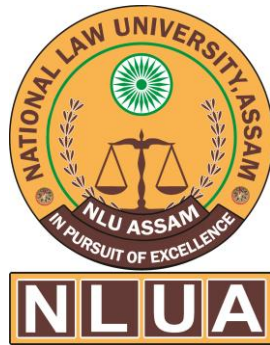


ONLINE DISPUTE RESOLUTION FOR RESOLVING E-COMMERCE  
DISPUTES IN INDIA- A GATEWAY TO THE FUTURE



Dissertation submitted to National Law University, Assam  
in partial fulfilment for award of the degree of  
MASTER OF LAWS

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LL.M, 2<sup>nd</sup> Semester

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National Law University, Assam

June, 2018



## **SUPERVISOR CERTIFICATE**

It is to certify that Ms. JYOTISIKHA CHOUDHURY is pursuing Master of Laws (LL.M.) from National Law University, Assam and has completed her dissertation titled ONLINE DISPUTE RESOLUTION FOR RESOLVING E-COMMERCE DISPUTES IN INDIA - A GATEWAY TO THE FUTURE under my supervision. The research work is found to be original and suitable for submission.

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## **DECLARATION**

I, **JYOTISIKHA CHOUDHURY**, pursuing Master of Laws (LL.M.) from National Law University, Assam, do hereby declare that the present dissertation titled **ONLINE DISPUTE RESOLUTION FOR RESOLVING E-COMMERCE DISPUTES IN INDIA- A GATEWAY TO THE FUTURE** is an original research work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

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## **PREFACE**

With digitalization process transaction are also became easy for everyone and also helps in expansion of e-commerce. But growing e-commerce transactions also brings with it the increasing number of disputes also. The cause of e-commerce disputes will be many and they arise from contractual and non-contractual disputes. One of the significant factors of such kind of dispute is that when any disputes arises between the parties than everyone has a right to go for litigation procedure for the settlement of their disputes. But increasing in litigation procedure has led to excess of cases for the court proceeding which lead to a delay in justice. So, there is need to find an alternate way for settling of e-commerce disputes in India and proving a flexible, cheap and convenient mechanism. This paper also explores the advantages of implementing Online Dispute Resolution (ODR) in India in order to fill up the justice gap and also discusses its future aspects. The paper also focuses on ODR as a means of providing justice to the e-commerce disputes. The study is based on various book, law journals, articles and websites that support ODR. As it is apparent that the concept of ODR is in infancy stage in India, this paper extracts its guideline from the various international resources for understanding the concept and development of ODR. This study understands the need of working toward the implementation of ODR in India by creating awareness and providing legal education to highlight the importance of using ODR as a new approach for settling e-commerce disputes in India. Through ODR people can easily access dispute settlement mechanism to resolves their disputes and gaining their trust in e-commerce transactions which becomes a driving factor in growth of international trade.

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- 1957- Copyright Act (amended in 2012).
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- 1961- Foreign Award (Enforcement and Recognition) Act.
- 1966- United Nation Commission on International Trade Law.
- 1985- UNCITRAL Model Law on International Commercial Arbitration.
- 1986- Consumer Protection Act. (bill passed in 2015).
- 1996- Arbitration and Conciliation Act (amended in 2015 and pass a new bill 2018).
- 1996- UNCITRAL Model Law on Electronic Commerce.
- 1996- Virtual Magistrate Project.
- 1999- Uniform Dispute Resolution Policy.
- 2000- Information Technology Act (amended in 2008).
- 2001- UNCITRAL Model Law on Electronic Signature.
- 2002- UNCITRAL Model Law on International Commercial Conciliation.
- 2005- United Nations Convention on the Use of Electronic Communications in  
International Contracts.
- 2017- UNCITRAL Technical Rules on Online Dispute Resolution.





## TABLE OF ABBREVIATION

1.	ABA	American Bar Association
2.	ADR	Alternative Dispute Resolution
3.	B2B	Business to Business
4.	B2C	Business to Consumer
5.	B2G	Business-to-Government
6.	C2B	Consumer-to-Business
7.	C2C	Consumer-to-Consumer
8.	C2G	Consumer-to-Government
9.	Co.	Company
10.	Corpn.	Corporation
11.	CRT	Civil Resolution Tribunal
12.	CSO	Central Statistic Office
13.	E-Commerce	Electronic- Commerce
14.	EDI	Electronic Data Interchange
15.	EU	European Union
16.	G2B	Government-to-Business
17.	G2C	Government-to-Consumer
18.	G2G	Government to Government
19.	GST	Goods and Service Tax
20.	HTML	Hypertext Markup Language
21.	HTTP	Hypertext Transfer Protocol

22.	Inc.	Incorporation
23.	ICANN	Internet Corporation for Assigned Names and Numbers
24.	ICC	International Chamber of Commerce
25.	ICSI	Institute of Companies Secretaries of India
26.	ICT	Information and Communication Technology
27.	ICSI	Institute of Companies Secretaries of India
28.	IMF	International Monetary Fund
29.	IRCTC	Indian Railway Catering and Tourism Corporation
30.	ISP	internet service provider
31.	IT	Information Technology
32.	Ltd.	Limited
33.	NCAIR	National Center for Automated Information Centre
34.	NIXI	National Internet Exchange of India
35.	ODR	Online Dispute Resolution
36.	OECD	Organization of Economic Co-operation and Development
37.	P4LO	Perry4 law Organization
38.	SSL	Secure Socket Layer
39.	TLCEODRI	Technological Centre for Excellence for Online Dispute Resolution in India
40.	UDRP	Uniform Domain Name Dispute Resolution Policy
41.	UN	United Nation
42.	UNCITRAL	United Nation Commission on International Trade Law
43.	URL	Uniform Resource Locator
44.	US	United States

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## CHAPTER-I

### INTRODUCTION

#### **1.1 Introduction:-**

The new era of “information technology<sup>1</sup> (IT)” diversified the traditional concept with the changing dynamics of society. Now a day’s every part of human life is related to technology from simple easy things to most complicated ones. We are using technology as a helping friend and making it as part of our lifestyle. The dispute resolution process is also no longer remaining apart from this. The traditional means of resolving dispute that are being used are not fortifying needs of present day society to resolve the disputes. The long run litigation process exhausts people and also lack of fast redressal mechanism wasting time and money. In this digitalized world the traditional way of doing business has also become obsolete and newer methods of doing business has emerged. One of such method is “electronic-commerce (e-commerce)” which is gaining much importance in this present era of development. “Electronic commerce” refers to all commercial transaction based on the electronic processing and transmission of data and electronic fund transfer etc.<sup>2</sup> Apart from the conventional methods of doing business, the “e-commerce” uses technology to transact business between entities and individuals residing in different parts of the world.<sup>3</sup> The market has changed with times and this transformation includes “business to business (B2B)” and “business to consumer (B2C)” transactions using various payment gateways. The easy accessibility “information and communication technology<sup>4</sup> (ICT)” helps in raising the transactions through “e-commerce”. The advantages of “electronic commerce” to commercial parties include ease of access, anonymous browsing of products, larger choice, the convenience of shopping from the computer and enormous efficiencies.<sup>5</sup> By recognizing the efficiency brought by the internet the business world is trying to modify traditional business to accommodate new forms of communication.<sup>6</sup> To be successful in “e-commerce” business, it also has to develop the strategies, challenges and problems face by it to

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<sup>1</sup> Information Technology is the use of Computers to store, retrieve, transmit and manipulate data or information often in the context of a business and other enterprises.

<sup>2</sup> Alan Davidson, THE LAW OF ELECTRONIC COMMERCE, 1<sup>st</sup> ed. 2009, p. 1.

<sup>3</sup> Karnika Seth, COMPUTERS, INTERNET AND NEW TECHNOGY LAWS, 2<sup>nd</sup> ed. 2016, p. 101.

<sup>4</sup> Information and communications technology is the infrastructure and components that enable modern computing.

<sup>5</sup> *Supra* note 3.

<sup>6</sup> Yun Zhao, DISPUTE RESOLUTION IN ELECTRONIC COMMERCE, 1<sup>st</sup> ed. 2005, p. 5.

better serve the customers and avoid potential liabilities and give fast and efficient response procedure. In the context of internet where the parties are located in different corners of the world can contract with each other at the click of mouse, litigations of online disputes is often inconvenient, impractical, time consuming and prohibitive.<sup>7</sup> For this reason providing an alternative approach to resolve online disputes is very essential to assist in redressing grievances and gaining consumer confidence in “e-commerce”.<sup>8</sup> The disputes of “electronic commerce” are no different than the traditional business disputes where parties disagree between or among them to come on a certain decision. The “electronic commerce” gives us a new market place for idea as well as new market place for disputes. There are various mechanisms are there for resolving disputes but the search for more efficient dispute resolution mechanism is goes on. The dispute resolve through litigation is an age old mechanism for resolving disputes and it is a formal public process. But the “e-commerce disputes” did not prefer this process because of time consuming, costly, “issues of jurisdiction and choice of law” is complicated and it does not suit the present pace of business. Litigation can never been abandon entirely but modified to suit its role as a part of whole system of dispute resolution.<sup>9</sup> With this advancement of technology the parties from different country enter into business relation so it’s difficult to decide which law they have to go for and there should be need of a way rather than the traditional system of litigation process. In alternate way of dispute resolution process the parties with or without the clause include in their agreement regarding their dispute resolution choose any institution for resolving their disputes anonymously. If the parties are from India and wanted to adopt the nation’s law they can adopt it. If there is cross border business according to their convenience choose their law for resolving disputes. Because in “e-commerce” time is like money so they wanted to resolve the disputes without any delay. The “Alternative Dispute Resolution (ADR)” takes the role of advance form of litigation where the parties are assisting to resolving their differences and to come to a definite solution. ADR comes with many advantages of speedy and cost effective solution with its various modes such as “Negotiation”, “Conciliation” and “Adjudication” etc. In India also “Arbitration and Conciliation Act, 1996” also provides such provision for ADR with the adoption of “UNCITRAL

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<sup>7</sup> Aashit Shah, “Using ADR to Resolve Online Dispute”, 10 RJLT (2004) p. 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Supra* note. 4 at 1.



(United Nation Commission on International Trade Law) Model law of United Nation (UN)". Though the ADR mechanism working well but with the growing rate of "e-commerce dispute" and Information Technology the dispute resolution through the ADR is also has to be up to date.

The "Online Dispute Resolution (ODR)" is newly emerged mechanisms for resolving disputes in "e-commerce" with the help of using "information and communication technologies" in ADR to mitigate the disputes in this modern era. The "Virtual Magistrate Project launched in 1996" first introduced the idea of resolving internet related disputes. The "European Union (EU)" and "United Nation (UN)" also promote ODR in certain ways to resolve "e-commerce disputes". There are various conventions and agreements are there internationally. Now a day's many countries has adopted this process of ODR services. In this process the parties don't have to meet "face to face" to resolve any dispute. In online dispute resolution disputes are resolved by automated software or by neutral third party or panel may offer the most practicable solution.<sup>10</sup> ODR is an information technology provided tool mechanism aimed to resolve disputes that may or may not involved internet related transaction or communication but is resolved by use of online dispute resolved procedure.<sup>11</sup> In ODR the tools which are used for dispute resolutions are "computer", "scanner", "web camera", "cell phones", "fax machines" and other communicative device using the services of the "third party" "service provider"<sup>12</sup>. There are various acronyms of "Online Dispute Resolution" they are "internet dispute resolution", "electronic dispute resolution", "electronic ADR" and "online ADR" etc. In ODR the "service provider" laws are adopted to adjudicate the disputes between the parties rather than a particular jurisdictional law. The "Internet Service Provider (ISP)" does not itself decide the dispute it aims to provide necessary infrastructure and administrative assistance to assist the parties to communicate and discuss possible settlement and arrive at a solution.<sup>13</sup> Though it is proven to be an efficient mechanism but there are no formal and definite laws for it internationally and nationally. The "e-commerce" related disputes are borderless and there is no limited jurisdiction of it so the dispute arises to

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<sup>10</sup> The World ODR Technology and Mediation Centre, "Online Dispute Resolution", <http://onlinedisputeresolution.com/> (May 16, 2018).

<sup>11</sup> Esther Van Den Heuvel, "Online Dispute Resolution as a Solution to Cross-Border E-Disputes", <http://www.oecd.org/internet/consumer/1878940.pdf> (May 16, 2018).

<sup>12</sup> Organization, business or individual which offers service to others in exchange for payment.

<sup>13</sup> Margaret Rouse, "ISP (Internet Service Provider)", <https://searchwindevelopment.techtarget.com/definition/ISP>, (May 16, 2018).

it is cannot be resolve through the certain nation's laws. For these there are "service provider" also there which provides definite laws to resolve such dispute but the problem is recognition of such decision in nation's laws. Though such process also evolve in India already the Indian law also did not provide direct laws for "e-commerce" and "Online Dispute Resolution" process but only gives the legal recognition indirectly. In India the laws relating to ODR are not so much flourished like other countries. The advantages which are given by this procedure are not getting by all the general people. The developing countries like India where the nominal needs are till now aren't enjoyed by the general people, there the online dispute resolution become a dream only. The legal sectors are not provided properly the ICT tools through they can resolve disputes speedily without any problem. The prospects of ODR in India are in till now in a working mood but not yet attained the proper recognition. If they are provided with necessary tools for it than normal people do not wasted their all year long efforts to resolving their disputes.

### **1.2 Statement of Problem:-**

The laws provided through traditional means are not the only way to resolve disputes like "electronic commerce". The concept of ODR new to the society and the government can't provide adequate procedure and tools for such kind of "dispute resolution mechanism". In such a big country like India which economy is growing too fast and increasing the "e-commerce" sector the problem arise for proper regulatory mechanisms to be updated with the changing scenario and make gateway for the new technology oriented prospects. By validating through the "Information Technology (Amendment) Act, 2008" it is not sufficient for ODR India to flourish in world scenario.

### **1.3 Aims and Objectives:-**

The Aims and objectives of this dissertation paper are given below:-

- To explore online dispute resolution as a means of e-commerce disputes in India.
- To study the international framework of ODR and its applicability in India.
- To highlight the laws and provisions available for online dispute resolution in India.
- To study the jurisdiction of online dispute resolution mechanisms.

- To analysis the importance and advantages of online dispute resolution in India.
- To study the ODR as means and options to achieve in e-commerce related disputes in India.

#### **1.4 Scope and Limitation:-**

The researcher in this dissertation paper limited its scope to the understanding the “online dispute resolution” for resolving “e-commerce” disputes India. In this paper researcher studies and analyses the benefits and advantages of “online dispute resolution” for “e-commerce” disputes and how it provides an efficient mechanism rather than the traditional formal law of dispute resolution. The paper addresses the problem in ODR Mechanisms in India and its prospects in future. It also highlights the legal framework available to ODR and “e-commerce” in India and discusses the policies which are taken in international scenario for establishing ODR as a mechanism in India also.

#### **1.5 Literature Review:-**

The review of the past research works helps in identifying the issues and concerns relevant to the study. The review of the literature is prerequisite for any systematic investigation. So a thorough study of the existing review of literature has been carried out in the area “online dispute resolution” and “e-commerce” in Indian scenario in order to understand the research problem and the topic entirely. The researcher has undergone some important books and articles while carrying out this research.

##### ➤ **Books -**

#### **1. Computers, Internet and New Technology (2016)**

The world of information and communication technology is changing so rapidly that it is difficult to keep pace with the issues that arising as a result of the changes. This book is deal with the beginning and evolution of cyberspace various new laws that are arises with new technologies. It also discusses about the “e-commerce” laws and “online dispute resolution” mechanism various aspects and its implication in India.

#### **2. A-Z E-Commerce (2009)**

With growth of information technology commerce through the electronic medium is also increasing. This book provides an overview of the current and next generation of “e-commerce”. It discusses the trends in “business to

consumer e-commerce” both from the point of view of “retailer” and “customer”.

**3. Internet Jurisdiction and Choice of Law (2010)**

This book examines the existing “jurisdiction and choice of law” rules proposes the interpretation of those rules to the “digital age”. It discusses the need for the modernization and harmonization of “private international law” compares current legislative framework and suggest a series of ways to remove the obstacle to the determination of “internet jurisdiction and choice of law”.

**4. Online Dispute Resolution Emerging Issues and Strategies (2007)**

“Online Dispute Resolution” is still in infancy and the main stakeholders in the “Online Dispute Resolution” community are the “parties to the dispute” who participate in the e-commerce and other transaction. In this book various factor of online dispute resolution is discusses and says about the Online Dispute Resolution as a logical step for the resolution of dispute that arises in the internet.

**5. Law and Practice of Alternative Dispute Resolution in India (2016)**

The book provides a comprehensive discussion on the different aspects of law and procedure in relation to the conduct of arbitration in India and enforcement of foreign arbitral awards. It also deals with the law and practice of “negotiation”, “mediation” and “conciliation”. It critically analysis the implementation of “Alternative Dispute Resolution” over the past decade and recommends some future step to strengthen the practice of “Alternative Dispute Resolution” in India.

**6. The Law of Electronic Commerce (2009)**

This book addresses the legal issues relating to the introduction and adoption of various forms of electronic commerce. It also discusses the various issues and challenges and legal framework e-commerce in international level. It gives a whole about the concept of e-commerce existing now days.

**7. Digital Justice Technology and the Internet of Disputes (2017)**

In this book author discusses in what way technology can be employed to resolve any dispute. The book focuses on the history and development of “online dispute resolution” and discusses the need of “Online Dispute Resolution” to resolve “e-commerce” and other disputes.

## **8. Dispute Resolution in Electronic Commerce (2005)**

The book explains the concept of “electronic commerce” and dispute related to it. It also discusses disputes which arises due to the “e-commerce” and existing dispute resolution mechanisms. The international framework for “e-commerce” disputes and the necessity of new mechanism is also included in this book.

## **9. Online Dispute Resolution for Business (2002)**

This book explains the “Online Dispute Resolution” and its need for the modern business. It also describes the new challenges face due to technology in the business and “Online Dispute Resolution” is a measure for resolving such kind of disputes especially for “e-commerce” disputes.

### ➤ **Articles –**

#### **1. ODR and E-Commerce (2013)**

This paper discusses the “Online Dispute Resolution” for the “e-commerce” and its theoretical framework for dispute resolution procedure. It also describes the taxonomy of “Online Dispute Resolution” process and its international framework, issues related to it and various applicable rules to “Online Dispute Resolution”.

#### **2. Is India Ready for Online Dispute Resolution Process? (2006)**

In this article discusses about the delay in judicial system and using alternate ways to resolves business disputes. It explains the new mechanism of “Online Dispute Resolution” and it applicability in India. The article discusses the shifting of mechanism from “Alternative Dispute Resolution” to “Online Dispute Resolution”.

#### **3. Using ADR to Resolve Online Disputes (2004)**

The article discusses the online ADR services and the issues which are suitable for the online ADR. It explores the effectiveness ADR tool to settle “online dispute” its advantages and disadvantages of the online ADR.

#### **4. Building Trust in E-Commerce Through Online Dispute Resolution (2015)**

This article analyses the need of “Online Dispute Resolution” for resolving the “e-commerce” consumer remedies. It discusses the framework for “e-commerce disputes” consumer protection criteria and current scenario, the

strength and weakness of the Online Dispute Resolution as a justice delivery system.

### **1.6 Research Question:-**

In considering the scenario of “online dispute resolution” for resolving “e-commerce” disputes in India as future prospects the following research question will be answered in this dissertation paper-

1. How is ODR effective as a dispute resolution mechanism in international e-commerce scenario?
2. Whether the ODR is having any impact in resolving e-commerce disputes in India?
3. What are the prospects of ODR in future for resolving e-commerce disputes in India?
4. What is the impact of implementation of the ODR Mechanisms in solving e-commerce disputes in India?

### **1.7 Research Methodology:-**

In this dissertation paper the researcher had adopted the doctrinal method of research for completion of the thesis. The researcher has utilized both primary and secondary resources for the project. In primary sources, researcher has referred various relevant acts, legislations, statute, books etc. available in the library of NLUJA, Assam and in secondary sources researcher has referred to articles, journals, online legal data base available in the library of NLUJA, Assam and free internet.

### **1.8 Tentative Chapterisation:-**

This dissertation paper of “ONLINE DISPUTE RESOLUTION FOR RESOLVING E-COMMERCE DISPUTES IN INDIA- A GATEWAY TO THE FUTURE” is consisted of **six chapters**.

