

ODR

The Future of Dispute Resolution in India

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make
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A. Introduction

The last two decades have seen a slew of reforms aimed at streamlining the dispute resolution ecosystem in India. Broadly, these reform measures fit into two categories- ones aimed at improving judiciary's efficiency at resolving disputes and the others aimed at reducing the very entry of disputes into the traditional court system. The E-Courts project under implementation since 2007 falls in the former category, whereby Information and Communication Technology ("ICT") was introduced in the judiciary leading to digitization of a few administrative and judicial functions;¹ and in the latter, are measures such as setting up of tribunals,² special courts³ and the push towards alternative dispute resolution ("ADR") mechanisms.⁴

Even though these above reforms have been at work for a few years, their effectiveness in achieving the stated objectives – increased efficiency and decreased case-load for courts, have not been upto the levels required to change the status quo. At present, there is a pendency of 33.47 million cases before the district judiciary and 4.46 million cases before the High Courts.⁵ The vacancy of judges remains high at 35.6%⁶ in the High Courts and 21.4% in the district judiciary⁷. Even the E-Courts project, while successful in building ICT infrastructure in courts across the country, has lagged behind in ensuring adoption across stakeholders which has affected its ability to truly deliver on its potential to increase efficiency.⁸

Similarly, the tribunals established to employ specialized expertise for technical matters and ease the burdens of courts, have been riddled with issues such as absence of uniformity and coherence across the framework, lack of independence and capacity, leading to further delay in resolution of disputes.⁹ ADR mechanisms, namely negotiation, mediation and arbitration, looked upon as the panacea for all ills of the traditional court system and tribunals, have failed to take off at scale. In fact, they have come to be riddled with the same complexities and inefficiencies as courts (discussed in detail in the second chapter).

The above stalemate has been in existence for at least a few decades. However, this status quo has now become completely unsustainable. The COVID-19 pandemic and the resulting need for social distancing measures has forced courts, tribunals and ADR, alike to function at sub-optimal capacities thereby exacerbating the problems. It will take months, if not years, to return to the previous level of normalcy, which in any-case was insufficient to cater to even the then existing case-load. The situation is now only going to worsen since thousands of disputes directly attributable to COVID-19 induced lockdown are waiting to enter the system. Delay on account of lack of access to courts will have deleterious effects not just on parties, but on the economy as a whole.

¹ E-Committee, Supreme Court of India, 'Policy and Action Plan Document Phase II of the eCourts Project' (8 January 2014) 2 <https://ecourts.gov.in/ecourts_home/static/manuals/PolicyActionPlanDocument-PhaseII-approved-08012014-indexed_Sign.pdf> accessed 20 May 2020

² Arijeet Ghosh and others, 'Reforming The Tribunals Framework In India: An Interim Report' (*Vidhi Centre for Legal Policy*, April 2018) 8 <<https://vidhilegalpolicy.in/wp-content/uploads/2019/05/8thJuneFinalDraft.pdf>> accessed 20 May 2020

³ Ameen Jauhar and Vaidehi Misra, 'Commercial Courts Act, 2015: An Empirical Impact Evaluation' (*Vidhi Centre for Legal Policy*, July 2019) <https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf> accessed 20 May 2020

⁴ The Doing Business reports have been an annual publication of the World Bank since 2004. See World Bank, 'Doing Business 2020' <<https://www.doingbusiness.org/>> accessed 25 May 2020

⁵ 'E-Courts Services' <https://ecourts.gov.in/ecourts_home/> accessed 26 July 2020

⁶ As per the statistics released by the Department of Justice on 1 May 2020, 385 out of 1079 positions were lying vacant in the High Courts. See Department of Justice, 'Statement Showing Sanctioned Strength, Working Strength and Vacancies of Judges in the Supreme Court of India and the High Courts (as on 01.05.2020)' <<https://doj.gov.in/sites/default/files/Vacancy%2801.05.2020%29.pdf>> accessed 22 May 2020

⁷ As per the report of Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 5146 seats of judicial officers are vacant out of the total sanctioned strength of 24018. See Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 'One Hundred First Report, Demands for Grants (2020-21) of the Ministry of Law and Justice (Rajya Sabha)' (6 March 2020) 79 <https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/18/125/101_2020_3_13.pdf> accessed 22 May 2020.

⁸ Deepika Kinhal and others, 'Virtual Courts in India: A Strategy Paper' (*Vidhi Centre for Legal Policy*, April 2020) 18-22 <https://vidhilegalpolicy.in/wp-content/uploads/2020/05/20200501_Strategy-Paper-for-Virtual-Courts-in-India_Vidhi-1.pdf> accessed 20 May 2020

⁹ Ghosh and others (n 2)

At this critical juncture, the entire ecosystem is either headed towards complete collapse or true transformation. Fortunately, both in the judiciary and the government, the approach has been towards steering the ecosystem towards the latter scenario- *transformation*. The judiciary has openly embraced technology as a means to deliver inclusive justice.¹⁰ Even during the nation-wide lockdown, courts were kept accessible, albeit to a limited extent, through e-filings and virtual hearings. And now it is steadily moving towards adopting a futuristic vision of virtual courts, where certain categories of cases will be resolved entirely online.¹¹

However, the judiciary alone cannot cater to the demands for quick and effective resolution of disputes. World over, resurrection of ADR, especially through technology, is being seen as an answer to tide over the current difficult times as well as for long term improvement in accessing justice. Online Dispute Resolution (“ODR”) or e-ADR, which emerged in the 1990s,¹² is now receiving fresh impetus. Several categories of disputes, especially those arising due to COVID-19 induced lockdown, are seen as fit cases for resolution through ODR. Recently, NITI Aayog, in association with Adami and Omidyar Network India, brought together key stakeholders in the judiciary, government, industry and policy, in an attempt to mainstream ODR in India.¹³ At this critical stage, this paper by the JALDI (Justice, Access and Lowering Delays in India) initiative at Vidhi, aims to contribute to this movement, by analysing ODR frameworks across the world and strategizing India’s road-map towards mainstreaming ODR.

Any thinking on ODR must necessarily start with an examination of its parent system- ADR. The first part of this paper delves deep into the successes and failures of ADR mechanisms in India and lays down a firm set of measures to strengthen the ADR framework as a precursor towards integrating ODR. The second part of the paper explores the potential of ODR and lays down a strategy for its systemic integration into the dispute resolution ecosystem in India, starting with COVID-19 induced disputes.

¹⁰ NALSAR University of Law, ‘Justice DY Chandrachud | Future of Virtual Courts and Access to Justice in India | Nyaya Forum’ (24 May 2020) <<https://www.youtube.com/watch?v=15nxZwNJsBM>> accessed 9 July 2020

¹¹ Deepika Kinhal and others, ‘Virtual Courts in India: A Strategy Paper’ (n 8), Murali Krishnan, ‘Filing of cases in SC will undergo radical change: Justice DY Chandrachud’ (*Hindustan Times*, 3 May 2020) <<https://www.hindustantimes.com/india-news/filing-of-cases-in-sc-will-undergo-radical-change-justice-dy-chandrachud/story-sFNEpebBzq5Z8rxAJawSpl.html>> accessed 9 July 2020

¹² Richard Susskind, *Online Courts and the Future of Justice* (OUP 2019) 61.

¹³ PIB Delhi, ‘Catalyzing Online Dispute Resolution (ODR) in India’ (7 June 2020) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1630080>> accessed 9 July 2020

B. Strengthening the Foundation – ADR in India

In his latest book, Richard Susskind, a renowned author in the field of law and technology, states that ADR ‘has not entirely fulfilled its early promise’ of resolving disputes without recourse to the conventional court system.¹⁴ One of the reasons he identifies for this is that ADR has come to be ‘quite court-like’, in that it has spiralled down into having complicated processes along with the time and cost constraints that it was originally meant to provide respite from. Even then, the author finds a place for ADR and ODR in one of the four layers of access to justice framework he lays out in the book, and that is the ‘*dispute containment*’ layer.¹⁵

It is against this primary objective of ADR i.e. containing disputes from proceeding to courts, that the coming sections evaluate the existing ADR framework in India. The premise is that ODR in India cannot take off as long as perennial problems with the mediation and arbitration regimes remain unaddressed. There is a need to thoroughly examine the problems and explore solutions to strengthen the existing ADR framework before moving onto facilitating ADR through technology.

I. Legal Framework for ADR- The present

In 1899, the British government enacted Arbitration Act, 1899, as one of the first attempts at codifying ADR in India.¹⁶ In the post-independence India, several gradual additions have been made to the legal framework supporting ADR mechanisms. A significant step was the insertion of Section 89 to the Code of Civil Procedure 1908 (“CPC”) through an amendment in 1999.¹⁷ This provision empowers the court to refer a case for resolution through one of the ADR modes recognised under the provision- arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation. The courts are expected to resort to Section 89 wherever it appears that there ‘*exist elements of a settlement acceptable to the parties*’. While this recognition for ADR in statute books is significant, at present there is no study which showcases the effectiveness of this provision in reducing judiciary’s burden or in promoting ADR as a legitimate avenue for dispute resolution. In fact, the burden that this provision places on judicial officers to decide the suitability of ADR on a case to case basis, has perhaps led to decreased adoption of ADR, as explained later in this chapter.

Notwithstanding the insufficiency on the legislative front, the judiciary has mostly been unwavering in its support for ADR. In the case of *Salem Advocate Bar Association v. Union of India* (“Salem II”),¹⁸ the Supreme Court of India (“the Supreme Court”) took a strong pro-mediation stance. This led to framing of model rules and establishment of court annexed mediation centres, bringing mediation into a formal framework for the first time. Further, the Supreme Court in its decision in the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*,¹⁹ specifically identified the following case types as being suitable for ADR:

- (i) all cases relating to trade, commerce and contracts;
- (ii) all cases arising from strained relationship, such as matrimonial cases;
- (iii) all cases where there is a need for continuation of the pre-existing relationship, such as disputes between neighbour and members of societies;

¹⁴ Susskind (n 12) 62.

¹⁵ The other layers identified by the author are dispute resolution, dispute avoidance and legal health promotion. See Susskind (n 12) 111-19.

¹⁶ Shaneen Parikh and others, ‘Arbitration in India – A Story of Growth and Opportunity’ (Cyril Amarchand Mangaldas) <<http://www.cyrilshroff.com/wp-content/uploads/2019/06/Arbitration-in-India-%E2%80%93-A-Story-of-Growth-and-Opportunity.pdf>> accessed 23 June 2020

¹⁷ Code of Civil Procedure (Amendment) Act 1999

¹⁸ *Salem Advocate Bar Association v Union of India* AIR 2005 (SC) 3353

¹⁹ *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* (2010) 8 SCC 24

- (iv) all cases relating to tortious liability, including motor accident claims; and
- (v) all consumer disputes.

While there is no legislation governing mediation, the Arbitration and Conciliation Act, 1996 (“**AC Act**”), governs the procedure, appointment and enforcement issues for arbitration and conciliation in India. This Act not only applies to the contractual disputes with an existing arbitration or conciliation clause, but also comes into play when a matter is referred for arbitration or conciliation by the court under Section 89 of CPC or other legislations referred to below. A more detailed discussion of the mediation and arbitration frameworks in India is under their respective sections below.

Another significant development in the field of ADR is the enactment of the Legal Services Authority Act, 1987 establishing Lok Adalats at different levels to provide ADR services. As per the legislation, the settlement reached through Lok Adalat is binding as decree of the court²⁰ and given the number of disputes that are resolved through Lok Adalats every year, this has definitely been one of the better performing of ADR mechanisms.²¹ In fact, adapting to the changing environment during the COVID-19 pandemic, e-Lok Adalats have recently successfully been held in Chhattisgarh and Karnataka.²² However, even here, there is tremendous scope to scale the reach and impact with minimal application of technology, as discussed later.

II. Mediation in India

Mediation is a voluntary process where parties arrive at a mutually agreeable settlement for their dispute in the presence of a neutral third party. The process is confidential, non-binding and does not involve a strict formal procedure or delve into questions of law or, right or wrong. As opposed to arbitration, mediation is preferred for disputes which do not involve complex questions of law or evidence and hold potential for amicable resolution outside the formal and rigid procedures.

In the Indian context, the words ‘mediation’ and ‘conciliation’ hold different meanings. A conciliator plays a more pro-active role in the settlement proceedings in comparison to a mediator.²³ The Apex Court in the *Afcons* case has observed that the legal framework applicable to mediation is different from conciliation; while the former is subject to procedures laid down by the court and is deemed a Lok Adalat to make settlements enforceable as decrees.²⁴ the latter is governed by the AC Act. Even the Delhi High Court has held that a settlement arrived through mediation is not covered within the ambit of Section 74 of the AC Act.²⁵ Section 74 gives a settlement agreement arrived through conciliation proceedings, the same status as an arbitral award.

Efforts at streamlining mediation have been ongoing at various levels in the judiciary and the government. In 2005, the Supreme Court set up the Mediation and Conciliation Project Committee (“**MCPC**”) to encourage court referred mediation. The MCPC has since been working towards imparting training and generating

²⁰ Legal Service Authority Act 1987, s 21

²¹ In 2019, National Lok Adalat and State Lok Adalats have resolved 59,17,932 disputes, out of which 27,58,649 (46.62 per cent) were resolved at a pre-trial stage. See National Legal Service Authority ‘Annual Report 2019’ (2019) 7 <<https://nalsa.gov.in/library/annual-reports/annual-report-2019>> accessed 23 June 2020

²² Mustafa Plumber, ‘First ‘Virtual Lok Adalat’ Held In Karnataka’, (*Live Law*, 15 July 2020) < <https://www.livelaw.in/news-updates/first-virtual-lok-adalat-held-in-karnataka-159924>> accessed 17 July 2020.

²³ Justice M. Jagannadha Rao, ‘Concept of Conciliation and Mediation and their Differences’ <http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20rao%201.pdf> accessed 19 May 2020.

²⁴ *Afcons* (n 19), p 16 read with p 20 provides that any institution or person conducting the mediation shall be deemed Lok Adalat and provisions of Legal Services Authority Act, 1987 shall apply to the proceedings. Further s 21 of the Legal Services Authorities Act, 1998 provides that every award of the Lok Adalat shall be deemed to be a decree of a civil court.

