 30 March 2021

²⁹ John Chopyk, 'Serving Justice Online: Online Dispute Resolution as an Alternative to Traditional Litigation' (9 November 2018) <<https://lawless.tech/serving-justice-online-online-dispute-resolution-as-an-alternative-to-traditional-litigation/>> accessed on 5 April 2021

³⁰ Llewellyn Joseph Gibbons et al., 'Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message' (2002) 32 N.M. L. Rev. 27-28

³¹ Cybersettle <<http://www.cybersettle.com/>> accessed on 1 April 2021

³² University of Missouri, 'Online Dispute Resolution: Other ODR Software' <<https://libraryguides.missouri.edu/c.php?g=557240&p=3832248>> accessed on 1 April 2021

³³ Daniel Hays, 'New York City Settling Claims via the Web' (10 March 2020) <<https://www.propertycasualty360.com/2004/03/10/new-york-city-settling-claims-via-the-web/?ref=navbar-next>> accessed on 1 April 2021

³⁴ E-Committee Supreme Court of India, *National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary* (2005) <<https://main.sci.gov.in/pdf/ecommittee/action-plan-ecourt.pdf>> accessed on 1 April 2021

installed proper ICT infrastructure in District Courts,³⁵ set up the e-Courts websites, created the National Judicial Data Grid and a unified Case Information System.³⁶ The e-Courts Project has also solidified ADR mechanisms such as Lok Adalats by conducting them on a large scale.³⁷ The successful ventures of the e-Courts Project blaze a trail for the development of ODR in India.

In the Indian context, ODR is a recent development that has emerged in the past decade. The Internet Corporation for Assigned Names and Numbers (“ICANN”) formulated a Domain Name Dispute Resolution Policy that provided for online administrative proceedings as the first mode of dispute resolution.³⁸ Similarly adopting ODR, the National Internet Exchange of India instituted the .IN Domain Name Dispute Resolution Policy in 2006 that prescribes for online arbitration based on written submissions only.³⁹ The Department of Consumer Affairs launched an online platform in 2016 called the Integrated Consumer Grievance Redressal Mechanism wherein companies volunteered to partner with the National Consumer Helpline and provide a direct interface for the consumers to raise their complaints and grievances with the companies.⁴⁰ In 2017, the Ministry of Law and Justice issued a statement asking government bodies to implement the use of ODR for resolving disputes.⁴¹ This prompted the Ministry of Micro Small and Medium Enterprises to launch their online portal called SAMADHAAN in 2018, for

³⁵ Ministry of Law and Justice <<https://pib.gov.in/PressReleasePage.aspx?PRID=1679933>> accessed on 5 April 2021

³⁶ E-Committee Supreme Court of India, *Objectives Accomplishment Report as per Policy Action Plan Document Phase II* (2019) <https://ecourts.gov.in/ecourts_home/static/manuals/Objective%20Accomplishment%20Report-2019.pdf> accessed on 1 April 2021

³⁷ E-Committee Supreme Court of India (n 35)

³⁸ ICANN, ‘Uniform Domain Name Dispute Resolution Policy’ (26 August 1999) <<https://www.icann.org/resources/pages/policy-2012-02-25-en>> accessed on 5 April 2021

³⁹ NIXI, ‘.IN Domain Name Dispute Resolution Policy (INDRP)’ (16 September 2020) <<https://www.registry.in/IN%20Domain%20Name%20Dispute%20Resolution%20Policy%20%28INDRP%29>> accessed on 5 April 2021

⁴⁰ National Consumer Helpline, ‘Integrated Grievance Redressal Mechanism’ accessed on 5 April 2021

⁴¹ Department of Justice, *Online Dispute Resolution through Mediation, Arbitration and Negotiation* (2017) <<https://doj.gov.in/sites/default/files/firm%20details.pdf>> accessed on 1 April 2021

addressing delay of payment disputes.⁴² In 2020, the Government of India launched the ‘Vivad se Vishwas Scheme’ for resolution of tax disputes through ODR.⁴³

