

IV. ONLINE DISPUTE RESOLUTION PLATFORM FOR B2C AND B2B E- COMMERCE IN INDIA: A CRITICAL APPRAISAL

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ABSTRACT

Online Dispute Resolution (ODR) in India is a relatively modern subfield of dispute resolution that is slowly gaining traction. While legislators and academicians have struggled to develop legal rules and policy frameworks governing cyberspace (particularly ODR), there have been a number of effective initiatives in the subfield, for instance, the UNCITRAL law proposal, and the European Union ODR proposal. Even with the effective initiatives, more study, particularly from an interdisciplinary and jurisdictional viewpoint, is needed that combines legal pluralism and cosmopolitanism, in an attempt to develop the platform while avoiding its drawbacks. Through the present paper, the author advocates for the promotion of the ODR scheme, specifically for B2C and B2B e-commerce in India. The paper heavily relies on the involvement of current dispute resolution scholarships and takes into account the seismic development in major jurisdictions. With that, the author uses a rather novel approach in the present paper and comments based on the online survey conducted amongst peers and experts. Following the data analysis, this paper identifies three main issues in the ODR scheme, in specific regard to e-commerce disputes in India: structural challenges, organisational challenges, and behavioural challenges in the scheme. The implications of the paper will be both methodological and practical.

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I. INTRODUCTION

*“I have a dream, that one-day international arbitration will rise up and feel out the true meaning of its creed: to live out as a truly transnational system of justice”.*¹

In his 2007 article entitled, ‘Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace’, Professor Ethan Katsh, widely recognised as the founder of Online Dispute Resolution (“**ODR**”), while critiquing David Johnson and David Post’s article,² articulated and perhaps started a rather controversial but important debate around the States’ driving force for interacting with the cyberspace. Katsh

¹ Maxime Chevalier, ‘From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order’ (2021) 12 J of Intl Dispute Settlement 558.

² David R Johnson and David Post, ‘Law and Borders – the rise of law in cyberspace’ (1996) 48 Stanford L Rev <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=535> accessed 8 April 2022.

noted that one side of the argument affirms that territorial nations may and should prescribe authoritative cyberspace norms, while the alternative argument states that cyberspace, in itself, is a different place/identity having authority for its own set of norms. With that, Katsh pointed out, at a more basic level, what is the real impact of technologies on the State's power to prescribe and enforce legislation. At a further basic level, the focus should be on the issues of what the law is, how it emerged, how it is evolving, and the issues that have a long history and still, remain unanswered in cyberspace.

The previous few decades have seen an evolving process for ODR, and the current ODR regime is the result of such advances. Started as a movement, ODR has evolved to handle millions of disputes through cyberspace.³ The authors, in an attempt to answer the above-mentioned questions, have divided this movement into four different phases, including, phase one (1970 - the 1980s), phase two (1980 - late 1990s), phase three (early 2000 - 2010), and phase four (2010 - 2022).⁴

A. The First Phase: A Phase of Reluctance, A Phase of Promotion

The first phase could be simply understood as the phase for the growth of the alternative dispute resolution (“ADR”) movement. This was a direct

³ Del Duca, Colin Rule and Zbynek Loebel, ‘Facilitating Expansion of Cross-Border E-Commerce- Developing a Global Online Dispute Resolution System (Lessons derived from existing ODR systems- work of the United Nations Commission on International trade law)’ (2012) 1 Penn State J of L & Intl Affairs 59.

⁴ Ethan Katsh, ‘ODR: A Look at History, A Few Thoughts About the present and Some Speculation About the Future’ Mediate: Online Dispute Resolution Theory and Practice <<https://www.mediate.com/odr-theory-and-practice-table-of-contents-forward-introduction-first-chapter-odr-past-present-future/>> accessed 8 April 2022.

result of the Pound Conference⁵ and a phase for an attempt to promote ADR.⁶ In the Indian-specific context, the phase was not pro-arbitration, with even the Hon'ble Apex Court observing, “[e]xperience shows and law reports bear ample testimony that the proceedings under the [Indian Arbitration] act have become highly technical and accompanied by unending prolixity, at every stage providing a legal trap to the unwary” (emphasis authors’).⁷

B. The Second Phase: Development of Internet and ODR

Universally, the second phase could be understood as the phase for the development of the internet, and the evolution of ideas for ODR.⁸ The development of ideas for ODR could be seen in the works of McCarty’s Harvard Law Review article⁹ and Susskind and Capper’s work.¹⁰ Again, in the Indian-specific context, this time could be considered as a developing period for dispute resolution. In 1985, the UNCITRAL Model Law was signed and adopted by India;¹¹ which was subsequently followed by the adoption of the Arbitration and Conciliation Act, 1996.¹² While this period, for India, was a novel one, India did not specifically lean in favour of the ODR.

⁵ Rex E Lee, ‘The Profession Looks at Itself—The Pound Conference of 1976’ (1981) Brigham Young Univ L Rev 737.

⁶ Roger Fisher, L William Ury and Bruce Patton, *Getting to YES: Negotiating Agreement Without Giving In* (185 Penguin 2011).

⁷ *M/s Guru Nanak Foundation v Rattan Singh & Sons*, 1982 SCR (1) 842.

⁸ Fahimeh Abedi, John Zeleznikow and Emilia Bellucci, ‘Universal standards for the concept of trust in online dispute resolution systems in e-commerce disputes’ (2019) 27 Int’l J of L and Information Technology 209.

⁹ L. Thorne McCarty, ‘Reflections on Taxman: An Experiment in Artificial Intelligence and Legal Reasoning’ (1976) 90 Harvard L Rev 837.

¹⁰ Phillip Capper and Richard E Susskind, *Latent Damage Law: The Expert System* (Butterworths 1988).

¹¹ UNCITRAL Model Law.