- The **first chapter** deals with the introductory portion, research question, literature review, statement of problem aims and objectives and methodology.
- The **second chapter** deals with the development of online dispute resolution as a dispute resolution mechanism and e-commerce in India.
- The **third chapter** deals with the concept of online dispute resolution and e-commerce.

- The **fourth chapter** deals with legal framework of online dispute resolution and e-commerce and its legal validity in India.
- The **fifth chapter** deals with the paradigm shift of dispute resolution process in e-commerce to the online dispute resolution process and its prospects in India.
- The **sixth chapter** deals with the conclusion and suggestion.

## CHAPTER-II

### **DISPUTES IN E-COMMERCE AND EMERGENCE OF ONLINE DISPUTE RESOLUTION**

In general sense the term dispute means the disagreement or argument between the parties to come to a certain decision. According to the “Black Law Dictionary” the term “dispute” means, “A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim or demand on one side, met by contrary claims or allegations on the other side.<sup>14</sup>” The disputes can also be called as conflict. There is no way to prevent the conflict from arising.<sup>15</sup> In our normal day to day life the thinking, necessity or requirement of every person is not similar to everyone. So the dispute among the people is a common thing. The dynamics and classification of disputes are different according to their standard. “E-commerce” disputes are one of the dynamics of disputes. “Any dispute that arises in e-commerce can be classified as an e-commerce dispute.”<sup>16</sup> E-commerce provides various advantages and opportunities to the modern commercial world. Breaking the traditional way of doing business routes it introduced commerce to the global market. It provides the business community and general consumer options of various offer provided by businesses all over the world.<sup>17</sup> With coming with all the benefits “e-commerce” also has potential risk of dispute. The dispute which are arises some of them are familiar to us and some of them are not.<sup>18</sup> For resolving the dispute arises in the “e-commerce” regime there are certain dispute resolution mechanism are to solve such disputes. According to the “Business Dictionary” definition “dispute resolution” means “A process for resolving differences between two or more parties or groups.<sup>19</sup>” In business, the “dispute resolution” wanted to achieve fairness to all the parties which is assist by a “third party”. Mostly the contract between the parties itself contain the clause of dispute resolution or how a dispute the parties can be resolve. Generally we can also referred dispute resolution as “alternative dispute resolution”, “appropriate dispute resolution” because dispute resolution processes are rather than deciding in a court it is decided

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<sup>14</sup> The Law Dictionary, “What is Dispute?”, <https://thelawdictionary.org/dispute/> (May 17, 2018).

<sup>15</sup> Colin Rule, “ONLINE DISPUTE RESOLUTION FOR BUSINESS”, 1<sup>st</sup> ed. 2002, p. 1.

<sup>16</sup> Roger LeRoy Miller and Gaylord A. Jentz, “LAW FOR E-COMMERCE”, 1<sup>st</sup> ed. 2002, p. 60.

<sup>17</sup> Zeng Tang, “Online Dispute Resolution An Effective Dispute Resolution System For Electronic Consumer Contracts” 23 CLSR (2007), p. 42.

<sup>18</sup> M.E. Katsh, “Dispute Resolution in Cyberspace”, 28 CLR (1996) p. 953.

<sup>19</sup> Business Dictionary, “Dispute Resolution”, <http://www.businessdictionary.com/definition/dispute-resolution.html> (May 17, 2018).



by the outside the court process.<sup>20</sup> The “dispute resolution mechanism” more convenient than the traditional mode of resolving disputes; it is cheaper, faster giving parties to greater participation in resolving any disputes and it is less formal and have more flexible rules than the courts.

## **2.1 E-Commerce Disputes:-**

With technological advancement, India also makes growth in “e-commerce” revolution and this created a business opportunity for peoples. It helps in redefining countries economy. But with all the good advantages it also gives us market for new disputes. The effectiveness of “e-commerce” is based on electronically made contracts which are given legal validity in India by “Information Technology Act, 2000”<sup>21</sup>. But majority of the people in India till now feel insecure while dealing business in online because of the lack of transparency of the terms and condition provided in such kind of contract. The e-contract is modeled and executed by a software system and the concept of e-contact is similar to the traditional commercial contract but the way of conducting is different.<sup>22</sup> The vendors present their products, prices and terms to prospective buyers and the buyers consider their options, negotiate prices and terms and place order and make payments.<sup>23</sup> In this “e-commerce” the vendors deliver the product to the buyer at his doorsteps. Because of the difference of the ways of conducting the commerce process, it raises many new technical and legal challenges. Generally disputes are settled within the territory of the one or the both the parties where they are located. But in case of online disputes customer can be located in any part of the world. So the problem arises regarding the broad territorial exposure how a dispute is resolved which is arises between the parties what courses of action they will take for any problem. Internet is multijurisdictional and boundary less, which involves people in commercial activity located in different jurisdiction.<sup>24</sup> The dispute arise when the parties localizing the dispute and finds problem in identifying to which law is to be applicable to the issues. The classification of “e-

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<sup>20</sup> American Bar Association, “Dispute Resolution Process”, [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses.html](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses.html). (May 17, 2018).

<sup>21</sup> Information Technology Act, 2000.

<sup>22</sup> Sachin Mishra, “Determining Jurisdiction over E-Commerce disputes in India”, <http://docs.manupatra.in/newslines/articles/Upload/FE4BA350-DBEF-49DA-97D4-09E54ED8B813.pdf> (May 17, 2018).

<sup>23</sup> *Ibid.*

<sup>24</sup> Ms. Manisha, “Determining Jurisdiction Over E-Commerce Disputes in India”, <http://journal.lawmantra.co.in/wp-content/uploads/2017/08/10.pdf> (May 18, 2018).

commerce” disputes can be many based on the different standards. The classification can be made on the topic of dispute like “interconnection disputes”, “sale disputes”, “payment disputes”, “delivery disputes”, “infringement disputes”, “disputes concerning the use of trademark belonging to third parties” etc. The disputes are also like traditional commercial disputes like disputes over the quality of good purchase online, failure to deliver, errors in order taking and failure to pay and internet specific dispute over problems like posting on the internet or issues with domain names.<sup>25</sup> The nature and qualifications of the disputing parties constitute another standard of comparison like disputes involving consumer, companies and public authorities. But all these classification cannot define properly the classification of dispute resolution. The disputes which are arise in e-commerce can be divided into contractual like B2B, B2C etc. and non-contractual issues like copyright dispute, defamation etc.<sup>26</sup> The disputes relating to the jurisdictional issues, choice of law issues, high cost of cross jurisdictional litigations issues, security, privacy and regulation issues are also there.<sup>27</sup>

### **2.1.1 Types of E-Commerce Disputes:-**

“E-commerce” carries both comfort and discomfort to the users. Comforts which are brings to the user include on spot sale and purchase of goods, competitive prices of product, convenient and time saving etc. and discomfort and problems like fraud, cybercrime committed against the “e-commerce” users. On the basis discomfort and problems faces by the user, enterprises etc. the “e-commerce” disputes are divided into-

2.1.1.1 Contractual Disputes &

2.1.1.2 Non-contractual disputes

#### **2.1.1.1 Contractual Disputes:-**

In contractual disputes the disputes are arise out of some not fulfillment of any contractual obligation<sup>28</sup> Contractual relationships are one of the important parts of regulating mutual performance of internet business. In most of the cases it has seen that the participants are already in some form of contractual relationship with “service providers” or enterprises. At first stage if “e-commerce” necessary infrastructure shall

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<sup>25</sup> A. Williams, “Dispute Resolution And Arbitration For Electronic Commerce”, [www.dww.com/articles/dispute-resolution-and-arbitration-for-electronic-commerce](http://www.dww.com/articles/dispute-resolution-and-arbitration-for-electronic-commerce) (May 19, 2018).

<sup>26</sup> Kah-Wei-Chong and Len Kardon, “Dispute”, <https://cyber.harvard.edu/olds/ecommerce/disputes.html> (May 19, 2018).

<sup>27</sup> *Supra* note 7 at 2.

<sup>28</sup> Salar Atrizadeh, “E-Commerce Transactions: Issues and Dispute”, <https://www.internetlawyer-blog.com/2015/10/e-commerce-transactions-issues-and-disputes.html> (May 29, 2018).

be made to undertake future operation. So the contract is first made between enterprises that operate the infrastructure and those that make use of infrastructure like “Internet Service Providers<sup>29</sup> (ISP)” to offer further business services to the consumers.<sup>30</sup> This kind of contract between parties can be called as interconnection contract. This kind of contract usually last for a longer period but in reality the contractual context can change rather drastically and might be influence by the further contracts which cause more disputes concerning interpretation and reasonable application of the relevant provision of the initial contract<sup>31</sup>. At the second stage contracts are made between “Internet Service Provider” (ISP) and their customer’s issues related to the service provided by the ISP that grant access to the communication networks. Disputes may arise concerning the price and quality of service and everything from attempts to connect to denial of access and exclusion of messages can arise. After these two stages accomplish the “e-commerce” in real commercial sense starts and it is concluded between the transacting parties. At this stage of contract are divided into two types of contract on the basis of the two types of “electronic commerce”- “Commercial contract” and “Consumer contract”. “Commercial contracts” have been in existence far longer than the latter. “Electronic Data Interchange (EDI)” has been the main form of commercial contracts. Transacting parties are likely to have known each other before and continue to maintain good relationships, making use of communication networks to facilitate the ordering, shipment, storage of goods and electronic payment. On the other hand consumer contracts are developing in 21<sup>st</sup> century.<sup>32</sup> In electronic commerce the end user of goods or services can surf through web advertisements, discriminate between purchase products. This form of direct transaction brings many structural and conceptual changes to modern commercial theory.

Generally contractual disputes are divided in to three categories. They are-

- **Enterprise and Internet Service Provider Disputes** - These kind of “disputes arises between the enterprise and Internet Service Provider or web-hosting service provider on the issues of disagreement over interpretation in

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<sup>29</sup> An Internet Service Provider (ISP) is a company that provides Internet access to companies, families, and even mobile users.

<sup>30</sup> Yun Zhao, DISPUTE RESOLUTION IN E-COMMERCE, 1<sup>st</sup> ed, 2005, p. 29.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

services, breach in data security etc”<sup>33</sup>. As an example- if any ISP provider name ‘A’ make contract with the enterprise name ‘B’ to provide an uninterrupted web hosting services. But ‘A’ fails to provide it this may lead to dispute between ‘A’ and ‘B’.

- **Business to Business Disputes (B2B)** - These kinds of “disputes arise between enterprise and its suppliers because of non-performance of contractual obligation, misrepresentations and complaint from customers regarding services provided by the suppliers”<sup>34</sup>. As an example- If an automobile manufacturer named ‘A’ who makes several B2B transactions such as buying tires, glass for windscreens and rubber hoses for its vehicles from the suppliers ‘B’ and make a contract. If the ‘B’ fails to perform its obligation within the stipulated time limit this may lead to a B2B dispute.
- **Business to Consumer Disputes (B2C)** - These kind of “disputes arise ‘between the enterprise and its customers such as non-payment for goods or services, non-performance of contractual obligations, poor performance of contract, misrepresentations, breach of the privacy policy, and breach of security of confidential information”<sup>35</sup>. As an example if any enterprise ‘A’ makes any contract with any consumer ‘B’ and sold the final product to the consumer is a single B2C transaction. If the consumer finds any defect in the product then it may lead to a B2C dispute.

#### **2.1.1.2 Non-contractual disputes:-**

The disputes which are “arising due to the non-observance of any statutory obligation on the part of the parties to the transaction can be called as non-contractual disputes”<sup>36</sup>. Non-commercial disputes have become an important issue since the introduction of the internet. All disputes not based on contractual relationships can be included in this type, a mixed of many different kinds of disputes in electronic commerce.<sup>37</sup> Among the most important of non-contractual disputes are infringements on intellectual property. ‘Copyright infringement’, ‘trademark infringement’, ‘data protection’ and ‘defamation dispute’ are frequent. One notable phenomenon is the emergence of “domain name dispute”; another is the debate over whether or not ISPs

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<sup>33</sup> Karl Mackie, COMMERCIAL DISPUTE RESOLUTION, 1<sup>ST</sup> ed. 1995, p.8.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Supra* note 30 at 13.

<sup>37</sup> *Ibid.*

should be held liable for the actions of a third party. These issues have raised problems with the traditional structure of 'intellectual property protections'. Besides issues concerning "intellectual property", there are further possible disputes concerning "freedom of expression", transmission of materials forbidden in some states, "competition law" etc. The parties involved therein are miscellaneous. Depending on the specific situation, individual, commercial entities, state or international organizations can be involved in an "electronic commerce non-contractual dispute". Care must be taken to evaluate all relevant parties in a dispute. While disputes involving individuals or commercial entities are not so problematic, disputes involving public authorities may require special consideration and unique solutions. Thus, various levels of mechanisms should be utilized for disputes involving different parties.

The common kind of non-contractual disputes are-

- **Copyright Disputes** - these kinds of disputes arise "when the enterprises are liable for 'copyright infringement'. If the enterprise uses copyrighted material in excess of fair use without permission of proper authority then the copyrighted disputes"<sup>38</sup>. As an example- If an enterprise named 'A' provides an online English- Hindi dictionary Facility to the users 'B'. Another enterprise 'C' subsequently published another online English- Hindi dictionary Facility. The former enterprise 'A' can sue the latter for infringement of copyright under section 51 of the Copyright Act, 1957 against 'C'.
- **Data Protection Failure** - these kinds of disputes arise "when the enterprise may be liable for sharing or revealing confidential data on customers and violates the privacy rules"<sup>39</sup>. As an example- If the services provided by an enterprise are of such a nature that the law mandates that it is the duty of the enterprise to provide data protection to the customers. Failure in observing such a mandate may give rise to a liability under the IT Act, 2000.
- **Right to Free Expression** – These kinds of disputes arise "when the enterprise may be subject to defamation suits for defamatory material posted online"<sup>40</sup>. As an example: if an enterprise publishes any defamatory statement

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<sup>38</sup> *Supra* note 36 at 14.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

on its website concerning a person of repute, Mr. X. Then Mr. X has all the right to sue the enterprise for defamation under the provisions of IPC, 1908.

- **Competition Law & Domain Name Disputes** - these kinds of disputes arise “when the enterprise may be subject to trademark infringement suits if it infringes a registered or otherwise legally recognized trademark”<sup>41</sup>. As an example- In United States (US), if the enterprise has registered a “domain name” which corresponds to a registered or common law trademark, it may be subject to a complaint under “Internet Corporation for Assigned Names and Numbers (ICANN)” “Uniform Domain Name Dispute Resolution Policy (UDRP)” or the U.S. federal Anti cyber squatting “Consumer Protection Act”. Henceforth, it is significant to note that although many of the issues such as ‘jurisdictional issues’, ‘choice of law issue’, high cost of ‘cross-jurisdictional’ litigation issue, which arise in relation to the different categories of disputes, are similar, the difficulties are perhaps more pronounced in respect of B2C transactional disputes which are often of small monetary value. Traditional methods of resolving cross jurisdictional ‘commercial disputes’, such as ‘international commercial arbitration’, are often too costly, inconvenient and burdensome in the context of consumer disputes.

## **2.2 Choice of Law in E-commerce Disputes:-**

“E-commerce” principally consists of buying, selling, marketing, and servicing using computer networks.<sup>42</sup> There is no any definite border for “e-commerce”. Today, the countries participating in such kind of commerce without any hesitation and maintain a good international relation with other countries. The convenience of “e-commerce” makes people to interest more to such kind of business activity. But with such convenience the disputes is also there in “e-commerce”. The nature of the business of “e-commerce” is borderless so the issues arise to which law is applicable for “e-commerce” disputes is in conflict. In “e-commerce” there are contractual and non-contractual disputes are there. When any e-disputes related to e-commerce arises the most good things of all is that the “parties are free to choose their laws and jurisdictional bodies in their agreement or contract which will help to resolves them

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<sup>41</sup> *Supra* note 13 at 30.

<sup>42</sup> José Edgardo Muñoz-López, “Internet Conflict of Laws: A Space of Opportunities for ODR”, 14 (2009) p. 163.

future disputes if any arises between them”<sup>43</sup>. This kind of choice of law is derived from the terms and conditions decided by the parties themselves<sup>44</sup>. But “when there is not any such clause among the parties related to the dispute settlement then the parties have the one or more jurisdictional bodies and exclusive jurisdiction of such kind of disputes. With consent of parties among themselves they are free to change their clauses of the contract and it will not affect the validity of contract”<sup>45</sup>. But when there is no contract between any parties relating to resolution of future dispute the problem of determination of applicable law may arise. So, in that case the parties generally follow the general rule of ‘lex loci damni’ meaning “the law of the country where the direct damage occurred, regardless of the place where the action resulting in the damage was taken, or the places where indirect consequences occur will be applicable. Though there is an absence of such kind of prior agreement of resolve the non-contractual disputes the parties can agree to choose any law, forum or any jurisdictional body to decide the disputes”<sup>46</sup>.

### **2.3 Jurisdiction of E-commerce Disputes in India:-**

When any disputes arise between the people they generally go to the litigation procedure and approach the court. The traditional approach of jurisdiction of the court is decided from its subject-matter, pecuniary and territorial matter of the dispute.<sup>47</sup> The internet doesn't have any territorial boundaries therefore the issues of territorial jurisdiction become major problem today's aspect. In India, for operating “e-commerce” there are certain Acts like the “Information Technology Act, 2000” and other regulations like ‘Information Technology (Intermediaries guideline) Rules, 2011’ which known as ‘cyber law due diligence requirement’ and relevant laws are there. And this scenario is also seen in other countries also.<sup>48</sup> The “e-commerce” is governed by many law of the country. But the problem arise when there is cross border “e-commerce” agreement is made between the parties and if any dispute arise between them then there is no definite international law only for “e-commerce” in International scenario.<sup>49</sup>

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<sup>43</sup> Faye Fangfei, INTERNET JURISDICTION AND CHOICE OF LAW, 1<sup>st</sup> ed. 2010, p. 17.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Rottenstein Law Group LLP, “What is choice of Law”, <http://www.rotlaw.com/legal-library/what-is-choice-of-law/> (May 22, 2018).

<sup>47</sup> Nemil Shah, Electronic Contract/Agreements – A General Overview, 2 IJIR, p. 225.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

In India **under Sec. 20**<sup>50</sup> of the ‘Civil Procedure Code (CPC), 1908’ deals with the jurisdiction of the court to resolve cases.

“**Section 20**, Civil Procedure Code, 1908 says that Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction –

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.”

“This section is more relevant to the court situated within the territory of India but it can be interpreted for transnational issues and private international law. The procedural law of India also provides for the enforcement of decisions of Courts of India as well as decisions of Foreign Courts.”<sup>51</sup>

“**Section 13**<sup>52</sup> of CPC provides for the effect of foreign judgment on the courts of India. Under this section it is provide that A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except”,—

“(a) Where it has not been pronounced by a Court of competent jurisdiction;

(b) Where it has not been given on the merits of the case;

(c) Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;

(d) Where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) Where it has been obtained by fraud;

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<sup>50</sup> Section 20 of Code of Civil Procedure, 1908.

<sup>51</sup> *Supra* note 15 at 10..

<sup>52</sup> Section 13 of Code of Civil Procedure, 1908.



(f) Where it sustains a claim founded on a breach of any law in force in India.”

“**Section 44 A**<sup>53</sup> of the Civil Procedure Code provides for the enforcement of decrees of the Indian courts in the countries, in which the central government has declared by notification and which have entered into mutual relationships and agreements. If in case a state does not have a mutual correspondence with our country, then enforcement of any decree can only be done by commencing a new action for enforcement in that courtroom. Sometimes it gets difficult and complicated when the foreign court may wish to reassess the merits of the lawsuit. Thus a uniform code for international jurisdiction and execution is required, which can bring certain and also solve confusions and controversies.”

“**Section 13**<sup>54</sup> of the IT Act, 2000 states about the issues of the time and place of dispatch and receipt of an electronic record; which deciding the issues of jurisdiction in electronic contracts.”

“According to **Section 13** the location of the computer resource is irrelevant. In electronic contracts, there is no defined place of consummation of the contract and no mention about the proper law for the parties belonging to different nations. Thus the courts have to enforce the laws of the state which bears the closest connection with the contract. The most of the B2B contracts include the jurisdiction and the governing law for the subsequent disputes. In such kind of contracts the courts usually upheld the contract between the parties and allow them to answer according to the contract. But still the courts impose certain limitations especially for B2C contracts” only because the grounds of consumer protection are nearly related to the public at large. Thus, the legislations of various nations and international convention have prohibited the exclusion of the jurisdiction of the courtroom in the B2C contract.”

