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# **FROM COURTS TO CLICKS: HYBRID ADR FOR JUDICIAL REFORMS**

AUTHORED BY - NITEEN KUMAR JETHANI

## **Abstract**

Alternative dispute resolution (hereinafter referred to as “ADR”) is one of the most pressing needs in today’s scenario. Due to a huge backlog of cases today in various sectors, the need to lay a middle path has become important. There are various ways through which the adoption of Alternative means of dispute resolution has become important. Many laws such as the Consumer Protection Act 2019 (hereinafter referred to as “CPA2019”), Commercial Courts Act (2015), Family Courts Act (1984), and numerous other legislations have been amended to include Alternative means of dispute resolution as one viable way to escape litigation. This paper will examine the benefits of Online dispute resolution, particularly in consumer disputes and MSME grievances, supported by initiatives such as SAMADHAAN Portal and RBI’s ODR Policy. The interplay between confidentiality and transparency in arbitration has also been critically analyzed, considering both the Indian legal context as well as international standards, with particular attention to Section 42-A of the Arbitration and Conciliation Act 1996. Furthermore, the new means of dispute resolution through online platforms and their credibility is also been critically analyzed. This paper further addresses the jurisdictional tensions between courts and arbitral tribunals, exploring key principles such as competence-competence and the impact of landmark cases of the Supreme Court. Based on recognizing the problems in ADR and ODR systems this paper presents solutions to address such problems by putting a limelight on Arbitration as well as addressing problems in mediation as well.

## **I. Introduction**

The *Audi alteram partem* is one of the most important principles of Natural Justice. The sanctity of this principle is maintained by the courts through its interventions. However, the balance of Justice is so delicate that sometimes even the courts fail to do Justice. This failure is the result of time-bound adjudication of disputes which creates a pendency of cases and due to this pendency, an alternative means of dispute settlement becomes necessary where the intervention of the court is

minimized and the disputes are settled expeditiously rather than prolonged litigation in courts. Today India has a huge pendency of cases and the resolution of these cases will take ages because courts cannot resolve old cases and if it does then new cases will increase. So, to resolve these disputes and to ensure an impartial delivery of Justice to both parties an instrument as useful as ADR has been derived. This “Alternative means of dispute resolution” has many facets such as Arbitration, mediation, Conciliation, Lok Adalat<sup>1</sup>, etc. are also the outcomes of ADR. As an instrument, the alternative means of dispute resolution is used to resolve commercial offenses or offenses of a “Civil nature” such as marriage, Contract, Consumer Disputes, and other such disputes. The Courts usually deal with cases that involve heinous offenses because of their gravity. There have been various forms of ADR that have evolved ranging from Arbitration which has been codified as The Arbitration and Conciliation Act of 1996,<sup>2</sup> Mediation which has been codified as the Mediation Act Of 2023<sup>3</sup>, and other such legislations have been derived to reduce pendency on Courts. With technological advancements, the balance between the Weights of Justice becomes disturbed because today there is the emergence of online means of Dispute resolution (hereinafter referred to as “ODR”) which has its loopholes but still, it is a useful means for expeditious adjudication of disputes. The emergence of ODR has been validly accepted by the judicial system and former Chief Justice of India Justice D.Y. Chandrachud has explained the importance of ODR during the stakeholders meeting conducted by NITI Aayog titled “Catalyzing Online Dispute Resolution in India” in which he observed that ODR can provide for the resolution of disputes, containment, and dispute avoidance services.<sup>4</sup>

This adoption of ODR has been integrated with the various legislative frameworks to provide means for alternative ways of dispute resolution such as the SAMADHAAN portal which provides for E-filing and online settlement of Micro and Small Enterprises ( hereinafter referred to as “MSE”) dues against Public Sector Enterprises, Union Ministries, Departments, and State Governments,<sup>5</sup> RBI's ODR policy which focuses on the complaints arising out of failed digital

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<sup>1</sup> Dr. Deepa P. Patil, \*A Critical Analysis on Lok-Adalat in India, [http://www.imlc.ac.in/minor\\_research\\_project/DPP/paper2.pdf](http://www.imlc.ac.in/minor_research_project/DPP/paper2.pdf) (last visited Nov. 27, 2024)

<sup>2</sup> Arbitration and Conciliation Act, No. 26, Acts of Parliament, 1996 (India), <https://www.indiacode.nic.in/bitstream/123456789/1978/3/a1996-26.pdf> (last visited Nov. 27, 2024).

<sup>3</sup> Mediation Act, No. 32, Acts of Parliament, 2023 (India), <https://legalaffairs.gov.in/sites/default/files/MediationAct2023.pdf> (last visited Nov. 27, 2024).

<sup>4</sup> NITI Aayog, Catalysing Online Dispute Resolution in India (June 12, 2020), <https://niti.gov.in/catalysing-online-dispute-resolution> (last visited Nov. 27, 2024).

<sup>5</sup> Press Information Bureau, Major Policy Initiatives and Achievements of the Micro, Small & Medium Enterprises (MSME) in 2017 (Dec. 21, 2017), <https://pib.gov.in/PressReleasePage.aspx?PRID=1513711> (last visited Nov. 27, 2024).

transactions and grievances about digital payment, and the Department for Industry and Internal Trade (hereinafter referred to as “DPIIT”) has also suggested policies for the electronic means of dispute resolution for disputes arising out of E-Commerce.<sup>6</sup>

There are numerous cases in which the apex Court has highlighted the importance of Online means of dispute resolution which is a viable way to conduct proceedings and decide the cases online. Recently Delhi High Court has undertaken a project to establish the Digital NI Act Court at the district level for online filing, hearing, and disposal of cheque dishonour cases.<sup>7</sup> The procedure for the resolution of these cases involves a digital mediation process, which allows parties to utilize the mediation forum and settle the case.<sup>8</sup>

The Hybrid ADR Models are now being increasingly used to resolve disputes expeditiously and it has also been given legal recognition through the judgments of the Supreme Court. It aims to make justice accessible to the doorstep through Online Dispute Resolution to increase accessibility, reduce pendency, and make the process more cost-effective for the people. Hybrid ADR models are a way of combination that can increase the efficiency of the courts to function at their desired level.

