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THE INTEGRATION OF INSTITUTIONAL ARBITRATION AND ODR: A PATHWAY TO MAKING INDIA A PREFERRED SEAT FOR INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

The landscape of conflict resolution in commercial and legal sectors has been transformed by the evolution of Alternative Dispute Resolution. Both, Online Dispute Resolution and Institutional Arbitration have emerged as key mechanisms in international commercial arbitration by offering structured frameworks and technological advancements in order to enhance efficiency, accessibility and cost-effectiveness. This paper analyses the growing relevance of Institutional Arbitration, administered by established arbitral institutions, ensuring consistency and enforceability, alongside the rise of Online Dispute Resolution, which integrates digital platforms to facilitate remote dispute resolution. The study explores the legal framework that governs such mechanisms in India and also highlights their adoption under the Arbitration and Conciliation Act, 1996 as well as the Information Technology Act, 2000. The author also evaluates the challenges that hinders India's potential as a global arbitration hub, which includes judicial intervention, lack of Alternative Dispute Resolution culture and also the enforcement delays. Furthermore, the research additionally underscores the necessity of institutional reforms, technological advancements and global cooperation to conform India's arbitration standards with international satisfactory practices. Lastly, the paper concludes that the integration of institutional arbitration and Online Dispute Resolution presents an assuring avenue for encouraging an efficient, transparent and technology driven arbitration eco-system in India, ensuring greater trust and participation from domestic and international stakeholders.

INTRODUCTION

The causes of disputes are multifaceted and so are the frameworks of resolving them.[1056] Alternative Dispute Resolution (hereinafter "**ADR**") is being acknowledged as an important mechanism in both the legal and business sectors. The main goal of ADR is to resolve disputes in a more efficient, less costly, and quicker manner and in doing so, encourage preservation and strengthening of long term relationships between parties.. In International Commercial Arbitration's domain, to resolve cross-border disputes efficiency and adaptability form key components. In recent years, Institutional Arbitration and Online Dispute Resolution ("**ODR**") have gained relevance as key mechanisms in the field of international commercial arbitration. Institutional Arbitration refers to arbitration proceedings overseen by a recognized arbitral institution, including the Delhi

[1056] **Bobette Wolski,** The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective, **13-16**.

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International Arbitration Centre (DIAC) and the Mumbai Centre for International Arbitration (MCIA) in India; the London Court of International Arbitration (LCIA); and the Singapore International Arbitration Centre (SIAC) in the international arena. Institutional Arbitration provides a framework of procedural rules for arbitration, administrative support, and procedural enforcement, which leads to consistency, credibility, and efficiency in resolving disputes. While Online Dispute Resolution incorporates technology with dispute resolution mechanisms. ODR can be seen as increasingly becoming relevant with the rise of digital transactions and global commerce since it allows parties to conduct arbitration remotely through virtual hearings, electronic submissions and electronic case management systems. The pandemic, COVID-19 further boosted the adoption of ODR, as it ensured access to justice despite physical constraints. The integration of institutional arbitration with ODR is certainly shaping the future of international commercial arbitration by enhancing accessibility, reducing costs and streamlining dispute resolution.

Overview of Institutional Arbitration and Online Dispute Resolution in India

Arbitration can be pursued by the parties individually on an ad-hoc basis, or it can take place pursuant to a procedural architecture of an arbitration institution. Institutional arbitration entails the selection of a specialized, permanent body responsible for facilitating and managing the arbitration proceedings in accordance with its own rules. Commonly, parties have a contractual relationship that specifies an arbitration clause with a designated institution as the arbitrator. Many institutional arbitral bodies exist; some affiliated with trade bodies and others as independent institutions. Examples include the London Court of International Arbitration (LCIA), the Chartered Institute of Arbitrators (UK), the National Arbitration Forum (USA) and the International Court of Arbitration (Paris). In India, the Indian Council of Arbitration (ICA) is the main institution providing arbitration for domestic and international commercial disputes. The benefits of an institutional framework, with the professional credibility and specialized experience of an institution, ensures that arbitration is efficient, economical, and straightforward, and thereby helps to ensure outcomes are more predictable and final.

