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Potential of Online Mediation in Revamping E-Commerce Dispute Redressal

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ABSTRACT

Information and Technology Act, 2000 has been enacted based on the United Nations Model Law on E-Commerce adopted by the United Nations Commission on International Trade Law. But e-commerce wasn't considered a significant aspect during the enactment of the Information Technology Act, 2000 rather cybercrimes and offences were the need of the hour during that time.

The redressal of e-disputes arriving out of e-commerce transactions involves challenges including jurisdiction, enforcement, law applicable, etc. For commercial disputes, whether the claim is small or big, with a larger number of diversified people involved, implementing online mediation for dispute resolution would serve as a better tool.

Online Mediation being less formal though would solve disputes effectively was lacking legislative framework. The newly enacted Mediation Act provides for legal sanction to online mediation, which is expected to revamp the dispute settlement landscape as a whole. The implementation of Online Dispute Resolution in the sphere of the E-Commerce sector through accessible online mediation will be a greater initiative. The study aims to trace the origin and innovation of Online mediation to e-commerce disputes and discusses the different methods and systems of Online dispute resolution. The paper further explores the judicial pronouncements supporting dispute resolution of consumer disputes and analyses the legislative framework related to mediation. The government's policy towards consumer redressal using ICT tools brings out its persistence in implementing ICT enabled dispute redressal. The paper further discusses the newly enacted Mediation act and gives insights to areas that need to be revisited.

Keywords: *Online Mediation, E-commerce, Dispute, Redressal, Consumer.*

I. INTRODUCTION

Indian Judiciary is affected by a huge backlog of pending cases. The idea of dispute resolution is to seek reformation in the judiciary and to prevent reaching disputes to the Court in the first place². Online Dispute Resolution seeks to hold huge potential when it comes to international

¹ Author is an Advocate in India.

² The Future of Dispute Resolution in India, Vidhi Centre for Legal Policy, Jul. 2020. https://vidhilegalpolicy.in/wp-content/uploads/2020/07/200727_The-future-of-dispute-resolution-in-

matters like cross-border disputes where parties are politically divided and digitally united. It is expected that the right of redressal to justice shall vest with all equally on mainstreamed Online Dispute Resolution (herein referred to as ODR). With the increased disputes, online mediation is anticipated to revamp the landscape of dispute resolution in the e-commerce sector.

(A) Meaning of ODR

ODR is an improved dispute resolution mechanism, equivalent to alternative dispute resolution wherein internet-related disputes and other conventional disputes that may or may not involve internet issues are solved through availing online resolution mechanisms. Primarily either Negotiation, Mediation, or Arbitration each separately or a combination of all the three are involved in ODR. It uses Information Technology including computers, web cameras, scanners, fax machines, cell phones and other communication devices supported with services of third-party service providers.

In the process of dispute resolution, the parties may have party autonomy and full control over the procedure or the third party may be given the control of procedures and its outcome. In ODR, these primary methods are accompanied by Information and Communication Technology (herein referred to as ICT). ODR is nothing but a synergy between Alternate Dispute Resolution (herein referred to as ADR) and ICT. ODR may be defined as ADR assisted principally with ICT tools.

II. ROLE OF TECHNOLOGY IN ODR

Computers and software play a major role in ODR. ODR is considered to be an independent input to the management of the dispute and hence the assistance of Information and Communication Technology has been named by Katsh and Rifkin as the "FOURTH PARTY"³. Hence the traditional three-side model of dispute resolution has been modified by labeling "technology as the fourth party" and adding it to the resolution process along with the two or more parties to the dispute and a third neutral party. The same capabilities of the third party are incorporated by the fourth party since it reduces the role of the neutral third party and at times takes the place of the third party's role i.e., automated negotiation. But frequently it is used by the neutral third party as a tool for assisting the process. The fourth party does exemplary work like it organizes information, scheduling meetings, monitoring performance, sending automatic

India_Final-Version.pdf

³ Ethan Katsh & Janet Rifkin, "Online Dispute Resolution: Resolving Conflicts in Cyberspace" 93 – 117 (JosseyBass, San Francisco, 1st edn., 2001).

responses, and making written communication constructive in a more polite manner (for example blocking foul language and so on).