## **II. Significance of Alternative means of Dispute resolution in today's scenario**

The new penal provisions provide punishment for heinous offenses committed and the procedure for investigating and trial. However, these new provisions have retained their technicalities which were evident in the previous provisions. These new laws do not have any provisions for ADR Mechanism due to the gravity of the offense and other factors such as tampering with evidence which decreases the sanctity of ADR. ADR is an effective tool especially in civil cases because punitive measures are not invoked in civil legislation and civil legislation only provides for compensation as per the quantum claimed in the civil suit. The courts are burdened with both civil and criminal cases so the legislations were changed

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<sup>6</sup> Department for Promotion of Industry and Internal Trade, Draft National E-Commerce Policy (2019), <https://dipp.gov.in/draft-national-ecommerce-policy> (last visited Nov. 27, 2024).

<sup>7</sup> Bhadra Sinha, Delhi Gets 34 Paperless Courts for Cheque-Bouncing Cases That Allow Digital Arguing, Judgments, The Print (22 Nov. 2020), (last visited Nov. 27, 2024).

<sup>8</sup> Delhi High Court, Digital NI Act Courts in Delhi Project Implementation Guidelines (2020), <https://delhihighcourt.nic.in/digital-ni-act-project> (last visited Nov. 27, 2024).

and then the emergence of tribunals to address such issues as the National Company Law Tribunal deals with issues of company matters, the National Consumer Forum deals with consumer disputes, and enormous other tribunals are established to relieve the burden on courts. These tribunals have expediently dealt with cases but the legislations under which they operate provide for exhaustion of alternative remedies before coming to these forums. For example, Section 89 of the Code of Civil Procedure<sup>9</sup> provided for the resolution of disputes first through arbitration and then through the courts which is a way to reduce the burden on civil courts. Similarly, to reduce the burden on tribunals the legislation has been amended to include ADR as one viable way for the resolution of disputes. We will explore some of the legislations that provide for ADR as one viable option to reduce disputes:

Legislations	Purpose	Provisions	Exigency
<b>The Family Courts Act 1984</b>	Unite the families and preserve their ties through speedy means for dispute resolution in a short time through family courts and to exhaust mediation and conciliation for resolving disputes.	Section 9 provides for courts to assist the parties in resolving disputes through conciliation. <sup>10</sup>	Speedy and inexpensive way of solving family disputes through ADR and to promote conciliation and settlement of family disputes.
<b>Commercial Courts Act 2015</b>	This act deals with the nature of disputes arising out of commercial transactions and its resolution on time.	Section 12-A provides for the resolution of disputes firstly through mediation and then litigation is preferred. <sup>11</sup>	Reduction of burden on civil courts and speedy disposal of the cases

<sup>9</sup> Code of Civil Procedure, No. 5, Acts of Parliament, 1908 (India), <https://www.indiacode.nic.in/bitstream/123456789/2191/1/A1908-05.pdf> (last visited Nov. 27, 2024).

<sup>10</sup> Family Courts Act, No. 66, Acts of Parliament, 1984, § 9 (India)

<sup>11</sup> Commercial Courts Act, No. 4, Acts of Parliament, 2015, § 12-A (India).

<b>Companies Act 2013 and Companies (Mediation and Conciliation Rules 2016)</b>	Regulation of business environment and to investor's interest, fair competition, sustainable development, etc.	Section 442 for expeditious resolution of disputes before central government, National Company Law Tribunals (hereinafter referred to as "NCLAT") through mediation. mediation. <sup>12</sup>	To resolve disputes expeditiously rather than prolonged litigation if the parties of the proceeding are before the Central Government, NCLAT etc.
<b>CPA 2019</b>	Addresses the needs of consumers and tackles daily practices done by the market and their drastic effects on the lives of the consumers	Section 74 to facilitate mediation for the consumers before approaching any consumer forums. <sup>13</sup>	To make it cost-effective, confidential and to prevent backlogs of disputes before the consumer forums.

Thus, it is not only one mode i.e. Arbitration that can be exhausted to resolve disputes in various sectors but new viable means of ADR such as Mediation, Conciliation, etc. have also been exhausted in various sectors to resolve dispute disputes at various stages of the proceedings. So, the lengths of access to justice have now been increased physically through ADR and electronically through ODR.

### **III. Online Dispute Resolution-The new alternative for the resolution of disputes under the umbrella of ADR.**

ODR is the new means that has emerged to resolve disputes over a period. It is effective to resolve disputes through video conferencing or using electronic means of summons for appearance through social media channels such as WhatsApp, Telegram, etc. These means have been given legal validity through various means by the intervention of the courts through its judgments which have been fruitful in further addressing disputes electronically. This new means of dispute resolution has been adopted through collaboration between private entities

<sup>12</sup> Companies Act, No. 18, Acts of Parliament, 2013, § 442 (India).

<sup>13</sup> Consumer Protection Website\*, <https://consumidor.gov/> (last visited Nov. 29, 2024)

and governments and it has already been incorporated into the jurisdiction of developed countries such as the United States of America, Japan, China, South Korea, the United Kingdom, Australia, and other such countries. It has evolved at this stage to address consumer grievances that are prevalent in these countries besides other disputes. The incorporation of ODR in these jurisdictions can be witnessed in the following manner evolved at this stage to address consumer grievances that are prevalent in these countries besides other disputes.