¹² Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

C. The Third Phase: Evolution of ODR space into E-Commerce

The third phase from the early 2000s to 2010 could be understood as the period for the growth of ODR-specific space, especially its usage in e-commerce. For instance, the usage of ODR by PayPal and eBay is one such example.¹³ This was further catalysed by wide research by scholars building trust towards ODR, such as, works by Chang,¹⁴ Pecnard,¹⁵ and Ebner.¹⁶ These scholars addressed important concerns to create confidence with both human and cyberspace platforms. Moreover, it is interesting to note that with the growth of ODR, there was a growth in the use of ODR to protect users' data, as observed by scholars.¹⁷ For India, this period was the growth and trust for the traditional dispute resolution mechanisms, for instance, offline mediation, and offline arbitration.¹⁸

D. The Fourth Phase: The Important Phase

For ODR, the fourth phase can be attributed as a phase for understanding “*ODR [as] the only method to conflict resolution and prevention that can play a role not just in a highly complicated future, but also*

¹³ Colin Rule and Chittu Nagarajan, ‘Leveraging the Wisdom of the Crowds: The Ebay Community Court and the Future of Online Dispute Resolution’ (2010) 2(2) ACResolution 7; E Katsh, J Rifkin and A Gaitenby, ‘E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of eBay Law’ (2000) 15 Ohio St J on Disp. Resol (2000) 705.

¹⁴ Elizabeth Chang, Farookh Hussain and Tharam Dillon, *Trust and Reputation for Service-Oriented Environments: Technologies for Building Business Intelligence and Consumer Confidence* (John Wiley & Sons 2006).

¹⁵ Camile Pecnard, ‘The Issue of Security in ODR’ (2004) 7(1) ADR Bulletin 1.

¹⁶ Noam Ebner, ‘*ODR and Interpersonal Trust*’ in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *ODR: Theory and Practice* (Eleven International Publishing 2012).

¹⁷ Suzanne Van Arsdale, ‘User Protections in Online Dispute Resolution’ (2015) 21 Harvard Negotiation L Rev 107.

¹⁸ Stephen York, ‘India as an Arbitration Destination: The Road Ahead’ (2009) 21(2) National L School of India Rev 77.

in a fast-changing one".¹⁹ This can be attributed to the failure of offline dispute resolution in many commercial endeavours and the fault (of traditional methods), which is exacerbated by the fact that courts are irrelevant to many, if not all, disputants.²⁰ ODR, in lieu of traditional methods, has evolved as a transnational system of justice.²¹ It has proved that justice, under any circumstance, is not a mere imagination; but rather an attempt in providing prompt resolution of disputes through cyberspace.²² As such, this phase was an attempt to provide justice and protect users' data in cyberspace.²³ This was further witnessed by the development of usable systems in ODR, for instance, the Civil Resolution Tribunal by the British Columbia and Rechtwijzer by the Dutch.²⁴ Particularly, these platforms became the artificial intelligent third-party resolvers in disputes.²⁵

In specific regard to the theme of the conclave, "*Practical Aspects in Information Technology Litigation and Data Protection in India*", the fourth

¹⁹ cf Katsh (n 4).

²⁰ Dave Orr and Colin Rule, 'Artificial Intelligence and the Future of Online Dispute Resolution' (New Handshake) <<http://www.newhandshake.org/SCU/ai.pdf>> accessed 6 April 2022.

²¹ Emmanuel Gaillard, *The Present—Commercial Arbitration as a Transnational System of Justice: International Arbitration as a Transnational System of Justice* in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years* (ICCA Congress Series No 16 of 2012).

²² Aranya Chatterjee and Sharique Uddin, 'Online Dispute Resolution: An Effective Mechanism and an Alternative Tool for Justice at a Reasonable Time' (2021) 87(4) *The Intl J of Arbitration, Mediation and Dispute Management* 529; Raymond H Brescia, Alexandria Decatur and Julia Kosineski, 'Civil Society and Civil Justice: Teaching with Technology to Help Close the Justice Gap for Non-Profit Organizations' (2019) 29 *Albany LJ of Science and Technology* 29.

²³ Robin V. Cupido, 'The Growth of E-Commerce and Online Dispute Resolution in Developing Nations: An Analysis' (2016) 10(10) *Intl J of Economics and Management Engineering* 3371.

²⁴ cf Arsdale (n 17).

²⁵ Scott Shackelford and Anjanette Raymond, 'Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR' (2014) *Wisconsin L Rev* 615.

phase universally observed that with the ever-increasing rise in online transactions,²⁶ the issue of data protection played a major challenge. It is believed, and as has been highlighted below in the last part of the article containing empirical research, there have been confidence/trust issues in regards to the protection of consumer data and security in the ODR mechanism. The data protection issue that the disputants may desire protection from is twofold: (a) unanticipated, and unauthorized ‘data usage’ by e-commerce platforms;²⁷ (b) any ‘data access’ in the form of technical security.²⁸ This shall be explained in greater detail in the last part of the article.

While the scholars were writing jurisdictional specific work,²⁹ it is enthralling to observe how not much has been written on ODR and e-commerce in Indian-specific disputes, let alone work on data protection through ODR. Nonetheless, there were instances of Indian e-commerce platforms using ODR; for instance, Snapdeal, an Indian e-commerce company, in 2020 used ODR as a mechanism to resolve its disputes.³⁰ That said, more study, particularly from an interdisciplinary and jurisdictional

²⁶ Daniela Coppola, ‘E-commerce worldwide’ (*Statista*, 23 February 2022) <<https://www.statista.com/topics/871/online-shopping/>> accessed 17 April 2022.

²⁷ cf Arsdale (n 17).

²⁸ Karim Benyekhlef and Fabien Gelin, ‘Online Dispute Resolution’ (2005) 10(2) *Lex Electronica* <<https://ssrn.com/abstract=1336379>> accessed 5 April 2022.

²⁹ Julia Hornle, ‘Encouraging Online Dispute Resolution in the EU and Beyond—Keeping Costs Low or Standards High?’ (2012) 122 *Legal Studies Research Paper* 1; Trish O’Sullivan, ‘Developing an Online Dispute Resolution scheme for New Zealand consumers who shop online—are automated negotiation tools the key to improving access to justice?’ (2015) 24 *Int J of L and Information Technology* 22; Pablo Cortes, ‘Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers’ (2010) 19(1) *Int J of L and Information Technology*.

³⁰ Neha Alawadhi, ‘Snapdeal partners with Sama for online dispute resolution, sees success’ (*Business Standard India*, 17 June 2021) <https://www.business-standard.com/article/companies/e-commerce-marketplace-snapdeal-sees-success-in-online-dispute-resolution-121061701499_1.html> accessed 17 April 2022.

viewpoint, is clearly needed to expand India's interest in cyberspace to resolve disputes, particularly, through ODR.