III. TYPES OF ODR SYSTEMS

- Online settlement - An expert system is used to settle financial claims automatically.
- Online arbitration – Resolves disputes using a website, with the aid and assistance of qualified arbitrators.
- Online resolution of consumer complaints – Resolves disputes using e-mail as a tool.
- Online mediation - Resolves disputes using a website, with the aid and assistance of qualified mediators.

All those ODR types mentioned above are not yet fully developed. There exist other Modern Hybrid forms of ADR, differing from classic models such as Med-Arb and a mini-trial. At present, online settlement and online mediation are the most advanced systems of ODR.

IV. HISTORY OF ONLINE MEDIATION

During the Mid-1990s, Villanova University and the University of Massachusetts established Virtual Magistrate and Online Ombuds Office as university-sponsored pilot projects.⁴ After several trial and pilot projects in 2005, it was reported that there were about 115 ODR sites dealing with different kinds of disputes including but not limited to issues on family, workplace, e-commerce and insurance, among others.⁵ The founders of the entity and the leading promoters of the ODR issue Ethan Katsh and Janet Rifkin, initially started mediation procedures through just e-mail communications which ended eventually into a signed settlement. Auction portal eBay has been offered mediation services by the Online Ombuds Office. This collaboration transformed into the Square Trade portal in 1999 which is being considered as one of the first commercial ODR providers specifically for dealing with consumer disputes in the US market. Online mediation is one among its most prominent services wherein complaints are filled in a complaint form which indicates the methods for dispute resolution. If a case settlement could not be reached, the parties would be directed to negotiate with the support of a mediator using e-mail as a tool for communication.⁶ After the

⁴ Katsh E, "ODR: A Look At History - A Few Thoughts About the Present and Some Speculation About the Future" <https://www.mediate.com/pdf/katsh.pdf>

⁵ Karolina Mania, "Online dispute resolution: The future of justice", 149, *International Comparative Jurisprudence*, Volume 1, Issue 1, November 2015. <https://www.sciencedirect.com/science/article/pii/S2351667415000074>

⁶ Sodiq Olalekan Omo-ola & Umar A. Oseni, "Towards an Effective Legal Framework for Online Dispute Resolution in E-Commerce Transactions: Trends, Traditions, and Transitions", 24 *IJUM Law Journal*

success of the eBay/SquareTrade partnership, the company developed a Trustmark known as SquareTrade Seal signifying the commitment of those businesses having the seal to stand committed to SquareTrade's ODR Service.

Also, CyberSettle was an online portal established in the year 1998 in the US, offered an automated online mediation blind bidding wherein the system-enabled negotiations are conducted using the Internet platform, by logging in and providing the basic information required and then inviting to participate in blind bidding by proposing not more than three times, shall specify the maximum amount they would claim to sign a settlement. Until and unless an equal or lower amount has been proposed by the other party, the figure is not revealed. This allows the parties to exclude considering the issue of legal liability and settle specific values of claims.

The online portal Modria.com (Modular Online Dispute Resolution Implementation Assistant) was established in the year 2011. Currently, it plays the role of market leader in the ODR mechanism among others and cooperates with eBay. Modria.com offers a vast range of tools to its customers and constantly expands its scope with its service.

