

## Online Dispute Resolution In India

by

Prathamesh D. Popat<sup>1</sup>

### Introduction

It is elementary knowledge both that disputes arise in society due to interaction amongst its members and that the greater and/or the more frequent the interactions amongst those with differing needs or conflicting interests, the higher the chances of disputes. The opening up of world markets – given their diversities - has been a contributor to the eruption of differences, misunderstandings and miscommunications, often culminating in complex disputes. With the advent of e-commerce and the Internet, the phenomenon of a 'Global Village' has been emphatically underlined. The unsavoury result, however, is that now we not only have disputes arising at a far greater pace than ever before but the same also entail even greater complexities due to their cross-border and cross-culture nature.

Courts all over the world are being challenged in the uphill task of matching and improving their disposal rates to the filing rates of new disputes. As a result, many courts have on their register matters which are awaiting disposal for years and, in some cases, even decades.<sup>2</sup> What makes the scenario truly i is that the very nature, or more appropriately, the *raison d'être*, of e-commerce is speed and cost-effectiveness which thus require that should a dispute arise, there must be a swift redressal thereof.

Here it can be observed that ingenious use of technology in general, and the Internet specifically, has resulted in turning an obstacle and problem into a stepping stone towards a healthy and harmonious marketplace. The Internet, which has initially been the cause of increase in disputes, has itself provided a new means to resolve not only the disputes generated due to its advent but also other disputes wherein it has had no role to play. It does through Online Dispute Resolution (ODR) in its various flavours.

ODR is viewed differently by different think-tanks but basically it is the employing of available communication technology to deliver ADR services or, to put it in another way, it is the implementation of ADR in an online environment. It hence logically follows that what is required for ODR to take off as the preferred form - and graduate into a primary form - of dispute resolution is, first, a legislative framework which, to begin with, is conducive to ADR and second, the easy access to technological infrastructure so as to afford all parties an equal opportunity for effective participation in the online proceedings of their chosen process of ADR. First, let us consider the various legislations that concern the concept of ADR and then look at the legal affordability of its implementation online.

---

<sup>1</sup> Counsel & Mediator, Bombay High Court – [popat@1stcounsel.com](mailto:popat@1stcounsel.com) [counsel@india.com](mailto:counsel@india.com)

<sup>2</sup> The Bombay High Court is currently taking up for final hearing Civil Suits which were filed in the '70s and '80s. The total number of Civil Suits pending disposal as on 1.1.2003 is 42508, only marginally less compared to the 45136 pending disposal as on 1.1.2000.

## THE STATUTES

A cursory look at the backlog of cases pending before the various courts in India<sup>3</sup> by itself provides sufficient reason to seriously consider bringing in some drastic reforms. One iniquitous measure, adopted by several States, was to create barriers at the entry-level, by increasing the Court Fees for various types of proceedings which are payable at the time of filing the same in the courts and tribunals. This has not only led to considerable resistance from various quarters but has also not had a noticeable impact in the desired direction, viz. a drastic reduction in the filing of fresh proceedings in the various courts and tribunals and has thus, inter alia, prompted the government to look elsewhere. In the last decade, there has been a gradual but paradigm shift in the legislative structure. Hitherto it had totally ignored alternate dispute resolution (ADR), whereas today it seeks to usher ADR to the center-stage.

### The Code of Civil Procedure, 1908

Section 89 of the Code of Civil Procedure, 1908 (the Code), in its original form, related to arbitration proceedings. With the enactment, in 1940, of a separate Act dealing with arbitration, the said Section was annulled by the Arbitration Act, 1940. A new 'Section 89' and related rules have been introduced by the CPC (Amendment) Act, 1999. This section reads as follows:

**S. 89. Settlement of disputes outside the Court.** – (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for –

- (a) arbitration;
- (b) conciliation;
- (c) judicial settlement including through Lok Adalat; or
- (d) mediation.

(2) Where a dispute has been referred –

- (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
- (b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of Section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
- (c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all other provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall

---

<sup>3</sup> <http://www.lawmin.nic.in/>

apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed;

#### **Order X**

**Rule 1A. Direction of the Court to opt for any mode of alternative dispute resolution** – After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

**Rule 1B. Appearance before the conciliatory forum or authority.** – Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

**Rule 1C. Appearance before the Court consequent to the failure of efforts of conciliation.** – Where a suit is referred under rule 1A and the presiding officer of the conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.