With that prelude, the authors proceed ahead with the article in the following manner. In **Part 1**, the authors rely on the involvement of current dispute resolution scholarships and take into account the seismic development in major jurisdictions. We use the theoretical understanding from ODR scholarships to review and provide suggestions in regard to the protection of personal data in e-commerce and the ODR space. Then, in **Part 2**, the authors use a rather novel and sequential explanatory approach by relying on the survey conducted amongst peers and experts. The survey findings include a survey of 68 individuals about their experience related to the protection of data in the e-commerce space of Indian specific jurisdiction and the limitations associated with it. This is followed by the conclusion and final remarks in **Part 3** of the article.

II. REVISITING E-COMMERCE, DATA PROTECTION AND ODR IN INDIA

As previously noted, the fourth phase brought with it, both, an inundation of e-commerce transactions and a sense of responsibility to use information and communication technology (“**ICT**”) properly. E-commerce has made it possible to execute transactions that were previously unusual and complex, not only for high-value purchases but also for low-value purchases.³¹ Currently, business-to-business (“**B2B**”), business-to-consumer (“**B2C**”), and consumer-to-consumer (“**C2C**”) transactions are increasingly taking place

³¹ Julio César Betancourt and Elina Zlatanska, ‘Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?’ 2013 79(3) Int J of Arbitration, Mediation and Dispute Management.

through cyberspace.³² Due to the research restraints, the articles focus on the study of only B2B and B2C e-commerce disputes, which are respectively defined as the “*business activities serving other businesses as the end consumers*”, and “*business activities serving end consumers directly with services and/or products*”.³³

Many scholars have raised issues and concerns regarding e-commerce transactions,³⁴ which are catalyzed by data of issues experienced by consumers when purchasing online, such as the delivery of damaged goods, non-delivery of items, or failure of goods to match their actual description.³⁵ Since many of these disputes/issues are not raised through a proper forum, it is quite challenging to determine the degree of incidence of difficulties that the consumer faces.³⁶ Nonetheless, the Indian Consumer Affairs Ministry’s press release reported that a total of 1,88,262 claims and disputes related to e-commerce space were lodged.³⁷

³² Tony Jewels and Gregory Timbrell, *Towards a Definition of B2C & B2B E-Commerce* in Proceedings of the Twelfth Australasian Conference on Information Systems (Southern Cross University (2001).

³³ K Alboukrek, ‘Note: Adapting to a new world of e-commerce: The need for uniform consumer protection in the international electronic marketplace’ (2003) 35 *George Washington Intl L Rev* 425; Huong Ha and Sue LT McGregor, ‘Role of Consumer Associations in the Governance of E-commerce Consumer Protection’ (2013) 12(1) *J of Internet Commerce*.

³⁴ Temitayo Bello, ‘Online Dispute Resolution Algorithm: The Artificial Intelligence Model as a Pinnacle’, in Stavros Brekoulakis (ed), (2018) 84(2) *Arbitration: The Int J of Arbitration, Mediation and Dispute Management* 159.

³⁵ Neelam Chawla, Basanta Kumar, ‘E-Commerce and Consumer Protection in India: The Emerging Trend’ (2021) *J of Business Ethics*.

³⁶ NITI Aayog, ‘Catalyzing Online Dispute Resolution in India’ (12 June 2020) <<https://niti.gov.in/catalyzing-online-dispute-resolution-india>> accessed 13 April 2022.

³⁷ Zia Haq, ‘As shopping goes online, e-commerce disputes rise to unprecedented levels’ (*Hindustan Times India*, 22 March 2021) <<https://www.hindustantimes.com/business/ecommerce-disputes-on-the-rise-shows-data-101616366508503.html>> accessed 17 April 2022.

In India, the practice and concept of ODR, while being at its nascent stage, is predicted to become popular, in near future, thought-out the ‘tech-savvy’ disputants.³⁸ Traditional dispute resolution mechanisms, such as ‘offline arbitration’, are seemed to be frequently ineffective since they are expensive,³⁹ time-consuming,⁴⁰ and raise severe issues regarding enforceability and jurisdiction.⁴¹ As a result, the “*conflicts that emerge online, should be resolved online*”,⁴² is the beginning point of the evolution of the ODR platform in Indian jurisdiction. This is one response to the stressed-out litigation system in India.⁴³

Alternatively, however, the process of addressing difficulties that arise in the absence of rules may serve as a beginning point. This beginning point leads to the formation of new rules or, in certain cases, new ways of thinking about how to shape conduct, settle disputes, and safeguard rights. Are these both beginning points important for the evolution of ODR in the e-commerce space in India? Is ODR, going to be a framework that, with time, becomes the

³⁸ Aditya Ranjan, ‘Creating a Safer E-Commerce Market for Online Customers in India’ (*Vidhi Legal*, 30 Oct 2020) <<https://vidhilegalpolicy.in/blog/creating-a-safer-e-commerce-market-for-online-customers-in-india/>> accessed 8 April 2022.

³⁹ Raphael Ng’etich, ‘The Current Trend of Costs in Arbitration: Implications on Access to Justice and the Attractiveness of Arbitration’ (2017) 5(2) *Alternative Dispute Resolution* 111.

⁴⁰ Aditya Sondhi, ‘Arbitration in India- Some Myths Dispelled’ (2007) 19(2) *Student Bar Rev* 48.

⁴¹ Sal Ramani Garimella, ‘Issues of Jurisdiction, Choice of Law and Enforcement in International Commercial Arbitration: An Indian Perspective’ (2007) *Private International Law: South Asian States’ Practice* 323.

⁴² Mansi Bhatt, ‘Get ready for online dispute settlement’ *Economics Times* (India, 31 July 2006); Smarika Singh, Abhijeet Swaroop, ‘Online Dispute Resolution and Consumer Disputes’ (2007) 9(1) *Asian Dispute Review* 38.

⁴³ Pendency and Vacancies in the Judiciary <<https://prsindia.org/policy/vital-stats/pendency-and-vacancies-in-the-judiciary>> accessed 8 April 2022.

engine of bringing a change to the legal regime in India? In the authors' view, the answer remains "yes", and will be expanded upon below.