V. EBAY AND ONLINE CONSUMER DISPUTE REDRESSAL

'EBAY' was a privately created largest global online marketplace, launched in the year 1995, evolved initially in consumer-to-consumer (C2C) auctions and then into Business-to-Business (B2B) and Business-to-Consumer (B2C) verticals. A robust, end-to-end Trust and Safety infrastructure was built by eBay after acquiring PayPal in 2002 which had the Resolution Center as its core principle providing customized online redressal process to every eBay and PayPal user around the world to address and resolve most of the typical disputes arising between buyers and sellers utilizing eBay's service. Initially, it focused on letting buyers report "fraud alerts," which got expanded extending support to dispute resolution by using escrow service and addressing the problems faced by both the sellers and consumers such as "unpaid item" disputes (seller as complainant) or "item not received", "item received but not as described" disputes (buyer as complainant).⁷ Thus, those developments enhanced the low-value, high-volume claims of B2C transactions with more in-depth specialized claims processes relating to higher dollar-value purchases.⁸

(2016)

https://www.researchgate.net/publication/303896528_Towards_an_Effective_Legal_Framework_for_Online_Dispute_Resolution_in_E-Commerce_Transactions_Trends_Traditions_and_Transitions

⁷ eBay Money Back Guarantee, EBAY (April 3, 2014), <http://pages.ebay.com/help/policies/money-backguarantee.html>

⁸ eBay Vehicle Purchase Protection, EBAY (April 3, 2014),

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VI. ODR METHODS

a. Online Arbitration

In Online Arbitration, a neutral third party (arbitrator) delivers a decision that is final and binding on both parties. The arbitral award replaces the judicial decision hence it can also be defined as quasi-judicial. On initiation of the procedure, the parties cannot abandon it. Generally, it is limited to Cross-border disputes and E-Commerce disputes. India being a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 applies the Convention for enforcement of arbitral award. With the consent of the parties involved, offline disputes are also resolved using online techniques.

b. Traditional Mediation using Information Technology

Websites like SquareTrade, Internet Neutral and WebMediate are established by Mediation firms to facilitate the resolution process. Websites rely on online technologies like chat rooms, e-mail and instant messaging and also incorporate traditional methods of communication to negotiate. Typically, the party contacting the service fills out the online form stating the problem and the preferred possible solution. The mediator on reviewing the form contacts the other party for participating in mediation. If he agrees, he can fill out his form or respond to the initial form via e-mail. The mediator aids in arriving at a potential solution and helps to reach an agreement.

c. Consensual methods

- **Automated Negotiation**

Technology takes over a negotiation in Automated Negotiation wherein liability is unchallenged and economic settlements for claims are determined with the requirement of no other assistance. ODR services in this area are called "blind-bidding" services. The respective offer and demand are entered, and a percentage range is chosen by each party, which is not disclosed to each other. If the figures are within the given range, a settlement amount is arrived at by the ODR algorithm and parties are informed of settlement of the dispute. If the claim

<http://pages.motors.ebay.com/buy/purchaseprotection/index.html>; eBay Business Equipment Purchase Protection, EBAY (April 3, 2014), <http://pages.ebay.com/help/buy/business-protection.html>

remains unsettled or bids are unmatched, parties are permitted to retry any number of attempts, within a certain period. The figures are not revealed to any other person regardless of settlement and are kept confidential.

- **Assisted Negotiation**

Technology assists the negotiation in Assisted Negotiation. The technology plays the role of the Conciliator which is similar to that of the mediator, where the parties propose with solution to consider before reaching an agreement, without direct involvement in the dispute. This method is designed in a way that parties' communications get enhanced with the assistance of a third party or software.

VII. DISPUTE RESOLUTION OF CONSUMER DISPUTE

(A) Judicial Pronouncements

Initially the 'arbitrability test' propounded in ⁹Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., case excluded an array of disputes including consumer disputes inarbitrable. However, the Supreme Court of India in M/s Afcons Infra Ltd. v. M/s Cherian Varkey Construction Company Ltd. and Others¹⁰, while enumerating matters that are suitable for ADR, held that all consumer disputes including disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation or product popularity can be referred to ADR. Because of the above, the Consumer Protection Act, 2019 has introduced the settlement of consumer grievances through the establishment of Mediation cells.

In the case of ¹¹M.R. Krishna Murthi v. The New India Assurance Co. Ltd. and Ors. the Supreme Court suggested the feasibility of enactment of the Indian Mediation Act to address mediation-related issues.