The Indian ODR topography has seen the emergence of various independent ODR start-ups in the recent past. SAMA, formerly known as ODRways, is one such start-up that is recognized as an ODR service provider by the Department of Justice.⁴⁴ It won the E-ADR Challenge organised by a non-profit organisation Agami in collaboration with ICICI Bank and is working for the pilot ODR platform of ICICI Bank that is projected to resolve over 10,000 disputes in its first phase.⁴⁵ SAMA provides their own in-house platform for conducting various ODR processes such as arbitration, conciliation and mediation. Post the pandemic, the State Legal Services Authorities (“SLSA”) have been conducting e-Lok Adalats under the e-Courts Project. SAMA has collaborated with the SLSA of Delhi,⁴⁶ Rajasthan,⁴⁷ Gujarat,⁴⁸ and Bihar⁴⁹ to provide technical support in holding online Lok Adalats and has assisted in resolving over 50,000 disputes with settlement value crossing over INR 400 Crores.⁵⁰ Although start-ups like SAMA offer Online Mediation services as well, they focus more on conciliation because the Indian law does not expressly provide for the enforceability of settlement agreements entered into through private mediations.

⁴² Press Information Bureau Delhi, ‘Major policy initiatives and achievements of the Micro, Small & Medium Enterprises (MSME) in 2017’ (21 December 2017) <<https://pib.gov.in/PressReleaseDetail.aspx?PRID=1513711>> accessed on 1 April 2021

⁴³ cf Niti Aayog Draft Report (n 1) 84

⁴⁴ Department of Justice (n 40)

⁴⁵ Agami, ‘Creating Online Dispute Resolution (ODR) solutions to resolve millions of disputes outside the courts’ <<https://agami.in/odr/>> accessed on 1 April 2021

⁴⁶ Delhi Legal Service Authority, ‘E-Lok Adalat - 8th August Report’ <<https://drive.google.com/file/d/1ZaffZv2Y0SJxdJuIIUVNWdxzcrFId24K/view>> accessed on 5 April 2021

⁴⁷ Rajasthan Legal Service Authority, ‘E-Lok Adalat – 22nd August Report’ <https://www.sama.live/media/Rajasthan-Lok-Adalat-Report.pdf>> accessed on 5 April 2021

⁴⁸ Gujarat Legal Service Authority, ‘Pre-Litigation Online Lok Adalat For Gujarat’ <<https://www.sama.live/media/Gujarat-Lok-Adalat-Report.pdf>> accessed on 5 April 2021

⁴⁹ Bihar Legal Service Authority, ‘Online Lok Adalat For Bihar’ <<https://www.sama.live/media/Bihar-Final-Report.pdf>> accessed on 5 April 2021

⁵⁰ SAMA, ‘Online Lok Adalat’ <<https://www.sama.live/lokadalat.php>> accessed on 5 April 2021

IV. LEGISLATIVE FRAMEWORK OF MEDIATION IN INDIA

The United Nations Commission on International Trade Law (“UNCITRAL”) granted international recognition to mediation as a legitimate alternative dispute resolution mechanism and developed the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (“**Model Law on Mediation**”).⁵¹ The Model Law on Mediation along with the Convention on International Settlement Agreements Resulting from Mediation (“**Singapore Convention**”) were approved by UNCITRAL on June 26, 2018. Subsequently, the United Nations General Assembly adopted the Singapore Convention on December 20, 2018⁵² and opened it for signature on August 7, 2019. As of March 31, 2021, fifty-three countries, including India,⁵³ have signed the Singapore Convention and six countries have ratified it.⁵⁴

Even though India has signed the Singapore Convention, it has not adopted the Model Law on Mediation.⁵⁵ The Supreme Court, in *M. R. Krishna Murthi v. The New India Assurance Company*, recognized the dire need to formulate a central legislation on mediation and recommended the Central Government to do so.⁵⁶ In January 2020, the Supreme Court, through its Mediation and Conciliation Project Committee, set up a panel (“**Mediation Panel**”) to draft a central legislation on mediation providing legal recognition to mediation settlement agreements. The Mediation Panel is currently being headed by Mr. Niranjan Bhatt.⁵⁷

⁵¹ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018

⁵² United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018)

⁵³ United Nations Treaty Collection, Status https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=en accessed on 31 March 2021; India signed the Singapore Convention on 7 August 2019

⁵⁴ *ibid.*

⁵⁵ *ibid.* India has not yet ratified the Singapore Convention.