III. LEGAL FRAMEWORK AND INITIATIVE GOVERNING CONSUMER PROTECTION AND DISPUTE SETTLEMENT PROCESS IN INDIA

A. Indian Legal Framework

The disputes arising through the e-commerce space in India are currently governed by the Consumer Protection Act, 2019⁴⁴ and Consumer Protection (E-Commerce) Rules, 2020.⁴⁵ Earlier they were governed by the Consumer Protection Act, 1986,⁴⁶ which had severe limitations concerning the adjudication and applicability processes.⁴⁷ The Consumer Protection Act, 2019, makes significant modifications to the extent of governance, penalties, and applicability. It establishes the Central Consumer Protection Authority ("CCPA") and provides them with regulatory and controlling powers in e-commerce disputes.⁴⁸

The 2019 Act is indeed pro-arbitration/mediation since it focuses on the establishment of Consumer Mediation Cells in all Indian districts and encourages the consumers to undergo dispute resolution through mediation.⁴⁹ Furthermore, the Consumer Protection Act (E-commerce) Rules 2020, provide a step further in the promotion of the ODR by laying down the

⁴⁴ The Consumer Protection Act, 1986 (Act 68 of 1986).

⁴⁵ The Consumer Protection (E-Commerce) Rules, 2020.

⁴⁶ The Consumer Protection Act, 1986 (Act 68 of 1986).

⁴⁷ cf Chawla (n 35).

⁴⁸ The Consumer Protection Act 1986 s 10.

⁴⁹ The Consumer Protection Act 2019 s 74; The Consumer Protection Act 2019 s 37.

foundation of requiring the entities involved in the e-commerce space to advance ODR by using it for internal dispute redressal mechanisms.⁵⁰

Illustration 1: Understanding the Consumer Protection Act, 1986 and Consumer Protection Act, 2019

Particulars	The Consumer Protection Act, 1986	The Consumer Protection Act, 2019
The mechanism for Alternative Dispute Resolution	No specific provision	Section 37: ⁵¹ Resolution of Disputes through ADR Section 74(1): ⁵² For the purpose of mediation, the State Government shall establish a consumer mediation cell for each District Commission and State Commission

⁵⁰ Consumer Protection (E-Commerce) Rules, 2020 <<https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf>> accessed 10 April 2022.

⁵¹ The Consumer Protection Act 2019 s 37.

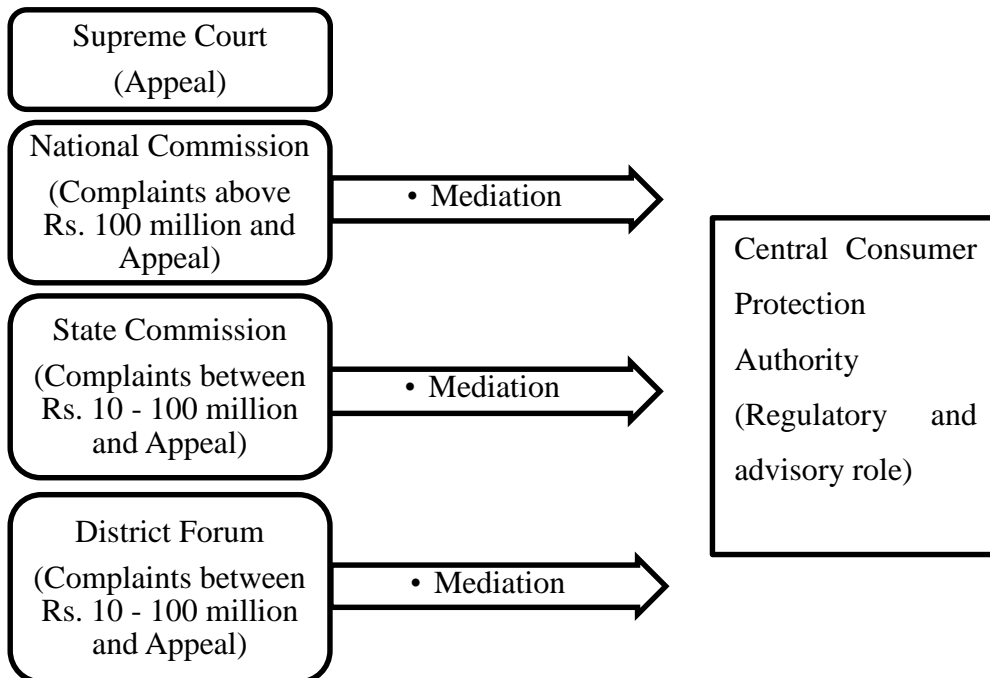
⁵² The Consumer Protection Act 2019 s 74 (1).

E-commerce	No specific provision	Section 2(16): ⁵³ The Act, 2019 applies to buying or selling goods or services over the digital or electronic network, including digital products, and to a person who provides technologies enabling a product seller to engage in advertising/selling goods/services to a consumer.
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The 2019 Act divides the jurisdiction (for instance, between District Forum, State Commission, National Commission, and Supreme Court) based on the amount of the consideration paid, and not on the compensation sought or good and services value. Further, it extends support towards mediation, which the below-mentioned figure explains in much greater detail.

⁵³ The Consumer Protection Act 2019 s 2(16).

Illustration 2: Grievance Redress Mechanism in India⁵⁴



While it is interesting to note that such reforms in the field of Indian e-commerce are an attempt to provide justice to the parties, it has not been able to cater to the needs of consumers effectively, because of the inherent limitations (discussed below). Indian legislation, per se, does not advance the usage of ODR heavily.

B. Indian Government Initiatives and the Judiciary's Understanding

The Indian government has promulgated, in 2020, the rules on e-commerce protection (Consumer Protection (E-Commerce) Rules, 2020) which provide for the following two requirements to be met by the

⁵⁴ cf Chawla (n 35).

government: (i) every e-commerce entity incorporating a proper mechanism for grievance redressal; and (ii) every e-commerce entity, voluntarily, participating in the government's Helpline of Consumer initiative. This indeed brings the usage of ICT in e-commerce to provide leverage to consumer protection. However, it does not specifically mention the usage of ODR, which could have been considered as a recourse for grievance redressal by the e-commerce entities.

With that, the Indian Supreme Court has also recognised the legality of using technology in the arbitration process in the case of *Trimex International*,⁵⁵ and *Shakti Bhog*.⁵⁶ Herein the Court affirmed the legitimacy of online arbitration agreements, and this includes agreements made through telegraph, emails, or ICT.