(B) Legal Framework

Mediation is a well-known and less formal conflict resolution mechanism involving voluntary cooperation between the conflicting parties. Mediation is considered an effective means of dispute redressal and is expressly mandated in various legislations for dealing with myriads of disputes.

1. Arbitration and Conciliation Act, 1996

Arbitration and Conciliation Act 1996 under Section 30 encourages with the consent of the

⁹ (2011) 5 SCC 532 (India).

¹⁰ Civil Appeal No.6000 of 2010.

¹¹ 2019 SCC OnLine SC 315.

parties to avail other forms of dispute resolution which includes mediation, conciliation or other procedures even during the pendency of arbitral proceeding.

2. Commercial Courts Act 2015

Under Section 12A of the Commercial Courts Act 2015, as amended in 2018, pre-litigation mediation is required unless there is an immediate need for interim relief.

3. Consumer Protection Act, 2019

Chapter V of the Consumer Protection Act, 2019 provides for the establishment, composition, empanelment, procedure of mediation, settlement through mediation. The Chapter also deals with qualifications, disqualifications, duties, cancellation and removal of mediators from the panel. Mediation cells are attached to each District Commission, the State Commission of that State and National Commission and each of the regional Benches to enable court-annexed mediation. Accordingly, Section 37 of the Act enables the District Forum to admit complaints and refer the dispute to mediation either at the first hearing of the complaint or at a later stage, if there exist elements of a settlement and for that, it may direct the parties to give in writing the consent within five days. As per Section 80, an agreement is reached between the parties concerning all of the issues involved in the consumer dispute or concerning only some of the issues. The terms as such concluded shall be reduced to writing accordingly, and signed by the parties to dispute or their authorized representatives. The mediator with a signed agreement prepares a settlement report along with and forwards it to the concerned Commission. The Commission shall within seven days of the receipt of the settlement report, pass a suitable order recording such settlement of consumer dispute and dispose of the matter accordingly. If the issues get settled partly, the Commission shall record the settlement settled partly and continue to hear other issues involved in such consumer disputes. On failure of settlement by mediation, the mediator shall prepare a report accordingly and submit the same to the concerned Commission. The District Commission shall proceed with such complaint [Section 81]. But there shall lie no appeal from any order passed under sub-section (1) of section 81 by the District Commission pursuant to a settlement by mediation under Section 80. Further Section 79(2) states that the mediator shall be guided by principles of natural justice meaning, he shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872, and shall have regard to the rights and obligations of the parties, usages of trade, if any, and the circumstances of the dispute and such other relevant factors.

4. Consumer Protection (Mediation) Rules, 2020

Rule 4 of the Consumer Protection (Mediation) Rules, 2020 stipulates that exceptional matters

enshrined under the First Schedule are not to be considered for mediation and the proviso to the rule states that the Commission has full discretion to choose not to refer any matter to mediation as the case may be.

5. Mediation Act, 2023

Mediation Act of 2023 was passed, pre-litigation and online mediation are encouraged at any point as long as all parties concerned provide for written consent¹². Mediation Act also amends the Legal Services Authorities Act of 1987 to foster online negotiation, arbitration, mediation, and conciliation as means of resolving conflicts. Chapter V of the Act discusses mediation proceedings. Sec.13 states that territorial jurisdiction is to be undertaken for the mediation process and in case of online mediation the jurisdiction may fall at any place mutually agreed upon by the parties. Sec.14 stipulates the commencement of mediation and Sec.15 elaborates the conduct of mediation. Sec. 31 provides for the establishment of a mediation council and Sec.38 discusses its duties and functions.

6. Government Facilitation towards Consumer Redressal

In 2015, the Department of Consumer Affairs launched an online portal named – Grievance Against Misleading Advertisements (GAMA) to register online complaints regarding misleading advertisements.

The government launched 'INGRAM' a National Consumer helpline portal for Consumer grievance redressal in the year 2016.