The protection of rights and remedies of the consumer are given under the **Section 28**<sup>55</sup> of the Indian Contract Act, 1872 which says “the agreements in restraint of legal proceedings void. Every agreement,

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

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<sup>53</sup> Section 44 A of Code of Civil Procedure, 1908.

<sup>54</sup> Section 13 of Information Technology Act, 2000.

<sup>55</sup>Section 28 of Indian Contract Act, 1872.

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.”

“**Section 11 (2)**<sup>56</sup> of the Consumer Protection Act, 1986” which says that “a complaint shall be instituted in a District Forum within the local limits of whose jurisdiction

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain, provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside, or carry on business or have a branch office, or personally work for gain, as the case may be, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.”

The above provisions disregard the agreement between consumer and the seller in respect of choice of forum and governing law are concerned.

In the case of **SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra**<sup>57</sup>, the Delhi High Court assumed jurisdiction where a corporate reputation was being defamed through e-mails. And in this case, the Delhi High Court has restrained the employee from sending mails and defaming the company.

**Section 4**<sup>58</sup> of the Indian Penal Code says that “Offence includes every act committed outside India which, if committed in India, would be punishable under this Code.”

In India, the court’s does not seem too much jurisprudence on the issues of jurisdiction of e-commerce. Other than U.S. the Indian courts have their own discretionary powers over deciding the jurisdiction of the cases. In some instances it has seen that the court in the preliminary stages assumed jurisdiction over a matter. When there is any issue arises relating to the jurisdiction the Supreme Court relies to the ‘Forum Convenience Test’. If courts find that the some other forum has the

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<sup>56</sup> Section 11 (2) of Consumer Protection Act, 1986.

<sup>57</sup> SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra Suit No. 1279 of 2001, Delhi District Court.

<sup>58</sup> Section 4 of Indian Penal Code, 1960.

competent jurisdiction over the case where it is suitable for the parties than the court refuse to exercise its discretionary jurisdiction. There are also other systems of resolution of dispute other than courts such as alternative dispute resolution system, private international law etc. The concepts of private international laws are accepted in India and the parties are free to choose one or more competent court to decide the disputes if there is more than two courts which has jurisdiction over the case.

It was held in **Ramanathan Chettiar v Soma Sunderam Chettiar**<sup>59</sup> that India accepts the well established principle of private international law that the law of the forum in which the legal proceedings are instituted governs all matters of procedure.

#### **2.4 Existing Dispute Resolution Mechanism for E-Commerce:-**

The mechanism which are used in resolving disputes are one of the most important future of dispute resolution system. While the parties are making any agreement it is necessary to pay attention in choosing choice of dispute resolution mechanisms. Because if any problem occur in future between the parties than the parties have no problem regarding to choosing the right mechanism for dispute resolution. Litigation is the first choice while selecting any mechanism for disputes by the general people. Besides the litigation procedure there are “alternative dispute resolution” mechanisms like “negotiation”, “mediation”, and “arbitration” is there.<sup>60</sup> To enforce the contract at a reasonable cost and time in dispute it is important to choose the adequate dispute resolution mechanism while negotiating a contract.<sup>61</sup>

##### **2.4.1 Litigation:-**

Litigation is the orthodox and mostly used mechanism for disputes by the general people. It is the formal, public process for resolving dispute before national courts. It is thus indispensable to the whole system of dispute resolution. It is thus considered to be indispensable to the whole system of dispute resolution. But now a days it's become trend of not employing litigation in the first stage of dispute resolution and it's also applicable to e-commerce. The length of time needed for the whole process of litigation does not suit the present pace of business.<sup>62</sup> The verdicts for the disputes should be come rapidly alongside the development of economic activities. The high

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<sup>59</sup> Ramanathan Chettiar v Soma Sunderam Chettiar AIR 1964 Madras 527.

<sup>60</sup> Intrigrity Management Toolbox, “Dispute Resolution Mechanism”, <http://www.waterintegritynetwork.net/imtoolbox/dispute-resolution-mechanism/> (May 28, 2018).

<sup>61</sup> *Ibid.*

<sup>62</sup> Legal Referee, “ODR and E-Commerce in India”, <http://legalreferee.com/odr-e-commerce-india/> (May, 2018).

cost of litigation procedure is another obstacle in litigation procedure. Sometimes it is equal or exceeds the actual damages. The usage of litigation procedure in electronic commerce diminishes considering the small amount involved in the disputes. “The cost of the travel to the forum state let alone litigation could be higher than the value of the transaction in dispute. This shall prevent people from applying litigation to protect their own rights. There are many cheaper mechanism available than litigation. The issues of jurisdiction and choice of law become particularly complicated in international level.<sup>63</sup>” A problem specific to electronic commerce is lack of information about the transacting parties “when an injured party wants to raise a suit he has to know the location of other party. But in cyberspace everyone is everywhere. Traditional theories for deciding jurisdiction and appropriate laws must be reevaluate in the wake of a digital world. The atmosphere of litigation also could be destructive to the future relationship of transacting parties. So in this way litigation is challenged as a means of dispute resolution. An efficient and affordable alternative is needed in order to address current dispute in electronic commerce and for future ‘cyber community’ continues to grow. Litigation can never be abandoned entirely but it can be modified to suit its role as a part of a whole system of dispute resolution.<sup>64</sup>”

#### **2.4.2 Alternative Dispute Resolution Mechanism**

Considering the limitations of “litigation”, “alternative means have been suggested and formulated to complement the dispute resolution system. ADR is a general term to distinguish between litigation in courts and other method designed to assist parties in resolving differences.<sup>65</sup>” Though there is no consensus in the academic or business fields on the exact meaning of ADR. Most experts view ADR as a range of approaches that fits within the boarder spectrum of dispute resolution, which include corporate consumer complaint services, ADR and litigation. These methods are not intended to supplant litigation but rather to supplement it.<sup>66</sup> ADR encompasses wide range of mechanism for resolving disputes between two or more parties outside formal court procedure. “Its emergence can be dated to the intellectually appealing multi door courthouse advanced by Professor Frank Sander in the late 1970s. Most of

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<sup>63</sup> *Supra* note 62 at 21.

<sup>64</sup> *Ibid.*

<sup>65</sup> United Nations, “Alternative Dispute Resolution in E-Commerce”, <https://www.unc.edu/courses/2010fall/law/357c/001/AltDisputeResolution/ecom.html> (May 28, 2018).

<sup>66</sup> *Ibid.*

the ADR proceedings don't involve the endless motions, voluminous proceedings, procedural wrangling and years of arguing and waiting for judgment that characterize the old litigation system for most modern business people and consumers."<sup>67</sup> There are many advantages of ADR process. ADR process can help disputing parties to reach a speedy and cost effective resolution. The issues relating to the jurisdiction shall be resolved by once for all ADR mechanism.<sup>68</sup> The ADR mechanism can lead to a creative business driven solutions. Avoiding litigation is important to disputing parties in a mature and mutually beneficial supply chain relationship not only to save costs but also to reduce commercial uncertainty and preserve valuable long term relationships that might be jeopardized by short term hostilities and belligerence.<sup>69</sup> The ADR procedure also helps to protect privacy and confidentiality of disputes between parties. There are still many features of ADR all of which share the aim of resolving disputes in speedy and cost effective way.<sup>70</sup> It is not surprising that ADR is generally considered the best succession for formal litigation, especially in the area of electronic commerce.<sup>71</sup> It is a tailor made solution that is better adapted to the particulars of network than traditional procedures. The mostly used ADR mechanisms are negotiation, mediation, arbitration.<sup>72</sup>

**Negotiation:** - the terms negotiation means "when the parties wants to compromise towards an agreed resolution of their dispute". The "negotiation" has many advantages than the "other dispute resolution mechanism". The term itself says the acceptable results of the parties, if they don't agree than there is no resolution. Negotiation accommodates with best solution o the basis of parties' ongoing business interests rather than the strict legal action and rights. It is more cost efficient and time benefited mechanism than other alternatives. Mostly the negotiation results are confidential. Commercial disputes should always try to negotiate the resolution of dispute first<sup>73</sup>. But for negotiation there should have to be compromise between the

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<sup>67</sup> *Supra* 30 at 13.

<sup>68</sup> *Ibid.*

<sup>69</sup> Stephen Antle, "Canada: Choosing a Dispute Resolution Mechanism", <http://www.mondaq.com/canada/x/201054/Arbitration+Dispute+Resolution/Choosing+A+Dispute+Resolution+Mechanism> (June 29, 2018).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Achit oswal," India: India and International Commercial Arbitration", <https://www.khaitanco.com/PublicationsDocs/Mondaq-KCOCoverage23June17Anchit.pdf> (May 29, 2018).

parties and there is certain kind of uncertainty also involved with it also. The parties can reject the possible solution of the dispute resolution through negotiation.

**Mediation:** - Mediation is as like as negotiation but the negotiation facilitate by the agreed neutral normally a trained and experienced mediator.<sup>74</sup> Generally if the parties are properly advised and they can negotiate by their own but sometimes it doesn't work out by the parties alone so they need a mediator to resolve their disputes. Mostly mediation has the same advantage and disadvantage of negotiation. The statistics of resolution of disputes through mediation is high in commercial disputes. In comparison of mediation with negotiation, mediation is not cheap as negotiation and not readily available. But if it achieves the proper resolution of disputes all the cost and time is well worth it.

**Arbitration:** - In arbitration parties moves to a different kind of dispute resolution mechanism. Arbitration imposes a legally binding resolution on the parties, whether they agreed with it or not. It is based on the parties' legal rights and obligations not on the business interest of the parties. The domestic law of the country related to such matter will prevail.<sup>75</sup> The fact finding procedure are based on the evidence. The arbitrator is appointed by the parties who make the decision the dispute. The arbitration provides certainty and finality to the resolution of dispute.<sup>76</sup> Like mediation and negotiation arbitration is also confidential. But there are also disadvantages of arbitration.<sup>77</sup> The order pass by the arbitrator is also unacceptable by one of the parties. The arbitration procedures are much similar to the litigation procedure than negotiation and mediation<sup>78</sup>.

## **2.5 Necessity of New Mechanism for E-Commerce:-**

Various mechanisms applying the ADR techniques have been constructed to resolve disputes and have been working fairly well up to the present. But the electronic commerce dispute entered the arena doubt arises concerning whether the present mechanisms are sufficient to resolves the disputes or not. The dynamics of global economy driven by new technologies changes the need of dispute resolution processes. "Electronic commerce" differs drastically from other means of

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<sup>74</sup> *Ibid.*

<sup>75</sup> Anirban Chakraborty, LAW & PRACTICE OF ALTERNATIVE DISPUTE RESOLUTION IN INDIA, 1<sup>st</sup> ed. 2016, p. 26.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

transactions. Different context are important in determining approaches to dispute resolution. The application of modern technology to dispute resolution mechanism has been made urgent by the introduction of the internet and the development of “electronic commerce”. Traditional mechanisms are lagging behind technologically. Indeed, important economic and business interests are at stake. “It has been generally recognized that consumers should have access to fair, timely, effective and affordable means for resolving problems with any transactions”<sup>79</sup>. While litigation occupies an important part in dispute resolution, new principle should be found to meet the demands of electronic commerce ADR offers a way to rapidly, cheaply and efficiently resolve disputes, which is seen to complement judicial procedures. As a mechanism to resolve dispute arising on the network, satisfies customer expectations and foster consumer confidence in online purchasing and other services and has enormous benefits for merchants.<sup>80</sup> The application of ADR should also benefit governments by mitigating the need to involve more formal systems of adjudication. According to some scholar electronic commerce is particularly likely to adopt non court methods of dispute resolution.<sup>81</sup> “The present legal remedies in the context of online transactions are not most effective means of redress because of the nature of long distance transactions and judicial problems.”<sup>82</sup> With the present mechanisms, a case could be prolonged for a year or longer, a ridiculous stretch of time for a dispute over some money. Thus only when it is demonstrated that dispute can be heard more quickly and disposed of more effectively with the use of internet that the net effect will achieve consumer trust in real consumer protection.

## **2.6 Emergence of Online Dispute Resolution:-**

The globalization of “dispute resolution processes led to epitomic movement of “online dispute resolution (ODR)”<sup>83</sup> The salient characteristics of the ODR is the ease of its access, include both online and offline disputes and relatively low cost generated by the procedure. However an important finding in ODR field is that almost exclusively usable for small and medium size disputes raising factually simple issues.<sup>84</sup> The ODR movement nonetheless remains a reference phenomenon for the

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<sup>79</sup> Anila V Menon, et al., THE FUTURE OF ODR: ONE BRIEF GLIMPSE, 1<sup>st</sup> ed. 2007, p. 208.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Supra* note 71 at 24.

<sup>83</sup> M. McLuhan, “EXPLORATIOS IN COMMUNICATION”, 1<sup>st</sup> ed. 1960, p. 6.

<sup>84</sup> Thomas Schultz, INFORMATION TECHNOLOGY AND ARBITRATION A PRACTITIONER’S GUIDE, 1<sup>st</sup> ed. 2006, p. 15.

use of information technologies in arbitral proceedings. The reason for ODR movement was the lack of confidence of the people in “e-commerce” so they need a dispute resolution system that relies on the same form of communication that was used in the commercial transaction.

Online Dispute Resolution was not only introduces to challenge the existing phenomenon but also to provide a mechanism for the issues where the present authority are inadequate to fulfill. The number of disputes arising out of online commercial activity is growing day by day. The development of ‘Online Dispute Resolution’ is well describing by Ethan Katsh in his articles. According to him;

*“ODR’s origins are traceable to the early 1990s and to a prediction and an observation made at the time. The prediction was that the Internet, as it continued to evolve and as its use increased, would not be a harmonious place. This might seem obvious to anyone today when consumer and copyright disputes are commonplace, when identity theft is increasing and when anti-virus software is required simply to keep a computer operating. It was not so obvious, however, in the early to mid-1990s before there was spam, phishing, music downloading, buying and selling online, multi-player games, etc. Indeed, the hope often expressed at that time was that this new online environment for commerce, education and entertainment would find ways to avoid the kinds of conflict that many of these activities had generated in the past in the physical world”*

Dispute resolution in 90s is assumed that the parties requires to meet “face to face whether in or out of court”. The internet is invented in 1969 and for some years there is only few disputes were there. The internet is uses mainly in academics; military services etc and if any disputes arise than it is solved informally. Only few people were aware of internet and there was not any internet service provider till 1992. The general people did not have any knowledge and skills relating to the computer to operate the software enabled dispute resolution system. In the year of 1989 World Wide Web was invented. In 1994, the beginning phase of e- commerce activity and no one heard the ‘google’, ‘e-bay’, ‘amazon’ etc. One of the famous web browsing company ‘netscape’, which can also call as mosaic did not have any initial public offering till 1995. During that time “National Science Foundation” “removed ban on



commercial activity on internet”.<sup>85</sup> At that time “Internet Corporation for Assigned Names and Numbers (ICANN)” did not established, only few corporations knew that domain name have some value.<sup>86</sup> “In 1994, April the first spam case was occurred and federal trade commission brought its first internet fraud case”.<sup>87</sup> Although the usage of internet related activity are very limited at that time so there is much less occurrence of disputes also.<sup>88</sup> During 1996 the disputes on internet changing its scenario and many problems are taking seriously. The “National Center for Automated Information Centre (NCAIR) in 1996 organized a conference on online dispute resolution and provided funding for three ODR experiments.<sup>89</sup> There were many conferences were held about ODR in late 1990s and early year of 21<sup>st</sup> century among them International Arbitration Forum remain constant till now and held many conferences in different cities in the world. “Online Dispute Resolution (ODR)” concept was first implemented in 1996 with the establishment of “Virtual Magistrate Project which was establish to offer online arbitration system to resolve online defamation matter.”<sup>90</sup> The online ombudsman office of “University of Massachusetts” generally wanted to facilitate internet dispute resolution.<sup>91</sup> “At last ‘Maryland University’ proposed ODR mechanism to see if ODR could be employed in family dispute where parents are located at a distance.<sup>92</sup> The new effort of resolving disputes handled the issues arises in the cyberspace or internet only. The new model of dispute resolution process essentially copies the offline model of arbitration and mediation.<sup>93</sup> The internet involved in dispute resolution process communicates over great distances and its “information processing and management capabilities linked with network provide a both dispute prevention and dispute resolution.”<sup>94</sup> The ODR mechanism

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<sup>85</sup> Jay P. Kesan and Rajiv C. Shah, “ Fool Us Once Shame on You—Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Domain Name System”, Available at [http://openscholarship.wustl.edu/law\\_lawreview/vol79/iss1/2](http://openscholarship.wustl.edu/law_lawreview/vol79/iss1/2) (May 30, 2018).

<sup>86</sup> *Ibid.*

<sup>87</sup> Ethan Katsh, “Dispute Resolution Without Borders: Some Implications for the Emergence of Law in Cyberspace”, 11 ICFAI (2006), p.42.

<sup>88</sup> *Ibid.*

<sup>89</sup> Amy Schmitz and Colin Rule, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION, 1<sup>st</sup> ed. 2017, p. 59.

<sup>90</sup> Karnika Seth, COMPUTERS, INTERNET AND NEW TECHNOLOGY LAWS, 2<sup>nd</sup> ed. 2016, p. 101.

<sup>91</sup> Ethan Katsh, “The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace”, <https://www.umass.edu/dispute/ncair/katsh.htm> (May 30, 2018).

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Ethan Katsh & Orna Rabinovich Einy, DIGITAL JUSTICE, 1<sup>st</sup> ed. 2017, p. 8.

supported the traditional ADR process and combined it with information technology to provide dispute resolution mechanism.<sup>95</sup>

From 1999 ODR with the help of online communication tool began to differentiate itself from other existing offline dispute resolution mechanism. ‘University of Massachusetts’ through Center for ‘Information Technology’ in its pilot project of online mediation conducted a dispute resolution for ‘e-bay’.<sup>96</sup> “E-bay creatively set up a feedback rating system” through which parties can indicate the authority to smoothness of sale system.<sup>97</sup> This information helps the concerned authority in assessing in whether seller is trustworthy or not for the general people.<sup>98</sup> With the growth of ‘e-bays’ dispute resolution mechanism the disputes are also increasing. This project is ended up with two hundred complaints with two week period.<sup>99</sup> After this ‘e-bay’ selected a start-up named ‘Square Trade.Com’ as a dispute resolution provider. Square Trade found that the disputes which remedies cannot provide by the traditional real-world legal system. It realized that for effective dispute resolution in an environment of ‘e-bay’ scale there is a need of something other than e-mail and human mediator in order to handle the increasing cases. Square Trade created a website for each dispute and provided options for choose forms of the resolution procedure and “limited the use of free text complaining and positioning.”<sup>100</sup> Instead of human now software guided the parties to resolving their disputes. The traditional system of negotiation between the parties became different with the involvement of technological “fourth party” who mediates the procedure. If this process is not adequate for resolving the issues between the parties than one can go for traditional means of human mediation procedure. The square trade makes a new way for the dispute resolution means and by processing information and with influential technological presence the dispute can be resolved. After several years e-bay again started its dispute resolution process and taken over its contract from the ‘square trade’. According some speculations in 2010 the number of dispute handled by e-bay reached sixty million.<sup>101</sup> At the time of “internet bubble of 1999-2000 many ODR”

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<sup>95</sup> *Supra* note 94 at 27.

<sup>96</sup> Ethan Katsh, Janet Rifkin and Alan Gaitenby, “E-commerce, E-disputes and E-dispute Resolution: In Shadow of E-bay Law”, 15 OSJDR (2000), Ohio State University, Columbus.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Supra* note 9.