Further, to improve its ADR mechanism, the government has opted to be regulated by international standards and obligations in addition to its internal efforts. For instance, recently India brought into effect the United Nations Convention on International Settlement Agreements from Mediation ("**Singapore Convention**").⁵⁷ The convention provides for expedited and direct enforcement of the mediated settlement agreements.

⁵⁵ *Trimex International v Vedanta Aluminum Ltd*, 2010 (1) SCALE 574.

⁵⁶ *Shakti Bhog v Kola Shipping*, (2009) 2 SCC 134.

⁵⁷ United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted on 20 December 2018 UNGA Res 73/198) (the Singapore Convention on Mediation).

IV. LEGAL FRAMEWORK AND INITIATIVES GOVERNING CONSUMER PROTECTION AND DISPUTE SETTLEMENT PROCESS AROUND THE WORLD

A. European Union: ODR Proposal and Data Protection Framework

With the advancement of technology, the European Union (“EU”) has become more interested in promoting ODR to stimulate and accelerate the expansion of e-commerce throughout the European market.⁵⁸ EU has made significant progress in the creation of an ODR platform that allows the European cyberspace market to start dispute resolution proceedings and track claims online.⁵⁹ This is further catalysed by the legislation promoting this idea. In accordance with Article 17 of the Directive 2000/31/EC, Member States must encourage entities responsible for the out-of-court resolution of, in particular, consumer disputes to function in a way that offers appropriate procedural protections for the parties involved.⁶⁰

Further, the EU’s effort on creating the Regulation on ODR for Consumer Dispute (“**the ODR Regulation**”)⁶¹ and Consumer Alternative Dispute Resolution Directive (“**the ADR Directive**”),⁶² became effective. The ODR Regulation and the ADR Directive directly aid in the promotion of ODR by providing consumers with access to national ADR platforms.⁶³ To be

⁵⁸ Green Paper of the European Commission of 19 April 2002 of Access to Consumer Justice and Alternative Dispute Resolution in Civil and Commercial Law (COM (2002) 196 final).

⁵⁹ cf Cortes (n 29).

⁶⁰ European Commission, Directive 2000/31/EC art 17.

⁶¹ Regulation EU No 524/2013 of 21 May 2013 on Online Dispute Resolution for Consumer Disputes [2013] OJ L 165/1.

⁶² Directive 2013/11/EU of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes [2013] OJ L 165/63.

⁶³ cf O’Sullivan (n 29); S Wrbka, *European Consumer Access to Justice Revisited* (OUP 2015); N Reich, *European Consumer Law* (2nd edn, Intersentia 2014).

specific, for instance, each EU member state is required under the ADR Directive to implement a system that makes ADR procedures available to consumers in their own country for resolving contractual disputes in the e-commerce space.⁶⁴

Specific attention has been paid to data protection, which under Article 8 of the EU Charter,⁶⁵ is recognised as a fundamental right. In accordance with Directive 95/46/EC's Article 24,⁶⁶ appropriate measures must be put in place to ensure proper data protection, including the imposition of consequences in the event of a breach of such protection. Before going to the courts in the event of a possible disagreement, data subjects must first contact the data controller, which may in turn rely on other dispute resolution mechanisms, including ODR. This is in accordance with the EU General Data Protection Regulation's Article 38(1)(h).⁶⁷

B. The Mexico case: ODR and the E-Government

Profeco/Concilianet, a consumer e-government service that offers online mediation, was founded in 2008 by the Mexican Protection for Consumer Agency.⁶⁸ In Mexico, the Concilianet is regarded as one of the greatest e-government systems accessible to the parties in dispute over e-

⁶⁴ ADR Directive art 2.

⁶⁵ The EU Charter art 8.

⁶⁶ European Commission, Directive 95/46 art 24.

⁶⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1, art 38(1)(h).

⁶⁸ Gabriela R Szlak, *Online Dispute Resolution in Latin America: Challenges and Opportunities* in *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Mohamed S Abdel Wahab et al eds 2012).

commerce.⁶⁹ Concilianet does not only specialize in the disputes that arise in an online setting but also provides services to resolve disputes resulting from both offline and online transactions.⁷⁰

Concilianet in the Latin American region is the first totally-online ODR mechanism provided by the government,⁷¹ with the entire process taking place online from start to finish, including, the submission of a case, uploading of evidence, hearing, and the determination of the decision.⁷² A total of 171 cases have been handled online in the year 2008 by Concilianet, with an agreement rate of 97%.⁷³ With that, it mediated a total of 1134 cases, with an agreement rate of 96% from around 2008-to 2010.⁷⁴

C. UNCITRAL ODR

The UNCITRAL's Working Group III has proposed its recommendations to the ODR regime universally. Majorly it recommends an ODR platform for filing claims and has also taken on the more ambitious mission of defining clear procedural guidelines with strict time constraints for resolving B2C and B2B low-value disputes involving e-commerce

⁶⁹ *ibid* Szlak (n 68).

⁷⁰ Mexcian Federal Law for Consumer Protection; Welcome to the New Mexico Courts Online Dispute Resolution Center' (*New Mexico Courts*) <<https://newmexicocourtsdmd.modria.com/#home>> accessed 11 April 2022.

⁷¹ Consumer Protection Agency in Mexico, <www.profeco.gob.mx/>.

⁷² Robert M Kossick Jr, 'Mexico's Emerging E-Government Program: The Role of the Internet in Promoting Economic Development' (2002) 8(1) *Democratic Governance, and the Rule of Law*, Law and Business Review of the Americas 141 <<https://scholar.smu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1856&context=lbra> accessed> 20 April 2022.

⁷³ Baoqing Han, *ODR in E-Government and Obstacles to Developing Countries* (Conference: The International Conference on E-Business and E-Government, ICEE 2010, 7 May 2010) Guangzhou, China.

⁷⁴ *cf* Szlak (n 68).

transactions. The UNCITRAL rules have suggested certain procedural stages in the resolution of disputes. The procedure of resolution of e-commerce disputes through ODR has been discussed below, in specific relation to the proposal for the Indian ODR framework (Part C.1).