The incorporation of ODR in these jurisdictions can be witnessed in the following manner:

**(A) Government-owned ODR Platforms**

In this category, the disputes that arise between government sectors are resolved in a fast and cost-effective way so that the burden on the judicial system is reduced. It is used mostly in cases of Consumer and labor-related disputes. Countries that operate using this means of dispute resolution are numerous. Some of them are highlighted below:

In addressing Consumer related Disputes following countries have led the mark:

- i. Brazil-** It has developed a website called Consumidor.gov<sup>14</sup> which addresses consumer-related disputes against the companies registered within it. It has been developed by the state and municipal consumer rights bodies known as ‘Procons’. The main striking part of this is that the ODR services in this platform are provided free of cost.<sup>15</sup>
- ii. European Union-** The EU has made an online dispute resolution forum specifically for addressing consumer-related disputes in its jurisdiction. The European Union has partnered with more than 750 ODR service providers across Europe to provide ODR services to the consumers<sup>16</sup> which are yearly audited and its reports are also published.<sup>17</sup>
- iii. Mexico-** The Concilianet<sup>18</sup> by the Mexican Federal Consumer Prosecution Office has enabled consumers to resolve disputes with the stakeholders or large companies that

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<sup>14</sup> Consumer Protection Website\*, <https://consumidor.gov/> (last visited Nov. 29, 2024)

<sup>15</sup> Get to Know Your Consumidor.gov.br, Consumidor, <https://consumidor.gov.br>, accessed 29 Nov. 2024.

<sup>16</sup> Dispute Resolution Bodies, European Commission, accessed 29 Nov. 2024

<sup>17</sup> European Commission, \*Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM (2019) 425 final\*, <https://ec.europa.eu/report-odr> (last visited Nov. 29, 2024).

<sup>18</sup> Concilianet, [https://concilianet.profeco.gob.mx/Concilianet/proveedores\\_que\\_concilian.jsp](https://concilianet.profeco.gob.mx/Concilianet/proveedores_que_concilian.jsp) (last visited Nov. 29, 2024).

are attached to the Attorney General's Office through Conciliation and it is free of cost.<sup>19</sup>

### **(B) Courts-Controlled ODR Platforms**

(a) In addressing Civil and Administrative Disputes whether from the internet or E-commerce, the following countries have made the mark:

**i. China-** The Beijing and Hangzhou Internet Court conducts mediation to resolve disputes successfully stemming from cases involving Civil and Administrative disputes.

In the first year, the Beijing Internet Court conducted online mediation for 29,728 cases and successfully mediated 23.9 percent of the disputes.<sup>20</sup>

**ii. United States of America-** The U.S.A. has a successful rate of 80% resolution of disputes through mediation the citizens in this country prefer this mode of dispute resolution because of less time. Under this, the Mediators are trained by the Michigan Supreme Court through video conferencing, document sharing, and other means.

**(ii) In Commercial disputes** involving filings, Wills, etc. the U.A.E leads the mark, and its Arbitration is conducted as per the Dubai International Finance Centre Courts (DIFC)<sup>21</sup> Arbitration law based on the UNCITRAL Model. The DIFC is the apex court that conducts teleconferencing and filing is done with the mode of E-Registry.

### **(C) Private Sectors ODR Platform**

In this, the disputes with the large companies are resolved by the ODR platforms, and this effective way has been devised to address grievances especially linked to consumer-related disputes and E-Commerce. However, some other disputes are also been resolved through it such as Travel disputes, Gambling, family disputes, etc.

In addressing Consumer and E-Commerce related Disputes following countries have led the mark:

**i. United States of America-** PayPal the renowned electronic transaction company of the U.S.A. has followed a two-tier dispute resolution mechanism.<sup>22</sup> Firstly, the dispute must get resolved within 20 days and secondly, if the dispute is not resolved then PayPal intervenes and the seller is also afforded a hearing subjected to some legal

<sup>19</sup> Participating Providers, Concilianet, [https://concilianet.profeco.gob.mx/Concilianet/provedores\\_que\\_concilian.jsp](https://concilianet.profeco.gob.mx/Concilianet/provedores_que_concilian.jsp), accessed 29 Nov. 2024.

<sup>20</sup> Guodong Du, Beijing Internet Court's First Year at a Glance: Inside China's Internet Courts Series – 05, CHINA JUSTICE OBSERVER (Oct. 19, 2019), <https://www.chinajusticeobserver.com/a/beijing-internet-courts-first-year-at-a-glance> (last visited Nov. 29, 2024).

<sup>21</sup> About the DIFC Courts, DUBAI INT'L FIN. CTR. COURTS, <https://www.difccourts.ae/> (last visited Nov. 29, 2024).

<sup>22</sup> University of Missouri Libraries, \*Online Dispute Resolution: Companies Implementing ODR\*, <https://libraryguides.missouri.edu/c.php?g=557240&p=3832247> (last visited Nov. 29, 2024).

requirements that must be fulfilled.

- ii. **United Kingdom-** The Resolver is a company in the U.K. that offers free dispute resolution services to consumers. In this, they can install documents, reply to communication, and track the progress of the complaint filed.<sup>23</sup>
- iii. **Europe-** The Youstice<sup>24</sup> addresses consumer-related disputes in service involving travel, gambling, etc. through a two-way negotiation between the negotiation between trader and consumer and secondly through a neutral third party because of the sanctity of the negotiation that can be compromised.
- iv. **China-** Alibaba's Internal Online dispute resolution mechanism has devised an online means through which disputes can be resolved online for the buyer and this is done through negotiation, public Review services, etc.<sup>25</sup>

In disputes involving Multiple Parties such as government, individuals, etc. the Australian Dispute Centre<sup>26</sup> has emerged as the leading entity that resolves disputes through Arbitration, expert determination, conciliation, etc., and provides design to the Virtual Courtrooms for better dispute resolution experience.