<sup>100</sup> *Ibid.*

<sup>101</sup> Ethan Katsh, “ODR: A Look at History”, “<https://www.mediate.com/pdf/katsh.pdf>” (June 1, 2018).

start-up appeared such as 'Cybersettle', 'Smartsettle' and Mediation Room etc. In 2006, 'Square trade' shifted its attention from online dispute resolution to consumer warranties. The 'domain name disputes' was instituted by ICANN and 'Uniform Dispute Resolution Policy' in 1999 and when the resolution process started it is a offline process but over time its changing and become online. With the interest of ODR process increases and various government and private agencies "adopting and promoting ADR as an effective method and resolving various problems". The "United Nations" UNCITRAL model law which is basically providing the rules of international trade also promoting and working with the policies and rules of online dispute resolution in cross border disputes. Through its various conventions it accepted the "electronic commerce" and "dispute resolution mechanism". So, in this way the "Online Dispute Resolution" shapes the characteristics of today's mechanism for dispute resolution. There is need of more to change to provide proper and effective usefulness of such technology oriented mechanism.

In India, the scenario of "Online Dispute Resolution" is not very much clear it is in developing stage. The concept of "Online Dispute Resolution" is not new but it didn't set its footing in India properly during 90s. After 2000 the concept of ODR is accepted when the problem arises due to involvement of technologies and the jurisdiction issues are main concern in commercial dispute because the increasing of cross border transaction. There is not any definite procedure for law which directly says about the "online dispute resolution" procedure. The provisions given under various laws indirectly support the ODR process in India. With the gradual and paradigm shift of the legislative structure provide somehow the effectiveness of the ODR processes. The "Arbitration and Conciliation Act, 1996" supported the dispute resolution through "information technology". The "Alternative Dispute Resolution" process are earlier not given so much of importance but with the increasing burden of court cases and noticing the complexity judiciary now a day's shifted certain kinds of disputes like commercial and civil disputes. With the globalization and coup up with international community India also adopted the UNCITRAL model law and become signatory of various convention of 'United Nation' and accepted its rules for better trade relation. The "Code of Civil Procedure, 1908" under "section 89" provided the provision for out of court settlement procedure. The 'Information Technology Act, 2000 also accepted the electronic form of commerce and resolution process. With aforesaid legislation the ground for ODR in India is made with taking help of ADR

mechanism implementation of technology as the fourth party. The Supreme Court of India also has given its approval of using technology in dispute resolution.

“In the case of ‘**State of Maharashtra v. Dr. Praful B. Desai**’<sup>102</sup> it was held that video conferencing could be resorted to for the purpose of taking evidence of a witness. There are also other cases where Supreme Court accepted the rule favour of technology.”

“In case of ‘**Grid Corpn. Of Orissa Ltd. v. AES Corpn**’<sup>103</sup> it held that when an effective consultation can be achieved by resort to electronic media and remote conferencing it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties”.

“In ‘**Sil Import USA v. Exim Aids Exporters, Bangalore**’<sup>104</sup> case the Supreme Court also says about the use of available technology” and held that “Technological advancement like facsimile, internet, e-mail etc. were in swift progress even before the bill for the Amendment Act was discussed by parliament. So when parliament contemplated notice in writing to be given we can’t overlook the fact that parliament was aware of modern devices and equipment already in vogue”.

Through this it is seen that favorable situation is created by judiciary in establishing the dispute resolution includes ADR which will later turn ODR into centre stage. The “National Internet Exchange of India (NIXI)” used the ODR for resolving “domain name disputes”. It is similar to the traditional arbitration but only difference is the resolution process conducted over internet. There are now gradually in India also establish various private sector ODR mechanism through internet service provider as an example we can take “Technological Centre for Excellence for Online Dispute Resolution in India (TLCEODRI)”, “Perry4 Law Organization” etc. for providing dispute resolution in national and international level mainly the commercial activity. The government also takes initiatives by taking the promotion of digitalization of India and using “Information and Communication Technology”.

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<sup>102</sup> State of Maharashtra v. Dr. Praful B. Desai, 4 SCC601 (2003).

<sup>103</sup> Grid Corpn. Of Orissa Ltd. v. AES Corpn, AIR SC 3435 (2002).

<sup>104</sup> Sil Import USA v. Exim Aids Exporters, Bangalore, 4 SCC 567 (1999).

## CHAPTER-III

### **ONLINE DISPUTE RESOLUTION AND E-COMMERCE AS A CONCEPT**

The concepts of “alternative dispute resolution” and “e-commerce” are very wide to explain and it contains many things which are now a day’s mostly popular among the general people. Though, these two concepts are developed in late 90’s but they are become directly or indirectly part and parcel of their life. With the advancement of internet and technology everything is changing. It is a powerful technology that gives faster communication both national and international level. The internet now a day’s become a new market and hub of commercial activity by using different methods of transactions. Border, time, places etc are no longer become the barriers of commercial activity. But with such advantage also there are certain disputes which arise among the parties. “Due to the broader jurisdiction of cyberspace the court of losses its effectiveness in handling such kinds of disputes and the traditional methods of resolving disputes are become out of date.”<sup>105</sup> With new economic development to mitigate the issues and to understand it there is need of new mechanism for dispute resolution. The “e-commerce” disputes are mainly related with the advance technological development so with the changing perspective scenario the disputes resolution process also be developed and should provide fast redressal mechanism. “E-commerce” mainly focuses on out of court settlement process without indulge in the long and cumbersome court procedure.<sup>106</sup> The out of court settlement includes the ADR method. The alternative dispute resolution can also be say as “amicable dispute resolution” process. It is now a day’s mostly used by the parties to resolves their dispute. With the acceptance of international community the countries also improved their resolution procedure to coup- up with the global scenario of economic advancement. Various international conventions, regulation also helps in to provide framework of these resolution system. The need of the present hours also establishes stepping stone towards a new means to resolve not only the dispute generated through internet but also other disputes. It is done through the online dispute resolution (ODR). Basically ODR is “employing of available communication technology to deliver ADR services or to put it another way, it is the implementation of ADR in an

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<sup>105</sup> Aura Esther Vilalta, “ODR and E-Commerce”, <https://www.mediate.com/pdf/vilalta.pdf> (June 2, 2018).

<sup>106</sup> *Ibid.*

online environment”.<sup>107</sup> The “electronic commerce” is basically disputes arises on the online environment and ODR can fulfill adequate necessities of resolving issues with modern amenities and advance technologies without causing the parties the further problem conveniently according to their interests.<sup>108</sup>

### **3.1 Concept of Online Dispute Resolution**

The phrase “Online Dispute Resolution” is used to cover different instances of “Alternative dispute Resolution” methods, such as mediation and arbitration using information technology to reach a settlement of dispute. The concept relating to online dispute resolution is given below-

#### **3.1.1 Meaning of Online Dispute Resolution**

There is plenty of definition of “Online Dispute Resolution”. Various scholar and eminent people defined it in very simple way which can understand by the common people. According to Alan Gaitenby ODR means “Online dispute resolution is the application of Alternative Dispute Resolution (ADR) practices and theories with networked information technology to manage conflict comprised primarily of online mediation, negotiation or arbitration systems also includes information management tools for informal conflict management by individuals and organizations”.<sup>109</sup> Schiavetta defined ODR as “a resolution process that is conducted exclusively online and other dispute resolution processes which are supported by internet. In general sense online dispute resolution means using of information and communication technology as a tool with the help of ADR mechanism to resolve any dispute arise both online and offline.”<sup>110</sup> It can also says that in ODR using traditional means of resolution process with the help of technology to provide resolution of disputes. Online Dispute Resolution process can resolves the various disputes from personal, consumer, commercial disputes etc. for commercial disputes it is the efficient mechanism to solve any issues without any delay and complexity.

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<sup>107</sup> Prathamesh D. Popat, “Online Dispute Resolution In India”, <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan021307.pdf> (June 2, 2018).

<sup>108</sup> *Ibid.*

<sup>109</sup> Community Theory, “What is it?”, [http://www.campus-adr.net/ODRmodule/odr\\_\\_what\\_is\\_it.html](http://www.campus-adr.net/ODRmodule/odr__what_is_it.html) (June 2, 2018).

<sup>110</sup> S Schiavetta, “Relationship Between E ADR and Article 6 of European Convention of Human Rights Pursuant to Case Law of European Court of Human Rights” 1 JILT (2004), p.6.

### 3.1.2 Methods of Online Dispute Resolution

There are various methods of “online dispute resolution” are there which made it efficient mechanism to resolving dispute among the people. There are various consensual, non-adjudicatory and adjudicatory mechanisms are there to provide a proper mechanism for dispute resolution. ODR included with the ADR procedure negotiation, conciliation, mediation, arbitration.

A. **Consensual Method:** - The consensual method of online dispute resolution includes **Automated and Assisted Negotiation** procedure.

In **Automated Negotiation** methods the technology plays a prominent role in negotiation. It can be also called as blind bidding services and here economic matter where liability is not challenged is determined and it is ideal for monetary value claim. It is easy and simple to operate. The players bid are hidden for negotiation and if they matched than automatically resolves the dispute between the parties. The parties enter their respective demand and also choose the percentage of range. All these demand, offer and percentage are not known to the other party. The algorithm of ODR computes the settlement amount in given range. If the bidding between the parties did not match than the parties can try again.<sup>111</sup>

In **Assisted Negotiation** methods the technology assists the negotiating party as a mediator. The technology provided certain process for negotiation and also gives evaluative advice in without involving in the dispute directly.<sup>112</sup> The mediator or conciliator used information management skills encouraging the parties to reach an amicable agreement by enabling them through effective communicative settlement through rephrasing their arguments. ‘Online conciliation’ is same as mediation but conciliator can propose solution before agreement is final. The assisted negotiation develops the communication through the assistance of third party or software.<sup>113</sup>

B. **Traditional Mediation Using Online Technologies :-** There are various mediation firms which establish various websites like Square Trade, Internet Neutral, Web Mediate for facilitation of the dispute resolution. These websites basis are e-mail, messaging, chat services and incorporate the traditional

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<sup>111</sup> Sankalp Jain, Online Dispute Resolution: Mechanism, Modus Operandi and Role of Government” SSRN: <https://ssrn.com/abstract=2779901> or <http://dx.doi.org/10.2139/ssrn.2779901> (June 2, 2018).

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

communication methods into negotiation process. Generally, a party contact such service provider and fills the form online that identifies the problems and possible solution. After reviewing the form by the mediator it contacts the other party. If the parties agrees than the party fill the form for respond through e-mail. The exchange of views between the parties helps in understanding the issue and to reach a possible agreement.

C. **Adjudicative Method:** - the adjudicative method includes online arbitration process. In arbitration “neutral third party” or “arbitrator delivers” the final “decision which is binding”. It is quasi-judicial process and parties can choose their arbitrator. The commercial disputes are mostly resolved by arbitration procedure because it provides a faster redressal mechanism. Once the procedure started parties cannot abandoned it and the awards are binding on everywhere due to the adoption of ‘Newyork Convention’. There are various names of online arbitration cyber arbitration, virtual arbitration and electronic arbitration. In online arbitration the arbitration is started by submission of mail, messenger and other electronic medium. With the involvement of both parties resolved the dispute with involvement of diverse electronic techniques. The only difference in online arbitration than the traditional arbitration is that the procedure is conducted at least partly using electronic means. Most of the service providers carry out only part of a procedure in online as an example downloading of forms, submission of documents through standard e-mail and secure web interference etc.

### **3.1.3 Procedure of Online Dispute Resolution**

The “online dispute resolution” process is initiated when any complaint is registered with an online service provider. The party who wants to complain mentions its issue mention his compensation to the service provider. The “service provider” contacted the other party for participating in resolution process. “If the other party wants to participate in the procedure than it can file a response to the complaint which can be in video or teleconference hearing if required.”<sup>114</sup> In automated “resolution process” there is not any neutral third party.<sup>115</sup> If the parties offer falls within the acceptable range than matter is resolved. In other ODR method also includes the electronic filing

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<sup>114</sup> V Bonnet, et al. (rev.), T Schultz, “Online Dispute Resolution System as Web Services”, 3 ICFAI (2004), p. 56.

<sup>115</sup> *Ibid.*



of documents and procedure and provides a reliable and fair dispute resolution. The ODR solve the problem of determining jurisdiction as to where a complaint should be lodged. As an example if any person purchase a camera online from a party in another location there is risk of non-supply of the product but ODR reduces the anxiety of buyers and dispute can be resolved through online means.

### **3.1.4 Communication Instruments in dispute resolution**

There are various types of communications instruments are there through which ODR mechanism works. The parties have to choose among the various types of online communication. Each option creates a various dynamic in the dispute resolution process. “Understanding the different an online communication option is essential to being able to design appropriate ODR systems.”<sup>116</sup> The range of dispute resolution types and the multiple tools that have arisen to match different disputes need parallel the range of online communication types. “Most of the people don’t interact at the same time over the internet. Many of the communication technology used online were actually designed to allow to people to log on as they like throughout the day. As an example we can take e-mail.<sup>117</sup> Synchronous communications occurred when the parties make communication in real time and the parties are expected to respond as soon as other side finishing their comments”<sup>118</sup>. Example - phone and face to face interaction. The Asynchronous Communication when the parties are not communicating at the same time. When person got the messages from the other side person are not expected to respond immediately.

- **E-mail** - The e-mail messages are operate very much like offline written letter but they are delivered through the internet. Content that comes through the e-mail is very personalized as it is intended for a single recipient.
- **Discussion environment**- when there is multiple participants it is difficult to communicate through e-mail. So the parties have to take the discussion environment where they worked in a group. Discussion environment usually contains much more information than the email exchanges. As an example- ‘listserve’ or ‘usenet’ groups.

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<sup>116</sup> Colin Rule, ONLINE DISPUTE FOR BUSINESS, 1<sup>st</sup> ed. 2002, p 48.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

- **Instant messaging** – instant messaging programmes take much less time to get the communication from one party to another. The recipient will see the sender’s messages within second.<sup>119</sup>
- **Chat rooms** - Instant messaging and chat rooms are the similar kind of communication there is a little difference between them. In instant messaging programmes have the option of chat session with other side. While typing in chat session other side can usually watch your compose messages and before one give their reply the other party respond their messages.
- **Audio Conferencing** - The audio conferencing can be done through the telephone or internet. Many mediator and arbitrator rely on the phone for meeting for short discussions and focusing on a single point.
- **Video conferencing** - The video has considered the ultimate ODR technology. In this communication one party can see the other party and the neutral. The parties without present in one place through video conference resolve the issues face to face.

### **3.1.5 Online Dispute Resolution Different from Judicial Process and its Need**

There are certain characteristics are there which differentiate the dispute resolution procedure from judicial process. “In judicial process when any dispute arose between two parties the parties approach the judicial courts for resolution of their disputes.<sup>120</sup>” The court adjudicates the issue and passes a decree which is “binding on the parties”. As opposed to the judicial process the “Online Dispute Resolution” is not an adjudicatory body and the decision passes through it is not binding on the parties. Online dispute Resolution mechanism is an out of court settlement mechanism. From the early time the traditional methods of dispute resolving systems are exercised by the judiciary. But with the advancement of global economy, trade and various sphere of society the burden of court procedure also increases. The cases are overburdened in the court and make a complex arena of dispute resolution process. The commercial dynamics didn’t carry such a long term resolution process because the concepts are changes gradually and it effected the economic development of the country. To provide an efficient mechanism for resolving dispute the out of court settlement was established but with the technological advancement it enters the arena of “information

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<sup>119</sup> *Supra* note 116 at 35.

<sup>120</sup> S k Verma, et al., “Dispute Resolution Process in India”, 16 IDE (2002) p.4.

and communication technology”.<sup>121</sup> The “Online Dispute Resolution” is providing a different arena than the other dispute resolution Mechanism.

### **3.2 Concept of E-Commerce**

The term ‘e-commerce’ itself defines that e-commerce encompasses buying and selling of goods via internet. Now a day’s people daily participated in such kind of commercial activity without it the thought itself make it complicated people to survive. E-commerce started in few decades ago only and with time it continues to grow with technologies, business etc. In the year of 1970 teleshopping and electronic data interchanges make the basis of modern e-commercial activity. The electronic data interchange took the place of traditional mailing and faxing of documents from one from one to another computer. After the order is sent the value added technique and directed the recipient order processing system. In 1979 the Tele shopping introduces by Michael Aldeich in United Kingdom and he modified a television through telephone make ‘real time multiuser transaction’. Online shopping marketing is beginning in 1980; only B2B transaction is there with Spain, Ireland and UK. France launched ‘minitel’ in 1982 which used “videotex terminal machines access through telephone lines” and the service is “free to the telephone subscriber and connected millions of subscriber in computer network”. Till 1999 nine millions ‘minital’ had distributed and connected over 25 millions user. “Tim Berners along with his friend Robert Cailliau make a proposal to build ‘World Wide Web’ in 1990.” In the same year Lee created the first web server where he first wrote web browser by using nextcomputer. The history of ‘e-commerce’ closely connected with the internet and it started with the opening of internet for the public in1991.<sup>122</sup> Before it the B2B online shopping is there but not the B2C. Lee further developed the Uniform Resource Locator (URL), Hypertext Markup Language (HTML) and Hypertext Transfer Protocol (HTTP).<sup>123</sup> The lift of the ban on net in commercial use by the ‘National Science Foundation’ in 1991; there is seem a remarkable shopping growth. The first online shopping was done in 1994 between two friends for sale of String CD. The ‘Secure Socket Layer (SSL)’ encryption certificate by the ‘Netscape’ in 1994

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<sup>121</sup> *Supra* note 120 at 36.

<sup>122</sup> Lucy Adamson, “The History of E-commerce”, <https://www.statementagency.com/bliog/2016/03/the-history-of-ecommerce> (June 2, 2018).

<sup>123</sup> *Ibid.*

developed a secure means to transmit data in internet. SSL certificate protocol is till now vital part of web security.<sup>124</sup>

During the time of 90s to 2000 saw a major growth in commercial use of internet. 'Amazon', one of the largest e-commerce sites established as bookstore in 1995 and became a largest growing online store in the world. Now amazons sold not only the books but also various products from various electronic appliances, food, toy, daily objects etc. There are now many e-commercial sites like 'e-bay', 'flipkart' etc. which fulfills the need of the people. 'Yahoo' also started 'google' in 1998 their own 'e-commerce' subsidiaries and at the same time 'PayPal' also emerging "in the e-commercial market". "With the growing use of internet there is a need of secure communication and transaction system so in 2004 Payment Card Industry Security Standards Council was established."<sup>125</sup> This organization mainly deals with the implementation and enhancement of security standards for the account data protection. 'Google wallet' was launched in 2011 which was the first digital payment option that allowed the transaction to take place.<sup>126</sup> The 'facebook' came with the idea of retailer sponsored story.<sup>127</sup> There are many big e-commerce giant which establishing and making a better service for consumers during these yeas and it is growing "day by day". The "development of technology" with the increasing usages of mobile, internet, tablet the e-commerce is also growing. Social media growth also helps in building conversation between the business and consumer and the transactions are now become easier than earlier. Now days the mobile commerce growing and user can purchase it with palm of1 their hand and expecting continuous growth in future.

The history of e-commerce started in the year of 1991and became one of the highest demanding commercial choices among the people through the internet.<sup>128</sup> During that time no one would thought that buying and selling through electronic means become a trend in world and also in India. In India Indian Railway Catering and Tourism Corporation '(IRCTC)' first make introduction of online e-commerce in 2002 and the

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<sup>124</sup> *Supra* 122 at 37.

<sup>125</sup> Sumit Sethi, A-Z E-COMMERCE, 1<sup>st</sup> ed. 2009, p. 133.

<sup>126</sup> Jennifer LeClaire, "The Evolution of E-Commerce", <https://www.ecommercetimes.com/story/40249.html> (June 2, 2018).

<sup>127</sup> *Ibid.*

<sup>128</sup> M M K Sardana, "Evolution of E-commerce in India: Challenges ahead", <http://isid.org.in/pdf/DN1408.pdf> (June 2, 2018).

govt. of India took this strategy to offer a convenient public train ticket booking.<sup>129</sup> With time govt. also came with the idea of 'IRCTC' passenger reservation system online through which people can book train ticket anywhere at any time. After the success of 'IRCTC' the air tickets are also available in online from 2003 and this online booking process is not limited to only transportation but also include the hotel, movie ticket booking etc. The growth and acceptance of e-commerce in large scale influenced the others also using technologies in their business. The emergence of 'flipkart' discount model in 2007 increases the e-commerce among the people though it is existed from 2000.<sup>130</sup> After 'flipkart' other e-commercial sites like 'amazon', 'jabong', 'e-bay' etc. also taken this way for growth of their business.<sup>131</sup> The e-commerce India is in developing stages with fewer options with time it will also provide better services for the consumer. Transaction for these commercial sites becomes handy and simple now days. Various services like 'Paytm', 'PayPal' etc. occur as a helping hand in growth of e-commerce. Despite the fact, India is a developing country the e-commerce or online market growing so fast. The increasing net connection, growing living standards, availability of product, busy schedules increases the usage of these online sites. The 'mobile commerce' is also a factor for growing e-commerce and social media also plays a large role. The people can now compare their prices through these search engines before buying any product. So with these the entire e-commerce sector in India still has to grow more with times new technologies new concepts are also coming to the online market and provide better services.