The Statement of Objects and Reasons<sup>4</sup> appended to the relevant Bill states with regard to this Section as follows:

“With a view to implement the 129<sup>th</sup> Report of the Law Commission of India and to make conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the court in which it was filed.”

It is thus clear that for any suit to proceed in court, it will first have to go through some mode of ADR. It must be understood that the statute does not make it mandatory for parties to actually resolve a dispute using ADR but it makes it mandatory, for parties seeking redress in a court, to first try to get their disputes resolved through an ADR mechanism of their choice. The court's direction in this regard, as per the Rules, would come at the stage of hearing the suit after the recording of admissions and denials. It is only when ADR fails that the Court would be empowered to entertain the claim, conduct a trial and dispose of the suit finally.

Undoubtedly, this legislative initiative is the boldest step taken thus far to counter the growing menace of court backlogs. Though confusing in its wordings, if implemented in earnest – in the spirit more than in the letter - these measures will effect a telling blow on delays in

---

<sup>4</sup> They usually accompany any new Bill seeking passage through the Houses of Parliament, explaining the underlying purpose for each Clause of the Bill.

dispensation of justice. While there are a few issues<sup>5</sup> which will need to be addressed for the smooth implementation of Court Annexed ADR, they shall, hopefully, be dealt with in good time once the lacunae become more apparent – which usually happens after more than just a few cases take an unexpected turn resulting in injustice or hardship due to the working of the provisions in their present form.

In order to enable a proper implementation of the underlying scheme of these provisions, various courts have started conducting training sessions for not only lawyers attached thereto but also for judicial officers. This will hopefully give the participants a better understanding of court annexed ADR which is a wholly new phenomenon for them.

Under these provisions, whilst some or the other regulatory framework exists for the rest of the mechanisms of ADR, none exists for mediation. Some Judges are hence finding it more convenient to refer parties to mediation and have even convinced parties before them to choose this mechanism over the others. Already a few matters in the Bombay High Court have been referred to mediators and some of them have been successfully settled.

When a matter is settled out of court, it is provided<sup>6</sup> that the Plaintiff, i.e. the claimant, would be entitled to a certificate from the court authorising him to receive back the full amount of the fee paid in respect of his Plaint.

### **The Arbitration & Conciliation Act, 1996**

Promulgated initially as an Ordinance, this Act (the 1996 Act) consolidates and streamlines the law relating to Arbitration in India by bringing under one statute the various provisions relating to arbitration which were earlier spread over three separate Acts<sup>7</sup>. It is drafted on the lines of the UNCITRAL Model Arbitration Law and the UNCITRAL Conciliation Rules and for the first time statutorily recognizes conciliation by providing elaborate rules of engagement.

The subtle difference in the 1996 Act with regard to the provisions relating to conciliation proceedings as opposed to arbitration proceedings is that the 1996 Act does not restrict the application of its provisions to conciliation proceedings taking place in India only. This provision hence affords parties the flexibility to hold their proceedings anywhere, even in cyberspace. This does not, however, mean that arbitration proceedings cannot be held online if they are to be amenable to the 1996 Act, for the said Act recognizes party autonomy and does not place restrictions on their choice of procedure and applicable law as long as they have all agreed thereon.

---

<sup>5</sup> For e.g., should the Court wait till the time of hearing of the suit to refer the same to an ADR process (as this could delay implementation of an ADR process by over a decade); which type of ADR should be suggested by the Court; who is to bear the fees of the neutral; what if the parties are not agreeable on the mode of ADR; in the event of a failure of one mode of ADR, should the parties be made to, or allowed to, try another mode of ADR or, for that matter, another neutral in the same mode before proceeding with the matter in Court; and what should be the within which a neutral is to facilitate a settlement or certify that the process has failed.

<sup>6</sup> vide newly inserted Section 16 of the Court Fees Act, 1870

<sup>7</sup> (i) The Arbitration (Protocol & Convention) Act, 1937;  
(ii) The Arbitration Act, 1940; and  
(iii) The Foreign Awards (Recognition and Enforcement) Act, 1961

As per the provisions of the 1996 Act, either party can initiate conciliation proceedings, which proceedings commence with the acceptance, within 30 days, of the invitation to conciliate a dispute. Thereafter would take place the appointment of the conciliator/s – there can be one, two or three conciliators. Parties can either appoint one conciliator by mutual consent, or appoint one each, or on appointing one each, request the appointed conciliators to appoint a third one.