Additionally, institutional arbitration provides both parties and the arbitrators access to the institution's professional staff for guidance and administrative assistance, who would be responsible for managing international commercial arbitrations per the institutions applicable rules. This mechanism allows for resolution to ambiguities and breaking procedural stalemates without involving the courts. This is in contrast to ad hoc arbitration, which could require parties to involve the courts to progress the arbitration, effectively eroding the expense management expected from the arbitration process through additional litigation. Despite the institutional arbitration benefits, it has been critiqued by some academics for unnecessarily delaying the arbitration by following procedural rules. But this position does not consider that these procedural safeguards are intended to contribute to efficiency to the process and procedural integrity. On the other hand, with ad hoc arbitration, delays can disproportionately increase if one party needs to rely on the court's authority to compel the defaulting party to start or continue with arbitration, which can entail more inefficiencies than the time wasted with institution procedures to comply. Importantly, instead of of being hindrances, the institutional requirements assist with statutory guided and effective resolution of the dispute.

Arbitration has traditionally been grounded in the idea that the parties retain complete freedom in the process. In institutional arbitration, however, arbitral institutions may take certain prerogatives normally left to parties (for example, arbitrator selection), and as a result, may gain an impression of control that encroaches upon party autonomy. This has led some to contend that there then emerges a

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difference between institutional arbitration and its foundational framework or purpose, ultimately questioning whether it is actually arbitration in the real sense. While this sentiment may provide an attraction towards ad hoc arbitration, it must be acknowledged that in today's complicated and rapid commercial environment, ad hoc arbitration is arguably better suited to disputes involving less intense claims, instances which are less resource-consuming, and domestic proceedings. For this reason, it is apparent that through the institutionalized and administrative and other associated benefits, institutional arbitration brings significant benefits, and if engaged by the parties, represents the means for expediting dispute resolution efficiently and cost-effectively.

On the other hand, we have Online Dispute Resolution which is gradually being acknowledged in the field of law as well as in the commercial sector. It can be defined as any method by which parties attempt to resolve disputes online.[1057] In India, the Arbitration and Conciliation Act, 1996[1058] (hereinafter referred to as "**Act**") provides for Online Dispute Resolution by incorporating the UNCITRAL Model Law, allowing for electronic arbitration agreements and virtual hearings. The ODR providers are essentially professionals or institutions that are made to participate at the request of the parties to the conflict.[1059] Key ODR methods includes assisted negotiations, automated negotiation, online mediation, and online arbitration. Both institutional arbitration as well as ODR were relatively new concepts in the Indian Territory. In its initial years, questions were raised pertaining to its applicability such as Is ODR suitable or convenient for India? Would it be possible for ODR mechanisms to develop in regions without massive Internet connectivity? Would these mechanisms be useful in countries like India where access to the internet is only available to a limited segment of the population? Even though to some extent, ODR mechanism has been successful in attaining its objectives however, it has faced certain difficulties. In any case, it has extraordinary potential qualities, some of which it has as of now acknowledged, including its adaptability to the local context; its effectiveness; and its ability to add to the advancement of rising economies.

Generally, Indian context shows that Information and Communication Technology ("ICT") infrastructure does not cover entire country. Personal computer penetration is still low in the country; internet and broadband access for middleclass, wherever available, are expensive and their quality usually tends to be poor. But we argue that it is logical that massive expansion of mobile phone sage would creatively address these local constraints as it has exponentially proliferated people using Internet and has started to minimize the digital divide. In India, the problem of low bancarization is being dealt with number of ways. For example, India takes part in a great deal of online exchanges, yet the quantity of online clients is miniscule contrasted with the number of inhabitants in the nation.[1060] A key investment in the Online Dispute Resolution (ODR) model was Modria—a ground-breaking start-up. Modria was founded by previous ODR owner at eBay. This was congruent with the forward-looking policy initiatives offered by the European Commission through the ODR Regulation, which has taken steps to encourage and reinforce the use of ODR platforms in which consumers are able to submit complaints via the internet. The Modria business model is based on the idea of assessing consumer disputes and, in collaboration with legal experts, incorporates the use of a platform to engage users to explore resolution mechanisms like arbitration, mediation or conciliation, but in many cases before the dispute presented in a passive form of litigation.