### **3.2.1 Meaning of E-commerce**

In simple meaning the term "e-commerce" means the "use of electronic systems to engage in commercial activity". In this digitalized era traditional methods of doing business become obsolete. The increasing demand of 'information and communication technology' provides a platform for business done through easy accessibility with simple operating rule without present for buying or selling in physical form. The virtual world of 'cyberspace' helps in conducting the business with the help of communication tool. The craze of commerce through internet or electronic medium is now on top. The e-commerce is also known as e-business or

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<sup>129</sup> *Supra* note 128 at 38.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

electronic business which means ‘to sale or purchase service or goods over an electronic medium’.<sup>132</sup> The usage of ‘information technology’ transacts business between individual and entity into electronic commerce. There are various models of e-commerce are there for transaction B2B, B2C etc.<sup>133</sup> According to Collins English Dictionary e-commerce means business transaction conducted on internet. In e-commerce business the products are displayed in the websites, prices and details are given online. There is software which works with the online payment system for transaction in e-commerce.<sup>134</sup>

### **3.2.2 Models of Conducting E-commerce:-**

Use of computers and internet has rendered efficiency and transparency apart from offering various options for transacting business with other service providers or merchants on the internet. There are various models for conducting business in the internet. They are-

#### **Business to Business (B2B) Model**

“In B2B business models the transaction for ordering and purchasing is done between business and in houses.” This model includes the trading of goods, professional and business subscription, wholesale dealing, manufacturing etc. Companies which have not any physical existence or virtual company sometimes seen done business through B2B model and it is done through internet<sup>135</sup>. As an example- ‘Amazon’ is an online e-commerce store which sells books and various products to the consumer. Various publishing houses sell their book through ‘Amazon’ because of the larger audiences. If any publisher displays their book on ‘Amazon’ he needs to transact business with it. This kind of business is called as B2B Model. This model helps in maintain efficiently the movement of supply chain and manufacturing and procuring processes. The B2B Model is one of the fastest growing value sectors of “e-commerce”.<sup>136</sup>

#### **Business-to-Consumer (B2C) Model**

“In this model the transaction is between the business organization and consumer.” This model includes business organization which sells its product and services to the

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<sup>132</sup> Pooja Vangikar, “What is e-commerce?What are E-commerce Websites?”, <https://cyberchimps.com/e-commerce-websites/> (June 3, 2018).

<sup>133</sup> Margaret Rouse, “E-commerce (Electronic Commerce or EC)”, <https://searchcio.techtarget.com/defination/e-commerce> (June 3, 2018).

<sup>134</sup> UMSL Online Credit Card Transaction Service, “Define E-Commerce”, <http://www.umsl.edu/~siegelj/Course5890/definitions.html> (June 3, 2018).

<sup>135</sup> Vimlendu Tayal, CYBER LAW CYBER CRIME INTERNET AND E-COMMERCE, 1<sup>st</sup> ed. 2011, p. 546.

<sup>136</sup> *Ibid.*

consumer through the internet. Websites displays the product information and catalog and store it in database. Example - Online banking services. When a consumer wants to buy any product in internet then the person go to the specific site and place his order. This business is done between the organization and the consumer.

### **Consumer-to-Consumer (C2C) Model**

“This model says about the transaction between the consumers to consumer. Here the one consumer sells directly the product and services to the other consumer.”<sup>137</sup>

Example- in ‘e-bay’, a common auction website the consumer has to register them with the site and after that it can advertise and sell their product to the other consumer. In this process the seller has “to pay a fixed fee to the auction house for selling their product, buyer can bid their without paying any fees.” In this C2C model consumer who wants to sell has to act as facilitator of the transaction. The customers are here act as an organization and make business relation with each other.

### **Consumer-to-Business (C2B) Model**

“In this model business is done between the consumer and business organization.”

This model is similar to B2C model but here the seller is consumer and buyer is business organization.<sup>138</sup> The price of the particular product is decided by the consumer than the organization. Example- website like ‘monster.com’ where consumer gives the details of the service he provided and make an offer if any business organization is interested in his services contact him.

There are also other models which involves the transaction between the government and other entities like consumer and business organization. This can also be called as models of e-governance.

- **Government to Government (G2G) Model-** Here the transaction is between the governments. If Indian wants to buy oil from the Arabian government, the business done between the two parties can be call as G2G model.<sup>139</sup>
- **Government-to-Consumer (G2C) Model-** Here the government makes transaction with the individual consumer. The enforcement of tax laws and pertains to the payment of individual through the internet to the government.<sup>140</sup>

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<sup>137</sup> *Supra* note 135 at 40.

<sup>138</sup> Alwayn Didar Singh, E-COMMERCE IN INDIA: ASSESSMENTS STRATEGIES FOR THE DEVELOPING WORLD, 1<sup>st</sup> ed. 2011, 74.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

- **Consumer-to-Government (C2G)**- Here the consumer interacts with the government. The tax payment for house or income by the consumer.<sup>141</sup>
- **Government-to-Business (G2B)** - It involves the transaction between the government and business organization. Example- request for tender from th contractor through internet.<sup>142</sup>
- **Business-to-Government (B2G)** - Here business organization transacts business with government. The tax payable by business organization to the government.<sup>143</sup>

### 3.2.3 Communication Instruments of E-commerce

There are various communication instruments in e-commerce through which the commercial activity are done. These communications are in electronic or done online format. In e-commerce business the seller put their effort to communicate their way consumer prefers. The most popular communication instrument or tool are-

- **Live Chat**- customer mostly accepted this method of communication. In this method problems are solved at the moment without waiting for the respond. It is very resource intensive and has to provide more information to consumer.
- **Email**- Email is also “one of the communication tools for the e-commerce”. E-mail support is must have for any e-commerce player and they provide a e-mail assistance for any discussion or issue.
- **Phone support**- phone support is also a popular medium of communication for e-commerce. The e-commerce site has to provide a contact number given in their website for their assistance.<sup>144</sup>
- **Product description**- Product description also makes communication between the consumer and seller. It affects the consumer in a great extent. The consumer going through the description on the websites can be benefited them to acquire a overview of the product.<sup>145</sup>
- **Advertisement**- the advertisement of the product also becomes a good communication instrument through which people can gain the messages it’s want to convey it.

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<sup>141</sup> Supra note 138 at 41.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> The Balance, “How to Do E-Commerce Communication Right?”, <https://www.thebalancesmb.com/how-to-do-e-commerce-communication-right-1141640> (June 4, 2018).

<sup>145</sup> *Ibid.*



- **Blog-** the blog also gives a platform for customers to converse their thought and through it the business organization can convey their prospects.<sup>146</sup>
- **User generated-** in this method the seller permitting the consumer to add their content related the product by giving review, comment, queries, discussion boards, videos etc.<sup>147</sup>

### 3.2.4 Legal Validity of E-commerce in India

With the booming of technology; it increases the trend of e-commerce transaction through the internet or electronic means prevailing all over the world. India also a part of world community accepted the modes of business through e-commerce. But with the acceptance there are also issues come relating to its legal validity in India. In India there is not any definite law for e-commerce. There are different Acts which has various provisions relating to the e-commerce which validates the e-commerce in India. The e-commerce contracts are primarily governed by “Indian Contract Act, 1872”. The provision relating to “essentials of contract” is also applicable to the e-commerce contract or ‘e-contract’. Electronic contract found its recognition “under the Information Technology Act, 2000”. The Act accepts the ‘digital signature’ and ‘electronic evidence’ in the court room. Under **section 10A** of the ‘Information Technology (Amendment) Act, 2008’ recognizes the ‘e-contract’ in India. In **Trimax International FZE Limited v. Vedanta Aluminium Ltd.**<sup>148</sup> the Supreme Court held that ‘contracts between the parties was unconditionally accepted through e-mails and was a valid contract which satisfied the requirements of the Indian Contract Act, 1872’. The Code of Civil Procedure, 1908 also has the provision relating to jurisdiction of the court which is also applicable to the jurisdiction o the e-commerce issues.

### 3.2.5 Reasons and Growth of E-commerce

There is not any one definite reason for the growth of “e-commerce”. Traditional notion of doing business is there in society from the ancient time. With the passing of decades the methods of doing business are also change. Today which models are popular among the world community tomorrow it will become obsolete. Everyday invented new ideas and concepts are evolving relating to commerce or business. The “e-commerce” is also one of the trends which become popular among the people of

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<sup>146</sup> *Supra* note 144 at 42.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Trimax International FZE Limited v. Vedanta Aluminium Ltd*, NO. 10 OF 2009.

the world. The improving communication and information technology the helps in make a platform for commerce also be digitalized. Now people can in hand operate such commercial activity without hesitation. The increasing connectivity speed of internet, availability of product and busy schedule of people make growth of “e-commerce”. The e-commerce businesses are very easy and simple to operate. Slowly India is also participating in e-commerce activity from the traditional modes of doing business. The changing standard of living, new facilities of online banking, plastic money, the increasing rate of IT Company are reason for growth of e-commerce in India. The increasing number of Smartphone and internet facilities also becomes the factor of growth of e-commerce. There are various e-commercial websites are there to provide and fulfill every facilities of human need from matrimonial to job portal. In 2000 e-commerce industry in India gaining the recognition among the people push the sector to development.<sup>149</sup> The traditional store also started their virtual store. Recently, Indian e-commerce industry makes a huge profit and people are more into participating and doing business through e-commerce.<sup>150</sup> According to report published by ‘International Monetary Fund’ (IMF) and ‘Central Statistic Office’ (CSO), India is one of the fastest growing economies in the world.<sup>151</sup> In the survey of ‘Morgan Stanley’ it is says that in financial Year of 2016-17 the e-commerce sales reach \$ 16 billion and it is estimated that it will expected to cross \$120 billion by 2020.<sup>152</sup> The inclusion of food and grocery store in online market also one of the growing factor of e-commerce. The working habit, adaptability or convenience of the general people makes the companies to provide it through e-commerce sector. The new uniform Goods and Service Tax (GST) rules of the government also contribute to the success of e-commerce in India. The foreign direct investment is also a factor for e-commerce development. Now rich and bigger company will participated in commercial sector which can contribute or invest more money and it helps in development of infrastructure of e-commerce and people will benefitted from its various offers. So, these factors’ contributing in growing e-commerce and it has to grow more in future.

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<sup>149</sup> Ramandeep Kaur, “E-commerce Boom and Hurdles in India”, “<https://www.mapsofindia.com/my-india/india/e-commerce-boom-and-hurdles-in-india>” (June 5, 2018).

<sup>150</sup> *Ibid.*

<sup>151</sup> Praveen Sharma, “Growth of E-Commerce in India”, <https://www.kartrocket.com/blog/ecommerce-growth-india-market-research-stats/> (June 4, 2018).

<sup>152</sup> *Ibid.*

## **CHAPTER-IV**

### **LEGAL FRAMEWORK OF E-COMMERCE AND ONLINE DISPUTE RESOLUTION PROCESS**

The concept of “E-Commerce” and “Online Dispute Resolution” both are growing with “the development of information and communication technology.” The emergences of these two concepts are during the 90<sup>th</sup> century. With the evolution of new methods and technologies it also became popularized among the people. The international community makes various changes in their methods to coup up with this development. If the world community didn’t recognize it than the countries across the world also can’t accept it. The development and changes are made for the better convenience and adaptability and to coup up with new situation of problems. The time changes and the tool and infrastructure uses for traditional concept also have to change. If we are stick to the age old process or system than situation become impossible for control and create problem. As the society are dynamic the need of new tools are also emerges. For noticing all this factor the international community and countries make convenient way for establishing and recognizing these concept. The legal framework helps in valididating and recognizing the concept. There are various steps which are taken by internationally and nationally for the legal validity of “e-commerce”. There are various conventions, model laws are formulated for “e-commerce” and “Online Dispute Resolution”. The ‘United Nation’ and ‘European Union’ play a prominent role in establishing these two concepts. The country across the globe also makes rules regulation for e-commerce and ODR. These rules and regulation help when any problems or issue arises related to this topic than with proper mechanism it can resolve the disputes. India also has various provisions relating to e-commerce and ODR in their laws and Acts which helps in accepting and resolving the issues related to it. There is no direct codified law relating to e-commerce and ODR but by amending various provision and Act it also improvise its law, rules and regulation in the favour of “e-commerce” and “Online Dispute Resolution”.

#### **4.1 International Framework for E-Commerce and Online Dispute Resolution**

The international framework for e-commerce and online dispute resolution contains convention, model law, regulation which establishes and recognizes the e-commerce

and “online dispute resolution”. These rules and regulations are combine effort of the countries to maintain a definite procedure which can be followed by world community. The internet or information technology hasn’t any boundary. So the rule accepted by the world community will helps in resolving the problem of cross border jurisdiction.

#### **4.1.1 NewYork Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958**

The “NewYork Convention” is one of the famous conventions which recognize the “international commercial arbitration” for resolving commercial dispute. This convention makes a huge impact on international trade. By noticing the growing commercial disputes the convention give recognition to the foreign arbitral award. It provides a common legislative standard for the recognition of arbitration agreement, court recognition and for enforcement of foreign and non-domestic arbitration award.<sup>153</sup> This convention was established with the aim that foreign award won’t be discriminated and the parties are obliges to enforce foreign award in the similar way as domestic award in their jurisdiction.<sup>154</sup> According to this convention if the parties are agree and make a consensual decision that they wanted to submit their all problems, “difference or issue which arise between them in respect of defined legal relationship, whether contractual or not concerning a subject matter capable of settlement by arbitration.<sup>155</sup> At the request of one of the party the court of a contracting state shall refer the parties to arbitration.”<sup>156</sup> The court will not refer if they find that the agreement is null and void and incapable of being performed. Article III of the convention says that ‘each contracting state shall recognize arbitral award as binding and enforce them in accordance with the rules of the procedure of the territory where the award is relied upon, under the condition laid down in the articles of the convention.<sup>157</sup> There shall not be imposed substantially more onerous condition or higher fees or charges on the recognition or enforcement of arbitral awards to which the convention applies than are imposed on the recognition or

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<sup>153</sup> Aura Esther Vilalta, “ODR and E-Commerce”, <https://www.mediate.com/articles/ODRTheoryandPractice7.cfm> (June 5, 2018).

<sup>154</sup> United Nation, Convention on the Recognition and Enforcement of Foreign Arbitral Award, (December 8, 2015) <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> (June 5, 2018).

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

enforcement of domestic arbitral award.<sup>158</sup> Through this it is established that if any disputes arise between the parties of commercial relationship from any jurisdiction or cross border relation they can settle their dispute according to their agreement and jurisdiction of the both the parties have to accept that foreign award and “treat them like domestic award unless the agreement is null and void.”<sup>159</sup>

There is a case “relating to the recognition of foreign arbitral award in India relating to the New York Convention”. The case is **Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.**<sup>160</sup> In this case Bharat Aluminium Co. entered into a contract with Kaiser Aluminium Technical Service Inc. for the supply of installation of a computer based system and this agreement provided for arbitration in London and governed by Indian domestic law. There was some dispute between the two parties and arbitration proceedings were initiated and the award was given in Kaiser’s favor. So to set aside the award Bharat filed an application in the District Court but the District Judge refused the Bharat application so they appealed to the High Court but the High Court also rejected the application. After that Bharat appealed to the Supreme Court and the Supreme Court rejected the appeal and held that Part I of the Arbitration and Conciliation Act, 1996 only applies to the Indian seated arbitration so it cannot be applied to set aside any foreign award and says that Part II of the Act only deals with the enforcement proceedings in India, not challenging the validity of arbitral awards rendered outside India.<sup>161</sup> Article V of the New York Convention is embodied and incorporated in Sec 48 of the Arbitration and Conciliation Act, 1996 and courts can refuse any foreign award if it violates the grounds and familiar circumstances under Sec. 48 of the Arbitration Act of 1996.<sup>162</sup>

#### **4.1.2 Role Played By the United Nation**

‘United Nation’ (UN) through its various conventions and commissions establishes and recognizes in the concept of “e-commerce and Online Dispute Resolution” and plays

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<sup>158</sup> United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention, 1958) (January 5, 2011), [http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=866&opac\\_view=-1](http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=866&opac_view=-1) (June 5, 2018).

<sup>159</sup> *Ibid.*

<sup>160</sup> *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.*, Civil Appeal No. 7019 of 2005.

<sup>161</sup> United Nations Commission on International Trade Law, *Cloud Case 1424* (September 6, 2012), [http://www.uncitral.org/clout/clout/data/ind/clout\\_case\\_1424\\_leg-3078.html](http://www.uncitral.org/clout/clout/data/ind/clout_case_1424_leg-3078.html) (June 6, 2018).

<sup>162</sup> Samuel Sharp, “India reins in the courts: *Bharat Aluminium v. Kaiser Aluminium Technical Services*”, <https://www.dlapiper.com/en/asiapacific/insights/publications/2012/12/india-reins-in-the-courts-ibharataluminium-v-ka/> (June 6, 2018).

a prominent role in the international community. The work which is done by ‘United Nations’ for validating “e-commerce” and ODR are mainly through “United Nation Commission on International Trade Law (UNCITRAL)”.<sup>163</sup> UNCITRAL makes various “model laws on e-commerce” and working committee for ODR for e-commerce dispute resolution. The steps which are taken by UN through its commission are given below-

**i) UNCITRAL Model Law on International Commercial Arbitration, 1985**

This Model is landmark for the acceptance of states and to assist them in reforming and modernize their arbitral law procedure and to consider certain features and fulfills the need of the international commercial arbitration. This model includes all the process of arbitration from ‘arbitral process ‘to ‘arbitral agreement’, ‘composition and jurisdiction of arbitral tribunal’ and ‘extent of court intervention through the recognition and enforcement of arbitral award’.<sup>164</sup> It also reflects the worldwide decision making on crucial aspects of international arbitration practice accepted by all different social, legal or economic aspect of the world.<sup>165</sup> For settling the dispute arises due to international commercial relations the Model law recognizes the value of arbitration method. It also point out the value or desirability uniform procedural for arbitration and set out goals to the state for legal framework of national law for arbitration procedure to modernize and improve according to their characteristics and need. The ‘United Nation’ plays a major rule in formulating the international commercial arbitration for better trade relation among the nations if any conflict or dispute arises between them. “United Nation has enacted the UNCITRAL Model Law on International Commercial Conciliation, 2002” with keeping the aim for recognizing the value for international trade of methods for settling commercial disputes in which the parties request the third person to assist them in their attempt to settle the dispute amicably.<sup>166</sup> According to United Nation conciliation, mediation and other similar methods has benefitted in reducing the case laws and cost of justice.<sup>167</sup>

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<sup>163</sup> *Supra* note 162 at 47.

<sup>164</sup> United Nation, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (June 24, 2002) [https://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf) (June 7, 2018).

<sup>165</sup> United Nation, UNCITRAL Model Law on International Commercial Arbitration (1985) with Amendment Adopted 2006 (December 20, 2006), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) (June 7, 2018).

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

There is a case law related to the ‘UNCITRAL Model Law on international commercial arbitration’ named ‘**MMTC v. Sterlite Industries (India) Ltd.**’<sup>168</sup>. The case is related to the arbitration clause contained in contract entered in to by the parties.<sup>169</sup> According to the arbitration clause each party to the contract can appoint an arbitrator and jointly they appoint a sole arbitrator. If any dispute arise between the parties than they can rely on the arbitration clause of the agreement. In this case respondent refuse to appoint an arbitrator so the appellant brought the case to the High Court. High Court says in favor of the appellant and special leave was given to appeal in the Supreme Court. The Supreme Court held that the relevant provision to determine the validity of an arbitration agreement is section 7 of the 1996 Act (adapted from article 7 Model Arbitration Law), which contains the writing requirement. As there is no reference to the number of arbitrators within this provision, the Supreme Court concluded that the validity of an arbitration clause does not depend on the number of arbitrators specified therein. The arbitration clause was therefore held to be valid.