The conciliators are to be guided by principles of objectivity, fairness and justice in their endeavour to assist the parties in an independent and impartial manner and shall maintain confidentiality of the proceedings as well as the outcome thereof. Their recommendations for settlement are not binding decisions and parties can jointly or unilaterally terminate the conciliation proceedings. However, should the parties sign a settlement agreement duly authenticated by the conciliator/s, the same is binding on them and can be enforced as a decree of the court.

### **Information Technology Act, 2000**

The Information Technology Act, 2000 Act (the 2000 Act) was enacted with a view to facilitate and encourage e-commerce and hence gives legal recognition to electronic records and digital signatures. The enactment of this Act has also brought with itself amendments to several other Acts<sup>8</sup>. It is a law meant to be “applicable to alternatives to paper based methods of communication and storage of information”.

Section 4 of the 2000 Act states that a requirement of any law for information or matter to be in written, printed or typewritten form shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and is accessible so as to be usable for a subsequent reference.

Section 5 of the 2000 Act gives recognition to digital signatures by providing that the requirement of any law for authentication by a person’s signature shall be deemed to have been satisfied if such authentication is done by means of a digital signature.

### **Online Implementation of ADR**

With the aforesaid legislations in place, the ground is now set for ODR to take a footing because we have both an ADR-friendly civil procedure and the technology and the statutory recognition for the use thereof. What we now require is first, that more and more courts make earnest attempts at making the optimum use of the provisions of Section 89 of the Code, and second, that there be more and more trained dispute resolution service providers (DRSPs), individuals as well as institutions, who can effectively deal with the disputes referred to them by the courts for resolution.

---

<sup>8</sup> The Indian Penal Code, 1860; The Indian Evidence Act, 1872; The Bankers’ Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934

Whenever a foray is made into any new territory, uncharted routes need to be taken. So is the case with ODR, as the implementation of technology as the “fourth party”<sup>9</sup> in dispute resolution is a novel scenario for India. It is hence inevitable that in the course of implementing ODR systems, questions will be raised regarding various aspects thereof and the argument against it is likely to be on the lines of “there is no precedent to that”. Undoubtedly, as with everything else in life, issues will arise from time to time on several aspects of ODR. However, the basic issue of legal sanction for the use of electronic media has already been settled by the 2000 Act.

The Supreme Court too has shown its approval of the use of technology in dispute resolution. In a recent case<sup>10</sup> it held that video-conferencing could be resorted to for the purpose of taking evidence of a witness. In that case, one party was seeking direction of the court to take evidence of a witness residing in the United States of America. Though a lower court had ordered such evidence to be taken with the help of video-conferencing, the concerned High Court struck down that order on the grounds that the law required the evidence to be taken in the presence of the accused. The Appeal Bench of the High Court upheld the said latter order. The Supreme Court struck down the High Court order by stating that recording of evidence satisfies the object of Section 273 of the Code of Civil Procedure that evidence be recorded in the presence of the accused. In explaining the benefits of video-conferencing, the Court observed that “In fact the Accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded Court room. They can observe his or her demeanour. In fact the facility to play back would enable better observation of demeanour. They can hear and rehear the deposition of the witness.” Addressing the various submissions made before it, the Court stated that “Virtual reality is a state where one is made to feel, hear or imagine what does not really exist. Video-conferencing has nothing to do with virtual reality. Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence.” “This is not virtual reality, it is actual reality.” Several interesting observations are made in the said Order which clearly indicate the strong support for use of technology, and especially video-conferencing, in the justice delivery system.

This is not the first time that the Supreme Court has ruled in favour of technology. In an earlier decision<sup>11</sup> it held that “When an effective consultation can be achieved by resort to electronic media and remote conferencing it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties.” In this case the contention was that the two arbitrators appointed by the parties should have met in person to appoint the third arbitrator.

In yet another decision<sup>12</sup> in which use of available technology has been given a real boost, the Supreme Court held that “Technological advancement like facsimile, Internet, e-mail, etc. were in swift progress even before the Bill for the Amendment Act was discussed by Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue.”

---

<sup>9</sup> See Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (2001).