²⁵ *Angle Infrastructure Pvt Ltd v Ashok Manchanda & Ors* 2016(2) Arb. LR 394 (Delhi)

awareness regarding the benefits of mediation.²⁶ Earlier this year, the Supreme Court has also established a panel to draft a law governing mediation.²⁷

Further, despite the absence of an umbrella mediation legislation, the parliament has introduced clear-cut provisions for mediation in four legislations which govern different categories of disputes. This is a true recognition of the potential mediation holds in resolving these disputes without burdening an already over-burdened court system. Details of the four legislations are:

1. Under Section 12A of the **Commercial Courts Act, 2015**, a suit, which does not contemplate any urgent interim relief, cannot be instituted unless the plaintiff exhausts the remedy of pre-institution mediation. The Central Government has authorised entities constituted under the Legal Services Authorities Act, 1987 to conduct such mediations. The mediation procedure is required to be completed within a period of three months, which can be further extended by two months with the consent of the parties. Pursuant to this, the **Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018**, which lays down detailed procedure for such mediation along with fees applicable, has been notified.²⁸
2. While the **Consumer Protection Act, 2019** also provides a framework for pre-litigation mediation, it does not make it mandatory. Under Section 37 of the Consumer Protection Act, 2019, if it appears to the District Commission that there exist elements of a settlement, it may direct the parties to settle the dispute by mediation. As per Chapter V of the Act, these disputes are to be decided by the 'consumer mediation cell', which is required to be attached to every district and state commission. Further, the draft **Consumer Protection (Mediation) Rules, 2019** have been released by the Department of Consumer Affairs for stakeholder comments. The current draft prescribes the judge-referred court annexed mediation model and recognises voluntary mediation. At a later stage in the paper we argue that these Rules hold potential for introducing Italian pre-litigation mediation for consumer disputes in the country.²⁹
3. Similarly, Section 442 of the **Companies Act, 2013**, gives an option to the parties to proceedings before the Central Government, National Company Law Tribunal ("NCLT") or National Company Law Appellate Tribunal ("NCLAT") to opt for mediation. It also empowers these fora to refer parties to mediation *suo moto*.
4. Even under the **Family Courts Act, 1984**, a responsibility is placed on the courts to make efforts to resolve the dispute by settlement. Under Section 9, in every suit or proceeding, the court is required to assist and persuade the parties to arrive at a settlement by following a procedure that they may deem fit. In fact, the statement of objects and reasons clearly states that the establishment of the Family Courts was "with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs".³⁰ In the case of *K. Srinivas Rao v D.A. Deepa*,³¹ the Supreme Court has held that mediation is an avenue that must be exhausted in matrimonial disputes. The procedure followed for such proceedings is generally as per the rules provided by respective High Courts, but that does not prevent a Family Court from laying down its own procedure.³²

²⁶ Mediation and Conciliation Project Committee, 'Mediation' <<https://main.sci.gov.in/pdf/mediation/Brochure%20-%20MCPC.pdf>> accessed 1 June 2020

²⁷ Ajmer Singh, 'Supreme Court forms committee to draft mediation law, will send to government' (*The Economic Times*, 19 January 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms>> accessed 22 May 2020

²⁸ Commercial Courts (Pre-Institution Mediation and Settlement Rules 2018 <<http://legalaffairs.gov.in/sites/default/files/PIMS%20RULES.pdf>> accessed 1 June 2020

²⁹ Consumer Protection (Mediation) Rule 2019, r 3(3) (Draft Rule)

³⁰ Family Courts Act 1984 <<https://www.mha.gov.in/sites/default/files/TheFamilyCourtsAct%2C1984.pdf>> accessed 1 June 2020.

³¹ *K. Srinivas Rao v D.A. Deepa* (2013) 5 SCC 226

³² Family Courts Act 1984, ss 9 and 10(3)

At present, mediation in India can be initiated in three ways – first, by providing for it in a dispute resolution clause in contracts and resorting to it either through institutional or ad-hoc mediation; second, by way of reference by the court under Section 89 of CPC or under special legislations such as Section 37 of Consumer Protection Act, 2019 after the case is filed in courts; and third, mandatory pre-litigation mediation as provided under Section 12A of Commercial Courts Act. The first two methods are commonly referred as ‘opt-in’ model of mediation. It must be noted here that in all these instances, the decision to continue with the mediation proceedings lies with the parties and to this extent, mediation is always voluntary.

One of the more recent and significant developments in mediation is the [Singapore Convention on Mediation](#)³³ held in 2019, which saw 46 countries including India, signing the convention. The Convention creates a uniform and efficient framework for settlement agreements arrived at through mediation for resolving commercial disputes. It is seen as filling a critical ‘missing piece’ in the mediation enforcement framework at international level.³⁴ This Convention has set the right tone and benchmark for India to address similar shortcomings in terms of enforcement and certainty in its domestic mediation framework.

1. **Shortcomings in the Present Framework**

Despite the provisions in law listed in the above section and the existence of mediation infrastructure created under the Legal Services Authorities Act, 1987, mediation in India has not really taken off as a popular dispute resolution mechanism. In the absence of specific data, it is hard to gauge if and to what extent mediation has prevented disputes from landing up in courts. However, reference to previous studies and consultations with mediation practitioners, bring to fore the following concerns which seem to be preventing mediation from becoming a preferred mode:

- Uncertainty regarding enforceability – As stated above, mediation settlement agreements are not covered under Section 74 of the AC Act and are thus not enforceable under the legislation. In the *Afcons* case, the Supreme Court has held that a mediation process initiated through court reference will be deemed to be Lok Adalat and hence be enforceable in accordance with Section 21 of the Legal Services Authorities Act, 1987. However, these fail to lend any recognition to mediation taking place outside the aegis of courts, thereby creating an uncertain environment for mediation, especially private mediation.³⁵
- Absence of a Central authority to promote and regulate mediation– At present, mediation is being conducted by different institutions and individuals in an ad-hoc manner. While the existing mediation ecosystem in the country has been informally self regulating, there are no formal accreditation standards or quality checks for practitioners. Even court-annexed mediation is supervised in a fragmented manner. Institutionalised efforts to promote mediation are far and few. Concerted efforts by authorities for promoting mediation are few.
- Issues with eligibility criteria for empanelment– Court annexed mediation is governed by the rules prescribed by the relevant forum which also includes the procedure for empanelment of mediators.³⁶ However, there are a few issues with the eligibility criteria prescribed under these rules: *First*, the eligibility criteria for some of these panels often exclude a large set of professionals who may be suitable for the role. For instance, private mediation centres are generally not included. *Second*, the criteria vary across fora. For instance, the Mediation/Conciliation Rules of Punjab and Haryana High Court under Rule 4 recognises

³³ PIB, ‘Cabinet approves signing of UN Convention on International Settlement Agreements resulting from mediation by India’ (21 July 2019) <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1580824>> accessed 1 June 2020

³⁴ United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted 20 December 2018) UNGA Res 73/198 (Singapore Convention on Mediation) <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> accessed 1 June 2020

³⁵ Notably, Section 12A(5) of Commercial Courts Act, 2015 provides that mediation awards arrived at under the provision will have the same status as arbitral awards under Section 30(4) of Arbitration and Conciliation Act, 1996.

³⁶ Under the present framework different forums have enacted their own mediation rules. While most High Courts have introduced their own mediation rules, mediation referred by NCLT/NCLAT under Section 442 of Companies Act, 2013 is governed by Companies (Mediation and Conciliation) Rules, 2016.

mediation institutions.³⁷ In contrast, the Companies (Mediation and Conciliation) Rules, 2016, under Rule 4, does not include institutions as qualified for empanelment. Similarly, Delhi High Court's Mediation and Conciliation Rules, 2004 only recognize persons and professionals and not institutions³⁸

- **Lack of domain specific training for mediators**– Building process expertise and skills of effective problem solving is critical to be a good mediator. Additionally, basic knowledge of the subject matter may also be useful while facilitating resolution of complex disputes. For instance, reference of commercial disputes to mediation before Legal Service Authorities has come under much scrutiny since the mediators under the Authority may not be familiar with the nuances of commercial agreements or specific industrial domains.³⁹ Instead, in some cases, not only lawyers but also Chartered Accountants and Company Secretaries may make for good mediators for commercial disputes. In short, capacity in mediation should be built at two levels across diverse range of professionals – one for developing process expertise especially among lawyers and judges in mediation; and second for developing domain expertise.

Besides the above, there are a number of considerations that merit attention for bolstering mediation in the country. In practice, Section 89 is not being actively invoked by the judges because of which court-annexed mediations remain low. Even if matters are referred for mediation, there are not enough mechanisms in place to ensure that parties appear for the scheduled sessions. Neither Section 12A of Commercial Courts Act nor the various mediation rules prescribe any kind of adverse consequence for non-appearance of parties for mediation. Moreover, in the absence of any central authority, there is no mechanism to ascertain how many private mediations are being conducted and if mediation clauses in contracts are being followed. This is also true for intra-governmental and governmental disputes, many of which can simply be resolved through mediation rather than infamously clogging the courts.

It is clear that the existing piece-meal mediation framework in India is perforated with technical and structural deficiencies, which have prevented it from becoming a preferred mode of dispute resolution in India. Due to lack of certainty as regards enforcement, the demand for mediation is low and consequently, the capacity in mediators and mediation centres has been slow to build up. This is particularly unfortunate considering that mediation is suitable for a wide range of disputes which hold potential to be resolved outside of courts, many of which are likely to see a surge due to the COVID-19 pandemic. The time is now riper than ever to strengthen the mediation framework in the country and progress towards e-mediation. A more detailed strategy to adopt ODR through mediation for COVID-19 induced disputes is discussed in the coming parts of this paper.

2. Strengthening Mediation in India

In its 2019 judgment, the Supreme Court acknowledged that there is a 'dire need to enact Indian Mediation Act'.⁴⁰ Following this, the Court has set up a committee to prepare a draft legislation for mediation.⁴¹ This legislation is a much needed structural reform to give greater recognition to mediation and quell any concerns regarding its legitimacy or enforceability of settlements. While the need for a mediation legislation is well accepted, the content of it is still subject to deliberations. This section attempts to give an overview of the needs that will have to be specifically addressed in a mediation legislation tailor-made for India.

³⁷ Similar recognition is accorded by the Madras High Court under Rule 5 of Tamil Nadu Mediation Rules 2010. See Tamil Nadu Mediation Rules 2010, r 5

³⁸ See Mediation and Conciliation Rules 2004 (High Court of Delhi)

³⁹ BN Srikrishna and Ashok Barat, 'VIEW: Resolving Commercial Disputes during Coronavirus (CNBC TV 18, 24 April 2020) <<https://www.cnbc18.com/views/view-resolving-commercial-disputes-during-coronavirus-5767711.htm>> accessed 1 June 2020

⁴⁰ *MR Krishna Murthi v New India Assurance Co. Ltd.* 2019 SCC OnLine SC 315

⁴¹ Ajmer Singh, 'Supreme Court Forms Committee to Draft Mediation Law, will send to Government' (*The Economic Times*, 19 January 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms>> accessed 1 June 2020

Understanding Italian Opt-out model

One critical takeaway from consultations with mediation professionals and institutes⁴² is that the voluntary and the court referred model of mediation, or collectively the opt-in model, have not been particularly successful in India or elsewhere. Even the mandatory pre-litigation mediation seems to have made very little dent to the burden of the commercial courts because of the manner in which it is currently structured. Therefore, the possibilities offered by a third model of mediation which is being used in other parts of the world can be explored. This is the 'opt out' mediation model which was pioneered by Italy and has achieved considerable success in the country. Under the model, the law mandates the parties to attend one compulsory session of mediation with their counsel before their case is admitted in the court. The mediation commences when a request is submitted by the plaintiff to an accredited public or private mediation provider having office in the same locality as the court which has the territorial jurisdiction of the court.⁴³ The counsel of the parties must be present in these mediation sessions under the law. If either of the parties, or if both the parties mutually decide to discontinue with the proceedings, they can 'opt-out' of the mediation and the mandatory condition under law for mediation will stand fulfilled. Otherwise, the parties can choose to continue with the mediation, and once a settlement is arrived at, both the parties, their respective advocates and the mediator must all sign the agreement which will then become automatically enforceable.⁴⁴

Under the Italian law, specific civil and commercial disputes have been identified for which the first mediation session is mandatory irrespective of the value of the dispute (the disputes have been listed below)⁴⁵. This specific identification of disputes not only removes any ambiguity and discretion pertaining to the procedure but also reinforces the value and suitability of mediation for these disputes. Before mediation is made mandatory in India, a similar mapping exercise needs to be undertaken to identify suitable case types. In this paper, in the coming section, we mention some category of disputes for which such an opt-out mediation model can be piloted in India. Before proceeding to identifying a suitable model for India, following depiction of Opt-in and Opt-out models of mediation should be carefully considered:

Commercial and civil disputes that require an initial mediation session before filing a case in court under the Italian Model:

- Joint ownership of real estate
- Inheritances, family covenant'/agreements
- Business or commercial leases
- Medical malpractice liability
- Damages from insurance, banking and financial contracts
- Real estate
- Division of assets
- Leases
- Bailments
- Damages from libel

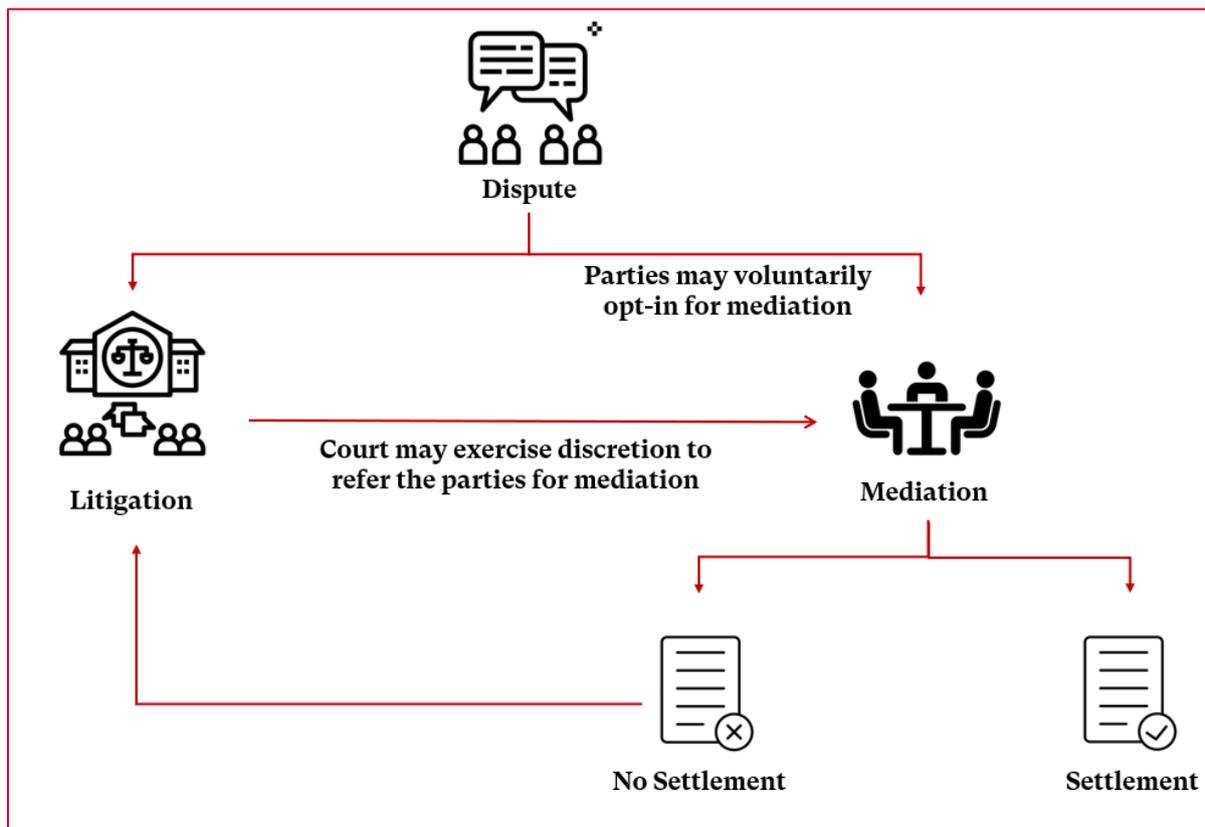
⁴² One such online consultation was convened by Justice Kurian Joseph and CAMP Arbitration & Mediation Practice Pvt. Ltd on the topic 'ADR/ODR Policy to Mitigate Litigation' on 28 April 2020. The session was attended by Justice Madan Lokur, Justice Sikri, Justice B. N. Srikrishna, Ekta Bhal (Samvad Partners), Sahil Kanuga (Nishith Desai Associates), Raj Panchmatia (Khaitan& Co), Supriya Sankaran and Sachin Malhan (Agami), and Arghya Sengupta and Deepika Kinhal (Vidhi Centre for Legal Policy)..