⁵⁶ *M. R. Krishna Murthi v. The New India Assurance Company Ltd.* AIR 2019 SC 5625; In *Salem Bar Association v. Union of India* (2003) 1 SCC 49, the Supreme Court had requested the Law Commission to prepare draft model rules for ADR and Mediation.

⁵⁷ Economic Times, ‘[Supreme Court forms committee to draft mediation law, will send to government](#)’ (19 January 2020) accessed on 26 March 2021; Niranjan J. Bhatt is a senior advocate in Ahmedabad, the founder/Managing Trustee of the Institute for Arbitration Mediation Legal Education and Development and a Convener of the Ahmedabad Mediation Centre

Under the current framework in India, mediation can be divided into court-mandated mediations, statutory mediations and private mediations. By an amendment to the Code of Civil Procedure, 1908 (“CPC”), Section 89 was enacted to provide for the court to refer a dispute to mediation where the parties seem to be amenable to a settlement.⁵⁸ High Courts, such as Delhi,⁵⁹ Allahabad,⁶⁰ Hyderabad,⁶¹ etc. have formulated their own mediation rules to govern Court mandated mediations under the CPC. Sub-section 2 (d) of the Section 89 gives legal enforceability to settlements arrived upon by parties through mediation. As practice, the Court enforces the settlement agreement by issuing it as a final and binding decree.

Statutory mediation refers to mediation that is mandated under statutes.⁶² The Indian Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (“Commercial Courts Act”) was amended in 2018 which introduced Section 12A that makes it mandatory for a party to exhaust the remedy of mediation before initiating court proceedings under the Commercial Courts Act.⁶³ Sub-section (5) of Section 12A accords the mediation settlement agreement the same status as an arbitral award by consent under Sub-section (4) of Section 30 of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”).⁶⁴ Various other statutes such as the Industrial Disputes Act, 1947,⁶⁵ the Companies Act, 2013,⁶⁶ and the Consumer Protection Act, 2019,⁶⁷ also provide for mediation.

Private mediation is a process that has not been referred or mandated by a court or statute and the services are offered by independent mediators or institutional mediation centres. The absence of a regime recognizing private mediation settlement agreements is disconcerting to the use of

⁵⁸ Code of Civil Procedure 1908, s 89

⁵⁹ Mediation and Conciliation Rules 2004

⁶⁰ Uttar Pradesh Civil Procedure Alternative Dispute Resolution Rules 2009

⁶¹ Alternative Dispute Resolution and Mediation Rules 2017

⁶² Shweta Sahu & Nikita Pattajoshi, ‘Mediation: The New Trump Card In Commercial Dispute Resolution?’ (2021) 1 NUJS JODR 1

⁶³ Indian Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, s 12A

⁶⁴ Arbitration and Conciliation Act 1996, s 30(4)

⁶⁵ Industrial Disputes Act 1947, s 4(1)

⁶⁶ Companies Act 2013, s 442

⁶⁷ Consumer Protection Act 2019, s 37 (2)

Online Mediation. Online Mediation also does not find any place in any of the existing rules regarding Court-mandated or Statutory mediation. It would be vital that the central legislation being drafted on mediation accommodates the quintessential features of an Online Mediation that vary distinctly from traditional forms of mediation as discussed in the below sections.

V. PROBABLE BENEFITS OF ONLINE MEDIATION

Unlike traditional mediation, Online Mediation must focus on technology and its benefits and drawbacks to the mediation process in order to ensure effectiveness and fairness. To make this assessment, it is imperative to discuss the recognized benefits of Online Mediation. First, the combination of technology and mediation make it possible for parties to save on costs related to travelling⁶⁸ for dispute resolution and for hiring legal advisors.⁶⁹ This is especially beneficial in international disputes wherein parties may be residing or working in different countries, in particular, disputes arising from the use of internet wherein users from across the world can utilize common online services.