The online Consumer Mediation Centre established at the National Law School of Bangalore provides for both offline and online mediation via its platform.

'ConfoNet' is a government-implemented portal where in computerized cases status and judgments of Consumer forums at different levels can be found.

The Consumer Protection Act of 2019 established the e-daakhil site to enable the electronic filing of complaints.

According to the Consumer Protection Act (E-Commerce) Rules 2020, all e-commerce enterprises are mandated to have established an interim grievance redressal system within their organizations.

VIII. ONLINE MEDIATION OF E-COMMERCE DISPUTES

Parties may fail to conclude the mediation process and that might further delay and raise the

¹² Section 30 of Mediation Act, 2023.

cost of the resolution but entailing ICT tools for settlement is expected to resolve such issues to a maximum extent.

a. Mediation of Commercial dispute

Section 2 of the Mediation Act 2023 states application of the act pertains to 'Commercial dispute' which means the Business to Consumer model of E-Commerce disputes is not inclusive of the application. Commercial dispute means dispute defined under Section 2 (1) (c) of the Commercial Courts Act 2015. On application to commercial disputes, the efficiency of online mediation and maintainability of confidentiality and privacy concerns shall be tested and may be applied to other disputes merely in the future as the case may be.

b. Enforcement of Settlements

Singapore Convention was adopted to ensure the enforcement of settlement of agreements and to maintain international economic relations. The Convention facilitates enforcement as if directly done by the court and not to be treated as a contract that could be enforced only by filing a civil suit. Though the decision of mediation is binding, the validity of settlement agreements at the international level is at risk, nevertheless, as the recently passed Mediation Act 2023 deviates from the United Nations Convention on International Settlement Agreements (Singapore Convention), which India ratified in 2019. This needs to be revisited to avoid ambiguity while dealing with international matters.

c. Mandatory Pre-Litigation and Online Mediation

Mediation is an amicable settlement of disputes among parties but mandatory pre-litigation and online mediation in commercial matters seems coercive and when settlement is not reached out of such mandated mediation it will be frivolous undergoing mediation for individuals and may result in a waste of time and increase in cost. However, it can be considered that the viability of mandatory mediating disputes can be raised with the support of the best possible use of technology in its process.

IX. CONCLUSION

With the development of the e-commerce sector in India, the disputes would burden consumer forums at large. Mediation being considered less formal in terms of choice of forum, governing law and enforceability of awards, when it is synergized with Information Communication Technology will benefit people and accessing online mediation can be done from any place in the country which seems to accord with the idea of Digital India Programmer being aimed at the grass root level.

The essential conditions for effective implementation of ODR for e-commerce disputes require awareness among parties involved in the transaction, efficient technological tools, integrity, a secured channel, a user-friendly platform, skilled and trained professionals and ensure enforceability of settlement.

¹³Online Consumer Mediation Centre which witnessed a slow start in late 2016 due to the non-cooperation of the e-commerce vendors and the non-binding nature of mediation as a dispute settlement mechanism. But with the legislative enactment, it is high time online mediation works shaping the landscape of dispute resolution to the next level. Judges and Lawyers are required to incentivize mediation both offline and online to avail its fullest potential.

ODR along with a stronger security mechanism and a comprehensive legal regime as followed in developed countries is essential for ensuring public confidence and to gain trust among the consumers. This would make the ODR mechanism an efficient and effective mechanism for dealing with e-commerce disputes. The government's initiation of enactment incorporating online mediation for e-commerce disputes is similar to that of the pilot project conducted in the US (eBay project) by a researcher from the University of Massachusetts to find out the level of compliance on its implementation. It is expected to be feasible and may be applied to other disputes as well in the future.

¹³Mugdha Variyar, Econsumer mediation centre gets off to a slow start, ECONOMIC TIMES (Jan. 01, 2018), <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/econsumer-mediation-centre-gets-off-to-aslow-start/articleshow/62321215.cms>