Addressing all such jurisdictions and their commonalities in using ODR for similar kinds of disputes we now have the following Key points which show some poignant details regarding the benefits of ODR in the next phase.

#### IV. Benefits of ODR

- (1.) **Cost-effective-**It is cost effective because the disputes are resolved expeditiously and cost-free. The consumers do not have to bear the burden of prolonged litigation; even the court's burden substantially reduced. The technical requirements under Arbitration are also not a barrier to resolving disputes.
- (2.) **Accessibility-**The accessibility of ODR in the comfort of one's home makes this mode of dispute as convenient as the physical presence in Courts or even enforcing the Arbitral Award is not required.
- (3.) **Expeditious and convenient-** The pendency of cases in Courts across India has been one

<sup>23</sup> Designing the Future of Dispute Resolution: The ODR Policy Plan for India, NITI Aayog, 36, <https://www.niti.gov.in/sites/default/files/2023-03/Designing-The-Future-of-Dispute-Resolution-The-ODR-Policy-Plan-for-India.pdf>, accessed 29 Nov. 2024

<sup>24</sup> Youstice Homepage, <https://www.youstice.com/en/> (last visited Nov. 29, 2024)

<sup>25</sup> Zhang Juanjuan, \*On China Online Dispute Resolution Mechanism: Following UNCITRAL TNODR and Alibaba Experience\*, 4 INT'L J. ONLINE DISP. RESOL. 14 (2017).

<sup>26</sup> Australian Disputes Centre Homepage, <https://disputescentre.com.au/> (last visited Nov. 29, 2024).

of the major challenges for the justice system. As per the India Justice Report, 2019, in 21 States and Union Territories, cases in District Courts remain pending for 5 years on average or more.<sup>27</sup>

(4.) **Limit bias caused due to human prejudices or malpractices-** This ODR is a non-human interface of technology that does not have any prejudices against the specific members of the communities. It purely relies on the Evidence and material on record before it in the form of such audio-visual media, Digital evidence, e-mails, etc. so the judgment is based more on cases of these rather than gender, ethnicity, or any identity of the party in the dispute.

(5.) **Segregation for the class of disputes-**The ODR provides segregation for the classes of disputes such as those falling under Consumer Protection, E-Commerce, Labor Law, Family, Real estate, etc. which is a form of convenient mechanism to resolve disputes making it more convenient.

## **V. Incorporating Online Means of Dispute Resolution mechanics in Consumer-related disputes.**

The groundwork for the legislative framework for the adoption and implementation of ODR is already at the forefront. In Consumer-related issues mainstreaming or integrating ODR remains a crucial challenge. This challenge cannot be effectively addressed by the CPA 2019 so the Ministry of Consumer Affairs had to devise some policies that can integrate ICT in consumer-related disputes and it has also resulted in “e-filing” which is one good step in resolving disputes and accelerating electronic means of dispute resolution.

The launching of the “**Consumer App**” to solicit complaints is one effective way devised by the ministry for quick resolution of disputes taking care of the accessibility aspect of the consumers.

The Techniques through which there can be an effective blend of the ODR with the Consumer-related can be manifold some of them are:

### **I. Confidential negotiations**

The automated negotiation is carried out efficiently through ODR where no third party interferes. Through the consent of both parties, the terms as well as the claims of

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<sup>27</sup>Subrat Das et al., \*India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid\* (Tata Trusts 2019), <https://www.tatatrusters.org/upload/pdf/overall-report-single.pdf> (last visited Nov. 29, 2024).

compensation can be decided clandestinely rather than going to the commission.

## **II. Online Mediation and Arbitration**

The CPA 2019 must be amended to include Online means of dispute resolution within it as “ADR” is already there in the provisions because usually at an international scale “ADR” as a mechanism is slowly being outshined by “ODR” so ODR becomes the new alternative rather than ADR.

## **III. Med-Arb**

It is a good alternative to first let the parties decide the outcome of the case themselves and then approach the court. During this process, they can take assistance from online mediators and if they are unable to arrive at any standpoint then Online mediation can be conducted.

## **VI. SAMADHAAN Portal’s Online dispute resolution mechanics**

In October 2017, the Ministry of Micro, Small and Medium Enterprises launched the SAMADHAAN portal, with facilities for e-filing and online settlement of MSE dues against Public Sector Enterprises, Union Ministries, Departments, and State Governments.<sup>28</sup> With the launch of this portal, it has resolved around 3000 cases of payment dues complaints against private enterprises, and others in MSE Facilitation councils. The portal works in a manner such that it is useful for addressing the grievances of all stakeholders rather than industries only. There is a procedural requirement for online Filing, tracking of the complaint filed, and Faster resolution of disputes. Through this, it has become a user-friendly interface to resolve issues faster with accountability.

## **VII. RBI’s online Means of Dispute Resolution Policy for Digital payments**

The Nandan Nilekani Committee in 2019 established by the R.B.I. recommended the adoption of ODR in two phases.<sup>29</sup>

Firstly, through the automated system and secondly through the intervention of people so that there can be double checks on the transparency of the proceedings conducted. The recommendation of appeal against the order was also put forth to make it fairer.