D. Australia: Creation of ODR

Australian academicians and practitioners have advocated for the creation of an ODR system for e-commerce consumers.⁷⁵ Martin Dorris, himself suggested the creation of an ODR programme similar to what has been developed by the European Union in Australia.⁷⁶ In consonance with Sourdin and Liyanage, “a proper strategic framework” might help in flourishing the ODR in Australia.⁷⁷ In Australia, the consumers are protected by the Australian Consumer Law⁷⁸ and this is accompanied by its focus on fair trading and prohibition on deceptive conduct.⁷⁹ Furthermore, the government, in itself, has taken steps toward the promotion of the ODR scheme.⁸⁰

V. MAKING INDIA A GLOBAL HUB THROUGH COMPARISON OF THE LEGAL PROPOSALS

Given the expanding amount of data indicating the benefits of a holistic and methodical approach to ODR,⁸¹ utilising a jurisdictional approach

⁷⁵ L Griggs, ‘e-Commerce’ in J Malbon and L Nottage (eds), *Consumer Law and Policy in Australia and NZ* (Federation Press 2013) 405.

⁷⁶ M Doris, ‘Developing Consumer ODR in the European Union—A Model to Imitate?’ (2012) *Aus Prod Liability Rep* 280, 283.

⁷⁷ cf Griggs (n 75).

⁷⁸ T Sourdin and C Liyanage, ‘The Promise and Reality of Online Dispute Resolution in Australia’ in Wahab 497.

⁷⁹ The Australian Consumer Law in Sch 2 of the Competition and Consumer Act 2010 (AU) ss 54–59.

⁸⁰ cf Doris (n 76).

⁸¹ cf Cortes (n 29).

for the Indian framework would seem to be a reasonable course of action for the e-commerce companies that litigate frequently. Nevertheless, India has not been able to accommodate itself with the ODR framework, and there are little to no studies of Indian specific origin, as has been stated above. As such, implementing some version of ODR in India, for many corporations looks like proverbial lemmings, and, in turn, unwilling to modify their litigation strategy.

Now one may wonder, how India will be able to be at the forefront in resolving disputes through ODR. As mentioned in Part 2.B, India needs to take a systemic strategy from jurisdiction analysis to systematically promote ODR and protect users' data. These choices are not only stand-alone, rather they can be mixed and matched to create unique hybrids.

A. Hybrid Framework in India

Aspiration may be taken from the EU proposal on ODR, specifically the ODR Regulation and ADR Directive, since its policies are quite extensive, and consumers are provided with certain rights when they interact with the e-commerce space.⁸² The consumers are directly provided with access to national entities on ODR for dispute resolution.⁸³ The entities are required to meet certain criteria, including but not limited to, effective, independent, transparent, and fair procedure.⁸⁴ This when combined with the Mexican Concilianet, offering online dispute resolution through e-government, can serve as a catalyzer for the Indian legal framework to excel in the ODR

⁸² cf Cortes (n 29).

⁸³ cf O'Sullivan (n 29).

⁸⁴ Eugene Clark, George Cho and Arthur Hoyle, 'Online Dispute Resolution: Present Realities, Pressing Problems and Future Prospects' (2010) 17(1) *Int Rev of L, Computers & Technology*.

scheme. As such, India could expand upon creating an e-government that serves in resolving high-to-low value e-commerce B2B and B2C disputes. Online traders in India, must inform the consumers about the resolution of disputes through ODR.

Other initiatives include taking a cue from the UNCITRAL ODR, which particularly focuses on e-commerce dispute resolution through ODR. This has been properly summarised in O’Sullivan’s article,⁸⁵ which states, that the following can be considered an ideal procedure –

- Lodging Complaint (Article 4) – via the ODR platform website, where the communications processing mechanism is overseen by an ODR administrator.
- Negotiation (Article 5) – negotiations between the parties through the website, in order to amicably resolve disputes.
- Neutral Appointment and Settlement (Article 9) – the ODR administrator, shall select a ‘neutral’, that is the independent third party. Neutral also attempts to help parties reach a conclusion (Article 5/6).
- Final Conclusion – in cases where the dispute is not resolved within 10 days from point 2, then the dispute may be submitted to arbitration.
- Settlement Stage (Article 8) – if the parties reached a settlement, the ODR platform records the agreement terms, and the case is deemed to be closed.

This Part sets experience, wherein, India can adopt an e-government platform and can promote ODR, as has been promoted by the UNCITRAL

⁸⁵ cf O’Sullivan (n 29).

ODR, and this in turn also facilitates in taking the EU's ODR proposal of having a national entity on ADR.

B. ODR regime promoting Data Protection, Confidentiality, and Trust in India

E-commerce dispute resolution through ODR appears to be challenging in the Indian context, primarily because, there have been a large number of breaches of data security and confidentiality,⁸⁶ which is also proved in Part 3 (empirical research). In turn, ODR comes with the inherent distrust challenge through the online environment.

It is indeed true that the consumers are most inclined to trust governments in providing them with information regarding the resolution of e-commerce disputes through ODR.⁸⁷ Primarily this is because of their legal standing and obligation to maintain society working under socially accepted standards, including trust and data protection. Indian regime has seen steps in favour of data protection and security, for instance, the recent Data Protection Bill 2021 provides for the protection of data, and data fiduciaries and prevents any misuse, unauthorised usage, and access.⁸⁸

A well-designed ODR platform gives consumers a sense of justice and confidence in cyberspace, which in turn promotes trust in the protection of data. This well-designed ODR platform can be built upon the concept of the e-government platform of Latin America and the EU proposal and Directive

⁸⁶ NITI Aayog, 'Catalyzing Online Dispute Resolution in India' (12 June 2020) <<https://niti.gov.in/catalyzing-online-dispute-resolution-india>> accessed 12 April 2022.

⁸⁷ cf Bellucci (n 8).

⁸⁸ Ministry of Parliamentary Affairs, Joint Committee on the Personal Data Protection Bill, 2019 seeks views and suggestions (Press Information Bureau, 3 February 2020).

95/46/EC which in turn promotes data protection and resolution of disputes through ODR. ODR mechanisms have, time and again, been regarded as an effective means for enforcing data protection rights and compensating the victims of improper use of personal data in the e-commerce space.⁸⁹

C. Enforcement and Governing Law

Another proposal for the Indian ODR regime is the framework for the enforcement of ODR awards. Since, the concerns, per se, the concern for enforcement of ODR terms, both for the customers and the awards, can only be dealt with by proper legislation, India might ensure the interoperability between ODR providers and the Courts. To do so, proper procedural standards must be brought in place by the government. Several critics have urged for the ODR to be accredited and regulated at a national level.⁹⁰

Focusing both on legal empiricism and the existing scholarships in Indian and international jurisdictions, the authors now embark upon the inherent challenges and assess its impact on the ODR movement in India. The research further tries to capture these challenges using a range of scientific methodologies, including, interviews, and surveys. This has been discussed in the subsequent section of the article.