## **ii) UNCITRAL Model Law on Electronic Commerce, 1996**

The Model Law on electronic commerce enacted with the aim to enable and facilitate commerce conducted using electronic means by providing national legislators with a set of internationally acceptable rules aimed at removing legal obstacles and increasing legal predictability for electronic commerce. This Model Law plays a major role to get over the problem arose from ‘statutory provision’ which is not diverse contractually and give equal treatment to both paper base and electronic information for promoting good international relation.<sup>170</sup> Under Article 2 (a) gives definition of the data message which means “Data message” means “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”.<sup>171</sup> Basically the traditional law requires written information, in electronic form the requirement is fulfill by “data messages” if the contained “information is accessible” and can be use for further. Article 8 says about the

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<sup>168</sup> *MMTC v. Sterlite Industries (India) Ltd.*, [1996] 10 S.C. 390.

<sup>169</sup> United Nation, Case on UNCITRAL Texts (October 23, 1997), [http://www.uncitral.org/clout/clout/data/ind/clout\\_case\\_177\\_leg-1066.html](http://www.uncitral.org/clout/clout/data/ind/clout_case_177_leg-1066.html) (June 7, 2018).

<sup>170</sup> United Nation, United Nation Model Law on Electronic Commerce, (December, 25, 1996), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html) (June 8, 2018).

<sup>171</sup> *Ibid.*

originality of information.<sup>172</sup> In paper base written agreement the information is presented in original or real form same requirement is fulfill by data messages if there is reliable assurance for integrity of information from the time when it was first generated as data message and that information can be displayed to whom it has to be displayed. Article 5 says about the “legal recognition of data messages”.<sup>173</sup> Article 11 of the Model law says that In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages.<sup>174</sup> Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.<sup>175</sup> This model law also defines the term ‘intermediaries’ also in Article 2 (e) which says that Intermediary with respect to a particular data message, means a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message.<sup>176</sup>

### **iii) UNCITRAL Model Law on Electronic Signatures, 2001**

This convention gives legal validity of the trade done through use of ‘electronic signature’ and establishes a presumption that the electronic signature which fulfill all the technical reliability can compared to the handwritten signature. It adopted the method of technical neutrality and in favoring the uses of appropriate technology for electronic signature. It also defines certain rules and conduct that are essential for guiding the signatories’ rules and duties.

### **iv) United Nations Convention on the Use of Electronic Communications in International Contracts, 2005**

This convention was held with goal “for uses of electronic communication for formation of contract between the parties whose places of business are in different states”. It helps in recognizes the electronic communication in international trade and says that contract done through these exchange of electronic communication are valid as similar to the traditional paper base methods. This convention based on the earlier

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<sup>172</sup> Supra note 170 at 49.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998, (January 5, 2001), [https://www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf) (June 9, 2018).

<sup>176</sup> *Ibid.*



UNCITRAL Model Law on Electronic Commerce and Electronic Signatures.<sup>177</sup> These Frameworks establishes and made the basis of electronic commerce and set forth that contract make through the electronic communication is same as traditional paper base contract. Art. 1 (2) says that “the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract”.<sup>178</sup> Art. 2 says that “Contracts concluded for personal, family or household purposes, such as those relating to family law and the law of succession, as well as certain financial transactions, negotiable instruments, and documents of title, are excluded from the Convention's scope of application”.<sup>179</sup> Art. 9 of the convention “sets out criteria for establishing the functional equivalence between electronic communications and paper documents, as well as between electronic authentication methods and handwritten signatures”.<sup>180</sup> Moreover it also defines in the Art. 10 about “the time and place of dispatch and receipt of electronic communications, tailoring the traditional rules for these legal concepts to suit the electronic context and innovating with respect to the provisions of the Model Law on Electronic Commerce”. It establishes a “general principle” that legal validity of communication can’t deny on the ground they were “made in electronic form”. Art 12 of the convention also recognize the contract made through automated system. In the case of international commercial transaction, matter which is determined by choice of law rules the convention applies to the state in whose court the dispute is decided to ask.

#### **v) 43<sup>rd</sup> Session of UNCITRAL**

In 43<sup>rd</sup> session of the UNCITRAL discuss about the possible future work related to e-commerce and online dispute resolution. In 42<sup>nd</sup> session there was a recommendation relating to the preparation of note for possible future work on ODR and cross border e-commerce and having the view that it also “addressing the types of e-commerce dispute and solved it through the ODR mechanism”, issues of enforcement of award of ODR procedure under relevant international conventions. The commission

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<sup>177</sup> United Nation, United Nation Convention on the Use of Electronic Communication in International Contracts (Newyork 2005), (November 23, 2005), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html) (June 9, 2018).

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

requested the secretariat to follow the legal development of e-commerce and ODR for cross border e-commerce transactions and make further suggestion and a study note on ODR for e-commerce. In 43<sup>rd</sup> session the note given by the secretariat to Commission and it contains the “about the electronic transferable record and recent developments in the field of electronic commerce”. The note also contains the issues of online dispute resolution and summarizes a discussion on “A fresh look at online dispute resolution (ODR) and global e-commerce: towards a practical and fair redress system for the 21st century trader.”<sup>181</sup> The commission was informed that traditional judicial mechanisms for legal recourse did not offer an adequate solution for cross-border e-commerce disputes and for that reason they have to bring the solution for providing a quick resolution and enforcement of disputes across borders might reside in a global online dispute-resolution system for small-value, high-volume business-to-business and business-to-consumer disputes.<sup>182</sup> E-commerce cross-border disputes required tailored mechanisms that did not impose costs, delays and burdens that were disproportionate to the economic value at stake. At the end of the session commission requested the secretariat and makes a Working Group III to identify and make a future possible roadmap for the UNCITRAL to “work in the area of electronic commerce and ODR for resolving e-commerce disputes”.<sup>183</sup>

#### **vi) UNCITRAL Technical Rules on Online Dispute Resolution**

The increasing rate of transnational commerce also increases the disputes and claims among the countries. ‘United Nation’ (UN) after noticing these disputes and small claim to overcome this situation thinking of a uniform legal framework for transnational commerce; which favor and provide an effective means of dispute resolution. ‘United Nation’ for fulfilling this goal given the UNCITRAL the task of suggest any role for ODR dealing e-commerce. The General Assembly on 13 December, 2016 adopted a resolution on technical rules on “online dispute resolution with the help of UNCITRAL Working Group III”.<sup>184</sup> The resolution recognizes that the ODR is the mechanism for resolving disputes in transborder transaction because through this the dispute can be resolved simple, fast, flexible and secure manner

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<sup>181</sup> Julian Kirtzinger, Commercial Arbitration in Cyberspace, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V10/556/48/PDF/V1055648.pdf?OpenElement> (June 9, 2018).

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> UNCITRAL, UNCITRAL Technical Rules on Online Dispute Resolution (April 30, 2017), [http://www.uncitral.org/pdf/english/texts/odr/V1700382\\_English\\_Technical\\_Notes\\_on\\_ODR.pdf](http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf) (June 10, 2018).

without the need of physical presence by any person and given significant opportunity for access of dispute resolution by buyer and seller for resolving transborder commercial disputes for both developed and developing countries. Section II of the technical note on ODR says about the principles which include fairness, transparency, accountability and due process. Section III says about the stages of ODR proceedings which consist of negotiation, facilitate settlement and third stage.<sup>185</sup> Section V says about the definitions, rule and responsibility of the ODR process.<sup>186</sup> Section VI of rules says about the commencement of the Online Dispute Resolution Process.<sup>187</sup> Here it is says that the claimant has to provide a notice to the ODR administrator containing information relating to the “name and electronic address of the claimant” and respondent, the grounds of claim, any proposed solution to resolved the dispute, identification of the claimant etc. After this ODR administrator notifies the respondent and he has to make response within a reasonable time with the essential documentation and any grounds of counter claim and after that procedure is started for ODR. There are other rules relating to negotiation, appointment, power and functions of neutral for the process of ODR.

#### **4.1.3 European Union**

The ‘European Union’ also a major rule maker and provide efficient mechanism in the field of e-commerce and dispute resolution system. Under the “Recommendation 12/1986 of the committee of Ministers at the Council of Europe” for preventing and reducing the court workload the European Union has given the work to introducing dispute resolution for extrajudicial mechanism for improving efficiency in small claims. The European Commission introduces the mechanism of “European Commission Communication on Consumer Redress’ in 1985 and Supplementary Communication from the Commission on Consumer Redress on 1987. Commission publishes a Green Paper on Consumer Access to Justice and Dispute Resolution in Consumer within the Single Market and according to it the member state of commission removes the hurdles for the consumer to provide an effective resolution process and invite the member state for enhancing settlement of cross border trade disputes. An action plan was enacted by the commission on ‘Consumer access to Justice and the Settlement of Disputes in the Internal Market’ in 1996. It pointed out

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<sup>185</sup> Supra note 184 at 52.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

the main criteria for ‘out of court procedures’ such as the body which handling the dispute should be impartial must be guarantee and for effective procedure the mechanism must be simple, clear, established in time–limit and have appropriate power. Again Council of Ministers makes a “European Green Paper on Alternative Methods for Resolving Conflicts in Civil Law by inviting the Commission of European Community’. In 2000 European Parliament stressed on ‘the importance of expanding the methods of out of court redress for consumers particularly in cross border conflicts’. The European Parliament with the European Council on 2000 on its directives on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market” it was requires that member state for disputes of consumer products encourage courts ‘to provide procedural safeguards for the parties’ and the directives also give stress to the certain areas of e-commerce like place of service provider. After one year 2001 the commission highlighted the key role of extra-judicial methods in order to improve access to justice for consumers and the significant role of ICT in the provision of means for resolving disputes and also created a Consumer Complaint Form for consumer disputes.<sup>188</sup> All these make a way to seen technology as prominent mechanism for dispute resolution. In 2005 European Union for providing communication and structure for creating network of consumer center and have the ‘goal to incorporate all ODR and ADR mechanism. On this basis of all these programmes and promoting the ‘Stockholm European Council Programme’ building the dispute resolution mechanism. In 2008 through commission directives also says about expand the use of cross border disputes.<sup>189</sup> In 2013, to easy accessibility and out of court settlement of consumer disputes arises from cross border e-commerce a legal framework was adopted on Online Dispute Resolution and it works from 2016.<sup>190</sup> There is Online Dispute Resolution Portal for the consumer for European union and provide platform to assist settling disputes out of court. The commission prepared a first report of ODR platform in 2017.<sup>191</sup>

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<sup>188</sup> European Commission, Report from European Commission the European Parliament and Council (December 13, 2017) [https://ec.europa.eu/info/sites/info/files/first\\_report\\_on\\_the\\_functioning\\_of\\_the\\_odr\\_platform.pdf](https://ec.europa.eu/info/sites/info/files/first_report_on_the_functioning_of_the_odr_platform.pdf) (June28, 2018).

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

## **4.2 Legal Framework of E-Commerce and Online Dispute Resolution in India**

The concept of e-commerce and Online dispute resolution is not very old in India. The information and communication technology industry in India is booming and along with the cross border transactions are also increasing. With the time new trends and concepts are also entering the territory which pushes to make changes in the traditional norms. E-commerce and Online Dispute Resolution are both are totally new concepts in India. There are no specific laws only for these two but the enactment of 'Information Technology Act, 2000' and other laws which having the provision relating to it are recognizing these two concepts. Various amendments are also done for establishing these two concepts in India.

### **4.2.1 E-Commerce Laws in India**

There are many issues relating to security of e-commerce transaction, trust issues which need a proper adequate legislative framework for the efficient governing. The Information Technology Act, 2000 give recognition to the electronic commerce. India as a member of 'United Nation' also follows the UNCITRAL model law on e-commerce. Although the various laws and directives doesn't have binding force in India but India adopted it for its benefits, drawbacks or feasibility while framing relevant legislation to govern e-commerce law in India or make amendments in the existing laws.

#### **i) "UNCITRAL Model Law on e-commerce and its implementation in India"**

United Nation Commission on International Trade Law (UNCITRAL)" adopted the model law of e-commerce on 1996 with the goal of overcome the problem of international trade through the internet. It is the guiding text for the enactment of "Information Technology Act, 2000" which incorporates the special provision relating to the 'e-contract' and e-commerce. This model law recognizes that electronic documents are valid and same as paper base documents. It says about the legal recognition of electronic records. The UNCITRAL model law has established an uniform set of laws on electronic commerce that will continue to guide the different legal systems to achieve a similar legal framework. It also says about the 'formation and validity of contract made through electronic means', "attribution of data messages, determining the time and place of dispatch and receipt of data messages".<sup>192</sup>

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<sup>192</sup> *Supra* note 125 at 50.

## ii) Information Technology Act, 2000

The “Information Technology Act, 2000” recognizes “e-commerce” and grant legal recognition to the e-contract and the preamble of the Act says about it. Section 3 of the Act deals with the authentication of electronic records, Section 4 grants the legal recognition for electronic records. Section 5 grants recognition to the electronic signature.

**Section 10A**<sup>193</sup> of the Information Technology (Amendment) Act, 2008 provides that contracts which are formed by electronic means shall be deemed to be unenforceable only on the grounds that such electronic means were used to form the contract. Chapter IV deals with the attribution, acknowledgement and dispatch of electronic records. Chapter V which deals with the secure electronic records and secure electronic signature that aims to create a secure environment for e-commerce. Chapter VI and VII create the legal framework and infrastructure to support an efficient e-commerce regime. There are other chapters also which says about the duties of subscriber, penalty, compensation, adjudication and about the establishment of cyber appellate tribunal. Chapter XII has the provision relating to the liability of intermediaries and requires greater accountability from ‘intermediaries’. It discusses the grounds wherein an intermediary shall not be liable for third party information if an intermediary’s role is limited to providing access or where the intermediary doesn’t initiate transmission, select the receiver of transmission and select or alter any information being transmitted. An ‘intermediary’ is not liable if he observes due diligence in exercising his duty under the Act. **Section 79**<sup>194</sup> states that an intermediary shall be liable and exclusion on **Sec. 79 (2)**<sup>195</sup> shall not apply and if the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act. An intermediary is also liable where upon receiving actual knowledge or on being informed by government or its agency that any data or link or communication or information in a computer resource managed by the intermediary being used to commit the illegal act, the intermediary fails to remove or disable access to that material without vitiating the evidence in any manner.

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<sup>193</sup> Section 10A of Information Technology (Amendment ) Act, 2008.

<sup>194</sup> Section 79 of Information Technology Act, 2000.

<sup>195</sup> Section 79 (2) of Information Technology Act, 2000.

### **iii) Indian Contract Act, 1872**

The traditional rules and laws of contract are also applicable to the electronic contract. For forming the electronic commerce or trade relation there should be contract between parties. In India for 'e-contract' there is no separate procedure for this. The traditional rule of formation of contract is applicable to the e-contract also. In a contract there shall be proposal or offer and acceptance is there. Section 10 of the 'Indian Contract Act, 1872' says about the essentials of contract. For forming a contract there should be an agreement, the agreement is made with the free consent of the party, the parties should be competent to contract and the contract contain a lawful consideration and lawful object. There should be a lawful consideration and lawful object. This is also applicable to the e-commerce contract also. A breach of terms of valid contract entitles a party to claim damages or compensation for direct loss under section 73 of "Indian Contract Act, 1872". This remedy is given to put a person who has suffered loss at the same financial position he had been in case of no breach of contract had taken place. Rule of mitigation applies "in case of breach of contract by other parties"; the party not in default should nevertheless take step to reduce and curtail the loss incurred by him. As an example in a electronic contract where A agrees to deliver a machine to B on a particular day for a specified price, and A fails to deliver it, at the specified time and B suffers loss as he is compelled to procure it for another seller at a higher price than he agreed with A, then A must pay to B the difference of the sum of price of A and price at which he brought from third party. There is a case in India relating to e-contract and the issue is relating to jurisdiction of court in e-contract. In **P R Transport Agency v. Union of India**<sup>196</sup> case the transport agency make a tender in Jharkhand BCCL and the agency got the tender. The bidding and all process acceptance of the tender is done through e-mail and appellate got the e-mail in Chamuli, Uttar Pradesh. So the respondent says that the "tender of Jharkhand no cause of action in Uttar Pradesh The court relied on the **Sec, 13 (3)**<sup>197</sup> of IT Act and held" that "when the mail was sent, it was intended for the address from where the Company was working. Since, the office of the Company was in Chamauli and Varanasi, both of which fell within U.P so the High Court had jurisdiction. So, a partial cause of action arose which allows the High Court to exercise its jurisdiction".

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<sup>196</sup> P R Transport Agency v. Union of India, AIR 2006 All 23, 2006 (1) AWC 504.

<sup>197</sup> Section 13 (3) of Information Technology Act, 2000.

### iii) Consumer Protection Act, 1986

The term 'consumer' includes many things from whole seller to retailer, buyer, and individual etc. In India, the Consumer Protection Act, 1986 governs to law relating to the 'consumers and provider of services or goods. There is no specific Act or regulation relating to the online transactions so when any 'deficiency in services', 'unfair trade practices', defects in goods arises the people went to take the help of "Consumer Protection Act, 1986". The Consumer Protection Act under its perview includes the seller, buyer, their liability, rights etc. There are some provisions relating to protection of e-commerce. They are 'removal of defect', "replacement of goods", "return of price in case of discrepancy", 'discontinuance "any form of trade practices".<sup>198</sup> There is new 'Consumer Protection Bill, 2005' introduces to Loksabha, which will replace the "Consumer Protection Act, 1986" and incorporate the laws relating to e-commerce.<sup>199</sup> This bill wanted to widen the scope of consumer protection and improve and modernize the law with the market requirement. India is growing in e-commerce sector. So, there is proper legal framework for controlling illegal activity which causes problem to the consumer, it incorporates the various penalties for e-retailers for offences committed by them. This bill proposes to set up a regulatory authority empowered to "recall products and initiate class suit against defaulting companies, including" 'e-retailer'.<sup>200</sup> The bill proposes mediation as alternative means of dispute resolution. If this bill is passed and 'Consumer Protection Act, 1986' is replaced, it will enhance consumer protection in the country both online and offline. The key features of this new bill include establishment of an executive agency central consumer protection authority in order to effectively enforce the rights of consumers. More stringent and quicker actions are envisaged for supply of defective products and services including product recall, class actions and payment of compensation. It is likely to be speedier process due to settling up of executive body and the proposed adoption of ADR process.

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<sup>198</sup> Rebecca Furtado, "Consumer Protection in E-commerce", <https://blog.ipleaders.in/consumer-protection-e-commerce/> (June 12, 2018).

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*



#### **iv) Sale of Goods Act, 1930**

In the online sphere, the ‘Sale of Goods Act, 1930’ will apply with equal force in B2B and B2C transactions involving sale of goods and not to services which are excluded from the ambit of the Act as Section 10A of the Information Technology (Amendment) Act, 2008 grants legal recognition to e-contracts and Section 81 of the IT Act, 2000 provides that it shall have the force of law despite inconsistency with other laws in force. **Sec. 2(7)**<sup>201</sup> of the Sale of Goods Act, 1930 defines Goods as every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attach to or forming part of the land which are agreed to be served before sale or under the contract of sale. Sale of Goods Act, 1930 prescribes implied terms of contract that are inferred even if no express clause is agreed by the parties unless expressly excluded from their contract such as merchantability of goods or fitness for use for a specific purpose. According to **Section 12**<sup>202</sup> of the ‘Sale of Goods Act, 1930’ a buyer is conferred with the rights of cancelling the contract and to seek damages in case of breach of condition,” which is an essential part of a contract. Breach of warranty entitles the buyer, to sue for damages alone but not cancel the contract. In case on the internet an e-retailer shows a particular item such as a camera and sells it online, but on delivery, a consumer finds that it is not the same model as exhibited in the catalogue and ordered by him, the defendant has breached a condition “and therefore, plaintiff is entitled to cancel the contract. **Section 73**<sup>203</sup> of the Indian Contract Act, 1872 says about Measure of damages. In case of **CW Simson v Koka Jagannadha Row Naidu**<sup>204</sup> there is a presumption that the measure of damages is the difference between what the goods are intrinsically worth at the time of delivery and what they would have been worth, if they had been according to the specification of the contract.<sup>205</sup> The damages can be computed by reference to the market price at that time, whether it has fallen or risen since the date of the formation of contract. The buyer also owes a duty to mitigate his loss by acting reasonably to curtail the loss he suffers.

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<sup>201</sup> Section 2(7) of Sale of Goods Act, 1930.