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<sup>28</sup>PIB Delhi, Major Policy Initiatives and Achievements of the Micro, Small & Medium Enterprises (MSME) in 2017, Press Information Bureau (21Dec.2017), <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1513711@=3&lang=1>, accessed 30 Nov. 2024.

<sup>29</sup>Report of High-Level Committee on Deepening of Digital Payments, Nandan Nilekani (Chairman), May 2019, 97, <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/CDDDP03062019634B0EEF3F7144C3B65360B280E420AC.PDF>, accessed 1 Dec. 2024.

This has led to the integration of ODR to address the issues of digital payment and to expand its ambit further. This has been further increased by putting the “cherry on the cake” as even the Governor of R.B.I. Mr. Shakti Kant Das has introduced an ODR mechanism for digital payments. As today due to the huge number of transactions through digital payment either via. U.P.I or other means of payment models have invoked with it as well. So, to resolve those disputes quickly and efficiently the advent of ODR is a huge step.<sup>30</sup>

## **VIII. Confidentiality vs. Transparency Debate in ADR-Analyzing it vis-à-vis Arbitration and Online Dispute Resolution**

### **(A) Domestic Arbitration**

In India, the extent of Confidentiality and transparency is a much-heated topic because, after the advent of the Arbitration and Conciliation Act 1996, the conduct of proceedings has been conducted the backdoor with no such disclosure of the documents, evidence, and even the Award that was passed by the Arbitral Tribunal. In this act Section 42-A is a provision in which the mention of confidentiality of the Arbitral Award is mentioned many experts say that it has been poorly drafted by the draftspersons because of this many new legal challenges can arise in the future so the Section itself might get struck down.<sup>31</sup> These flaws are so much so that the sanctity of “Confidentiality” of Arbitration becomes questionable as the bend towards transparency in all stages of the proceedings becomes important.

Instances where transparency can override the principle of “confidentiality in Arbitral proceedings are numerous some of them can be highlighted as follows:

#### **(a) Drafting problems**

Section 42-A of the Arbitration and Conciliation Act 1996 provides for the confidentiality of essential documents such as Arbitral Award, Trade Secrets, Business proprietary information, Intellectual property rights, etc. This section has not differentiated between what is an “essential document” due to which the parties to the proceedings are free to make any

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<sup>30</sup> Reserve Bank of India, \*Online Dispute Resolution (ODR) System for Digital Payments\*, <https://www.rbi.org.in/commonperson/English/Scripts/Notification.aspx?Id=3194> (last visited Dec. 1, 2024).

<sup>31</sup>Vikash Kumar Jha & Nikhil Aradhe, \*Conundrum Surrounding Section 42 of Arbitration and Conciliation Act, 1996\*, DISPUTE RESOLUTION, CYRIL AMARCHAND MANGALDAS BLOGS (Nov. 22, 2023), <https://disputeresolution.cyrilamarchandblogs.com/2023/11/conundrum-surrounding-section-42-of-arbitration-and-conciliation-act-1996/> (last visited Dec. 1, 2024).

document “confidential” and even during the stage of appeal against arbitral award they are not bound to disclose those documents. This principle of giving importance to specific documents was substantiated by the Singapore High Court in the case of *International Coal Pte Ltd. vs. Kristle Trading Ltd. & Anr* where it was held that only those different documents must be given different protection rather than maintaining a blanket of confidentiality.<sup>32</sup>

### **(b) Party autonomy-The Sacrosanct principle of Arbitration**

Section 42-A of the Arbitration and Conciliation Act 1996 is a provision that conflicts with party autonomy because of its drafting and power. The way it has been inserted makes it conflict with the terms of the agreement because the parties in the term of the agreement can decide if they wish to maintain the confidentiality of the award through a clause in the agreement rather than expressly doing so. However, this provision acts as a barrier and it is hampering the working of other legislations also which require the parties to the dispute to disclose certain relevant information such as the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015 in which the listed companies are under an obligation to make certain disclosures about their financial situation, performance, ownership, governance, etc., by way of statements, periodic filings, reports, and other documents.<sup>33</sup>

### **(c) “Public interest” the neglected exception for disclosure of the Award**

There is only one exception provided in Section 42-A in which for enforcement and implementation of Arbitral award then the principle of confidentiality can be neglected. However, if we look through the legal lens then this provision has failed to take care of “public interest” as one exception because how it is drafted only gives importance to the enforcement of the Arbitral award and due to this the confidentiality of the proceedings, evidence, and the award remains confidential even if public interest demands it to be disclosed. At an international scale, the example of Australia becomes important because the Australian High Court in the case of **Esso Australia Resources Ltd. vs. Plowman**,<sup>34</sup> declared “public interest as an exception for maintaining confidentiality.

<sup>32</sup>Int'l Coal Pte Ltd. v. Kristle Trading Ltd. & Anr., [2008] SGHC 182.

<sup>33</sup>Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, § 4, last amended on Jan. 10, 2020, [https://www.sebi.gov.in/legal/regulations/Jan2020/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-January-10-2020-\\_37269.html](https://www.sebi.gov.in/legal/regulations/Jan2020/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-January-10-2020-_37269.html) (last visited Dec. 1, 2024).

<sup>34</sup>Plowman v. Esso Australia Res. Ltd., 2 ARIA L. J. (No. 4), <https://aria.law.columbia.edu/issues/2-4/plowman-v-esso-australia-resources-ltd-confidentiality-in-arbitration-vol-2-no-4/> (last visited Dec. 1, 2024).

## (B) International Arbitration

The international disputes between the countries are also being resolved through this one viable tool of Arbitration which not only makes it important but due to this, the parties are not bound to approach the International Court of Justice (ICJ) to resolve their disputes. The disputes are resolved in a three-fold manner through the Inter-state, Investment-State, and International Commercial Arbitration.