⁸⁹ cf O'Sullivan (n 29).

⁹⁰ Charlotte Austin, 'Online dispute resolution – An introduction to online dispute resolution (ODR), and its benefits and drawbacks' (Government Centre for Dispute Resolution, Ministry of Business, Innovation and employment, New Zealand Government, 2017).

VI. REVISITING ASSOCIATED CHALLENGES TO THE INDIAN ODR MOVEMENT

This Part seeks to identify the challenges associated with the ODR and its usage in the e-commerce space in India. For this, the starting point is the fact that there have been semantic limitations and confusion concerning the development of the ODR movement in India.⁹¹ A recent report by Niti Aayog, a public policy think tank of the Government of India, “*Designing the Future of Dispute Resolution: The ODR Policy Plan for India*”,⁹² identified three main limitations of the growth of the ODR movement in India. Typically, the limitations were divided into the following three emergent themes/challenges: *first*, structural; *second*, behavioural; *third*, operational.

As such, in lieu of determining the extent empirically and forming a preliminary understanding amongst the Indian practitioners and legal experts, the authors designed an extensive survey that ran from April 3 to April 10, 2022, and collected data from around 68 respondents.

However, to narrow the research survey, and focus on the main theme of the conclave “*Practical Aspects in Information Technology Litigation and Data Protection in India*”, the author has identified a major limitation, which is the concern for the protection of data.⁹³ The author expands upon the three mentioned emergent themes for data protection concerns in the survey.

⁹¹ cf Aayog (n 86).

⁹² Niti Aayog (Government of India), *Designing the Future of Dispute Resolution: The ODR Policy Plan for India* (60-65).

⁹³ cf Alboukrek (n 33); cf Arsdale (n 17); cf McGregor (n 38); cf Chawla (n 35).

Thus, the research question for the survey conducted was, “*What are the inherent limitations in the way for the Indian ODR regime to be at the forefront of resolving e-commerce disputes?*”

Further, the narrower question that the author has focused on is, “*Does the concern of data protection play a major role in being a limitation? Are the other emergent and sub-emergent themes (including, structural challenges, behavioural challenges, and operational challenges) interrelated to the major theme of data protection?*”

A. Quantitative Data Analysis

Before proceeding ahead with the survey’s conclusion, it is imperative to discuss how the survey was conducted. The research analysis uses Qualtrics,⁹⁴ as has been used earlier in similar studies (by Fahimeh Abedi, John Zeleznikow, and Emilia Bellucci⁹⁵), because of the design and efficiency of the online survey software system. With the huge amount of quantities collected through this survey, the data analysis tries to gradually reduce it into small information, which was in compliance with Clark Moustakas’s method of a phenomenological research study⁹⁶ – with properly identified themes and as such, a model is tried to be finalized through the survey.

Throughout the survey, the authors have maintained a balance between academicians and practitioners, to ensure maximum scope and heterogeneity insight into the survey’s questions. The respondents' demographic includes 48 practitioners and 20 academicians (that is 70.58 percent and 29.41 percent

⁹⁴ Jonathan Hill, *Cross-border Consumer Contracts (OUP 2008)*.

⁹⁵ cf Abedi (n 8).

⁹⁶ Clark Moustakas, *Phenomenological Research Methods (Sage Publications 1994)*.

respectively). Around 58.33 percent of respondents had the experience of 5 to 10 years as practitioners. Most of the respondents (67 respondents) indicated to be associated with the field of ‘Law’, more precisely, ‘Arbitration’; with 64 respondents belonging to India, and 3 belonging to the United Kingdom.

The survey was organised to define, apply, and measure security and data protection concerns in the ODR systems from arbitration experts. The rest of this Part of the article details upon the research conducted and the themes, and answers identified.

B. Overview of the Findings

The four research questions addressed in this paper are only concerned with the factors contributing to the problem presented in Part 3 (research questions and narrower questions):

- Is the ODR system compatible to privacy?
- How likely it is for the ODR regime to flourish in India if it works on all the associated challenges?
- Is there a need for a legislative framework governing data protection and ODR in India?
- Is there a need for robust management of data and ODR in India?

1. Theme 1: Structural Challenges:

Though the survey conducted, structural challenges were indeed agreed upon as a major challenge concerning trust and compatibility with the ODR system. We noted that users and practitioners have been facing a majority of issues due to structural challenges, which include, sub-issues like lack of proper knowledge, lack of proper infrastructure, lack of literacy, and a

divide in the access to information and technology. One of the participants suggested, “that there needs to be a proper knowledge about the ODR scheme in dispute resolution, primarily, because of it being a relatively new field”. With this, as was expanded upon by one of the respondents: “ODR in India faces the inherent limitations of the Indian society, and there appears to be a gap because of no-proper digital infrastructure coupled with the lack of digital literacy”. Another respondent observed, “‘ODR’ and ‘trust for ODR’ goes hand in hand, even if one of these is disrupted, the ODR regime would not flourish in Indian regime”.

In specific regards to data protection, one of the respondents observed, “data protection is a major concern in the field of ODR, because of both, (a) concerns – primarily, confidentiality, security and privacy, in the Indian regime of e-commerce space; (b) trust issues for ODR in Indian specific space, because of consumer’s experience in e-commerce space”. As such, it must be noted, this appears because of the general issue of structural challenges.