<sup>202</sup> Section 12 of Sale of Goods Act, 1930.

<sup>203</sup> Section 73 of Indian Contract Act, 1872.

<sup>204</sup> CW Simson v Koka Jagannadha Row Naidu, AIR 1940 Mad 633.

<sup>205</sup> Karnika Seth, Product Liability in India, <https://www.sethassociates.com/wp-content/uploads/Product-liability-in-India.sethassociates2.pdf> (June 13, 2018).

#### **v) Legal Remedies under Tort Law**

Tort law which is based on the traditional law also protects the online consumer for any civil wrongs committed by e-retailers or online service provider in India. Although there is no such case on this subject in India, such a claim for negligence is made, a customer will be entitled to seek damages and compensation for any injury suffered by him owing to online to online negligence of an e-retailer or service provider the remedies in tort law will lie in addition to any remedies in Indian Contract Act, 1872.

#### **vi) Criminal liability under IPC**

Under 'Indian Penal Code, 1860' 'criminal liability' for injury or damages caused by defective products or service is imposed where *mens rea*<sup>206</sup> and *actus reus*<sup>207</sup> can be established beyond reasonable doubt. Indian Penal Code, 1860 prescribes punishment to offenders for false weights and measures<sup>208</sup>, adulteration of goods<sup>209</sup> and false property marks<sup>210</sup> apart from punishment for breach of trust,<sup>211</sup> impersonation and cheating<sup>212</sup> besides other provisions to protect a customer's interest. This is general law and will apply with equal force in online transaction too.

#### **vii) Foreign Direct Investment Policy in E-Commerce**

Under the Consolidated FDI Policy Circular, 2015 automated route is available in B2B commerce. A manufacturer is permitted to sell his products manufactured in India through e-commerce retail. Single brand retailer trading entity operating through brick and mortar stores is permitted to undertake retail trading through its e-commerce stores. An Indian manufacturer is permitted to retail its own single brand products through e-commerce. Indian manufacturer would be investee which owes Indian brand and manufactures in India at least seventy percent in-house and thirty percent sources from others.

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<sup>206</sup> The intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused.

<sup>207</sup> Actus reus is the Latin term used to describe a criminal act. Every crime must be considered in two parts-the physical act of the crime and the mental intent to do the crime.

<sup>208</sup> Section 265 of Indian Penal Code, 1860.

<sup>209</sup> Section 272 of Indian Penal Code, 1860.

<sup>210</sup> Section 481 of Indian Penal Code, 1860.

<sup>211</sup> Section 406 of Indian Penal Code, 1860.

<sup>212</sup> Section 419 of Indian Penal Code, 1860.

#### 4.2.2 Online Dispute Resolution in India

The origins of Online Dispute Resolution in India lie on the Alternative Dispute Resolution. The overburdening and backlog of cases in court procedure leads to a complex and problematic dispute resolution process. So to remove these obstacles the court opts for out of court settlement procedure. The law relating to the Online Dispute Resolution in India is runs through ‘Code of Civil Procedure in India, 1908’, ‘Information Technology Act, 2000’ and ‘Arbitration and Conciliation Act, 1996’.

##### i) Code of Civil Procedure, 1908

Under Sec. 89 of the ‘Code of Civil Procedure, 1908’ is related to the arbitration proceedings. With the amendment of the Act in 1999 this Sec. was introduced and promoting the out of court settlement procedure to resolve the disputes through ‘Mediation’, ‘Conciliation’, ‘Arbitration’, ‘Judicial Settlement’ and including the Lokadalat also.<sup>213</sup>

“**Under Section 89** of Code of Civil Procedure, 1908 says that settlement of disputes outside court”.<sup>214</sup> It says that-

“(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for—

- (a) arbitration;
- (b) conciliation;
- (c) judicial settlement including settlement through Lok Adalat; or
- (d) mediation.”

(2) “Where a dispute has been referred”—

(a) “for arbitration of conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;”

(b) “to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act,

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<sup>213</sup> Chitranjali Negi, “Concept of Online Dispute Resolution in India”, file:///C:/Users/Hp/Downloads/SSRN-id2596267.pdf (June 14, 2018).

<sup>214</sup> Justice S.U.Khan, “Judicial Settlement under Section 89 C.P.C. A Neglected Aspect”, [http://ijtr.nic.in/Article\\_chairman%20S.89.pdf](http://ijtr.nic.in/Article_chairman%20S.89.pdf) (June 15, 2018).

1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;”

(c) “for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;”

(d) “for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.”

“Under **Order X** of the ‘Code of Civil Procedure, 1908’ also says about the out of court settlement procedure”. That are-

“**Rule 1A**<sup>215</sup>. Direction of the Court to opt for any mode of alternative dispute resolution – After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of settlement outside the Court as specified in subsection (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.<sup>216</sup>”

“**Rule 1B**<sup>217</sup> Appearance before the conciliatory forum or authority. – Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.<sup>218</sup>”

“**Rule 1C**<sup>219</sup>. Appearance before the Court consequent to the failure of efforts of conciliation. – Where a suit is referred under rule 1A and the presiding officer of the conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.<sup>220</sup>”

Through this the concept of out of court settlement scenario it became clear that if any party proceed any suit in the Court, than the parties first opt for ADR process. “It is not mandatory for parties to resolve their disputes using ADR, the parties are obliged to try to settle their dispute through ADR.”

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<sup>215</sup> Order X Rule 1A of Code of Civil Procedure Code, 1908.

<sup>216</sup> Prathamesh D. Popa, “Online Dispute Resolution In India”, <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan021307.pdf> (June 16, 2018).

<sup>217</sup> Order X Rule 1B of Code of Civil Procedure Code, 1908.

<sup>218</sup> *Supre* note 150.

<sup>219</sup> Order X Rule 1C of Code of Civil Procedure, 1908.

<sup>220</sup> *Supre* note 150 at 61.

## **ii) The Arbitration and Conciliation Act, 1996**

“The Arbitration and Conciliation Act, 1996” is enacted in India as an one statute by combining the various Act; the “Arbitration (Protocol & Convention) Act, 1937”, the Arbitration Act, 1940, the “Foreign Awards (Recognition and Enforcement) Act, 1961”, which scatter as an different Act. The “Arbitration and Conciliation Act, 1996” is drafted on the basis on UNCITRAL Model Arbitration Law and UNCITRAL Conciliation Rules. This Act first time legally recognizes the conciliation proceeding by providing provision relating to it. The subtle difference between the arbitration and conciliation is that the conciliation proceeding is not restricts its application in India only, it provides flexibility to the party to ‘hold their proceeding in anywhere even in ‘cyberspace’. It does not says that arbitration proceeding can’t held online. If the parties wanted than the Act recognizes the ‘party autonomy and doesn’t place restrictions on their choice of procedure and applicable law as long as they have all agreed thereon. “According to the ‘Arbitration and Conciliation Act, 1996’ any party can initiate conciliation within 30 days of invitation to participate in conciliation and after the appointment of a conciliator, the principles of natural justice and fair play assist in reaching a settlement although the decisions are not binding and the parties can mutually or unilaterally terminate a proceeding. It is important to note that in case parties agree to a settlement and sign a binding contract, the same is enforceable in a court of law.”

## **iii) Information Technology Act, 2000**

“The Information Technology Act, 2000 was enacted to encourage e-commerce and grant legal recognition to use of electronic signatures and electronic records. Under Section 4 and 5 of the Information Technology Act, 2000 grant legal validity to electronic records and electronic signatures respectively.”

“**Under Section 4**<sup>221</sup> of the Act says the legal recognition of electronic record”-  
“Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

(a) rendered or made available in an electronic form; and

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<sup>221</sup> Section 4 of Information Technology Act, 2000.

(b) accessible so as to be usable for a subsequent reference.”<sup>222</sup>

“**Under Section 5**<sup>223</sup> of the Act says about the legal recognition of electronic signature”- “Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signature affixed in such manner as may be prescribed by the Central Government.”<sup>224</sup> “Another important development is the legal recognition granted to recording of evidence through video conference facility. In **State of Maharashtra v. Dr. Praful B Deesai**<sup>225</sup> case Supreme Court recognizes the use of technology in dispute resolution. It is one of the landmark cases relating to video conferencing.” It held that “video-conferencing could be resorted to for the purpose of taking evidence of a witness”. Here one party asks the court direction for taking “evidence of a witness residing in Unites States of America”. The lower court accepted the evidence of witness “taken with the help of video conference but the High Court struck down the order” by saying that “the law required the evidence to be taken in the presence of the accused” and upheld the decision. By struck down the High Court order Supreme Court stated that “recording of evidence satisfies the object of **Section 273**<sup>226</sup> of the; ‘Code of Civil Procedure, 1908’ that evidence be recorded in the presence of the accused. In explaining the benefits of video-conferencing, the Court observed that. In fact the Accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded Court room. They can observe his or her demeanour. In fact the facility to play back would enable better observation of demeanour. They can hear and rehear the deposition of the witness.” “Addressing the various submissions made before it, the Court stated that Virtual reality is a state where one is made to feel, hear or imagine what does not really exist. Video-conferencing has nothing to do with virtual reality. Video-conferencing is advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence.” “This is not virtual reality, it is actual reality. Several interesting

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<sup>222</sup> India Kanon, “Section 5 of Infor mation Technology Act”, <https://indiankanon.org/doc/292738/> (June 18, 2018).

<sup>223</sup> Section 5 of Information Technology Act, 2000.

<sup>224</sup> *Ibid.*

<sup>225</sup> State of Maharashtra v. Dr. Praful B Deesai, 2003 4 SCC 601.

<sup>226</sup> Section 273 of Code of Civil Procedure, 1908.

observations are made in the said Order which clearly indicate the strong support for use of technology, and especially video-conferencing, in the justice delivery system.”

## **CHAPTER-V**

### **ONLINE DISPUTE RESOLUTION: A PARADIGM SHIFT IN PRESENT DISPUTE RESOLUTION MECHANISM FOR E-COMMERCE IN INDIA**

#### **5.1 ODR & E-Commerce- A Comparative Analysis**

Electronic commerce shall constitute a major part of future commercial transaction. With more and more transactions consummated through the internet disputes shall definitely arise more often and in more diversified form than they have in traditional business. At present there are various level of mechanisms to resolve such disputes, the most formal one being litigation. However, ADR mechanism have been in existence since the wide spread emergence of International transactions. Mostly e-commerce disputes are seen to resolve through out of court settlement procedure. The advantages entailed by ADR mechanism are attractive to most transacting parties and more frequently employed by them. We can say that it is in the right track. But the problems entailed in the present mechanisms have adversely effected the final resolution of disputes in various aspects. Common weakness are linguistic limitations mostly done in english, availability to certain merchants only, “higher consumer fees, lack of ability to fit the type of dispute resolution with the type of dispute, limited incentives for compliance with online ADR results, lack of transparency in respect of both dispute resolution results and the credentials of dispute resolution officers and failure to include adequate consumer representation on the services governing board.” With the rapid development of electronic commerce a new mechanism is needed. The Online Dispute Resolution is the mechanism for dispute resolution for accommodating the character of new commerce to serve the internet society; moreover its indirect nature will preserve the relationship between the parties once in a dispute is resolved. In this digitalized era Online Dispute Resolution is taken as viable solution for resolving the disputes. The dispute resolution process is also growing with the internet. Because of new type of transaction process with the increasing connectivity and new ways of resolving disputes must also be explored.<sup>227</sup> The traditional mechanism can resolve complaint and disputes to a certain extent but

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<sup>227</sup> Robin V. Cupido, “The Growth of E-Commerce and Online Dispute Resolution in Developing Nations: An Analysis”, 10 ISSRI (2016) p. 3371.



the mechanism similar to the ODR in e-commerce process can increase consumer confidence in the merchant's credibility. With the wide application of internet, transactions can be completed online much more efficiently, requiring less time and cost, the transactions completed offline. The rapid development of online consumer transaction is a result of this fact. With keep pace with this new development ADR mechanism should also be reformulated and make a proper online based dispute resolution. There is no doubt that the new mechanism is an interest based model of ADR which provide options such as mediation arbitration and mini trials etc.<sup>228</sup> As the choice of ADR vehicle shall have a strong bearing on the success of Online Dispute Resolution, it is important to decide whether the initial target for this mechanism should be arbitration and mediation etc. The choice among those forms shall depend on what the parties hope to achieve and what they are willing to do to achieve the desired end.

The Online Dispute Resolution build trust in the transactions, keep customers satisfied, preserves relationship and shields companies from liability. The first wave of e-commerce created online market places for businesses and consumers and made a way to their possibilities. The second wave of e-commerce will build the dispute resolution services to buyers and sellers need to sustain their involvement in online marketplaces because only after user getting redress the real potential of e-commerce can be achieved. Business that understand the needs and activity done by it to integrating in to online dispute resolution services to their websites will benefit from increased customer loyalty, higher transaction volumes and significantly greater profits. Those businesses that don't provide a fair forum for resolving disputes will lose credibility with their customers.

Developing nations like "United States of America" and "European Union" from the beginning have involved in creating a proper "dispute resolution mechanism". Currently they have a sophisticated system of resolution to deal with the problem arises from e-commerce. The borderless nature of the internet promotes the crossborder trade. Participation in commerce of any nature boost the country's economy as the new market of information technology is available to the consumers of world and they can participate in such market. The investment of the cross border

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<sup>228</sup> *Supra* note 227 at 66.

transactions promotes good international relations. This also increases the need of effective dispute resolution system for increasing e-commerce disputes. The European model of Online Dispute Resolution Mechanism is one of the recent developments of ODR mechanism it has a regulation on “Online Dispute Resolution for Consumer Disputes of 2013” and provides an ODR platform for the consumer to resolve their “disputes without facing any complexities. But the ODR process is not fully practice here also there are more to do proving a proper mechanism for e-commerce disputes. But this model is also inspiring the nations and world community and draw in their minds the importance and efficiency of ADR mechanism.

The “United Nation Commission on International Trade Law (UNCITRAL)” also plays a one of the prominent role in the case of e-commerce and made various model for the countries to follow.<sup>229</sup> By observing the international legal framework there are many instruments which regulates the e-commerce transactions “UNCITRAL Model Law on Electronic Commerce, 1996” and “UNCITRAL Model Law on Electronic Signature, 2001” etc.<sup>230</sup> All these instruments are validating or recognizing the concept in international level. UNCITRAL become the structure or basis for facilitating the e-commerce transaction also it having the legal machinery of using mediation as ODR mechanism for resolving e-commerce disputes. UNCITRAL also made electronic signature validate and legally recognizable or can be used over internet as similar to handwritten signature.<sup>231</sup> It also gives ‘electronic signature evidential value’ before national courts. But with all these in new phase of digital world new ideas and concepts are emerging so all these to be amended with time to keep pace to avoid complexities. Many countries adopted the Model law of UNCITRAL to enact their national laws. So, the responsibility also increases to maintain a proper framework for e-commerce and if any problem arises to deal with it provide a dispute resolving mechanisms. It recently makes a noteworthy work in the area of cross border e-commerce transactions by making a “Technical Note on Online Dispute Resolution”. They used online mediation as a means of Online Dispute Resolution procedure but not used online arbitration expressly. There are many thing

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<sup>229</sup> Dr. Jur. Ihab Amro, “The International Legal Framework Regulating Electronic Commerce and Online Mediation”, <https://www.themediationroom.com/single-post/2018/03/30/The-International-Legal-Framework-Regulating-Electronic-Commerce-and-Online-Mediation> (June 19, 2018).

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

have to improvise for keep noticing in future aspects of ODR and to become a viable medium for dispute resolution.

There are many improvements we have seen in international scenario like “Organization of Economic Co-operation and Development (OECD)” introduces guidelines for ‘consumer protection in the context of electronic consumer’. It is designed to help ensure that consumers are no less protected when shopping online than they are when they buy it from their local store or order from a catalogue. By setting out the core characteristics of effective consumer protection for online business-to-consumer transactions, the guidelines are intended to help eliminate some of the uncertainties that both consumers and businesses encounter when buying and selling online.<sup>232</sup> The American Bar Association (ABA) from the establishment of the ODR concept plays a prominent role in providing a e-commerce dispute resolution process. Recently a new white paper publishes in United Kingdom on “The Digitization of Tribunals: What We Know and What We Need to Know”. In this paper they discuss about the “reforms to administrative justice and changes to tribunals, advances in e-government developments in online dispute resolution (ODR); and the development of the Transforming Our Justice System proposals”.<sup>233</sup>.

There are many international dispute resolution centers and ‘internet service providers’ (ISP) are emerging with efficient mechanism and new technologies and proper rule to provide online redressal system without any complexities with convenient time frame.<sup>234</sup> As an example ‘International Chamber of Commerce’ (ICC) which provides various international commercial terms, e-terms and their resolution processes. The ‘e-bays’ dispute resolution system for consumer also one of the significant service provider in the areas of online dispute resolution.<sup>235</sup> The ‘United States’ based ISP provider ‘Modria’ is one of the leading online dispute resolution provider and it has handled and solved many cases relating to e-commerce.

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<sup>232</sup> OECD, “OECD Guidelines for Consumer Protection”, <http://www.oecd.org/sti/consumer/oecdguidelinesforconsumerprotectioninthecontextofelectroniccommerce1999.htm> (June 21, 2018).

<sup>233</sup> Robert Thomas and Joe Tomlinson, “The Digitalisation of Tribunals: What we know and what we need to know”, <http://www.publiclawproject.org.uk/data/resources/279/The-Digitalisation-of-Tribunals-for-website.pdf> (June 20, 2018).

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

Recently, 'Amazon Alexa' introduce a new feature "my mediator" through which consumer disputes in the area of real state, probate and partnership can be resolved but it is only available in California only.<sup>236</sup>

In many parts of the world they are thinking about the 'digital court' and 'e-justice'. Turkey is the great example among the countries; it has altered its court system to establish electronic procedure. The parties, lawyers have to submit their file online, fees payment etc. The countries like US, Australia also took the similar initiative in this regard. There are some places where digitization goes beyond the simple court procedure to promoting alternative dispute resolution.<sup>237</sup> As an example British Columbia's Civil Resolution Tribunal's (CRT) introduced in 2016 according to which in certain types of disputes the parties have to go for negotiation before going for adjudication. These initiatives are taken for creating the prospects and opportunities for resolving the disputes online and with it the mediators can involved with it the comfort from their home.

The advancement of rules and regulation in international scenario also helps to build a unified system of dispute resolution procedure for all and it helps the countries to resolves their dispute to without any hesitation issues and conflict of law. Till now there is not any proper and definite procedure for their in international scenario. The initiatives taken through organization by to conducting conventions and conferences and preparing notes and research paper is not sufficient. Some countries taken their initiatives and establish a system like ODR with help of ADR procedure and enclosed it also in their court proceedings. But the problem is that there is not any recognized law which theses countries can adopt as an model law for Online Dispute Resolution. The organizational initiatives can help to the certain limitations only. The UNCITRAL recent technical note on ODR is only conceptualizing the basic rules of ODR only but it is non- binding in nature. But without any model it is better to at least have one. The internet service providers are also having the laws of according to their consumer convenience. Only those which are having the knowledge of this process and infrastructure for such mechanisms can access this process. Moreover the big giant corporation, companies, governments can afford such a costly procedure for

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<sup>236</sup> Pritika Malhotra, "Recent Development in Online Dispute Resolution", <http://blog.mediatoracademy.com/online-dispute-resolution-developments> (June 20, 2018).

<sup>237</sup> *Ibid.*

faster procedure and disposal of disputes. The common people can't hire them. In B2C transaction we see some improvements by providing the buyer their dispute redressal forum but it is not as much improving till now. So, many times people after buying product the inefficiency in the mechanism and lack of trust in the online process and fear to go for long litigation process they are not going for any procedure. The 'European Union' model of ODR platform in this matter is best to adopt at this model for e-commerce dispute resolution and it is a successful one. There is more way to go for Online Dispute Resolution to establish as a permanent solution in the e-commerce perspectives but with the recent years and the initiatives being taken by the world community we can hope that it will also finds its way for the right tracks and make an efficient mechanism for dispute resolution.

## **5.2 Position in India**

The concept of Online Dispute Resolution is growing in developing country but it is not flourished as developed country. There are many obstacles developing countries have to face for establishing and accepting this new concept. But with the participation in global market these developing countries also have to maintain a standard system or mechanism for future disputes. In India, the concept of Online Dispute Resolution is in an infancy stage. There is legal framework that recognizes the ODR process but it is not sufficient. By validating a concept it doesn't mean that the problem related to it will be solved. The indirect recognition through certain laws and provision creates doubt in the minds of people. People cannot easily trust to such a new mechanism. Many times people have seen that they go for the option of traditional litigation process because of lack of trust in the online process.

