

Jurisdictional Problems to E- Commerce Entity in Online Dispute Resolution

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Abstract

Online Dispute Resolution (hereinafter ‘ODR’) is well recognized mechanism in resolving disputes now-a-days. In simple words ODR means the resolving of dispute between the disputed parties on internet and physical presence of parties, documents, etc. is not in need. The parties to the disputes are opting ODR more in comparison to the traditional Alternative Dispute Resolution (ADR) and this is because ODR provides more benefits to them. Every process is having their own pros and cons but what matters is that how to overcome those negative aspects to make that process better from other. The basic objective of my research is to scrutinize the reasons to opt ODR over the ADR; the legal concerns that the disputed parties face while opting ODR; and the focus is on the jurisdictional issue which the disputed parties usually face in the ODR, and lastly to propose the possible solutions to overcome the issue of jurisdiction in ODR.

Introduction

The roots of the ODR was found in 1996 when to resolve defamation pending matters the Virtual Magistrate project was recognized to suggest online arbitration.¹ The aim of the ODR is to resolve the disputed matter between the parties through arbitration, mediation or negotiation via online (internet). In today’s era, the ODR is an essential means to the dispute resolution, as ODR facilitate the traditional mediums of dispute resolution (ADR) through its new technologies. The scope of ODR is too broad, as this covers the matters of personal conflicts (C2C – consumer to consumer disputes or marital separation) to interstate conflicts. In the development of the e-commerce, ODR plays an important role, as the disputed matters are getting resolved very quickly with less manual effort. Further, in the disputes of online transactions in B2C (business to consumer) where the parties are from different places (jurisdiction), ODR is the only means which is suitable for everyone and also recommended to the disputed parties.²

The court’s authority to decide the matter or the court’s competency to deal with the matter will only depend on the ‘jurisdiction’ of that particular court.³ Now, the most important question is why the e-commerce entities will take ODR over the other traditional forums? There are plentiful

¹Frank A. Cona, ‘Application of Online Systems in Alternative Dispute Resolution’(1997) 45 Buff L Rev 975

²Nandini C P, “B2C E-Commerce and Consumer Protection with Special Reference to India – ADR a Best Possible Solution ”(*Chair on Consumer Law and Practice* February 2021) <https://clap.nls.ac.in/wp-content/uploads/2021/02/B2C-E-COMMERCE-AND-CONSUMER-PROTECTION-WITH-SPECIAL-REFERENCE-TO-INDIA-%E2%80%93-ADR-A-BEST-POSSIBLE-SOLUTION-.pdf> accessed October 1, 2021

³Kamath N, ‘*Law Relating To Computers, Internet And E-Commerce: A Guide To Cyber Laws*’, Vol 1 (5th Universal Law Publishing Co 2016)

reasons due to which the e-commerce entities are opting ODR over the traditional forums, some of them are as follows:⁴

- Flexible and informal process;
- Cost and time effective;
- Reduce violent behaviour in sensitive matters;
- Physical presence not in need; or
- Confidential.

Legal Concerns regarding ODR

The application of ODR is questionable. For instance, in arbitration, the centre chosen by the parties is in Mumbai, arbitrator is in Delhi, and the parties are from Chennai and Bangalore, then it is evident that there may arise some legal concerns. The main concern is legal sanctity of - ODR system itself, proceedings, emails, documents, written submissions, and award. The other main legal concern is court's jurisdiction to enforce the award. To get the clarity on these concerns it is essential to read Arbitration and Conciliation Act, 1996 and Information Technology Act, 2000 together. For instance:

- **Arbitration agreement shall be in writing⁵**:-In Indian Arbitration Act, Sec 7(3) makes it obligatory to have the arbitration agreement in writing. But the validity of such agreement is in question when the parties go for online arbitration. This online agreement will be considered to be valid as per Sec 4⁶ of the IT Act read with Sec 7(3) of Arbitration and Conciliation Act.
- **Award to be in 'writing' and 'signed'**⁷:- Sec 31(1) of the Arbitration and Conciliation Act clearly mentioned that the arbitral award shall be in writing and also signed by the arbitral tribunal. The necessity of 'writing' will cover under Sec 4 of IT Act, and Sec 5⁸ will cover the necessity of signature as this states that the digital signature will have the equal validity as paper signature.
- **Enforceability of the e-award**⁹:-It is questionable for the party (to whom the arbitral award has been given) in ODR that how to enforce the award. It is clearly mentioned in the Arbitration and Conciliation Act that "such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as it were a decree of the court".⁹

⁴ Ankona, "Advantages and Disadvantages of ODR" (VIA Mediation & Arbitration Centre 2020) <https://viamediationcentre.org/readnews/OTE1/Advantages-and-Disadvantages-Of-ODR> accessed October 1, 2021

⁵ The Arbitration and Conciliation Act 1996, s.7(3)

⁶ "Legal recognition of electronic records.-Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is –

a) Rendered or made available in an electronic form; and
b) Accessible so as to be usable for a subsequent reference."