<sup>10</sup> *State of Maharashtra v. Dr. Praful B. Desai* (2003) 4 SCC 601

<sup>11</sup> *Grid Corpn. Of Orissa Ltd. V. AES Corpn.* 2002 A.I.R. (S.C.) 3435

<sup>12</sup> *Sil Import, USA v. Exim Aides Exporters, Bangalore* (1999) 4 SCC 567

## **Ramifications**

It can thus be seen that in view of a favourable climate being brought about for dispute resolution through the initiative of court annexed ADR, a culture is soon going to set in where ADR, and in turn ODR, will take centre-stage.

As stated above, the 2000 Act gives legal sanctity to electronic records and hence parties can safely settle their disputes online with the guarantee that the settlement agreement, if arrived at and executed as per the requirements of the 1996 and 2000 Acts, would be enforceable in a court of law. The cases referred to above give a clear indication that use of technology has the blessings of the judiciary.

Given the affordable technological infrastructure abundantly available, it is certain that ODR would be the preferred medium for dispute resolution even when both the parties reside in the same city. This is so because in most metropolitan cities, due to the traffic during peak hours, it takes an average of an hour and a half to get into the heart of the city. Considering that it could take an equal amount of time to get back, a party would be well off attending the said meeting via video-conference so that he saves that extra fifty per cent time that he would have spent in traffic. Furthermore, his presence may not be required for all the time in which case he can conveniently log off and, being a businessman, get down to negotiating some or the other deal instead of negotiating his vehicle through the traffic for another hour or so. A party even saves on legal costs as lawyers, and especially counsels, charge by the hour and hence they could be engaged for a shorter duration if the proceedings are conducted online. And if the neutral and/or the other party is in another city, this would save also the cost of transport and accommodations. The additional benefit of conducting proceedings online is that this affords the parties to engage the services of experts in any field who, due to their various other commitments, would not be available thanks to the time-consuming efforts of attending an off-line meeting.

Resolution of disputes outside court will have a profound impact on the backlogs in the various courts in more ways than one. First, as we all know, a final order in a given matter does not finally end the matter – it only ends up as an addition to the backlog in a higher court as and by way of an appeal brought by the party aggrieved by the lower court's order. On the other hand, a dispute resolved in a non-adversarial manner resolves the dispute finally and hence there is rarely ever any challenge brought against such resolution which is a settlement by mutual consent. Hence, when the pending matters start getting settled by Court-Annexed ADR, not only will that decrease the burden of that court, but it will not lead to any increase in the burden of the appeal courts. Second, once the backlog reduces substantially, justice would seem to be more easily achievable and this will prompt more members of society to come forth and file proceedings for settlement of their disputes, which hitherto they avoided due to the delays in justice dispensation. This may seem as a retrograde development for the court registry but, socially speaking, dragging someone to court, however bad that may be, certainly is healthier than being disgruntled due to the frustrating experience of not being able to obtain justice. As for the court registry, this will not make much of a difference as even the newly filed proceedings would also go through the court-annexed ADR process.

## **Conclusion**

The ADR-related legislative reforms, when viewed in conjunction with other legislative provisions relating to information technology and e-commerce, provide an excellent opportunity to any group, body or institution seeking to establish themselves as service providers for Online Dispute Resolution (ODR). There are several established entities actively engaged in providing ADR services and who are already well-positioned to fill the space suddenly created by this healthy juxtaposition of the several legislative provisions. What is lacking is not only awareness of this opportunity but also the proficiency/expertise necessary to implement ODR as a truly viable (and a much healthier) alternative mechanism to litigating in a court of law. Considering the pool of talent available, it is only a question of showing the way. And this is the task that UNECE has taken upon itself – of introducing to the member-nations, and educating them about, ODR and its inherent benefits.

India stands to benefit greatly from this effort simply because not only does it probably have the highest backlog of cases pending in its courts of law, but also because its litigious population does not take too many days off. Yes, many have been shying away from the courts looking at the prolonged delays, but once they have an alternative and convenient mode like online resolution of disputes, they are certainly not going to shy away from opting for it to settle their disputes.

In fact, looking at the benefits that ODR has to offer, the Supreme Court is seriously considering setting up e-courts on the lines of the system which has been implemented in Singapore and is in the process of preparing a feasibility report for the said project. And when such courts are established, that would truly bring ODR to the centre-stage – no dispute about that.