In India the concept of Online Dispute Resolution lay down in the concept ADR. It is the online form of ADR mechanisms. The ADR techniques are done through the "Arbitration and Conciliation Act, 1996" which is "based on the UNCITRAL Model law on E-commerce". The legal framework that supports the Online Dispute Resolution is given under the provision of "Sec. 89 of the Code of Civil Procedure Act, 1908 which promotes the use of alternative dispute resolution mechanisms." The concept Online Dispute Resolution is first recognize through the Banking Ombudsman. The provisions of 'Information Technology Act, 2000' is also recognize and validate the 'information and communication technology' through which the dispute can be resolved and can be conducted. In India 'the legal mechanisms for

ODR can be created by reading Arbitration Act with the Information Technology Act, 2000. As an example if the “Sec, 7 (3) of the Arbitration and Conciliation Act, 1996 provides that the agreement should be in writing. However, if the agreement is made online and referred to ODR, the same will be valid under Section 4 of the IT Act which states that where any law provides that information or any other matter shall” “be in writing or in the typewritten or printed form, then such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form and accessible so as to be usable for a subsequent reference”. Similarly, “Section 31(1) of the Arbitration Act requires the arbitral award to be in writing and signed by members of arbitral tribunal. Both these requirements can be fulfilled under Section 4 and 5 of the IT Act which provide for legal recognition of electronic records and electronic signature respectively. Both Section 4 and 5 can help in establishing the legal base for ODR in India.”

The new “Consumer Protection Bill, 2015” also has in its “statement of objects” says about the development of e-commerce which can created a new opportunities for consumer fast redressal. It also makes the electronic filing of complaints and also providing the consumer mediation cell for at national and grass root level.

India is a growing economy and the index of participation in the e-commerce sector is also increasing. The significant growth of Information and Communication Technology, popularity of mobile services and data services among the consumer, payment gateway services, and foreign direct investment in commercial sector also make expansion of the e-commerce industry. “According to recent statistical data, retail e-commerce in India has grown from 2.3 billion U.S. Dollars in 2012 to an estimated 17.5 billion U.S Dollars. In 2015, the retail e-commerce sales as a percent of total retail sales in India were expected to be 0.9 percent of all retail sales in India but this figure is also expected to reach 1.4 in 2018.”<sup>238</sup> With this advancement of information technology the government have to maintain a detail procedure and rules of framework for controlling the problems and. The e-commerce disputes in India.

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<sup>238</sup> Statista, “E-Commerce Statistics in India”, <https://www.statista.com/topics/2454/e-commerce-in-india/> (June 24, 2018).

The Government has taken initiative by endorsing 'digital India' but it is not fruitful. With the 'Digital India' initiatives the concepts of 'e-governing' is also come in to the scenario but till now it is in infant stage.

The Madras High Court Judge S Vimala on 10<sup>th</sup> conference of "Institute of Companies Secretaries of India (ICSI)'s Southern Indian National Council" on Online Dispute Resolution said that "Online dispute resolution (ODR) has emerged as a new method, which may be beneficial in a geographically large country like India, where a large number of business-to-business and business-to-consumers disputes are of significantly low value, But, there are a number of hurdles like access, technology, cultural and language issues. Above all, trust with a new untested system. Of late, the ODR has been successfully used by the National Internet Exchange of India (NIXI) and the judiciary has also shown perceptible shift towards the use of the new technology and methods in the resolution of disputes."<sup>239</sup> The Ministry of Law and Justice has recently given advice government departments relating to settlement of their disputes before going to the court they taken the alternate dispute resolving mechanisms like arbitration, conciliation, mediation etc. This notification is given by government by noticing the backlog of cases in Indian Court.

Recently in April, 2018 there is a national conference is held relating to the "Online Dispute Resolution" in New Delhi. The main objective of this conference is to way for Online Dispute Resolution and its efficiency in getting justice in e-commerce sector. It also discusses about the exploring innovative technologies to improve the dispute resolving mechanism.<sup>240</sup> "In this conference Vice President Shri M. Venkaiah Naidu has said that Online Dispute Resolution Mechanism is a laudable initiative to fast-track dispute resolution and it shall go a long way in resolving disputes, attracting more foreign investment by projecting India as an investor-friendly country and strengthen economy". He also added that "country like India having a sound legal framework and ease of doing business can become a natural choice for investors. He further said that flagship programs like establishment of Smart Cities in India would require a techno-legal smart dispute resolution mechanism."<sup>241</sup> People should also be

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<sup>239</sup> L. Saravaran, "Online Dispute Resolution Most Suitable for Indian Constitution", THE TIMES OF INDIA, Madurai, Saturday, 13 August, 2016, p. 1.

<sup>240</sup> Construction Industry Arbitration Council, "National Conference on Online Dispute Resolution", [http://www.ciac.in/workshop\\_feb\\_2018.html](http://www.ciac.in/workshop_feb_2018.html) (June 26, 2018).

<sup>241</sup> *Ibid.*

made aware of the avenues available”.<sup>242</sup> “Online Dispute Resolution mechanism is the need of the hour keeping the increase of e-commerce and e-businesses in view”.<sup>243</sup>

### **5.3 Alternative Dispute Resolution as a Dispute Resolution Mechanism for E-Commerce**

E-Commerce became viable option for doing business without thinking about the geographical differences, the companies can transact with the consumer easily. But the problem arises regarding to the resolution of disputes arises in the process of e-commerce. The consumers are protected by their jurisdictional law and the sellers are also comes under the law where they are located. When any problem or issue arises related to e-commerce many times it has seen that the cost of the proceedings and other factors makes it difficult to the parties to resolve their disputes. In this case Alternative Dispute Resolution is beneficial for resolving e-commerce disputes. There are various forms of ADR which provide better convenience to the consumer. This provides the customers the different choices for e-commerce disputes. These ADR services can be provided by governments, consumer organization, business provider itself for easy accessibility to the consumers.<sup>244</sup> They meet with each other mutual understanding with their time convenience. The process of dispute settlement in ADR is much faster than the usual litigation process within time limit. There are some cases which can't be resolved by the court but it is to resolve it through the ADR processes. The ADR process provides opportunity to the parties and flexible creative solution to the parties according to their convenience. It also provides parties to equitable and fair resolution process with low costs. Many times it has seen that the vendors included the clauses of ADR policy in to contract and agreement to not involving in the litigation procedures. The arbitration processes in ADR are binding in the nature to the parties. The systems of ADR is easily available provide a swift resolution to the process of e-commerce disputes. It also benefited the all including the government, business organization, consumers to fulfilling the need and provides a formal system like litigation.

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<sup>242</sup> *Supra* note 240 at 73.

<sup>243</sup> Press Information Bureau, “ODR Mechanism is a laudable Initiative, Vice president”, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=178824> (June 26, 2018).

<sup>244</sup> Trans Atlantic Consumer Dislounge, “Alternative Dispute Resolution in the Context of Electronic Commerce”, <http://test.tacd.org/wp-content/uploads/2013/09/TACD-ECOM-12-00-Alternative-Dispute-Resolution-in-the-Context-of-Electronic-Commerce.pdf> (June 28, 2018).



#### **5.4 Drawbacks of Alternative Dispute Resolution Mechanism as a Dispute Resolution Mechanism**

With providing the convenience to all the consumer and buyers the ADR become now a day's most useful mechanisms for the resolving the e-commerce disputes. The countries adopted this model for better commercial perspective of the economy. But the problem is that with which motive it is formulated the goals are remain far from its fulfillment. The 'United Nations' took initiatives and countries across the globe for the need of better mechanism of dispute resolution through alternate way than the usual one. The legal framework also made but there are many things which are still to improve. With the introduction of information and communication technology people want more reliable than the earlier one. Today fast growing and economic world spending time and mind in only dispute resolving will costs the both the buyer and seller. So they prefer the most convenient and reliable one. Apart from this there are many problems in the framework of alternate way of dispute resolution which also have to fix. There are many problems relating to the ADR process also the linguistic problems cultural problems, the persons who are governing and tagged as an expertise didn't know the ADR process well. The consumers for small business many times can't afford the cost of the ADR mechanisms. There are some of the drawbacks of ADR mechanism.

- There is a lack of unified formal appeal process for the dispute resolution in ADR. Domestic laws are there for ADR now a days but when it comes to cross borders e-commerce there is a conflict of law. Some parties have their own nation laws but some are take the help of private organization. So everyone process of appeal and procedure became different.
- When it came to nation's law if any problem arises between the parties then the judge or mediator which are controlling the matter many times seems that they are not expert in their fields.
- When it came to the evidence procedure it is fully depend on skill and experience of the mediator or arbitrator there are no other interrogation process are there.
- Many times it has seen that the parties who enter in to the contracts or agreements there is a mandatory clauses are there in it, basically work for the

benefits of company. Because they itself make the contracts which they are made keep it in mind their beneficial factors. .

- Sometimes it has seen that the arbitrator becomes a biased as he appointed to any party more than one time.
- The hearings of the arbitration procedure are not for all. Though it is useful for privacy reason but if it open for all. It became as a precedent for all. So the courts established certain rules through it.
- There is concept that the cost of proceedings in ADR is lower than the litigation but in reality the when taking the help from the arbitration the cost of the proceedings with the arbitrator fees it became huge.

### **5.5 Alternative Dispute Resolution to Online Dispute Resolution - A Paradigm Shift**

Shifting from one avenue to another one it doesn't mean that there have to be certain specific drawbacks in the earlier one. The shifting can be done sometimes by seeing the better convenience and possibilities. Drawbacks can be fulfilled by the amendments but the new concept from the earlier one creates a conflict in the minds of people when it merged together. Same in the case of ADR and ODR also both are new possibilities of disputes resolution mechanism one having human intervention to mitigate the process and another one is software based assistance. Online Dispute Resolution emerged from an online environment that is jam packed with full of confusion and disputes but innumerable number of avenues to addressing them. Originally the intent of ODR was not to displace, challenge or disrupt the existing legal regime or familiar ADR processes, rather its goal was to fill the vacuum involving online dispute where the laws were inadequate to provide better efficient ways to resolve the disputes in the internet. Most of the people say that Online Dispute Resolution is modern day tool using ADR technology for resolving e-commerce disputes. There is not any legislation which defines Online Dispute Resolution process as specific terms for dispute settlement in internet.<sup>245</sup> However attempts to copy ADR in the online setting but in exercise it is a difficult task and the ODR began to develop processes with feature that were clearly different from the

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<sup>245</sup> Nikita Vadrevu, "Online Dispute Resolution Mechanism: Expansion of Alternative E-Dispute Resolution Mechanism in India", <http://legaldesire.com/online-dispute-resolution-mechanismexpansion-alternate-dispute-resolution-mechanism-india/> (June 28, 2018).

traditional dispute resolution. There is a “lack of face to face” interaction in reality; it is done through the assisted tools.<sup>246</sup> It automatically recorded all the dispute data and it relied completely on the intelligence of machines.

### **5.6 Prospects for Online Dispute Resolution Mechanism in India**

For commercial activity and businesses time is like money. The litigation is least preferred methods for e-commercial disputes. Most of the times they want to resolve it without going to the traditional court procedure they go for “alternative dispute resolution” system. In India the genesis of ODR is lies on ADR. The ‘Arbitration and Conciliation Act, 1996’ deals with the ADR procedure through arbitration, conciliation, mediation, judicial settlement and Lok Adalat. The online arbitration is used by “National Internet Exchange India (NIXI) for domain name dispute resolution and there are some private organization which also slowly growing in this sector of online dispute resolution mechanism”. Such as; ‘Perry4 law Organization’ (P4LO), “Techno Legal Centre of Excellence for Online Dispute Resolution in India (TLCEODRI)”.<sup>247</sup> But the scenario of “Online Dispute Resolution” is still blurred from the Arbitration Act. Despite the Fact that trough various Act it is validate but desired model of ODR is not there. For noticing the fact that the need of future in mind it should be properly establish through provisions in Indian Code or specific Acts. Then it can help growth of commercial sector and also reduce the burden of courts in this Matter. There are some salient feature of ODR because of which it can be establish as ideal and prospects of future dispute resolution mechanism in India.

**Fast Redressal-** The traditional forms of court system is very steady and slow. From decade’s peoples of India using this mechanism when any problem arises but when it comes to the resolved the matter it takes so many times to settle it. For commercial activity it is not possible to wait for such a long the ODR can provide them perfect solutions for resolve the matter within very limited time.

**Convenience and Easy Accessibility-** Online Dispute Resolution has various features for the people who access to the other dispute resolution mechanism like ADR and litigation. It provides electronic filing, convenient to present the case where the person stays. For commercial people who wants fast redressal and with it they also

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<sup>246</sup> *Supra* note 245 at 76.

<sup>247</sup> *Ibid.*

get additional advantage of convenience and easy accessibility. The person who can access the internet can anywhere get the facility of ODR.

**Time Management-** like the traditional resolution proceedings the people doesn't has to wait for so long outside the court. The disputant in ODR doesn't need to travel to the court. In place of lawyer or attorney many times it is seen that the business executive itself can deal with the disputes or even in non-commercial disputes the parties itself can resolve their matter with the assistance of computer software. There is specific time limit around which the disputes should be resolved.

**Cost Saving** – The ODR is cost saving also. People from far places don't have to come to attend the court proceedings. The major portion of their disputes which contains the cost of lodging, food, travel expenses are save due to the ODR process.

**Easy Storage of Data** – the system of storage of data in the digital world is much organized and easy to find out quickly due to the help of information technology. The storage of file in court proceeding in traditional way is much complicated. Among the files it is difficult sometimes to find out the required document within the reasonable time. So ODR makes it convenient because from filing to every proceedings note it is done through the digital process.

**No Geographic Barriers-** In traditional court there is a specific seat and benches for the court proceedings from Supreme Court, High Court to lower court. People from the remote areas and outside areas it is difficult for them to come and go frequently for any matter without further progress. But in the case of Online Dispute Resolution Procedure there isn't any problem like this. There aren't any geographical barriers relating to dissolution of any matter.

With all these features ODR become efficient mechanism for dispute resolution in e-commerce procedure in India. But the way to ODR is not that much easy in India. It also has certain problems. The people till now don't want to trust completely this mechanism. The traditional court system gets the most of the time preferences because a person believes that longer or shorter period it required for resolution they will get the justice. The new concept of ODR is not gaining beliefs of the people. The technology is distrust by the people most of the time. There is a sense of insecurity among the people. The lawyers are in most of the cases in India didn't know the

mechanism perfectly. There is a need of skilled and expert people in the field of the online disputes. Though the ODR reduce the dependence of lawyer but some complex cases they need to take the help of the lawyers then the problem arises related to knowledgeable one which is lack in India. This dispute resolution mechanism isn't available for all the disputes it can the civil matters most of the time and mostly commercial transactions matter. Moreover it is virtual world dispute resolution mechanism there is not any face to face interaction so people don't understand each other personality so it is difficult by seeing the documental value without interaction how verdict will be given. In Country like India where most of the people didn't aware of the cyberspace clearly, they are used to with traditional court proceedings if the verdict isn't satisfactory to them then how they handle it that is the big question. They aren't aware of things related to the online world. Till now in some places in India where people can't afford electricity and govt. also cannot provide the whole population and the tools which are related to ODR is needed are unaffordable by them then it is not easy to establish ODR so easily. Now days govt. are taking initiatives in the sector of electricity to some places hope soon it will be available to all and with it the other modern amenities also be there and they aware of the online dispute resolution mechanism.

The ODR systems are now accepted by the India judiciary to fulfill the dispute resolution demands of people. The existing system can't handle the cases they became overburdened. They consider the alternate way for resolution of disputes as soon as possible. The Supreme Court is also encouraging in acceptance of new mechanisms, use of technology for faster resolution process.

## **CHAPTER-VI**

### **CONCLUSION AND SUGGESTION**

Technology has now become a very component of everyone's life. It is such a powerful tool which slowly embraces all the sectors in the society and the legal profession is not an exception. With the increasing usage of information and communication technology the disputes have also become complex and new concepts have emerged. To adjust with it the dispute settlement bodies also require new models or mechanism to give fairer and proper justice to the parties. In the context of e-commerce, the disputes are boundary less and there isn't any proper and definite jurisdiction and geographical area. The parties come to the agreement and they can be from different places. If any dispute arises between them the problems are related to the conflict of law and jurisdictional issues. For this kind of disputes Online Dispute Resolution Mechanism is one of the best mechanisms to resolve the disputes. There are other processes also and various prominent institutes provide efficient mechanism for such disputes. But they may not cost saving and time bound and may not be able to give the judgment in specific time. In India, Online Dispute Resolution comprises of present ADR mechanism to implement its rules and procedure to resolves the online disputes. The ADR is the third party who solves the disputes by negotiation, mediating and through the arbitration procedure and in the ODR process there is a 'fourth party' to resolve the disputes by software assistance. All the proceedings are in online form from filling to submitting.<sup>248</sup> For enabling ODR in India properly there is many ways to go which are yet to be functional. But with increasing commercialization, the disputes are inevitable course of action. So there is a need to formulate a proper regulation specifically for e-commerce. The Indian scenario of e-commerce laws is not so specific and it recognizes and validates through various provisions of the different Acts. So noticing the increasing complexity of cases there is need of proper provisions or legislation for the e-commerce. Same is in the case of Online Dispute Resolution also as it runs through the various Acts or by interpretation of court using various provisions for resolving disputes. As a dispute resolution mechanism, ODR has potential and future prospects. So there is need to frame a proper outline for it.

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<sup>248</sup> Pankhudi Khandelwal and Samarth Singh, "ODR and E-Commerce in India", <http://legalreferee.com/odr-e-commerce-india/>. (June 29, 2018).

This dissertation paper has given a brief idea about the Online Dispute Resolution as a dispute resolution mechanism for e-commerce disputes in India by noticing the future prospects of it. There are different kinds of e-commerce disputes are there and various mechanisms are available for resolving e-commerce disputes. But even after having a mechanism for dispute resolution, traditional litigation method and alternative dispute resolution method, the necessity of new mechanism of Online Dispute Resolution is the need of the hour because of the development of information and communication technology in India. In India ODR is developed through ADR mechanism but it is not flourishing as much as it has the potential. There are certain international developments coming up in the establishment of ODR. Both E-commerce and online dispute resolution are creation on the basis of information technology. By giving a redressal system which is similar to the above mechanisms is the best way to gain the peoples trust and growing the e-commerce business also. India slowly taking the path of ODR mechanism but there is lot more to go. With the enactment of Information Technology Act 2000, the electronic form of filing documentation, dispute resolution etc was legalized in India. The judiciary also recognizes and adopted the electronic form of redressal mechanism. The need of specific provisions and procedure is at the utmost level. There is a lack of awareness among the people related to such kind of dispute resolution system and lack of infrastructure facility which is a problem in ODR facility in India. The e-court which is established for convenience and giving relief to the people within limited time is not that much upto date.

Many a times the filing and documentation is done in electronic form but the people have to participate in traditional process only. The effectiveness of ODR should not be limited to court house and institutions only and it should not also limit to certain aspects of internet technology. There are uncountable possibilities of its uses which are handful and people can easily engage them with such technology without any complexity to resolve their disputes. There are many users of 'Smartphone' or electronic gadgets in India and e-commerce is now common among all the generations. So the online dispute resolution will help the people access the dispute resolution methods from home if proper legal framework and governmental programme will be formulated. And this will benefit the traditional court by lowering the court burden of cases in some way.

Though today ODR isn't well framed and institutionalized in India properly but in future its essential and usefulness will increase and people will accept it as similar to the traditional form of dispute resolution mechanisms.

### **Suggestions**

For establish Online Dispute Resolution as a effective dispute resolution mechanism for e-commerce in India the following suggestions are given-

- There is a need of creation of proper international and national body to establish a proper procedure or framework or outline for the ODR mechanism.
- There is a need of infrastructural upgrade in the courts in India so that the people can gain the benefit of dispute resolution through online dispute resolution method.
- People should be aware of such convenient proceedings and also provide proper education and training for easy operation of the proceedings.
- The decision given by ODR should be binding in nature which can reduce the confusion among the people about its effectiveness.



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