Second, parties also save time that is generally spent in the court process including travelling to appear for hearings. In 2019, the India Justice Report was published which stated that on an average, cases in district courts took 5 years or more for even a simple resolution because of long pendency of cases.⁷⁰ This can, *inter alia*, be attributed to unwarranted adjournments due to the absence of parties and numerous staff vacancies in the judicial and administrative departments.⁷¹ In the process of Online Mediation, the presence of the parties can easily be secured as the scope of excuses to seek adjournments is limited. Further, since it is usually a private form of dispute

⁶⁸ Padmini Baruah, 'Paths to Justice: Surveying Judicial and Non-judicial Dispute Resolution in India' (Daksh 2017) <https://dakshindia.org/Daksh_Justice_in_India/12_chapter_02.xhtml> accessed on 5 April 2021

⁶⁹ Joseph W. Goodman, 'The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites' (2003) 2 Duke Law & Technology Review
<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr>> accessed on 1 April 2021

⁷⁰ Subrat Das and Others, 'India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid' (Tata Trust 2019) <<https://www.tatatrusters.org/upload/pdf/overall-report-single.pdf>> accessed on 1 April 2021

⁷¹ Dushyant Mahadik, 'Analysis of Causes for Pendency in High Courts and Subordinate Courts in Maharashtra' (Administrative Staff College of India 2018) <<https://doj.gov.in/sites/default/files/ASCI%20Final%20Report%20Page%20641%20to%20822.pdf>> accessed on 1 April 2021

resolution, the load of cases on the mediators is not as burdensome and they are able to prioritize and focus on each mediation process leading to speedier resolution.

Third, it serves as a neutral platform that provides an equal level playing field to all the parties.⁷² The result of a mediation process is affected if parties are anxious to communicate with other participants belonging to different communities.⁷³ Online Mediation reduces the possibility of mediator and participant prejudice by protecting attributes such as race, age, gender, disability, etc. and allows the parties to concentrate on the pivotal points of the dispute rather than such biases.

Fourth, Online Mediation provides a more comfortable platform as it is voluntary, informal and confidential. Mediation focuses on the parties as opposed to their legal counsels, if any, and these parties are usually untrained individuals. Since the process of Online Mediation is conducted virtually, parties may take their time to think about their proposals without the fear of being judged on the basis of their body language and accordingly, may indulge in more thorough and logical discussions. E-commerce online mediation platforms reduce the power imbalance between the company and its consumer by eliminating the use of lawyers and face-to-face conversations which may be intimidating for an individual who is going up against a company with ample resources in their favour.

Fifth, Online Mediation is considered to be a step towards increasing 'ease of businesses'⁷⁴ and may be especially beneficial for businesses that can market themselves as consumer friendly.

Sixth, Online Mediation may be the most preferable form of dispute resolution in cases where there is a lacuna or ambiguity in law around the subject of the dispute. For example, online gaming has not legally developed in many jurisdictions and disputes may arise over in-

⁷² P Young, 'Online Mediation: Its Uses And Limitations' <<https://www.mediate.com/articles/young4.cfm>> accessed on 1 April 2021

⁷³ Carol Izumi, 'Implicit Bias and Prejudice in Mediation' 70 SMU Law Review 681 <<https://scholar.smu.edu/cgi/viewcontent.cgi?article=4696&context=smulr>> accessed on 1 April 2021

⁷⁴ NITI Aayog, 'Unlocking Online Dispute Resolution to Enhance the Ease of Doing Business' (8 August 2020) <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1644465>> accessed on 1 April 2021

game artefacts.⁷⁵ Since such artefacts are not real property under law but are valuable to an online gamer, Online Mediation may be best suited to resolve such disputes as it would provide an informal non-legal interface to the consumer and the company to discuss the issue.

VI. DRAWBACKS AND CHALLENGES WITH ONLINE MEDIATION

Traditional mediation is heavily reliant on interpersonal skills of the mediator to gain the trust of the parties. It is often said that a mediation is only as good as the mediator. The mediator ensures that a comfortable environment is created for the parties to communicate freely. It can be argued that a virtual interface makes it difficult for mediators to carry out their responsibilities effectively and build a trust channel with the parties. Parties may not cooperate or correspond regarding sensitive data thereby reducing the quality of the process.⁷⁶

Traditional Mediation also relies upon strategies that facilitate both parties to ‘*humanize*’ each other and understand differing point of views. The online interface may act as a barrier for the parties to ‘*humanize*’ the issues and resolve the dispute speedily and more effectively.⁷⁷ The use of Online Mediation is still being assessed for certain types of disputes such as family, matrimonial, child custody, etc. where there is a substantial interplay of emotions.⁷⁸