⁴³ Leonardo D'Urso and Romina Canessa, 'The Italian Mediation Law on Civil and Commercial Disputes' (*ADR Center*, 2017)

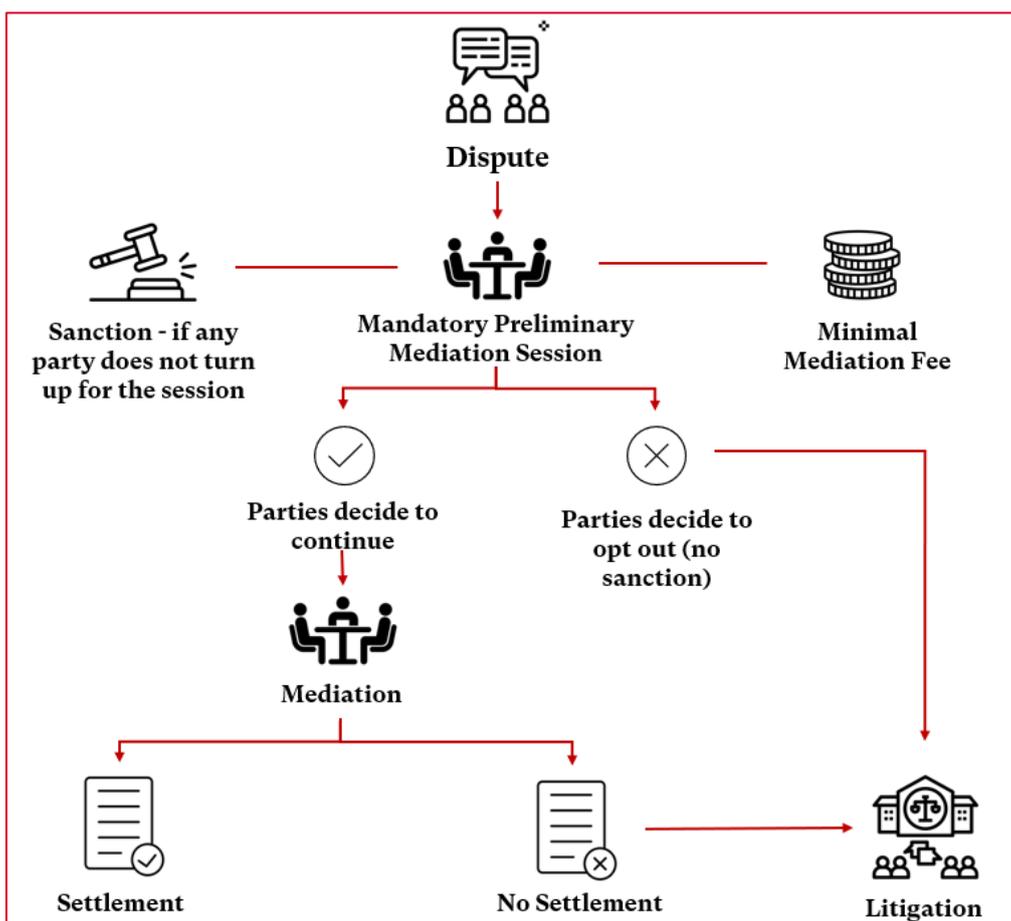
⁴⁴ Ibid.

⁴⁵ Ibid.

Voluntary or Opt-in Model of Mediation

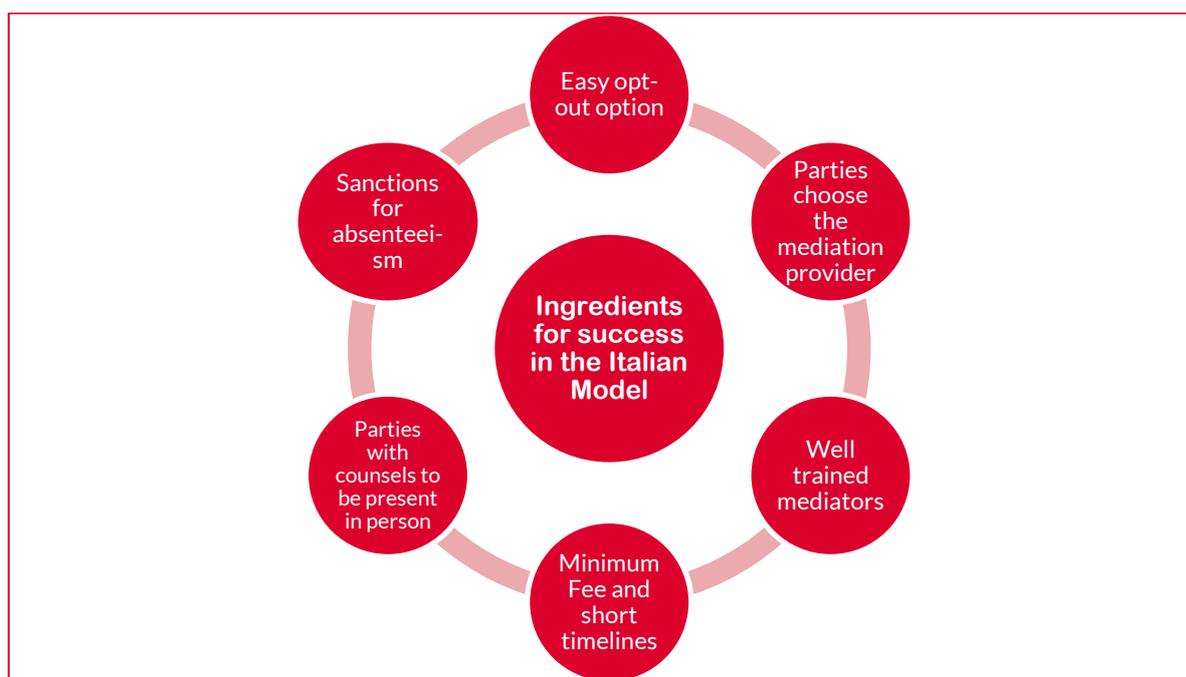


Opt-out Model of Mediation (Italian Model)



Factors contributing to Italian Opt-Out model's success

After the introduction of the opt-out mediation model in Italy, it was observed that about 180,000 mediations were initiated.⁴⁶ Out of these, on an average, in almost 50% of the sessions, the parties voluntarily agreed to continue with the full mediation process. Subsequently, the figures showed that in Italy, for these categories of disputes, the mediations outnumbered the cases in courts- a first for Europe. Significantly, the institution of cases before the courts witnessed a fall for these disputes, specifically in the case of joint ownership of real estate (by 30%), rental apartments (by 40%), and adverse possession (by 60%).⁴⁷ These numbers make it clear that with the opt-out model, Italy was able to realise the benefits which mediation offers at its full potential and relieve the judiciary's burden. As the chart below identifies, the ingredients that have led to a successful Italian model are universal. They hence show promise that if adopted in India, the model could lead to successful resolution of disputes through mediation.



3. Pillars for a Successful Mediation Model

As India works towards developing its own model for mediation, it can draw on the experiences and feedback received on the current provisions that enable mediation and on the successes of the Italian model. These lessons can help identify some of the key pillars that ought to be a part of a successful mediation framework, especially in the context of India.

Drawing from the Italian experience, the following integral pillars for strengthening the mediation framework can be identified which will have to be considered and provided for in any mediation legislation:

First Pillar: Freedom to choose the mediation provider

Under the Italian model, the choice of the mediation provider / mediator rests with the plaintiff.⁴⁸ Even though various High Court rules may allow this choice, significantly the Commercial Courts (Pre-institution Mediation

⁴⁶ Leonardo D'Urso, 'Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation' (2018) 36 Alternatives 49 <<https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/07/Italys-Required-Initial-Mediation-Session-by-Leonardo-DUrso.pdf>> accessed 10 July 2020

⁴⁷ *ibid.*

⁴⁸ Maharashtra National Law University, 'MA Mediation and Conflict Resolution' ><http://mnlumumbai.edu.in/Mediation.php>> accessed 10 July 2020

and Settlement) Rules, 2018 do not.⁴⁹ For mediation to be truly voluntary, the parties should have the liberty to pick the mediator or the mediation institute under whose aegis their mediation will be conducted. To aid this, the government and the judiciary should make public a list of accredited mediators and institutions along with details of their respective domain expertise, fees charged and geographical locations.

Second Pillar: Standardized court annexed mediation

At present, the rules governing mediation across states are varied with different High Court rules prescribing different timelines and procedural details.⁵⁰ A legislation providing for adoption of Italian model (opt-out model) for a few categories of disputes will bring the much needed standardisation for mediation across fora and bring clarity about the process and outcomes. It should also provide for an environment which is unlike the daunting court atmosphere to ensure a friendly, non-threatening environment.

Third Pillar: Incentives for all stakeholders

The Italian opt-out model identifies the correct incentives for boosting mediation, wherein lies the model's strength. Under this easy opt out option, parties have to pay a subsidized fee for the first session and regulated fee for future sessions, thereby being absolved of a mandatory time or a cost commitment. Moreover, as the law mandates the presence of both the parties and their advocates, even the services of the bar are engaged. A person who refuses to participate in the proceedings may be sanctioned by the court by imposition of costs. Successful mediations are also rewarded with tax credit.⁵¹ Similar incentives need to be identified for all stakeholders in India.

Fourth Pillar: A strong monitoring system

In Italy, as the mediation is conducted by public and private institutions outside the court system, the limited judicial resources are not burdened. The efficiency and fairness of the system is ensured through strong monitoring mechanisms involving accurate data collection and analysis.⁵² Such measures also need to be introduced in India with the help of MCPC along with the Department of Justice. Feedback from parties after the mediation sessions could also be of value for this purpose.

Fifth Pillar: Clear enforceability of mediation awards

As already discussed, the Indian law does not provide for enforcement of private mediation awards. Enforcement of court referred settlement awards is also not streamlined. Even if it is argued that settlement awards being mutual and voluntary need not reach enforcement stage, it is important that a mediated settlement agreement is legally enforceable to build confidence amongst the parties and the legal community in the process.

4. Building adequate capacity and infrastructure

The foremost prerequisite for making opt-out pre-litigation mediation mandatory in India is to build adequate capacity of professionals and infrastructure for mediation.

⁴⁹ Commercial Courts (Pre-institution Mediation and Settlement) Rules 2018, r 3(7)

⁵⁰ For example: While some High Courts like Punjab and Haryana, Madras and Bombay expressly qualify mediation institutions as eligible for empanelment with the High Court, the Delhi High Court does not. Non-attendance of parties to the mediation sessions without sufficient cause can be punished with costs under the rules of High Courts of Punjab and Haryana, Bombay and Gujarat High Courts. Whereas, rules of Delhi and Madras High Courts do not specify these costs. The timelines prescribed for completion of proceedings also varies with High Courts of Bombay and Madras prescribing 60 days while High Courts of Delhi, Gujarat and Punjab and Haryana prescribing 90 days. These examples are illustrative of the variance in the present framework for court-annexed mediation.

⁵¹ D'Urso and Canessa, 'The Italian Mediation Law' (n 44)

⁵² Constantin-Adi Gavrilă, 'Don't rush' (*Kluwer Mediation Blog*, 2 March 2015)

<http://mediationblog.kluwerarbitration.com/2015/03/02/dont-rush/?doing_wp_cron=1589283508.1908419132232666015625> accessed 1 June 2020

At present, the training and accreditation for mediators is being provided by very few state institutions such as the Indian Institute of Corporate Affairs⁵³, Delhi Dispute Resolution Society, ad-hoc training by courts and a handful of private ADR institutes. However, in the absence of any centrally regulated training there is a void of industry standards for mediation practice. Even as more institutions are increasingly offering mediation training, with even educational institutions like Maharashtra National Law University introducing specific courses on mediation,⁵⁴ state backed training remains limited.

A snapshot of the existing mediation infrastructure in India, as per the data released by National Legal Services Authority (“NALSA”) is given below⁵⁵:

ADR/Mediation Centres ⁵⁶		No of Mediators		Judicial Officers		Lawyers		Others	
ADR Centres	Mediation Centres (Other than ADR's)	No of Mediators in ADR Centres	No of Mediators in Mediation Centres	Trained	Deployed	Trained	Deployed	Trained	Deployed
8,622	19,268	51,951	96,106	63,866	31,744	1,83,141	1,15,879	6,491	5,103

Table 2: Existing Infrastructure for Mediation as per NALSA

From the above data, it appears that there already exists sufficient capacity in trained mediators for mediation to scale up in the country. One of the contributing factors for this could be the grants given by the Thirteenth Finance Commission for the creation of ADR centres in the country. The figures for the grant are given below⁵⁷:

Amount Allocated	Amount Released	Amount Utilized
750.00	312.85	220.11

Table 3: Status of grants recommended by Thirteenth Finance Commission for establishment of ADR Centres, training the mediators, Lok Adalats and Legal Aid as on 31 October 2014 (Amount in crores)

However, the data is not very helpful when it comes to assessing the quality of this capacity. As can be ascertained from the NALSA data, the focus has been on training practicing advocates and judicial officers as mediators. As these persons are fundamentally trained in adversarial processes, it is important that the pool of mediators be (1) very well trained in the collaborative process of mediation, and; (2) expanded to include other professionals trained to be mediators. This need was in fact felt in the commercial mediation of *Daramic Battery Separator India Pvt. Ltd.* where NALSA was unable to find a suitable commercial mediator within its pool of mediators.⁵⁸ Therefore, for mandatory opt out mediation, it is important that capacity in resources and infrastructure is built at the required scale to increase confidence in the viability of mediation as a preferred mode of dispute resolution.