Firstly, we will delve into the aspects of *Inter-State Disputes* because in these kinds of disputes, the degree of confidentiality is subsided by transparency and in these disputes, the balance is tilted more towards transparency. In these kinds of disputes, the proceedings that are conducted on the Internet are made available to the public at large,<sup>35</sup> and written evidence, Pleadings,<sup>36</sup> and even the Judgements<sup>37</sup> passed by the permanent court of Arbitration are no longer confidential. This is a healthy practice that ensures transparency reasonably.

Secondly, in cases of *Investment-State Arbitration* problems are somewhat peculiar because the balance between Transparency and confidentiality is somewhat disturbed because the Award is made public but the Hearings, Pleadings, and Written statements are made privately adding a veil regarding the submissions that were made. For example, case of *Micula v. Romania*<sup>38</sup> the European Commission did not have access to any submissions made by Romania and even in the case of cross-examination the commission representatives were unaware of the issues that were there before the tribunal.

Thirdly, in the case of *International Commercial Arbitration*, the issues of confidentiality are different subjected to different jurisdictions.

The explicit provisions of confidentiality are recognized by countries such as the United Kingdom, Singapore, New Zealand, etc. For instance, the Singapore International Arbitration

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<sup>35</sup>International Court of Justice, Press Release, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (19 Feb. 2004), accessed 1 Dec. 2024

<sup>36</sup>International Court of Justice, Rules of Court 1978, art. 53(2). The rule provides: "The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings."

<sup>37</sup>International Court of Justice, Rules of Court 1978, art. 94(2): "The judgment shall be read at a public sitting of the Court and shall become binding on the parties on the day of the reading."

<sup>38</sup>Ioan Micula et al. v. Romania (I), ICSID Case No. ARB/05/20.

Centre Rules of 2016,<sup>39</sup> Hong Kong International Arbitration Centre [“HKIAC”] Administered Arbitration Rules 2018 under Article 45,<sup>40</sup> etc. protect confidentiality with some reasonable exceptions such as consent among the parties, the Court’s order, third-party interests, appeal against the order of the tribunal, enforcement of a legal right, etc. This reasonable exception maintains the balance between confidentiality and transparency during and after the proceedings.

The Implied principles of Confidentiality are recognized by some countries such as the United Kingdom, Singapore, etc. These are the same countries that have express confidentiality rules. For instance, the affirmation of public interest as an exception is one of the paramount principles that have been recognized and makes the confidentiality principle weaker.<sup>41</sup> In Singapore, as per Section 57, the confidentiality principle becomes weaker where the interest of the parties as well as the Court’s judgment intervenes where the court can opine whether to disclose any part of the proceeding in the public domain based on the interest of the parties and their consent.<sup>42</sup>

There is laxity in maintaining confidentiality because some countries give more importance to transparency rather than confidentiality. This was seen in the case of *United States v. Panhandle E. Corp.*<sup>43</sup> Similarly Nordic countries such as Sweden which was the first country to reject this “confidentiality” principle expressly provided for confidentiality only in two instances when there is an express Contract for it or when the arbitration rules guarantee it. in the case of *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.*<sup>44</sup>

### (C) Online Dispute Resolution

The online dispute resolution is conducted through mechanisms such as E-mails, Zoom, Cisco-Webex, Google Meet, etc. However, the terms and conditions under which these companies are sometimes so one-sided that they prefer the disclosure of confidential information at the peril of the affected party. For example, in case of disputes between Sony

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<sup>39</sup> Singapore International Arbitration Centre, Rule 39.1, [https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac\\_rule30](https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule30), accessed 1 Dec. 2024.

<sup>40</sup>HKIAC, art. 45, <https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018>, accessed 1 Dec. 2024.

<sup>41</sup>The Chartered Institute of Arbitrators v. B & Ors., [2019] EWHC 460 (Comm).

<sup>42</sup> Arbitration Act, § 57, No. 37, Acts of Parliament, 2001 (Singapore).

<sup>43</sup> United States v. Panhandle E. Corp., 118 F.R.D. 346 (D. Del. 1988).

<sup>44</sup> Bulgarian Foreign Trade Bank Ltd. v. AI Trade Fin. Inc., Case No. T 1881-99 (Swedish Sup. Ct. Oct. 27, 2000).

and Nintendo the information of the documents, evidence, hearings, and the Award itself can be used negatively by companies such as Microsoft without selling it to third parties that can monetize this data. It can even lead to the advancement of X-Box.

In the case of Cisco-Webex, the privacy statement of the company expressly states that retaining and using personal data can be necessary to comply with the business requirements, and legal obligations and to enforce their rights and agreements.<sup>45</sup>

The Online video conferencing platforms such as Zoom expressly states in their privacy statement that the content or information passed through their webinars can be collected and processed by them without the consent of their users.<sup>46</sup> It can be used by its employees and stakeholders to respond to lawsuits and infringe on the rights of its users for its market interest. In response to this, there was a case filed in the U.S. Northern District Court of Carolina in 2020 where the users made a complaint against Zoom for sharing their private information with third parties such as Google, Linked- In, Facebook, etc. without their consent and it led it to instances of Zoombombing. However, the court in its judgment rejected the contention of the parties on the ground that “information” that was obtained by the third parties was not clarified before it.<sup>47</sup>

The Cloud-storing services of companies such as Microsoft Cloud Storage, Dropbox, etc. also prioritize their rights and exploit the users electronic records. Dropbox uses personal data for business purposes without permission from the users and it shares that personal information with other third parties for the protection of its rights and without the consent of third parties.<sup>48</sup> Thus, the principle of confidentiality and even transparency remains at stake.