Mediators also lack effective control of the mediation process in Online Mediation. In Traditional Mediation, when heated discussions ensue during a mediation process, it is the responsibility of the mediator to maintain civility. This is done by either calling private caucuses or imposing cooling down periods on the parties. However, in Online Mediation there may be situations where the primary mode of communication is not under the control of the mediator. For example, an online mediation being conducted over email turned sour when parties started

⁷⁵ cf Terekhov (n 14) 44; Christina Sterbenz, ‘One of the most downloaded gaming apps is being sued for denying lives’ (Business Insider, 12 March 2015) <<https://www.businessinsider.in/One-of-the-most-downloaded-gaming-apps-is-being-sued-for-denying-lives/articleshow/46533953.cms>> accessed on 1 April 2021

⁷⁶ Rachel I. Turner, ‘Alternative Dispute Resolution in Cyberspace: There is More On the Line, Than Just Getting "Online,"’ (2000) 7 ILSA J. Int’l & Comp. L. 133, 147- 148

⁷⁷ cf Terekhov (n 14) 45

⁷⁸ *ibid*

corresponding with offensive and insulting emails that aggravated the conflict and the mediator could not ensure compliance.⁷⁹

Further, confidentiality is the most important and lucrative feature of a mediation process. Parties in disputes that involve the exchange of highly sensitive and confidential data may be apprehensive of Online Mediation due to the digital trails left post each mediation session, especially for data that is submitted in a written format and may be stored on the web server.⁸⁰ With a dramatic increase in cyber-attacks, the ambit of confidentiality should be widened and ethical responsibility to prevent such attacks has to be taken by the mediators.⁸¹ Practices have started incorporated mechanisms such as multi-layered authentication, encryption of textual data, use of virtual private network, etc. to protect confidential information exchanged during Online Mediation.⁸²

Structural imbalance and challenges such as inaccessibility of ICT services by the common public need to be tackled for Online Mediation to be a successful ODR mechanism. With ODR being a proponent of access to justice, it is not commonly accessible to the public due to 1) lack of ICT infrastructure and 2) lack of digital literacy. The majority of the population does not have the means to afford the proper ICT infrastructure required or possess the basic digital literacy for an effective ODR process. In the Indian backdrop, the digital divide is affected by factors such as gender, class, caste, age, ethnicity and geographical location.⁸³ Currently, digital literacy and access to ICT infrastructure is increasing rampantly in the urban areas and, contrastingly, is stagnant in the rural areas. The Internet India Report 2019 is reflective of the gender divide in digital literacy with women constituting only 1/3rd of internet users and women in rural areas constituting only twenty-eight percent of the internet users.⁸⁴ It also observed that the population

⁷⁹ S S Raines, 'Can Online Mediation Be Transformative? Tales from the Front' (2005) 22(4) Conflict Resolution Quarterly 449

⁸⁰ cf Terekhov (n 14) 46

⁸¹ A. Foote, 'Hackers are Passing Around a Megaleak of 2.2 Billion Records' accessed on 1 April 2021

⁸² Julian Granka Ferguson, 'Navigating Cybersecurity in ADR' (December 2020) <<https://www.mediate.com/articles/ferguson-cybersecurity.cfm>> accessed on 1 April 2021

⁸³ Charlotte Austin, 'Online dispute resolution – An introduction to online dispute resolution (ODR), and its benefits and drawbacks' (2017) 18 <<https://www.mbie.govt.nz/assets/00ddeb604/online-dispute-resolution-report-2018.pdf>> accessed on 1 April 2021

⁸⁴ IAMAI, 'India Internet 2019'(2019) <<https://cms.iamai.in/Content/ResearchPapers/d3654bcc-002f-4fc7-ab39-e1fbeb00005d.pdf>> accessed on 1 April 2021

above 40 years of age constitute only fifteen percent of the internet users, use of desktop and laptops is ten percent in an urban setting whereas it is three percent in rural areas and ninety-nine percent of the internet users access it through their mobile phones.⁸⁵

Additionally, there is no legislative clarity on the enforceability of settlement agreements under Online Mediation in India. This situation is further complicated when parties are spread across multiple jurisdictions and the enforceability of such settlement agreements is at the behest of the jurisdiction where enforceability is sought. This is precisely the gap in law that the Singapore Convention aims to address. The international framework on mediation is at its nascent stages and does not provide a compact legal backing making the parties apprehensive towards the process. Further, the international consensus on disputes arising out of the use of internet is not comprehensive and parties with multi-jurisdictional online disputes may face even more complex legal issues.