⁵³ Indian Institute of Corporate Affairs, 'Be a Commercial, Consumer and Financial Mediator' <<http://www.mediationiica.in/>> accessed 1 June 2020

⁵⁴ Maharashtra National Law University (n 47)

⁵⁵ National Legal Service Authority, 'Statistical Information in Respect of Cases Settled Through Mediation in Mediation Centers/ADR Centers' <<https://nalsa.gov.in/lsams/nologin/lsamsMediationInformationReportGenerateView.action>> accessed 1 June 2020

⁵⁶ Mediation Centres are generally operated by the state Legal Service Authorities. On the other hand, ADR Centres have generally been established by state governments in pursuance to the recommendations made by the 13th Finance Commission, using the funds granted thereunder.

⁵⁷ 'Allocation of Thirteenth Commission Grants (2010-2015)' <https://doj.gov.in/sites/default/files/tfc_release_31.10.14_4.pdf> accessed 1 June 2020

⁵⁸ Srikrishna and Barat (n 38)

Technological Infrastructure

In the wake of COVID-19, e-mediation, has also gained momentum. Online mediation or e-mediation is generally conducted by the mediator through emails, calls and video conferencing with documents exchanged online.⁵⁹ Research shows that the process of slow paced asynchronous communication through emails gives time for the parties and mediators to think about out of the box settlements, thereby improving the quality of discussion. Further, discussions through email provide a level playing field for both the parties.⁶⁰ It is also extremely suitable for resolution of sensitive cases such as where domestic violence is involved, by creating distance between the victim and the perpetrator.⁶¹

For e-mediation to thrive, technology needs to act as a fourth party that is embraced equally by all - the parties to the dispute, their advocates and the mediator. Not only do they need to have access to adequate technological equipment and internet, but more importantly, they need to trust the online process for its ability to resolve the dispute. This makes the job of the mediator all the more challenging as s/he bears the onus of making the parties comfortable with the new setup. The mediator needs to not only be skilled at mediation processes but also have a good grasp of the technology tools used for online mediation. Rigorous practice and training is also required to ensure seamless experience during these sessions. It must be noted that, conscious of its benefits, online mediation is gaining ground with a few state institutions like the Delhi Dispute Resolution Society.⁶²

5. A resounding precaution: Ensuring access to justice

Any procedural tweak must be such that it does not compromise on the parties' right to access justice. And a procedure that is made mandatory runs the risk of violating this right unless it is done with great care, mindful of its repercussions. Therefore, before enacting a legislation that mandates pre-litigation mediation, it is absolutely essential that the system is ready to deliver in terms of supply of quality mediators and good mediation experience across all jurisdictions in the country. It has to be ensured that the procedure is fair and does not favour one section of the population over other.

An example of where a pre-litigation mediation legislation inadvertently restricted access to justice of parties is that of Romania.⁶³ Here, as the law mandated the first session to be free of cost, the mediators were disincentivised from delivering their best services which often led to a bad first experience for the parties. Secondly, the sanction imposed for non-appearance was too extreme for the parties as it would result in the case being inadmissible in court. This was implemented strictly and it completely violated the claimant's right to access justice. All these factors cumulatively destroyed the public trust in the mediation system of the country.

It is critical that the legislation mitigates these risks by putting in place adequate checks and adopts a balanced 'stick and carrot' approach. The demand for mediation which will be created by the mandatory provision needs to be satisfied with adequate supply of quality services. At this juncture where the attempt is to boost mediation, it is important to tread carefully to create a robust system that generates confidence and lays the foundation for a future where mediation gains prominence as a preferred dispute resolution mechanism, a recognition that it deserves for its effectiveness for a large number of civil disputes.

⁵⁹ PON Staff, 'Usung E-Mediation and Online Mediation Techniques for Conflict Resolution' (*Program on Negotiation, Harvard Law School*, 27 January 2019) <<https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>> accessed 30 May 2020

⁶⁰ *ibid.*

⁶¹ Samantha Dick, 'Coronavirus: Family violence victims spared from facing abusers as matters move online' (*The NewDaily*, 7 May 2020) <<https://thenewdaily.com.au/news/national/2020/05/07/coronavirus-family-violence/>> accessed 30 May 2020

⁶² Delhi Dispute Resolution Society, 'Online Mediation' (15 April 2020)

<http://mediation.delhigovt.nic.in/wps/wcm/connect/doi_ddrs/DELHI+DISPUTES+RESOLUTION+SOCIETY/Home/Online+Mediation> accessed 17 July 2020.

⁶³ *ibid.*

III. Arbitration in India

In this section, we explore how the arbitration culture has panned out in India, its limitations and some of the measures that can be taken to make arbitration a popular mechanism for a wider range of disputes. In India, the arbitration framework is governed by the Arbitration and Conciliation Act, 1996 (amended in 2019) which was enacted based on UNCITRAL Model Law⁶⁴. Under the present framework, arbitration can either be institutional, i.e. conducted by an arbitration institution under its self governing rules, or it can be *ad-hoc* with the parties themselves deciding the contours of the proceedings.⁶⁵

In India, arbitration has primarily been confined to the second form.⁶⁶ A survey conducted in 2013 found that majority of the corporate in India prefer *ad hoc* arbitration (47% preference) against institutional arbitration (40% preference) while 13% were neutral.⁶⁷ This is despite the many advantages which institutional arbitration offers such as specific rules of procedure, timelines, and the choice of arbitrators from an empaneled pool.⁶⁸ The reason for this can be traced to the lack of systemic support for popularizing institutional arbitration in the country.⁶⁹

The first limitation of the current arbitration framework arises from issues surrounding *ad hoc* arbitrations. With *ad hoc* arbitration in India, parties seem to show greater preference for retired judges from the Supreme Court and High Court for appointment as arbitrators. This hampers the arbitration culture in the country in two unintended ways:⁷⁰ the arbitration proceedings continue to follow the formal court-like system with a discernible hierarchy between the arbitrators, the advocates and the parties; and, in practice, the fee charged by the arbitrators can be extremely high because of which only high value commercial disputes are resolved through this mode.⁷¹

Second, there is evidence of malpractices seeping into the arbitrator appointments especially in case of banking or finance industry. One stark example of this is the case involving *Tata Capital Financial Services* where the Bombay High Court found that the same advocate had been appointed by the company as an arbitrator in 252 matters where the company was the claimant.⁷² In his disclosure to the parties, however, the arbitrator had misrepresented this number as being merely eight cases. Therefore, there is an undeniable risk of corporate giants practically engaging arbitrators on their pay roll.

Third, arbitration as a process in itself has certain limitation, irrespective of its mode. It is governed by strict rules of arguments and evidence. As it is also binding in nature which means any one party cannot terminate the proceedings unilaterally and then approach the court under section 32 of the AC Act, limiting the process's flexibility. As a result of this limited flexibility, even courts may be hesitant to refer a matter to arbitration under Section 89 of CPC.

Fourth, in the past, the courts have held that certain categories of disputes are not suitable for arbitration as they involve an element of public policy. This includes tenancy disputes covered under the Transfer of Property

⁶⁴ Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I

⁶⁵ Bibek Debroy and Suparna Jain, 'Strengthening Arbitration and its Enforcement in India – Resolve in India' (NITI Aayog 2016) <https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf> accessed 10 July 2020

⁶⁶ CFO India, 'A case for arbitration' <<https://www.cfo-india.in/cmsarticle/a-case-for-arbitration-2/>> accessed 10 July 2020

⁶⁷ Vidya Rajarao and others, 'Corporate Attitudes and Practices towards Arbitration in India' (PWC 2013) <<https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf>> accessed 23 June 2020

⁶⁸ BN Srikrishna and others, 'Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India' (2017) 16 <<http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf>> accessed 10 July 2020

⁶⁹ *ibid.*

⁷⁰ Debroy and Jain (n 65)

⁷¹ *ibid.*

⁷² *Sawarmal Gadodia v Tata Capital Financial Services Limited* 2019 (4) ABR 652

Act, 1882⁷³, workmen claims arising under the Industrial Disputes Act, 1947⁷⁴, consumer disputes⁷⁵ and most matrimonial matters.⁷⁶ These categories of cases constitute a large portion of the civil litigation before the courts across the country and contribute to the clogging of courts. However, even though the option of mediation can still be invoked for these disputes, it is a reality that this is seldom the case. This signals the need to identify and categorise disputes under suitable ADR mechanisms, so that the disputing parties can resolve their disputes in an effective manner without adding to the judiciary's burden.

1. Scope for Institutional Arbitration

Over the last five years, the Arbitration and Conciliation Act, 1996 has undergone two significant amendments with a view to further streamline the process of arbitration, provide for effective enforcement and introduce stricter timelines. The amendments in 2015 introduced provisions for fixed time period for arriving at the award,⁷⁷ recommended disposal of cases on appointment of arbitrator within 60 days of service of notice to the party⁷⁸ and urged High Courts to frame rules to determine the fee and manner of payment for arbitration.⁷⁹ Further, the amendments in 2019 provided for establishment of a regulatory body, Arbitration Council of India, for improving and overseeing institutional arbitration in the country.⁸⁰

In addition to these developments, there is a strong need for shifting the focus of arbitration from high value commercial disputes to the large number of small value civil and commercial disputes where its potential has not been fully realised. For instance, the cases that fall below the present pecuniary limit of Rs.20 lakhs⁸¹ for institution before Debt Recovery Tribunal constitute a significant volume of litigation. This becomes evident from the following observation of the Rajasthan High Court which upheld the notification which increased the pecuniary limit of DRT:⁸²

“...substantial energy and resources of the large number of Tribunals across the country is being consumed for the segment of the recovery cases having value between ten and twenty lakh rupees, which although account for 41% of the total pendency but on the present scale account only 5% of the total value of the recovery claims.”

Such cases have potential for being resolved through deeper penetration of arbitration in these sectors. This can be made possible by building capacity for institutional arbitration with upgraded ICT and increased reliance on ODR.⁸³

2. Need for Capacity Development

Recognising the importance of institutional arbitration, the 2019 amendment to the AC Act provides for establishment of an Arbitration Council of India with a duty to encourage arbitral institutes. This development comes after the 2017 report of the 'High Level Committee to Review the Institutionalisation of Arbitration

⁷³ Binsy Susan and Himanshu Malhotra, 'Arbitrability of Lease Deed Disputes in India - The Apex Court Answers' (*Kluwer Arbitration Blog*, 19 February 2018) <http://arbitrationblog.kluwerarbitration.com/2018/02/19/arbitrability-lease-deed-disputes-india-apex-court-answers/?doing_wp_cron=1588834417.2339699268341064453125> accessed 1 June 2020

⁷⁴ BW Online Bureau, 'Whether Employment Disputes can be settled through Arbitration' (*BW People.in*, 6 June 2018) <<http://bwpeople.businessworld.in/article/Whether-Employment-Disputes-can-be-settled-through-Arbitration-/06-06-2018-151159/>> accessed 1 June 2020

⁷⁵ Chakrapani Misra and others, 'India: Supreme Courts Rules on the Arbitrability of Consumer Disputes' (*Mondaq*, 4 January 2019) <<https://www.mondaq.com/india/arbitration-dispute-resolution/769412/supreme-court-rules-on-the-arbitrability-of-consumer-disputes>> accessed 1 June 2020

⁷⁶ The Supreme Court has held that matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody are not arbitrable. However, the exclusion by the court does not apply to matrimonial disputes such as those involving division of property and these can still be referred to arbitration. See *A. Ayyasamy v A. Paramasivam & Ors* (2016) 10 SCC 386

⁷⁷ Arbitration and Conciliation Act 1996, s 29A

⁷⁸ Arbitration and Conciliation Act 1996, s 11(13)

⁷⁹ Arbitration and Conciliation Act 1996, s 11(14)

⁸⁰ Arbitration and Conciliation (Amendment) Act 2019, s 10

⁸¹ Ministry of Finance, Department of Financial Services Notification No. S.O. 4312(E) (06 September 2018) <https://financialservices.gov.in/sites/default/files/Notification_dated_06.09.2018_sw.pdf> accessed 20 March 2020

⁸² *Kirti Kapoor v Union of India* 2019 (4) RLW 3396 (Raj.)

⁸³ Debroy and Jain (n 65)

Mechanism in India', chaired by Justice B.N. Srikrishna wherein it was recommended that a national level body should grade arbitral institutions based on infrastructure and personnel and also establish standards for accreditation of individual arbitrators.⁸⁴ The Committee in its report also suggested the setting up of a specialist bar for arbitrators for admission of advocates to arbitration practice and having avenues for extensive training on the subject.⁸⁵ This recommendation had previously found emphasis in a 2016 NITI Aayog study.⁸⁶

Clearly, promoting arbitral institutions, training accredited arbitrators and developing online platforms are some measures that need to be treated as priority for a successful future for arbitration in India. Arbitration in India has already found its roots particularly for commercial disputes. It has the advantage of a solid foundation on which further innovation and improvements can be made. It also has the advantage of observers of the system having knowledge on its inadequacies and pre-identified avenues for progress. The question now is how this existing arbitration framework can be further strengthened. In the following section, this paper explores how online arbitration, as a part of a larger ODR framework, can be the next major development for arbitration in India.