The E-Mail services providers such as Microsoft Outlook and G- Mail also subside the principles of confidentiality and transparency through their vested market interest which is a barrier to effective implementation of the award because firstly, Microsoft has control over

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<sup>45</sup> Cisco, ‘Cisco Online Privacy Statement’ (2024), accessed 1 Dec. 2024.

<sup>46</sup> Zoom, \*Zoom Privacy Statement\* (last updated Mar. 17, 2024), <https://zoom.us/privacy> (last visited Dec. 1, 2024).

<sup>47</sup> Order by Judge Lucy H. Koh Granting in Part and Denying in Part Motion to Dismiss, (lhk1c2, COURT STAFF) (Filed on Mar. 11, 2021) 19–23.

<sup>48</sup> Maud Piers & Christian Aschauer, Survey on the Present Use of ICT in International Arbitration, in *Arbitration in the Digital Age 15-24* (Cambridge Univ. Press 2018), <https://doi.org/10.1017/9781108283670.003>. Accessed 7 December 2024.

the products, services, communications, etc which is evident from its privacy statement<sup>49</sup> and secondly, Google also prioritizes its harms, safety, and rights which is evident from the privacy statements<sup>50</sup> so this new mode of expeditious dispute resolution has its loopholes.

## **IX. Jurisdictional Line of Intervention between the Courts and Arbitral Tribunals and the Impact of the Landmark Cases of the Supreme Court on this “Line”**

The Courts and Arbitral Tribunals significantly have clashes between them on issues of Jurisdiction and this “Jurisdiction” is a technical aspect because the way has been changed with the advent of the new Arbitration and Conciliation Act 1996 is significant. For example, in the case of enforcing foreign awards given by the Foreign Courts, the vagueness in its scope of interpretation and enforcement on grounds of “Public Policy” in India is the vantage point that creates disputes.<sup>51</sup> This conundrum was resolved substantially in the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa (2013)* where the issue of appeal and the court's enquiry regarding the foreign awards was settled.<sup>52</sup> Even during the intervention of the courts, there have been instances where jurisdiction as well as party autonomy in appointing arbitrators has been compromised.

The principle of “**Competence-Competence**” is also a contested concept where the jurisdiction oscillates between Courts and Arbitral Tribunals and due to this, the presence of the Arbitration clause is somewhat at peril because even if there is a void or voidable contract the arbitration clause remains intact. This Oscillation can be enumerated through the following case laws:

- (1) *Hindustan Petroleum Corpn. Ltd v. M/S. Pink city Midway Petroleums (2003)*<sup>53</sup>- In this case, the Supreme Court recognized the principle of “Competence-Competence” as paramount and gave liberty to decide the Jurisdictional challenges first and thus court's intervention was limited.
- (2) *N. Radhakrishnan v. Maestro Engineers (2009)*- In this case the Supreme Court deviated from

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<sup>49</sup>Microsoft, \*Microsoft Privacy Statement\* (2024), <https://www.microsoft.com/en-us/privacy> (last visited Dec. 1, 2024)

<sup>50</sup>Google, \*Privacy Policy\* (effective Mar. 28, 2024), <https://policies.google.com/privacy> (last visited Dec. 1, 2024).

<sup>51</sup> Arpan Kr. Gupta, A New Dawn for India—Reducing Court Intervention in Enforcement of Foreign Awards, 2.2 Indian J. of Arb. L. (Nov. 2013), <http://ijal.in/sites/default/files/Arpan%20Gupta.pdf>. Accessed 1 Dec. 2024

<sup>52</sup> *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, (2013) 8 SCALE 489, 2013 Indlaw SC 413 (India).

<sup>53</sup> *Hindustan Petroleum Corpn. Ltd. v. M/S. Pink city Midway Petroleums*, AIR 2003 SC 2881 (India).

Competence-Competence and relied on the observations made by the Madras High Court in the case of **OomorSait v. AslamSait, (2001)** where in allegations of the fraud parties to a dispute cannot be referred for Arbitration by the Civil Court.<sup>54</sup>

- (3) *Swiss Timing Ltd. v. Organizing Committee, Commonwealth Games (2014)*<sup>55</sup>- This case is the opposite of the previously mentioned case where the Supreme Court Overruled its previous observations, and Arbitration in case of fraud allegations was also deemed legitimate.
- (4) *Vidya Drolia v. Durga Trading Corporation (2020)*- In this case, through a more liberal rather the Conservative stance the Supreme Court determined that the Arbitrability based on the “Competence- Competence” rule would be deemed passable if it doesn't directly affect the Arbitral agreement itself.

Thus, all these observations have further bleaked the “line” of Court intervention in matters related to Arbitration so Sections 8 and 16 of 1996 Arbitration and Conciliation Act 1996 were amended after recommendations from the 246th Law Commission Report.<sup>56</sup>

## **X. Recommendations to address problems in Alternative Disputes Resolution and Online Disputes Resolution.**

### **(A) Arbitration**

- (i) **Awareness-** Arbitration as a dispute resolution mechanism is effective but then it still the biggest challenge that remains is “Awareness” because people still prefer litigation as one viable option because of the accessibility of Courts and trust in them and Arbitration is visualized as an “Elitist Dispute Resolution” that resolves disputes between big companies, their shareholders and other such commercial matters. To make it more accessible just as the hierarchy of the Courts at the district, state, and national level the Arbitral Tribunals also will have to be in close proximity so that it is accessible and investment for this infrastructure must be borne by the government.
- (ii) **Clear boundaries of judicial intervention-** The judicial intervention must be minimized as the differing interpretation of principles such as “Competence-Competence” can further lead to a decline in faith in Awards or proceedings conducted independently by the Arbitral Tribunal so it can further exacerbate problems

<sup>54</sup> Oomor Sait v. Aslam Sait, [2001 (3) CTC 269] (India).