⁷ The Arbitration and Conciliation Act 1996, s.31(1)

⁸ "Legal recognition of [electronic signature] -Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of¹⁶ [electronic signature] affixed in such manner as may be prescribed by the Central Government. Explanation.- For the purposes of this section, "signed", with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression "signature" shall be construed accordingly".

⁹ The Arbitration and Conciliation Act 1996, s.36

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Further, it is on the subject-matter of the arbitration that whether the specific court have jurisdiction or not, as per the definition of the 'court'.¹⁰

The legal concern relating to the legal sanctity can be resolved through the combine reading of The Arbitration and Conciliation Act, 1996 and Information Technology Act, 2000.

Jurisdictional Concerns to E-commerce in ODR

In e-commerce, the contract between the parties has been formed online (internet), which makes the jurisdictional issue more complex.¹¹ This will give a rise to questions regarding of the law that under what law that contract will be governed, and secondly, it will also questions the jurisdictional competency of the Indian courts on those contract. As the use of internet in e-commerce is increasing too fast, which results into the scenario where there are more chances of having parties from different jurisdictions. Sometimes the parties of foreign nationals may involve which will step up the complexity in jurisdictional concern.¹² When the parties to the dispute in e-commerce are from different States, then it is not essential that the provisions of both the States are inparimateria. In the case of *Bachanan v. India Abroad Publications Incorporated*¹³, where the UK laws were not enforced in New York, it has already been experienced that the enforcement of foreign decision is difficult.

The issue of jurisdiction was handled numerous times by the Indian courts, but they were mostly on IPR (copyright, trademark infringement) in cyberspace, instead on consumer disputes. The issue of territorial jurisdiction has been decided by the Supreme Court by in the case of *Dhodha House v. S.K. Maingi*¹⁴ and observed that if the place of business has switched from physical to virtual, then it does not mean that the plaintiff would not carry on business on that place –means if the plaintiff has transactions across India then he has the choice of forum. But the extent of this case is only to the IPR (copyright, trademark infringement) matters. There are situations where the e-commerce transactions would include more than one place, so in that situation, the complaint can be file by the consumer either the place where he resides or the place where he personally works for gain.¹⁵

In the case of *Swastik Gases v. Indian Oil Corporation Limited*,¹⁶ the court has observed the issue that there are more than one courts have the jurisdiction and the dilemma is which court is having appropriate jurisdiction. So in this case, the court states that the parties can expel the jurisdiction of others in favour of one. It has been clearly mentioned in many e-commerce websites that the specific court only will have a jurisdiction in case any dispute will arise. This jurisdiction clause is usually there in the agreement when the consumer makes the transaction. Sometimes the consumer is unaware about this clause and in case dispute arises then the consumer have to bear unwanted expenses which will further cause inconvenience to him.

Conclusion

The IT Act, 2000 has amended to give legal status to the digital India (e-commerce), and similarly, the Arbitration and Conciliation Act, 1996 has been also amended at specific time to match the UNCITRAL Model. The ODR is popularizing now-a-days in India, so this is the time to have an amendment in the existing Arbitration and Conciliation Act, 1996 – so that the sole legislation will be sufficient to deal with the issues relating to the ODR. The amendment should be specifically on the

¹⁰ The Arbitration and Conciliation Act 1996, s.2(e)

¹¹ Kevan T and Mcgrath P, 'E-Mail, the Internet and the Law', 183 (Universal Law Publishing Co. Ltd., 2007)

¹² Padmavathi L, 'E-Contracts- Emerging Dimensions', 135 (1st Edn. Amicus Books, The ICAFI University Press 2008)

¹³ (1992) 154 Misc. 2d 228

¹⁴ 2006 (9) SCC 41

¹⁵ Consumer Protection Bill 2015, s.40

¹⁶ (2013) 9 SCC 32

jurisdiction, as this is the major concern in the ODR. If the law makers did not find appropriate to make amendments to the existing laws, then they should make a separate legislation on ODR.

As the India is becoming more digitalized, the e-commerce is also gaining the consumers. It is very commonly seen in e-commerce that the parties are usually from different jurisdictions, and in case of any dispute in e-commerce the ODR is the most favourable means to get that dispute settled. But still the parties have legal concerns in relation to the ODR and we have seen some of them with the possible solution. In every e-commerce transaction, the parties have to undersigned an e-contract; the jurisdiction clause should be inserted in that contract with the consent of the party. The Consumer Protection Bill, 2015 contains the procedures in relation to the dispute resolution but for the proper implementation of that procedure it is essential to have separate rules. This will reduce the inconvenience which may cause otherwise and this will also reduce the extra cost to the complainant. In today's era time is the money and every one does not want to waste time unnecessarily. In case if dispute arises, then everyone wants that dispute to be settled as soon as possible. ODR is the best means for those who want to save time and money.

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