⁸⁴ BN Srikrishna and others, 'Report of the High Level Committee' (n 68)

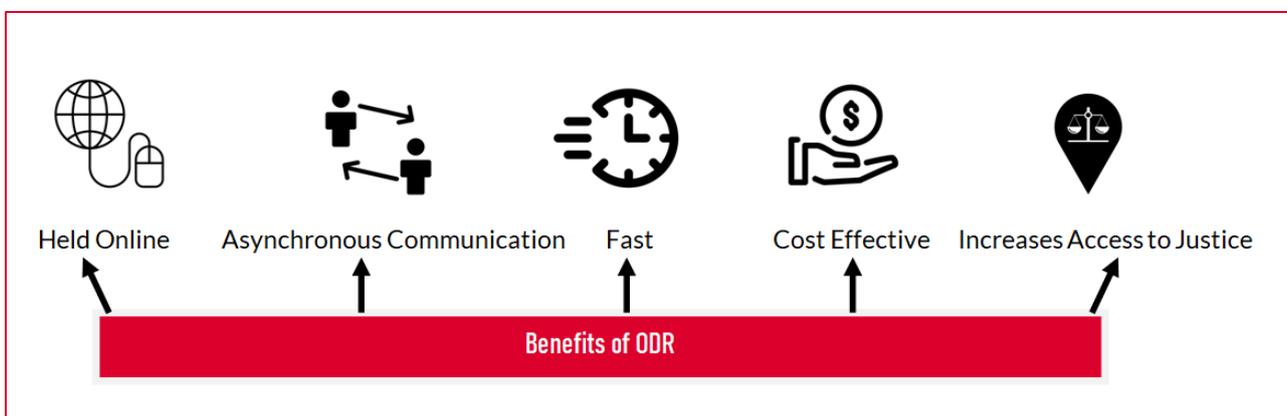
⁸⁵ Arbitration and Conciliation (Amendment) Act 2019, s 10

⁸⁶ Debroy and Jain (n 65)

C. Introducing and Mainstreaming ODR in India

The proliferation of internet brought together people from different locations and jurisdictions to engage in virtual business transactions. This eventually led to the origination of a large number of cross border disputes and consequently, innovative techniques for resolving these were developed by private organizations. The first such was eBay back in 1999. The eBay platform allowed a customer to file a complaint online and initiate a settlement process. In the event that the settlement failed, an online mediation process would commence. The platform was designed to diagnose the problem and conduct automated negotiation followed by mediation or arbitration.⁸⁷ This model, which has since then evolved into more sophisticated variants which are widely used by other private organizations and states alike, has popularly been termed as ODR.

The United Nations Commission on International Trade Law ODR Working Group defines ODR as “ [...] a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology”.⁸⁸ In essence, ODR is simply e-ADR where interactions take place online using technology. In practice, ODR offers more advantages than the traditional offline ADR mechanisms as parties do not have to be present together in person and resolution can take place through asynchronous communication.⁸⁹ This means that parties and the neutral party do not have to communicate simultaneously and can record their response at a time and place convenient to them. To this effect, technology has been touted as being the “fourth party” in ODR.⁹⁰ Besides these, there are some key benefits arising out of ODR. *First*, ODR is cost effective. Given the reliance on video conferencing and technology to transmit information, ODR can drastically reduce the costs in resolving a dispute. *Second*, it is particularly useful for resolving cross-border disputes and issues that may arise because of multiple jurisdictions. It is for this reason that early adoption for ODR has been in resolving e-commerce transactions where parties are in different jurisdictions, and in low value disputes arising out of both a business-to-business as well as business-to-consumer transactions, where going to courts makes little economic sense.



⁸⁷ Gintarepetreikyte, 'ODR Platforms: eBay Resolution Center' (*The 15th ODR Conference*, 14 April 2016) <<https://2016odr.wordpress.com/2016/04/14/odr-platforms-ebay-resolution-center/>> accessed 22 May 2020

⁸⁸ United Nations Commission on International Trade Law, 'UNCITRAL Technical Notes on Online Dispute Resolution' (2017) vii <uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf> accessed 06 May 2020

⁸⁹ Susskind (n 12) 62.

⁹⁰ E.Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (2001).

ODR can primarily take two forms – ODR conducted by private bodies and court annexed ODR. ODR originated and evolved in the realm of the private international organisations such as Smartsettle⁹¹, Cybersettle⁹² and the Mediation Room⁹³ offering online mediation and settlement to parties for commercial disputes. These organisations across the globe are generally governed by their own set of rules. Notably, the International Council for Online Dispute Resolution (“**ICODR**”) is a consortium of public and private sector organizations that resolve disputes or conflicts through online dispute resolution service providers.⁹⁴ The organization works for promotion of ODR by promulgating standards and best practices, and training and certifying service providers.⁹⁵

The success of private ODR has motivated several governments in different jurisdictions to co-opt ODR into their own public court systems. Increasingly, jurisdictions have set up court annexed ODR centres for certain class of cases, which can be disposed speedily such as motor vehicle accident cases, loan defaults, and consumer cases that have limited questions of law and fact.⁹⁶ Some notable examples of this include the New Mexico Courts Online Dispute Resolution Center in the US for resolving debt & money due cases at district level through negotiation,⁹⁷ the United Kingdom’s Money Claim Online for settling money claim disputes⁹⁸ and Canada’s Civil Administrative Tribunal for a range of small value disputes.⁹⁹

In the coming sections, applications of ODR across different jurisdictions are mapped. Thereafter, measures required to mainstream both court annexed and private ODR in India are discussed, based on extensive analysis of the existing framework.

I. Usage of ODR Globally

While ODR might have started with the resolution of e-commerce disputes, it has since been adopted to resolve a wider variety of disputes across the globe, some of which have been identified below.

a. Consumer disputes

The European Online Dispute Resolution platform mandates all online traders in the EU, Norway, Iceland and Liechtenstein to provide an easily accessible link to an ODR platform on their website for consumer information using which consumers can file complaints.¹⁰⁰ Another similar effort has been made in Mexico where the Office of the Federal Prosecutor for the Consumer, also referred to as the Federal Consumer Protection Agency (Profeco) is responsible for managing Concilianet¹⁰¹, an online dispute resolution process to address complaints of consumers against merchants of goods and services. Under this system, consumers can file complaints online or in person and the Agency will then carry out conciliation either telephonically or over the internet. Consumers can also get advice from the Profeco itself at the module installations so as to accelerate the resolution procedure for each case. One limitation of the system is that the only remedy available under Concilianet is

⁹¹ ‘Smartsettle’ <<https://www.smartsettle.com/>> accessed 1 June 2020

⁹² ‘Cyber Settle’ <<http://www.cybersettle.com/>> accessed 1 June 2020

⁹³ ‘The Mediation Room’ <<https://www.themediationroom.com/>> accessed 1 June 2020

⁹⁴ ICDOR, ‘About ICDOR’ <<https://icodr.org/sample-page/>> accessed 10 July 2020

⁹⁵ *ibid.*

⁹⁶ Deepika Kinhal, ‘Every Crisis Presents an Opportunity – It’s Time for India to Ramp Up its ODR Capabilities’ (*Live Law 22 March 2020*) <<https://www.livelaw.in/columns/every-crisis-presents-an-opportunity-its-time-for-india-to-ramp-up-its-odr-capabilities-154196>> accessed 22 May 2020. See also, Akanksha Agrawal, ‘With judiciary embracing technology, time to push dispute resolution online’ (*Business Standard*, 29 March 2020) <https://www.business-standard.com/article/current-affairs/with-judiciary-embracing-technology-time-to-push-dispute-resolution-online-120032901023_1.html> accessed 30 May 2020

⁹⁷ ‘New Mexico Courts’ <<https://www.nmcourts.gov/ODR.aspx>> accessed 1 June 2020

⁹⁸ Nicolas W. Vermeys and Karim Benyekhlef, ‘ODR and the Courts’, in Mohamed S Abdel Wahab and others (ed), *Online dispute resolution: Theory and Practice: a Treatise on Technology and Dispute Resolution* (2012) <https://www.mediate.com/pdf/vermeys_benyekhlef.pdf> accessed 1 June 2020.

⁹⁹ Civil Resolution Tribunal, ‘Starting a Dispute’ <<https://civilresolutionbc.ca/tribunal-process/starting-a-dispute/#1-apply-from-the-solution-explorer>> accessed 27 May 2020.

¹⁰⁰ European Commission ‘Online Dispute Resolution’ <<https://ec.europa.eu/consumers/odr/main/?event=main.trader.register>> accessed 24 April 2020

¹⁰¹ Gob.mx, ‘PROFECO’ <<https://concilianet.profeco.gob.mx/Concilianet/inicio.jsp>> accessed 10 July 2020

contract compliance by the merchant.¹⁰² Irrespective, it is quite clear that ODR has seen large scale adoption in tackling consumer disputes arising out of online and offline transactions.

b. Insurance claims

Private entities have begun to use ODR to settle insurance claims as well. One prominent example of this is CyberSettle, which is a website based out of North America that started in 1998.¹⁰³ This is an automated website which allows the parties to negotiate through multiple rounds of blind bidding. The website calculates if the offers are close and negotiates to arrive at the settlement point.¹⁰⁴ By 2011, CyberSettle had settled over 200,000 disputes with an accumulated value of more than USD 1.6 billion.¹⁰⁵ The insurance sector has vast potential for using AI technology and aiding court annexed as well as private negotiation.

c. Intellectual property/domain name disputes

Registration of domain name is a competitive process that can lead to conflicts as parties are interested in protecting their intellectual property entitlements. Consequently, the World Intellectual Property Rights Organization introduced the Uniform Domain Name Dispute Resolution Policy (UDRP) which is being implemented by Internet Corporation of Assigned Names and Numbers (ICANN). Under this a cost-effective online arbitration process is conducted for resolving domain name disputes.¹⁰⁶ WIPO is working to expand this online arbitration to other intellectual property rights disputes also wherein all submissions, communications as well as payments will be made electronically.¹⁰⁷

d. Family disputes

Online tools can provide an impetus to attempts at settlement by removing geographical and cost barriers. Further, in cases of domestic violence or hostility, it facilitates communication without threat. However, platforms providing these services in family disputes have remained sparse.¹⁰⁸ Moreover, in most jurisdictions online tools in divorce cases have been restricted to online filing of cases.¹⁰⁹ Largely, ODR in the context of family disputes has not been fully developed despite its huge potential.

e. E-commerce

The examples that we saw earlier for the potential and practice of ODR for consumer disputes will also largely apply to e-commerce disputes as well. For instance, in South Korea, the Electronic Commerce Mediation Committee has a panel of mediators which consist of lawyers, patent attorneys, specialists, professors and those in the consumer protection field. An application can be filed for a mediation process, relating to a dispute in electronic commerce, online or by email, or via fax or mail, though the evidence needs to be physically submitted. The mediation process can be conducted either at a particular location or electronically. Cyber-based mediation

¹⁰² Maud Piers and Christian Aschauer (ed), *Arbitration in the Digital Age: The Brave New World of Arbitration* (CUP 2018) <<https://books.google.co.in/books?id=K8k-DwAAQBAJ&pg=PA200&lpg=PA200&dq=Concilianet+online&source=bl&ots=afEZBLkwCZ&sig=ACfU3U0yDP13v-ONEil1ARk-VDnqY87V6w&hl=en&sa=X&ved=2ahUKewi9n-yb-O7nAhXEzjGHbrBDd8Q6AEwAXoECAwQAQ#v=onepage&q=Concilianet%20online&f=false>> accessed 30 May 2020.

¹⁰³ Fabien Gelinias, 'Alternative Dispute Resolution (ADR) Online Mechanisms For SME Cross-Border Dispute' (OECD 2004) <<http://www.oecd.org/cfe/smes/31919270.pdf>> accessed 30 May 2020

¹⁰⁴ Norman Solovay and Cynthia K. Reed, *The Internet and Dispute Resolution: Untangling the Web*, (Law Journal Press 2003) <https://books.google.co.in/books?id=ebpst9j-Y7EC&pg=SA3-PA41&lpg=SA3-PA41&dq=cybersettle+insurance+pdf&source=bl&ots=tIRIPfMbWP&sig=ACfU3U06DTgzCKFRiJTq4rU_tvryujsRXg&hl=en&sa=X&ved=2ahUKewj9tI-81K3oAhXGeisKHc-OBzYQ6AEwBHoECAoQAQ#v=onepage&q=cybersettle%20insurance%20pdf&f=false> accessed 30 May 2020.

¹⁰⁵ Dr. Pablo Cortés, 'What should the ideal ODR system for e-commerce consumers look like?' at *The Hidden World of Consumer ADR: Redress and Behaviour* (Oxford 2011) <https://www.law.ox.ac.uk/sites/files/oxlaw/dr_pablo_cortes.pdf> accessed 30 May 2020

¹⁰⁶ Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2010) 196.

¹⁰⁷ WIPO, 'On-Line Arbitration' <<https://www.wipo.int/amc/en/arbitration/online/index.html>> accessed 27 May 2020

¹⁰⁸ Melissa Conley Tyler & Mark McPherson, 'Online Dispute Resolution and Family Disputes', (2006) 12(2) *Journal of Family Studies* 15 <<https://poseidon01.ssrn.com/delivery.php?ID=179007082000079112069127082103004011008035001029052027018025030126007115098066096070031119115055051016105086112124100127092067044036091040041107065014119119028025067007073125123095002067074025007064083117080103015080003065074081011125004123027027017&EXT=pdf>> accessed 27 May 2020.

¹⁰⁹ Gov.uk, 'Apply for divorce' <<https://www.gov.uk/apply-for-divorce>> accessed 1 June 2020

method proceeds using an online chat or video conferencing system. The parties are connected to the Cyber Mediation Centre (Electronic Commerce Mediation Committee). The decision can also be rendered electronically. The Committee is required to submit the mediation proposal to the parties within 45 days of the submission of their application. Thereafter, the parties have 15 days to either accept or reject the proposal. On acceptance, the Committee's mediation document is delivered to the parties. The mediation document has the same effect as a court-ordered composition under the Civil Procedure Act.¹¹⁰

f. Small causes and small claims disputes

Canada's Civil Administrative Tribunal, British Columbia, is an online Tribunal which exercises jurisdiction over small claims disputes, strata property disputes, motor vehicle accident and injury claims of low value and societies and cooperative association disputes. The application for the dispute is filed online and the Tribunal in most cases will issue notice to the other party. Thereafter parties enter into negotiation and a case manager is appointed. The consent resolution, if arrived at, is then converted into an enforceable order.¹¹¹

g. Disputes involving small and medium enterprises

A collaborative framework to resolve low value disputes involving cross-border B2B disputes, to help micro-, small-, and medium-sized enterprises (MSMEs), has been sponsored by APEC (Asia-Pacific Eastern Cooperation).¹¹² Under this ODR framework, a business may file an online cross-border complaint against a business in another participating economy in cases where both businesses have consented to having such disputes resolved under the ODR framework. The framework provides a comprehensive set of model procedural rules and requires the maintenance of a list of independent ODR providers willing to undertake dispute resolution in terms of the framework on the APEC website. It requires the maintenance of confidentiality by the service providers and encourages the use of private international law instruments such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 2006 UNCITRAL Model Law on International Commercial Arbitration.