2. Theme 2: Behavioural Challenges:

The survey also noted behavioural challenges, for instance,⁹⁷ the lack of awareness, the lack of proper governing legal culture, and lack of interaction, to also be a concern in the promotion of ODR. The behavioral challenge in the promotion of proper data protection in ODR is intertwined with the sub-emergent themes. For instance, it was noted by one of the respondents, “data protection is not a singular issue, rather a combined issue emanating from other issues of behavioral challenges, including, but not limited to, trust, transparency, relationship, anonymity. For instance,

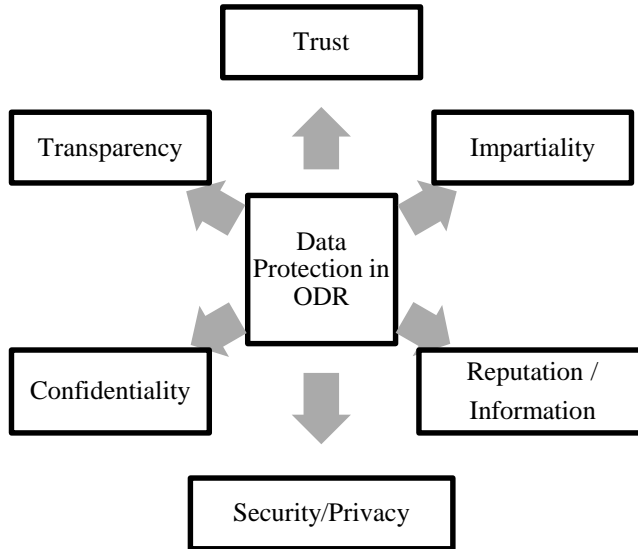
⁹⁷ cf Aayog (n 86).

transparency is an important concern, which if not properly explained to users, may cause an issue. However, the ‘transparency’ concern ultimately affects the major ‘privacy and data confidentiality’ concern because users/consumers do not tend to believe that their data is protected if not processed transparently”.

3. Theme 3: Operational Challenges:

Operational challenges, as was also observed by Niti Aayog’s report include – privacy and confidentiality concerns, archaic legal processes, and ODR-related specific issues, such as its enforcement issues. This operational challenge is interlinked with the other two emergent themes (structural and behavioural challenge). For instance, one respondent interestingly observed that “the lack of interaction, specifically, in-person, combined with the no proper legal process, demolishes the users’ trust for protected data and security”.

Illustration 3: Model for Consumer's Data Protection in ODR



C. Recommendations from the Findings

1. Recommendation 1: Legislative Framework:

The data collection showed that 94.56% of respondents agreed upon having a legislative framework in India that governs both ODR and data protection concerns. The respondents concluded and have also been observed in the Niti Aayog's report, that in India, a strong ODR framework can only be possible, with comprehensive legislation on data protection that handles both security and confidentiality issues that emerges during the ODR procedures.⁹⁸ In this respect, the recent Personal Data Protection Bill, 2019,⁹⁹ can indeed serve towards being the legal framework that protects users/consumers. As

⁹⁸ cf Aayog (n 86).

⁹⁹ The Personal Data Bill 2019 (373 of 2019).

such, the data produced online will be secured and trust in the ODR regime will be advocated. Other than that, the legislation should interact with the ODR, for instance, provisions may be added in the Commercial Courts Act, 2015, and the Consumer Protection Act, ultimately recognising ODR in India.

2. Recommendation 2: Building Robust ODR Framework:

Again, the respondents (83.7%) agreed upon that the ODR framework, should itself be robust to promote ODR processes, that do not ultimately tamper with the data produced online. The other respondents (16.3%) interestingly said ‘no’ to the question. They stated that “ODR in itself has a robust framework and the concern is primarily around robust legislative framework”.

The authors believe, that online impersonation, violation of confidentiality and data given through ODR procedures, and the tamper with digitally transmitted awards/agreements or tampering with digital evidence are just a few of the issues.¹⁰⁰ To overcome these problems and follow the recommendation of the respondents, ODR providers, which also include government, should focus on developing strong data management and storage systems. In line with the Niti Aayog report, some of the procedures that need to be made to stably incorporate ODR for large-scale conflicts include digital signatures,¹⁰¹ and document encryption to assure confidentiality¹⁰².

¹⁰⁰ Esther van der Heuvel, ‘Online Dispute Resolution as a Solution to Cross Border e-Disputes’ (2000) OECD <<https://www.oecd.org/internet/consumer/1878940.pdf>> accessed 13 April 2022.

¹⁰¹ Graham Ross, ‘Challenges and Opportunities in Implementing ODR’ in Proceedings of the UNECE Forum on ODR (2003) <<https://www.mediate.com/Integrating/docs/ross.pdf>> accessed 15 April 2022.

¹⁰² cf Heuvel (n 100).

Illustration 4: Themes, Clusters, and Codes identified¹⁰³

Emergent Themes	Sub-Themes	Recommendations Identified
<ul style="list-style-type: none"> • Structural Challenges 	<ul style="list-style-type: none"> • Digital Infrastructure • Digital Literacy • Divide in Access to Information and Technology 	<ul style="list-style-type: none"> • Recognition of ODR under Consumer Protection Act, 2005 • Law specifically on ODR and governing data protection
<ul style="list-style-type: none"> • Behavioural Challenges 	<ul style="list-style-type: none"> • Lack of Awareness • Lack of Trust • Legal Culture / Lack of Interaction • Role of the Government and PSU's • Lack of Transparency 	<ul style="list-style-type: none"> • Building upon reputation • Building upon trust, transparency • Hosting workshops and increasing awareness/knowledge
<ul style="list-style-type: none"> • Operational Challenges 	<ul style="list-style-type: none"> • Privacy and Confidentiality Concerns • Archaic Legal Processes • Enforcement of the ODR outcome 	<ul style="list-style-type: none"> • Building upon the Personal Data Protection Bill, 2019 and specifically including the ODR framework

¹⁰³ cf Aayog (n 86).

VII. CONCLUSION

This article has established an institutional approach and has drawn heavily on a jurisdictional analysis in an attempt to propose a legal reform, that helps in “*India [being] at the forefront of global online dispute resolution movement*”.¹⁰⁴ The democratic, varied, and pluralistic potential of ODR¹⁰⁵ can be used to bolster e-commerce dispute resolution in India. When comparing the legal framework and initiatives in national and international jurisdictions, the article aims to reach a focal point for the Indian ODR movement.

However, reaching such a focal point comes with inherent challenges. Through this article, we investigate the major inherent challenge of “data protection”, which is embedded and intertwined with the other major challenges, including, trust, transparency, reputation, confidence, security, and privacy. As such, the empirical research, interestingly identified various clusters and limitations posited in the Online Dispute Resolution field, including but not limited to, lack of infrastructure, literacy, knowledge regarding information and technology, awareness, trust, interaction, and alike. For answering and proposing recommendations, the empirical research at last also provides for the same, which mainly includes building and working upon the challenges, including, structural, behavioural, and operational.

¹⁰⁴ cf Aayog (n 86).

¹⁰⁵ cf Heuvel (n 100).