VII. WAY FORWARD

The primary step to legitimizing Online Mediation would be the enactment of a central legislation on mediation that also accommodates the features of Online Mediation. There should be an express recognition of Online Mediation settlement agreements and a framework governing the enforceability of such agreements.

Further, as the success of mediation as an effective tool to resolve disputes lies in the hands of a mediator, mediators should also be required to get some level of accreditation including mediation training along with training on the use ICTs. The ODR platforms, especially the ones that use computer softwares as mediators, should espouse the same standards as expected from professional mediators. This would, amongst other things, also assure that principles critical to parties such as those of neutrality and confidentiality are upheld even by the ODR platforms, making them more lucrative.

The policy governing Online Mediation should focus on increasing the access to ICTs, digital literacy and providing adequate training to the mediators.⁸⁶ While one can always argue as to

⁸⁵ *ibid.*

⁸⁶ Sarah Rudolph Cole and Kristen M Blankley, 'Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be' (2006) 38 U Tol L Rev 193

whose responsibility it is to make ICTs readily accessible to the public at low cost, a possible solution is for the government to partner with service providers to subsidize internet and other ICT requirements for parties using ODR platforms for dispute resolution. The government has already undertaken projects such as ‘Digital India’,⁸⁷ the BharatNet Project and the National Broadband Mission,⁸⁸ which aim to digitize public services and provide optic fibre connectivity to rural areas.⁸⁹ Further, the government has also instituted initiatives such as the Pradhan Mantri Gramin Digital Saksharta Abhiyan for increasing digital literacy.⁹⁰ The efficacious execution of these initiatives along with the e-Courts Project will be beneficial for the development of ODR and Online Mediation in India.⁹¹

The future of ODR will also be shaped by the rapid development of Artificial Intelligence (“AI”) and its integration in dispute resolution processes. Programmes are being developed that deploy smart mediators to curate specific responses to individuals based on situations.⁹² The Supreme Court is working on developing the Supreme Court Vidhik Anuvaad Software that would be powered by AI and have the capability to translate judicial documents from English to nine vernacular language scripts and vice versa.⁹³ If the results are fruitful, AI might increase its hold on the judicial process, in particular ODR, and would have to be regulated accordingly.

The fact remains that in a country like India where we have numerous disputes of all kinds, ODR has the potential to alter the dispute resolution landscape in many ways.

⁸⁷ Government of India, ‘About Digital India’ <<https://digitalindia.gov.in/content/about-digital-india>> accessed on 1 April 2021

⁸⁸ Department of Telecommunications, Ministry of Communications, Government of India, ‘National Broadband Mission’ <https://dot.gov.in/sites/default/files/National%20Broadband%20Mission%20-%20Booklet_0.pdf?download=1> accessed on 1 April 2021

⁸⁹ Press Trust of India, ‘All villages to be connected with optical fibre in 1,000 days: PM Modi’ (The Hindu, 15 August 2020) <<https://www.thehindu.com/news/national/all-villages-to-be-connected-with-optical-fibre-in-1000-days-pm-modi/article32361806.ece>> accessed on 1 April 2021

⁹⁰ Pradhan Mantri Gramin Digital Saksharta Abhigyan <<https://www.pmgdisha.in/>> accessed on 1 April 2021

⁹¹ cf Niti Aayog Draft Report (n 1) 86

⁹² Melanie Lefkowitz, ‘AI as mediator: ‘Smart’ replies might help humans communicate’ <<https://news.cornell.edu/stories/2020/03/ai-mediator-smart-replies-might-help-humans-communicate>> accessed on 1 April 2021

⁹³ Supreme Court of India, Press Release (25 November 2019) <<https://main.sci.gov.in/pdf/Press/press%20release%20for%20law%20day%20celebratoin.pdf>> accessed on 1 April 2021; Ajmer Singh, ‘Supreme Court develops software to make all its 17 benches paperless’ (Economic Times, 26 May 2020) accessed on 1 April 2021



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cadr@nludelhi.ac.in



**Centre for Alternate Dispute Resolution at National Law
University Delhi, Sector-14, Dwarka, New Delhi – 100078, India**