II. Present status in India

There have even been some instances of the courts identifying the need for having ODR mechanisms across courts. Justice Ramana, for example, has stated that ODR can be used to successfully resolve consumer, family, business and commercial disputes.¹¹³ He noted the need to cut down on paper, which has been a part of the system for a very long time. The process has in fact started by relying on e-filing of digital paper books instead of hard copies. In light of the COVID-19 pandemic, even the current Chief Justice, Justice Bobde has noted the need for steps to be taken to make courts virtual in order to prevent the shutdown of the top courts.¹¹⁴ In the past, he has iterated the need for making mediation agreements binding while recognising the many benefits of such a system of dispute resolution. He has also emphasised on the need to have international arbitration and artificial intelligence ("AI") as a leading alternative to the current status quo.¹¹⁵ All of this conversation seems to

¹¹⁰ Electronic Commerce Mediation Committee, 'Mediation procedure-related FAQs'

<<https://www.ecmc.or.kr/ecmceng/subIndex/233.do>> accessed 27 May 2020

¹¹¹ Civil Resolution Tribunal, 'Starting a Dispute' <<https://civilresolutionbc.ca/tribunal-process/starting-a-dispute/#1-apply-from-the-solution-explorer>> accessed 27 May 2020.

¹¹² APEC, 'APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-Business Disputes – Endorsed (Second Economic Committee Meeting, 26-27 August 2019)' <http://mddb.apec.org/Documents/2019/EC/EC2/19_ec2_022.pdf> accessed 10 July 2020

¹¹³ Justice N.V. Ramana, 'Delay reduction at different tiers of the court system, pre-trial settlement (use of conciliation procedures for dispute resolution) – The experience of the Supreme Courts of Shanghai Cooperation Organization (SCO) countries' <<https://drive.google.com/file/d/1N3G1iSnP4oiaABN2oLPLf7US9gC2m1Ga/view>> accessed 20 May 2020, See also 'Justice Ramana Tells SCO to Harness Technology To Resolve Disputes' (*India Legal*, 21 June 2019) <<https://www.indialegalive.com/top-news-of-the-day/news/justice-ramana-tells-sco-to-harness-technology-to-resolve-disputes-67451>> accessed 20 May 2020

¹¹⁴ PTI, 'CJI rules out total shutdown of Supreme Court amid coronavirus threat' (*Livemint*, 16 May 2020) <<https://www.livemint.com/news/india/cji-rules-out-total-shutdown-of-supreme-court-amid-coronavirus-threat-11584300621602.html>> accessed 22 May 2020

¹¹⁵ PTI, 'CJI Bobde bats for law containing compulsory 'pre-litigation mediation' (*The Week*, 08 February 2020) <<https://www.theweek.in/news/india/2020/02/08/cji-bobde-bats-for-law-containing-compulsory-pre-litigation-mediation.html>> accessed 20 May 2020

come within his larger scheme of having more technological intervention in resolving disputes across courts, like the introduction of 'SUVAS' (Supreme Court Vidhik Anuvaad Software)-an artificial intelligence powered translation engine that translates judgments from English to Indian languages.¹¹⁶

In fact, the discourse on a formal ODR system in India has already been initiated with the Nilekani panel in 2019 recommending the setting up of online dispute resolution systems to handle complaints arising out of digital payments.¹¹⁷ The committee suggested that such ODR platform should have two levels – one automated and one human, with a provision for appeal.¹¹⁸

Therefore, the stage seems to be set, partly driven by the COVID-19 induced urgency, for ODR to take off as one of the main modes of dispute resolution in India. Quite recently, NITI Aayog, in association with Agami and Omidyar Network India, organised a meeting on 'Catalyzing Online Dispute Resolution in India' where it brought together key stakeholders to work collaboratively to ensure efforts are taken to scale online dispute resolution in India.¹¹⁹ During the meeting, it was recognised that ODR holds great potential for India particularly for small and medium value disputes. It can enhance access to justice and ease of doing business, as efficient dispute resolution will be key in reviving the economy from the challenges posed by the COVID-19.¹²⁰

1. Judicial Preparedness

The Supreme Court has played an integral role in setting the foundation for ushering in ODR in to the country. It has upheld the validity of video-conferencing as a mode for taking evidence and testimony of witnesses in the *State of Maharashtra v Praful Desai*¹²¹ and went on to call 'virtual reality the actual reality'. A similar trend was followed in *Grid Corporation of Orissa Ltd. v AES Corporation*¹²² where the court held that if consultation could be achieved through electronic media and remote conferencing, it was not necessary for people to sit with each other in the same physical space. Similarly, in the case *M/S Meters And Instruments Pvt. Ltd. vs. Kanchan Mehta*¹²³ it observed that there was a need to consider categories of cases which can be partly or entirely concluded "online" without physical presence of the parties and recommended the resolution of simple cases like those concerning traffic challans and cheque bouncing.

Further, the court has recognised the validity of online arbitration in *Shakti Bhog v Kola Shipping*¹²⁴ and *Trimex International v Vedanta Aluminium Ltd.*¹²⁵ In both these cases the court has held that an online arbitration agreement is valid as long as it is compliant with Section 4 and 5 of the Information Technology Act ("IT Act"), 2008 read with Section 65B of the Indian Evidence Act, 1872 and provisions of the Arbitration and Conciliation Act, 1996. The simultaneous movement to integrate technology in dispute resolution and reliance on ADR mechanisms is a clear indicator that India is gearing itself to logically transition towards ODR.

2. Legislative Preparedness

As mentioned above, the current legislative framework can be used to implement ODR in practice. There exist provisions in the present laws which have enabled the accommodation of online processes, especially sharing of virtual documents and virtual hearings. As mentioned earlier, Indian Evidence Act, 1872 under Section 65-A and 65-B allows for the recognition of electronic evidence. Similarly, the IT Act accords recognition to digital

¹¹⁶ PTI, 'CJI focus on speedy end to litigation' (*Telegraph India*, 08 December 2019) <<https://www.telegraphindia.com/india/cji-bobde-focuses-on-speedy-end-to-litigation/cid/1725051>> accessed 22 May 2020

¹¹⁷ Nandan Nilekani and others, 'Report of the High Level Committee on Deepening of Digital Payments' (2019) 97 <<https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/CDDP03062019634B0EEF3F7144C3B65360B280E420AC.PDF>> accessed 30 May 2020

¹¹⁸ *ibid.*

¹¹⁹ NITI Ayog and others, 'Catalysing Online Dispute Resolution in India' (NITI Ayog, 12 June 2020) <<https://niti.gov.in/catalyzing-online-dispute-resolution-india>> accessed 10 July 2020

¹²⁰ *ibid.*

¹²¹ *State of Maharashtra v Praful Desai* (2003) 4 SCC 601

¹²² *Grid Corporation of Orissa Ltd. v AES Corporation* (2002) 7 SCC 736

¹²³ *M/s Meters and Instrument Private Limited v Kanchan Mehta* 2017(4) RCR (Criminal) 476

¹²⁴ *Shakti Bhog v Kola Shipping* (2009) 2 SCC 134

¹²⁵ *Trimex International v Vedanta Aluminium Ltd* 2010(1) SCALE574

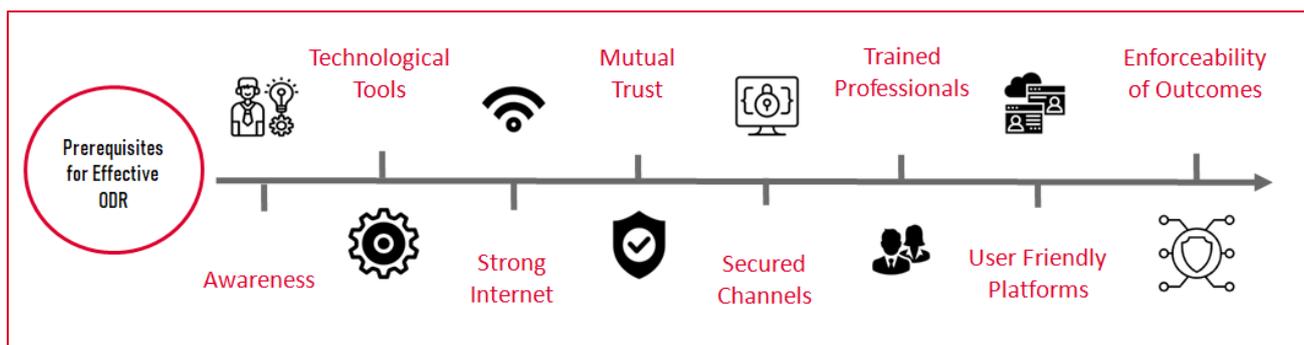
signatures under Section 4, 5, 10-A and 11-15 to provide validity to online contracts. This has been made possible by adopting the UNCITRAL Model Law on Electronic Commerce in 1996 and the Model Law on Electronic Signatures in 2001.

This framework can continue to be the bedrock to ensure enforceability of ODR in the short run. In the long run however, specific recognition for ODR in all forms of dispute resolution – private and court-annexed ADR, would be ideal.

III. Building Capacity and Ensuring Logistical Support

Important variables in making ODR a reality in India is the technological capacity and internet penetration across population.¹²⁶ Even though India might have a large absolute number of internet users, it still accounts for only 34.8% (2016) of its population.¹²⁷ This limited internet access and lack of infrastructure such as affordable computers are primary roadblocks for widespread adoption of ODR. These infrastructure problems would require large-scale resource intensive intervention on part of both government and private players to ramp up capabilities which can enable ODR adoption in India. Apart from technological barriers, ODR also faces mental barrier since people may not readily be comfortable with internet driven communication as opposed to face to face communication. Failing a shift in mentality, the steps taken to move forward will fail to attract immediate support for ODR. However, with greater reliance on e-commerce as a key source of commerce, there certainly seems to be a shift in India’s relationship with online technology. The mechanisms and strategy adopted by e-commerce companies need to be studied to ensure introduction to ODR has a firm footing at least with the internet generation.

The image below identifies all the requirements for an effective ODR mechanism:



Focusing on the ‘trained professionals’ segment above, admittedly capacity building is a long drawn process, but a few recent developments show tremendous promise. ODR has already seen some success stories in India. PayPal for example has an online dispute resolution centre which acts as a neutral third party in resolving consumer disputes which allows parties to first negotiate their issues and on its failure, to arbitrate their disputes.¹²⁸ Similarly, in the recent past NestAway has integrated an ODR platform to resolve disputes with their tenants regarding bill payments.¹²⁹ ICICI Bank has been a pioneer in the banking sector by being one of early adopters of ODR. It has already embarked on a pilot project to resolve about 10,000 of its disputes under the

¹²⁶ See Sree Krishna Bharadwaj H, ‘A Comparative Analysis of Online Dispute Resolution Platforms’ (2017) 2 AJOMIS 81, 82 <<http://www.sciencepublishinggroup.com/journal/paperinfo?journalid=104&doi=10.11648/j.ajomis.20170203.13>> accessed 1 June 2020

¹²⁷ Internet Live Stats, ‘Internet Users by Country (2016)’ <<https://www.internetlivestats.com/internet-users-by-country/>> accessed 1 June 2020

¹²⁸ PayPal, ‘Resolving a dispute with your seller’ <<https://www.paypal.com/in/webapps/mpp/buyer-dispute-resolution>> accessed 19 May 2020

¹²⁹ Indulekha Aravind, ‘Online dispute resolution is beginning to find takers in India’ (*Economic Times*, 12 January 2020) <<https://economictimes.indiatimes.com/small-biz/startups/features/online-dispute-resolution-is-beginning-to-find-takers-in-india/articleshow/73206371.cms?from=mdr>> accessed 30 May 2020.

value of Rs. 20 lakhs using ODR.¹³⁰ The Online Consumer Mediation Centre, of National Law School of India University, which was sponsored by Ministry of Consumer Affairs, targets resolution of consumer disputes both through physical as well as online mediation.¹³¹ Independent private ODR service providers have also been set up in India and provide for the development of technology and increase in capacity to resolve disputes online. Their services currently range from online consultation to online arbitration and mediation. Organisations such as Sama, Centre for Online Resolution of Disputes (CORD), Presolv360, Centre for Alternative Dispute Resolution (CADRe) etc. provide dedicated ODR services. Further, organisations like Centre for Mediation and Conciliation set up by Bombay Chamber of Commerce have been conducting remote mediations before and during the pandemic which has been helpful in easing the burden on the judiciary.¹³²

Not just private players, but even the government seems to be embracing ODR. The Income Tax Department has come up with an E-assessment Scheme (EAS), which seeks to do away with any human interaction between an income tax assessee and officer from the IT Department.¹³³ Similarly, the National Internet Exchange of India (NIXI) had adopted a Domain Name Dispute Resolution Policy (INDRP), which sets out the terms and conditions for resolving a dispute between a holder of an '.in Internet domain name' and a complainant, arising out of the registration and use of the .in Internet Domain Name.¹³⁴

A few years ago the Department of Justice had published a list of institutions that have the capacity to resolve disputes online.¹³⁵ Since then a number of developments have been made in the sector. In order to encourage ODR platforms and generate public awareness, it is necessary to publish a periodically updated list of recognised service providers on various government and court websites. The government and the private sector need to work in harmony for expansion and increased reliance on ODR.

The above list a few definite positive developments in ODR. For this momentum to truly fructify into long lasting adoption of ODR, a few concerns need to be addressed immediately. These are:

- First, one of the most attractive aspects of ODR is that it does not require proceedings to be geography localised. ODR provides a platform for cross-border parties to resolve their disputes in a neutral space provided by the internet. However, the likelihood of proceedings being subject to jurisdictional challenges also increases. Current ADR proceedings across the country have already faced jurisdictional issues and challenges. The applicable law, the seat of the arbitration, the language of the proceedings and the knowledge of the arbitrator of both jurisdictions, continue to be challenges that the current arbitration framework faces. These complexities are only augmented in an online world, whose jurisdictional contours are yet to be clearly demarcated. Thus, any law and policy framework for ODR will have to necessarily address these concerns.
- Second, one of the key elements which make ADR successful is its confidentiality aspect. When this process is conducted online, there is naturally some room for concern regarding data privacy during and after proceedings. One of the ways to safeguard parties' interests is to ensure that there are guidelines and standards which mandate encryption of documents along with a stringent privacy policy, the details of which should necessarily be informed to the parties.¹³⁶

¹³⁰ Ibid.