<sup>55</sup> Hindustan Petroleum Corpn. Ltd. v. M/S. Pink City Midway Petroleums, 2003 AIR SC 2881 (India), <https://indiankanoon.org/doc/1087099/>. Accessed 1 De. 2024

<sup>56</sup> Amendments to the Arbitration & Conciliation Act, 1996, Report No. 246, Law Commission of India (Aug. 2014), at 50, available at <http://lawcommissionofindia.nic.in/reports/Report246.pdf>, accessed 1 Dec. 2024

as then litigation will be the most preferable option because of the power of the Court.

- (iii) ***Balance between transparency and Confidentiality-*** The balance between Transparency and Confidentiality is so delicate that the boundaries get disturbed so parties should have access to relevant information, hearings, documents, proceedings etc. should be conducted on time. Implementing more technological advancements can improve the efficiency of arbitration proceedings.
  - (iv) ***International Cooperation-*** Many Countries are increasingly working towards making agreements in support of arbitration, engaging in initiatives for harmonizing ADR rules so India must develop multilateral Cooperation with the countries that are advancing in Arbitration rather than just relying on the agreements and not executing them. It will lead to the disposal of cases in a faster manner.
  - (v) ***Establishment of Arbitral Tribunals and aligning with courts at a decentralized level-*** The government must endeavor to make these institutions accessible for common people at a decentralized level so that the proceeding can be transparent and the cost of deciding the “Venue” can be reduced.
- (B) Mediation**
- (i) ***Awareness-*** The common problem in all of the ADR mechanism is this because the members of the bars want court to intervene so that they make high profits. There is a need for frequent seminars, meetings, events etc. to sensitize judges for mediation and for this the electronic and print media should be used so that even common citizens can understand the value of mediation.
  - (ii) ***Budgetary incentives-*** Neither the courts nor the mediation cells receive adequate budgetary share from the government for the maintenance of their infrastructure. The current budgetary allocation in 2024- 25 is Rupees 50 lakh<sup>57</sup> for the mediation councils in a huge populous and diverse country such as India. This allocation is almost negligible as the mediation cells cannot work at their full capacity and with efficiency in this budget.
  - (iii) ***Requirement of specialized knowledge and skilled professionals-*** In conducting mediation the requirement of skilled and specialized professionals for certain kinds of dispute becomes important as the courts also have their limitations so they appoint

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<sup>57</sup>2024-25 Budget and Judiciary, Arbitration and Mediation, Feb. 17, 2024, <https://www.webnyay.ai/blog/2024-25budgetanjudiciaryarbitrationanmediation#:~:text=Let us%20look%20at%20the%20implications%20of%20this,to%20hope%20for%20their%20formation%20this%20year>, accessed 2 Dec. 2024.

experts to deal with complex issues but in India, there is a dearth of skilled professionals in mediation as well. For example, to resolve intellectual property disputes mediation may not be a viable option.

- (iv) ***Imbalance of Leanings of justice and induced acceptance of agreement-*** Mediation is based more towards to consent-based approach to resolving disputes but due to economic or social factors such as the power of one party, the mediator itself, etc. can create problems because the weaker party will have to compromise against the stronger party in this” Win-Win” situation. This must be reduced so that mediation can become substantially punitive rather than just based on compromise for the greater loss.

(C) **Online Dispute Resolution**

- (i) ***Inclusion of a clause or an action to maintain confidentiality-*** As was previously seen in the privacy statements of big companies such as Zoom, Google, Microsoft, etc. they favour their market share more at the cost of privacy to prevent any such event that hinders confidentiality a clause can be introduced in the submissions of the Arbitral proceedings for safety so that these companies cannot misuse such private data and limit their actions to just providing services.
- (ii) ***Collaborations with countries for ODR-*** As ODR is at its birth stage in India the government must implement policies on a time-bound basis so that the agreements reached after such collaborations are fruitful because it will leverage both the private players, court’s functioning, and even the government’s function as well.
- (iii) ***Credibility in ODR-*** As ODR is relatively a new phenomenon with not much awareness “Trust” must be ignited among people because at the present times disputes such as those of Consumer Rights are resolved through E-Mediation which is a better alternative option for such disputes.
- (iv) ***Introduction of ODR in legal education-*** The Bar Council of India (BCI) can introduce ODR in the syllabus for law students so that they can have distinguished careers in ODR and they can further contribute to strengthening the roots of ODR in India.
- (v) ***The Conventional problem of Digital Divide must be tackled-*** The conventional problem of “Digital Divide” must be tackled first-hand because if

this is not tackled then the accessibility of ODR will reduce for people in rural areas or those who don't have sufficient technological means. It can exacerbate the lack of accessibility due to which this mode of dispute resolution will become useless.

## **XI. Conclusion**

The development of making justice accessible and efficient, while utilizing hybrid Alternative Dispute Resolution frameworks, which include arbitration, mediation, and online dispute resolution, helps in dealing with systemic judicial issues such as delay and costs, thereby bringing about efficacy, equity, and inclusion in the processes related to settling disputes. Hybrid ADR mechanisms will come into full effect when strategic concentration on campaigns for awareness, investment in digital infrastructure, and building capacity is concentrated. International cooperation, combined with specialized expertise, will provide a delicate balance between confidentiality and transparency. The hybrid ADR mechanism, thereby, stands at the core of modern jurisprudence as a landmark expression of a sustainable and equitable future for global justice system.