¹³¹ Online Consumer Mediation Centre, 'About' <<https://onlinemediationcenter.ac.in/about-online-consumer-mediation-centre/>> accessed 30 May 2020

¹³² Srikrishna and Barat (n 38)

¹³³ 'ODR Opportunities in India (Agami and Sama, December 2019) 6 <https://static1.squarespace.com/static/5bc39a39b7c92c53642fc951/t/5e13302088456a2a6f7e4c35/1578315811604/Updated_ODR+Opportunities+in+India.pdf> accessed 21 June 2020

¹³⁴ Ibid 8

¹³⁵ Department of Justice, 'Online Dispute Resolution Through Mediation, Arbitration, Conciliation, Etc.' <<https://doj.gov.in/page/online-dispute-resolution-through-mediation-arbitration-conciliation-etc>> accessed 1 June 2020

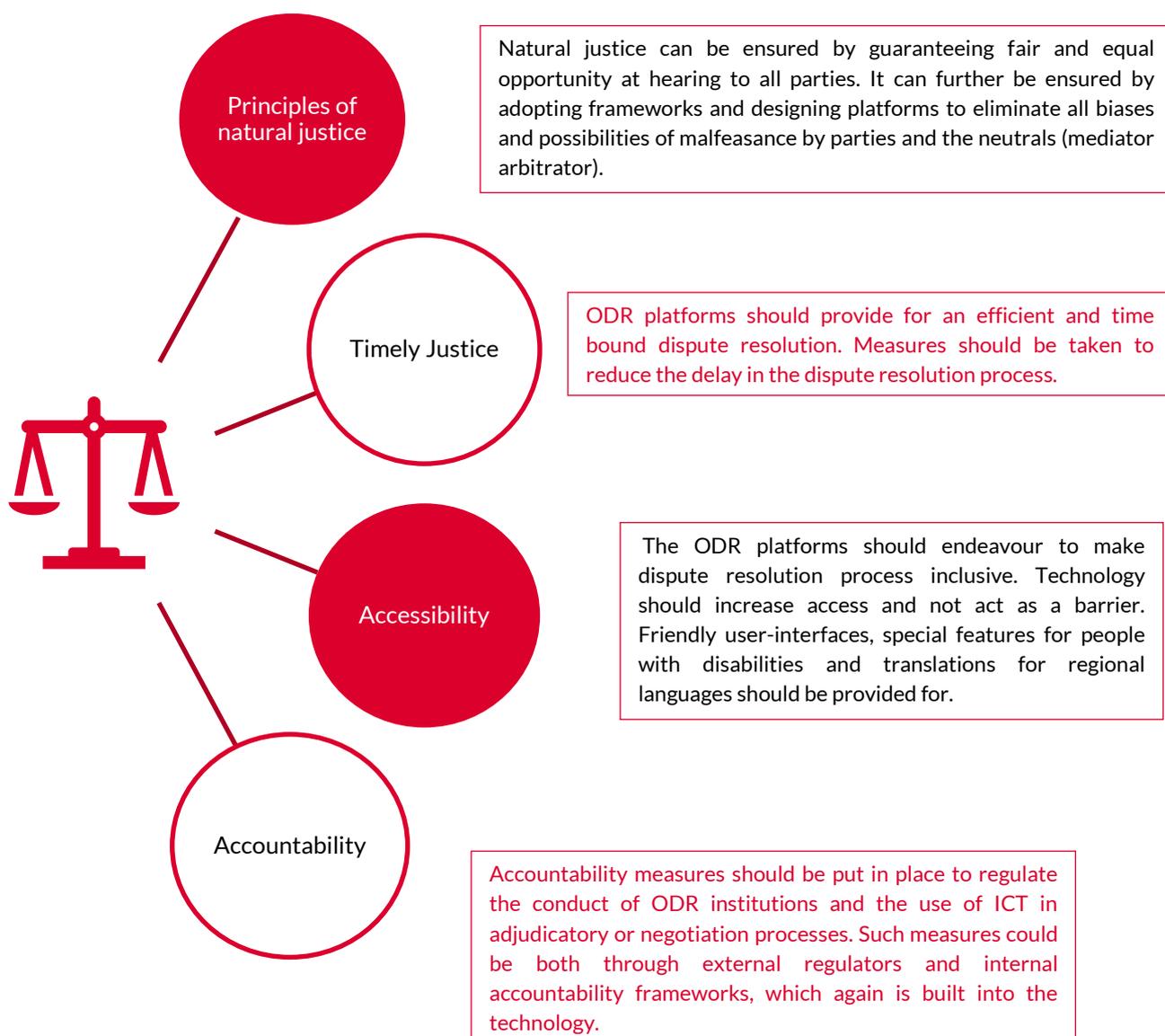
¹³⁶ Esther van der Heuvel, 'Online Dispute Resolution as a solution to cross-border e-disputes – An introduction to ODR' <<http://www.oecd.org/internet/consumer/1878940.pdf>> accessed 1 June 2020.

IV. Principles framework for ODR

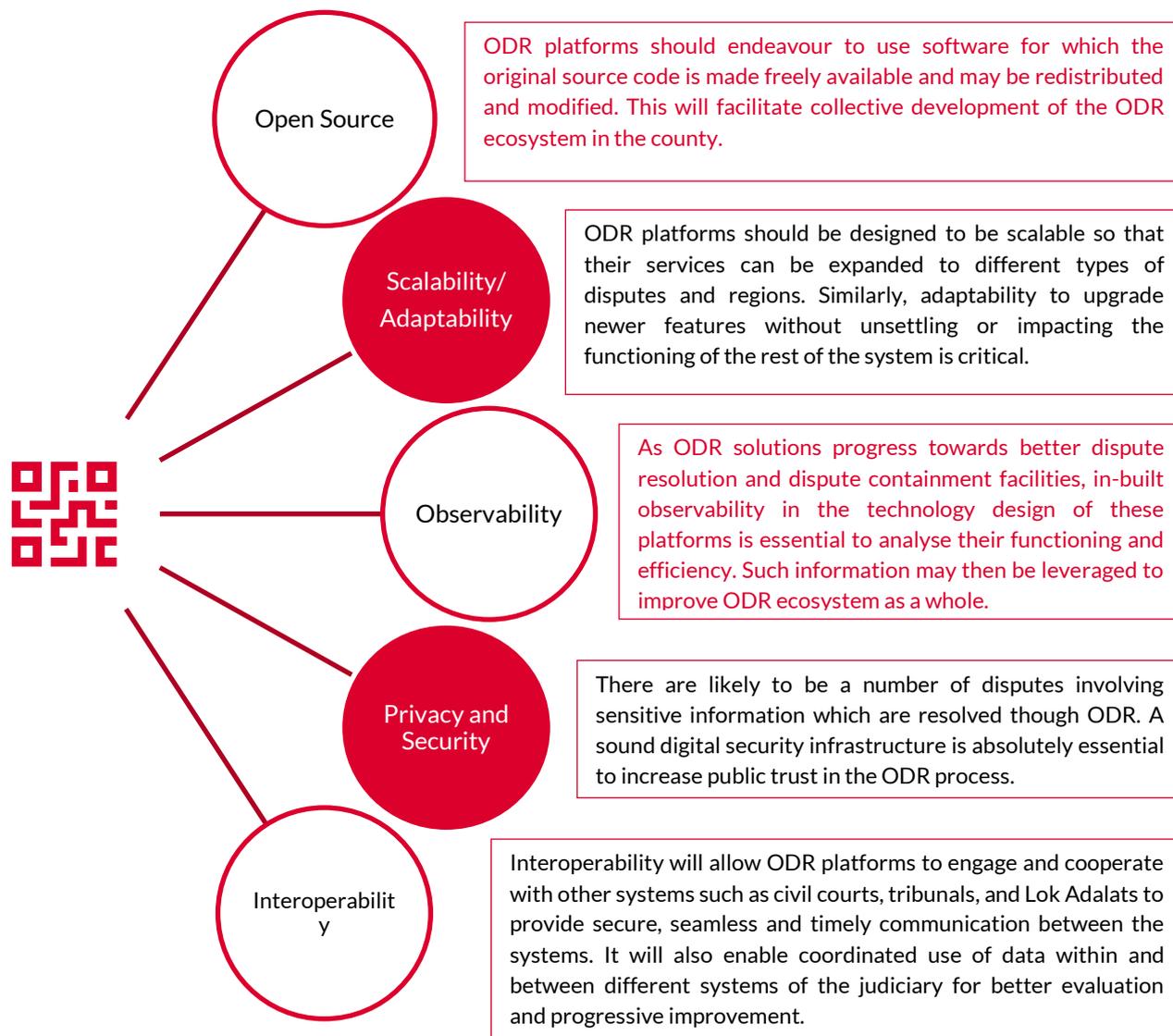
In addition to the concerns listed above, the development and adoption of ODR platforms may result in several other legal and policy challenges. These challenges may include adhering to existing legal structure, building public trust in ODR mechanisms, and developing a system which can improve and evolve with changes in technology and society. To develop a robust ODR ecosystem, ODR frameworks should be based on certain key principles that will assist in mitigating these challenges and steering the dispute resolution ecosystem into the future. This is equally true for both court annexed platforms and private platforms.

These governing principles (which are indicative and by no means exhaustive) can be divided into three categories- legal principles, technology principles and design principles.

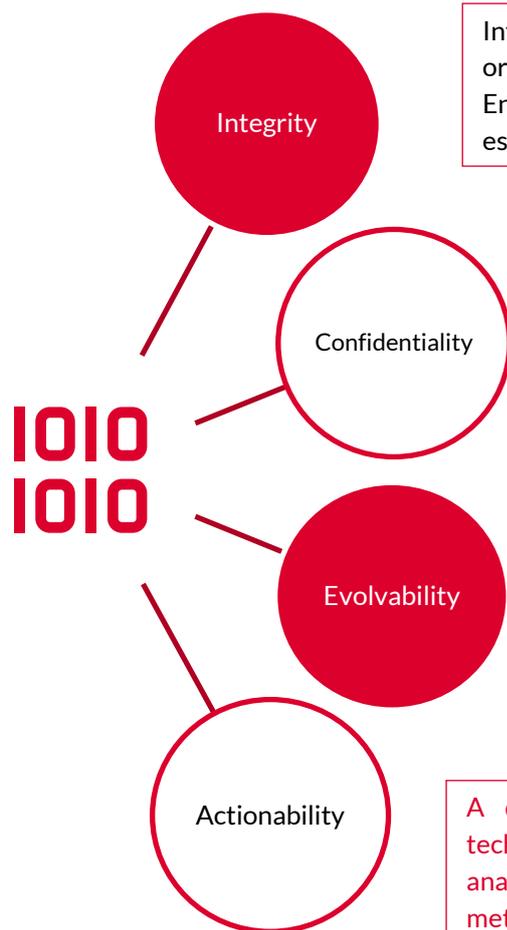
A. Legal Principles



B. Technology and Design Principles



C. Data Principles



Integrity of data is one of the most important principles for any organisation or service. It is especially critical for any legal process. Ensuring accuracy and authenticity of data and documents is essential to guarantee fair process and an enforceable outcome.

An ODR process is likely to involve confidential commercial and private data. Platforms need to ensure a robust confidentiality framework to protect the very fibre of ODR. Additional measures such as data anonymization should be adopted while saving data for the evaluation of the platform.

Evolvability of stored data into metadata and patterns would enable greater understanding of ODR platforms which feed into further improvements. Data points regarding the functioning of the ODR platform should be gathered and shared in various formats to ensure thorough study of individual and collective performances

A dynamic ODR platform which adapts to advancements in technology and legal ecosystem requires the ability to explore, analyse, predict, and act upon the data available. Such analysis of metadata is important for continuous improvement of an ODR platform and to prepare it for the challenges and demands of the future.

IV. The future of ODR in India

Richard Susskind propounds that access to justice encompasses four layers – legal health promotion, dispute avoidance, dispute containment and authoritative dispute resolution.¹³⁷ He points out that the traditional court system has been concerned with only the last two of these. This observation holds true for India as well. The judiciary of the country has systematically employed technology for resolving disputes and keeping the court system alive virtually. However, the time has come for the focus to shift from dispute resolution to dispute avoidance, containment and improving the overall legal health.

Investing in ODR through adoption of more advanced second generation technology, can help India progress towards a futuristic justice system.¹³⁸ As has been the case with the evolution of ODR so far, it is likely that these newer technologies, ones which not only employ legal principles but can also expand to better economic principles for settling civil disputes, will in all likelihood originate from the private sector. It will therefore be important for the judiciary and the executive to partner with these capabilities and adopt them for the larger public use. As difficult as it might be at present to imagine this, but fact of the matter is that the future of dispute

¹³⁷ Susskind (n 12) 113.

¹³⁸ *ibid* 261.

resolution lies with technology, and even AI. ODR can play an important role in this by evolving techniques for better neutral evaluation of legal relationships for early measures.

It is evident that India already has the key elements for introducing a comprehensive framework for technology in dispute resolution processes, namely, institutional willingness, expertise and to a large extent, technology capacity. Going forward, a modular strategy for greater innovation and transformation is required to be ushered in a manner which caters to immediate as well as long term needs. One such modular strategy has been proposed in the coming chapter.

D.Strategy Framework

ODR has the following core components, each requiring different strategy to embrace the idea of ODR and then adopt it to resolve different categories of disputes. These are:

1. Disputing Parties- Individual parties, businesses, banks, governments etc.
2. Dispute Resolution Professionals- Mediators/ Conciliators/ Arbitrators
3. ODR platforms which provide technology and may also lay down rules and procedure for resolution

ODR will be able to take off in India only if the above core components' preferences towards ODR is actively supported and nurtured by the judiciary and the government (at all levels); not only because they are in charge of enforcement of awards/ settlements, but also because their participation lends legitimacy to the processes and outcomes in ODR. Although ODR faces no legal impediments and is a perfectly legitimate mode of dispute resolution, positive reinforcement of this notion by the judiciary and the government will go a long way in realizing ODR's true and complete potential.

Moreover, India needs to adopt an ODR scheme at the earliest for the disputes arising out of the COVID-19 pandemic. Lessons can be drawn from the experiences of two primary jurisdictions. The first is **Hong Kong**, which has introduced an ODR scheme for MSME sector providing for a three tier dispute resolution structure. The scheme identifies an online platform to conduct negotiation, mediation and arbitration for resolution of disputes where the claim amount is under HK\$ 500,000. By fixing reasonable fee for platform usage and strict timelines, the scheme enables affordable, faster and effective mode of dispute resolution even during the current pandemic.¹³⁹

The second is **China**, which, anticipating a surge in commercial and employment disputes, has taken multiple steps including 24*7 legal assistance on telephone and internet, reducing legal service fee, providing legal aid to workers and accelerating the development of Internet Arbitration System.¹⁴⁰ The measures include speedy arbitration in cases where the arbitration award will result in resumption of production. China has also strengthened their efforts to increase coordination between courts and mediation institutions to encourage parties to settle their disputes through mediation.¹⁴¹

Drawing from the experiences in the above jurisdictions and to cater to the dual end of bringing actors and stakeholders together, and catering to sector specific disputes, the following strategy for ODR in India is proposed:

Phase 1: Catering to COVID-19 induced urgency [3 months]

Annexure A of this report identifies in detail the types of disputes that are likely to see a rise in the near future directly as a result of the pandemic. These cases are yet to even enter the court system and are ripe for resolution through ADR mechanisms. Therefore, the first phase of strategy should cater to these disputes.

¹³⁹ 'COVID-19 Online Dispute Resolution (ODR) Scheme' (*SJ's Blog*, 13 April 2020) (HK) <https://www.doj.gov.hk/eng/public/blog/20200413_blog1.html> accessed 29 May 2020

¹⁴⁰ Ministry of Justice Government Network, 'Epidemic prevention and control and public enterprises resumed production complex legal service guide' (03 March 2020) (CN) <http://www.moj.gov.cn/government_public/content/2020-03/03/tzwtj_3243112.html> accessed 29 May 2020

¹⁴¹ *ibid.*

Given the urgency, it is necessary to actively encourage and co-opt existing expertise and resources in private ADR institutions and ODR platforms. In fact, successful adoption and resolution of these disputes in Phase 1 could provide the much needed validation for ODR as a dispute resolution process and sustain this campaign in the long run.

Following are the objectives and action points per stakeholders in Phase 1:

Objectives:

- Reaffirming ODR as a legitimate mode of dispute resolution.
- Identifying categories of disputes fit for ADR.
- Ensuring quality ADR professionals trained in effective use of technology.
- Encouraging innovation and growth in ODR by ensuring a steady stream of disputes / cases to these platforms enabling them to function at scale.
- Creating an ecosystem of partnership between lawyers, ADR professionals, ADR/ODR private institutes and the judiciary.

S. No.	Measures to be taken	Implementation Authority	Action Points
I.A.	Immediate		
I.A.1.	Awareness Campaign	Ministry of Law & Justice, NITI Aayog.	Large-scale awareness campaigns to educate potential litigants about benefits of ADR and ODR along with information about legitimate ODR service providers and ADR professionals.
I.A.2.	Database of Service Providers	The Ministry of Law & Justice	A list of recognised ODR/ADR service providers who satisfy minimum standards and adhere to the principles laid down by the Working Group on ODR.
I.A.3	Principles framework for ODR platforms	Working Group on ODR under NITI Aayog	Lay down principles framework against which ODR platforms can self-regulate . This should be put out in public domain for public to verify a platform's adherence.
I.B.	Short Term (0-3 months)		
I.B.1.	Training lawyers and judges	Judicial academies High Courts & District Courts Private institutes which can provide training	Train lawyers to identify cases fit for ADR/ODR and incentivize them to refer such cases towards appropriate means of resolution. Create easy referral mechanisms for judges to refer matters to

		Bar Council of India	ADR/ODR
I.B.2	Setting minimum standards	NITI Aayog	Encourage the ADR/ODR sector to create industry standards which can work as guidelines to create accreditation for ADR/ODR institutions and professionals. This will ensure quality professionals as well as healthy competition in the market.
I.B.3	Invigorate ODR in private sector	Ministry of Law & Justice, NITI Aayog, Ministry of Finance Ministry of Electronics and Information Technology (DeitY)	Encourage businesses to provide ODR solutions for their customers, especially e-commerce platforms, to avoid and contain disputes early in their lifecycle Encourage entrepreneurship by providing financial grants and tax incentives for private ODR platforms seeking to ensure better and quicker access to justice.
I.B.4	Encouraging ODR in Public Sector	Ministry of Law & Justice and relevant administrative ministries.	Issuing circulars/directives to encourage governments to adopt ADR/ODR for intra and inter departmental governmental disputes by inserting a clause along the following lines: <i>“In the event of any dispute or difference relating to the interpretation and application of the provisions of the contracts with another government ministry/department, such dispute or difference may be referred by either party to arbitration, mediation or online dispute resolution. For this purpose, services of an ADR/ODR service provider which is recognised by the Ministry of Law and Justice can be availed.”</i> Providing appropriate guidelines for government representatives participating in an ADR/ODR process to enable them to take decisions and contribute towards resolution of disputes.

I.B.5.	Preparing a draft pre-litigation ODR Scheme for COVID induced disputes. This should then be circulated for open consultation.	NITI Aayog Ministry of Law & Justice (Department of Justice.)	<ol style="list-style-type: none"> 1. Identify categories of disputes suitable for pre-litigation 2. The scheme should co-opt existing ODR platforms and ADR service providers and leave the choice of fora /professionals to the parties 3. Upgrade court-annexed ADR institutes to provide ODR services by co-opting existing ODR platforms. 4. Set up a fund to upskill ADR professionals in using technology and subsidise the cost of technology equipments in ADR institutes, lawyers' offices etc. 5. Provide legal aid for parties in need of assistance to effectively use ODR facilities
I.B.6	Legislative support for ADR/ODR	Ministry of Law & Justice MCPC Supreme Court of India	<p>Identify legislations where ODR can be introduced into statutes alongside ADR.</p> <p>Expedite the process of finalising Mediation legislation.</p>

Phase 2: Mainstreaming ODR by strengthening ADR and incentivizing innovation [1 year]

ODR can flourish only when ADR mechanisms have grown deep roots in the overall dispute resolution ecosystem in the country. Therefore, it is critical that the society embraces a *'culture of ADR'*, which requires strong backing in law and policy. At present several legislations, including the Code of Civil Procedure, 1908, provide for resolution through one or more of ADR mechanisms. However, adoption has been slow. This is due to lack of incentive mechanisms for two key players- lawyers and judges, to push cases towards ADR. Lawyers perceive ADR as a threat to their ability to earn while judges are simply too overburdened to individually assess cases for their suitability for ADR. Therefore, both statutory mediation and judge referred mediation have failed to take off. Some progress has been made under the Commercial Courts Act, 2015, which provides for compulsory pre-litigation mediation, along the lines of Italian 'Opt-Out' model. However, this seems to have done little to nothing to steer mediation or ADR growth in the country, due to lack of an effective implementation mechanism or guarantee of quality mediation professionals in the country.

Therefore, it is critical that systematic approach is taken towards mainstreaming ADR to ensure the ODR journey is sustainable. Once this foundation is established, ODR is bound to catapult the dispute resolution mechanism towards the best and latest technology innovations worldwide from introduction of AI for speedier resolution of disputes to block-chain for robust security of transactions.

Towards the above vision, the following objectives are laid down for Phase 2:

Objectives

- Entrench pre-litigation ADR/ODR for specific categories of disputes through legislation
- Co-opt lawyers to drive the ADR / ODR mission
- Recognise ODR under existing and future legislations in ADR.
- Encourage entrepreneurship and innovation in ODR by creating an enabling law and policy environment.

S. No.	Measures to be taken	Implementation Authority	Action Points
II. A.	Launching (3-6 months)		
II.A.1	Pilot the pre-litigation ODR Scheme for COVID induced disputes.		
II.A.2	Building Capacity	The Secretariat under NITI Aayog and Ministry of Law & Justice to set guidelines and standards for dispute resolution professionals State and national level Bar Councils.	Increasing capacity for ODR - training lawyers, professionals in different fields as well as retired judges to effectively function as dispute resolution professionals over online platforms. The government only needs to set standards and leave it to the market to

			<p>cater to the demand and supply of quality dispute resolution professionals and accreditation courses.</p> <p>Encourage creation of mediation and arbitration bars with funding for technology upgradation and trainings for the advocates.</p>
II.A.3.	<p>Introduce opt out mediation (both physical and online) for a few categories of disputes on a pilot basis.</p> <p>Evaluate outcomes and extend if satisfactory results are seen.</p>	<p>Minister of Consumer Affairs</p> <p>Ministry of Micro, Small & Medium Enterprises</p>	<p>Amend Commercial Courts (Pre-institution Mediation and Settlement) Rules, 2018 to align with the Italian model –</p> <ol style="list-style-type: none"> 1) Allow parties to opt-out 2) Empower courts to impose sanctions on non-participating parties 3) Recognise and facilitate online mediation <p>Amend Section 37 of the Consumer Protection Act, 2019 to align it with mandatory opt out model. This should also be kept in mind while drafting the rules under the Act.</p>
II.B.	Legislative Reforms & Scaling (6-15 months)		
II.B.1.	<p>Amending Arbitration and Conciliation Act, 1996</p>	<p>Ministry of Law & Justice</p>	<p>Section 2 (1) (a) of the Arbitration and Conciliation Act should be amended to include:</p> <p><i>'arbitration' shall include arbitration that are wholly or partly administered electronically by using Information and Communication Technology.</i></p> <p>Further Section 61(1A) of the Act should be inserted to provide recognition to ODR.</p> <p><i>S. 61 (1A): This part shall also apply to conciliation proceedings conducted electronically, wholly or partly, using Information and Communication Technology.</i></p>
II.B.2.	<p>Amending procedural laws to introduce court annexed</p>	<p>Ministry of Law & Justice</p>	<p>Amend Section 89(1) of the CPC to recognise ODR for each of the category of</p>

	ODR	Supreme Court and High Courts <i>Note - Court annexed ODR should be built on FOSS (Free and open source software principles) to facilitate APIs and further innovation</i>	ADR, including Lok Adalat. The High Court ADR rules to be amended to include ODR platforms as eligible service providers and clarify that ADR procedure conducted electronically shall be recognised. Legal Service Authorities Act, 1987 and National Legal Services Authority (Lok Adalats) Regulations, 2009 to be amended to allow organising Lok Adalats online.
II.B.3	New legislation for mediation	Ministry of Law & Justice MCPC	The law should at the very least provide for the following: - standards for accreditation - recognition to e-mediation - enforcement of settlements, - confidentiality.
II.B.4.	Amending special legislations for introducing opt out model of pre-litigation mediation. This will be based on the progress and experience of pre-litigation mediation in commercial and consumer courts.	Relevant ministries for different legislations	Amending the following legislations to align with the opt out mediation model: - The Family Courts Act, 1984 - Real Estate (Regulations and Development) Act, 2016 - Companies Act, 2013 - Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002
II.B.5.	Amending special legislations for introducing ODR. This can initially be done for cases under The MSMED Act, 2006 and personal insolvency under IBC.	Ministry of Micro Small and Medium Enterprises Ministry of Finance, MCA and IBB	Under the MSMED Act, 2006 it can be notified that for the purpose of Section 18 of the Act, the words 'alternate dispute resolution' includes 'online dispute resolution' and the word 'conciliation' includes 'online conciliation'. Similarly, IBC can be amended to insert a provision for ODR which would include e-mediation in cases of personal insolvency .
II.B.6.	Scaling court annexed ODR	Ministry of Law & Justice Supreme Court and High Courts All relevant ministries	Based on the initial experience, reference to court annexed ODR should be scaled to newer jurisdictions and disputes. Providing guidelines for tribunals and ombudsman offices to use ODR.

			Sharing of statistics and success stories.
II.B.7	Capacity building	Bar Council of India, Law Schools, Judiciary	Update Legal Education Rules to include modules on ODR. Induct future ODR professionals by introducing updated ADR curriculum in law universities with avenue for internships in ADR/ ODR institutes

Phase III- Making ODR the new norm

This final phase of ODR mission is when all the stakeholders have accepted and adopted ODR as their preferred mode of dispute resolution. This could be both as part of court-annexed ODR or through private ODR platforms, both of which co-exist and contribute in building an efficient and trustworthy dispute resolution ecosystem in India. Large scale ODR will make justice accessible to every Indian devoid of language, geography or financial barriers.

It is however critical that ODR platforms and public court system do not operate in silos. There should be integrated data exchange mechanisms to identify areas of impact, newer areas for dispute avoidance and altogether co-creating an effective dispute management ecosystem in the country.

The above journey towards mainstreaming ODR will have to carry along and provide for the changing expectations of the bar, the bench, ADR professionals/ institutes and the disputing parties. The above stakeholders need to be prepared and trained to view technology as their ally rather than a threat. This way, ODR will not only become the new norm, but also usher in an era of innovation and experimentation in the dispute resolution ecosystem in the country.

Annexure A

<i>Category of Dispute</i>	<i>Disputes</i>	<i>Governing Law</i>
Commercial Dispute	Breach of Contract	Indian Contracts Act, 1872; Commercial Courts Act, 2015
	Non-performance of Contract	Indian Contracts Act, 1872; Commercial Courts Act, 2015
	Payment of consideration	Indian Contracts Act, 1872; Commercial Courts Act, 2015
	Delivery of Goods or Services	Indian Contracts Act, 1872; Commercial Courts Act, 2015
Labour Disputes	Payment of Wages	Payment of Wages Act, 1936
	Layoff	Industrial Disputes Act, 1947
	Retrenchment	Industrial Dispute Act, 1947
	Working Conditions	Disaster Management Act, 2005
	Leave Disputes	Factories Act, 1948
Family Disputes	Payment of Maintenance	Criminal Procedure Code, 1973, Personal Laws ¹⁴² , Family Courts Act, 1983, Personal Laws
	Children's Custody	Personal Laws ¹⁴³ , Family Courts Act, 1983, Personal Laws
	Divorce	Personal Laws, ¹⁴⁴ Family Courts Act, 1983, Personal Laws
	Domestic Violence	Indian Penal Code, 1860
Consumer Disputes	E-Commerce Disputes	Indian Contracts Act, 1872, Consumer Protection Act, 1986
	Airline- Passenger Disputes	Indian Contracts Act, 1872, Consumer Protection Act, 1986
	Hospital – Patient Disputes	Indian Contracts Act, 1872, Consumer Protection Act, 1986
	Insurance Disputes	Indian Contracts Act, 1872, Consumer Protection Act, 1986
	Disputes regarding pre-booking (hotels, travel agency, entertainment events, etc.)	Indian Contracts Act, 1872, Consumer Protection Act, 1986
Tenancy Disputes	Possession of Property	Transfer of Property Act, 1882
	Payment of Rent	Transfer of Property Act, 1882
	Eviction	Transfer of Property Act, 1882
Negligence causing injury to Staff or person	Dispute against Delivery Services	
	Dispute against Hospitals	
	Dispute against Restaurants	
	Dispute against Hotels	

¹⁴² Hindu Marriage Act 1955, Hindu Adoption and Maintenance Act 1956, Muslim Women (Protection of Rights on Divorce) Act 1986, Parsi Marriage and Divorce Act 1936, Divorce Act 1869, Special Marriage Act 1954.

¹⁴³ Hindu Marriage Act 1955, Special Marriage Act 1954, Hindu Minority and Guardianship Act 1956, Divorce Act 1869.

¹⁴⁴ Hindu Marriage Act 1955, Hindu Adoption and Maintenance Act 1956, Muslim Women (Protection of Rights on Divorce) Act 1986, Parsi Marriage and Divorce Act 1936, Divorce Act 1869, Special Marriage Act 1954.

Criminal Offences	Domestic Violence	Indian Penal Code, 1860
	Violence against Medical Professional	Epidemic Diseases Act, 1897
	Violence against patients	Indian Penal Code, 1860
	Breach of Lockdown Guidelines	Disaster Management Act, 2005
	Spreading Fake News	Disaster Management Act, 2005; Indian Penal Code,

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