[1057] Sarah Rudolph Cole & Kristen M. Blankley, Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be, 38 U. Tol. L. Rev. 193, 193 (2006).
[1058] *The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).*
[1059] Maria Mercedes Albornoz & Nuria Gonzalez Martin, Feasibility Analysis of Online Dispute Resolution in Developing Countries, 44 U. Mia. Inter-Am. L. Rev. 39, 39–61 (2012).
[1060] Dr. A. Abdhul Rahim, Problems and Prospects of Online Share Trading Practices in India, 2 Int'l J. Mktg., Fin. Servs. & Mgmt. Res. 4 (2013).

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In the situation in India, despite the lengthy and expensive nature of this process, the cost implications of the substantive process often emerge as the main issue. In addition, due to a general feeling of disappointment in the viability of the court system for handling disputes, cost-effectiveness becomes a factor in resolving disputes. ODR directly tackles these issues, providing a means of while eliminating substantial costs associated with reserving space, travel expenses and accommodation expenses to be physically present. ODR is not only more accessible and efficient, but also quite simply much cheaper. Ignoring the potential usefulness of the alternatives available to you in the case of a dispute would simply result in situations where unfair aspect of cost has denied potential claimants meaningful access to justice.

Since, there is an increase participation in cross-border trade and foreign investment on India's part, India has emerged as an integral jurisdiction in the International Commercial Arbitration field. There has been a growing shift towards institutional arbitration where structured rules, professional case management and enforceability advantages exists in comparison with the traditional ad-hoc arbitration where there was a lack in institutional support which often led to delays and inefficiencies. India has signed various Bilateral Investment Treaties with different nations to not only protect the investor but also provide access to international arbitration mechanisms.

Online Dispute Resolution (ODR) takes away the requirement for the parties to be in the same place for the adjudicator to make findings based on the merits of the case, promoting impartiality. In addition, most of the engagement and exchange is asynchronous on a platform, which allows disputants to take time to think about their position and then write and submit a response. The asynchronous paradigm typically allows for greater engagement and less stress than one might encounter in a real-time dispute. ODR also mitigates some of the economic and other structural imbalances for parties, evening the playing field. It also creates a neutral space where procedural fairness is preserved, and an accurate and accessible record of the proceedings is maintained.

Just like the two sides of a coin, institutional arbitration provides for structured mechanism along with global credibility on one side, ODR provides for efficiency and accessibility on the other. Though, multiple challenges exist in order to ensure a streamlined process, the Indian Government has been making efforts consistently in order to ensure the standards of institutional arbitration and online dispute resolution mechanisms are at par with those provided by other nations and align with the international commercial arbitration standards.

Legal Framework of Institutional Arbitration and Online Dispute Resolution in India

The Arbitration and Conciliation Act, 1996 is based on the UNCITRAL model, which is an accepted model internationally and most developed jurisdictions have adopted this model. The Act explicitly recognizes the idea of an "arbitral institution" which is defined as an institution designated by the Supreme Court or a High Court under this Act. The Act gives the Supreme Court and High Courts the power to designate arbitral institutions, which means to assign institutions from time to time in their respective jurisdiction, only if the arbitral institution has been graded by the Arbitration Council as designated in Section 43-I. If there are no graded arbitral institutions in the jurisdiction, the Chief Justice of the respective High Court may devise a panel of arbitrators to do the functions of an arbitral institution.[1061] A significant ruling in this respect was handed down by a seven-judge bench of the Supreme Court in the 2005 Patel Engineering case[1062], where the Court ruled that the Chief Justice (or any judge appointed by them) could not delegate the power to appoint arbitrators to any institution. This ruling reinforced the non-

[1061] The Arbitration and Conciliation Act, 1996, No. 26, § 11(3A), Acts of Parliament, 1996 (India).
[1062] SBP & Co. v. Patel Eng'g Ltd., (2005) 8 SCC 618 (India).

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delegable nature of such judicial power. It is also important to recognize the growing trend among retired judges to seek arbitration as an opportunity for post-retirement work. Thus, appointments by Chief Justices or designate judges are often made to retired members of the judiciary.

To ensure that an online dispute resolution mechanism is valid, an online arbitration clause must meet the basic requirements set out by Section 7 of the Act, which stipulates that arbitration agreements must be in writing (which can be shown not only through a document signed, but also through exchanges of letters, telex, telegrams, or other means of telecommunication, if both parties have clear and unstinting agreement). It is reasonable to argue that an email exchange would fall under "other means of telecommunication", and, in function, cases in which emails are exchanged are analogous to telegrams being exchanged. The Information Technology Act, 2000[1063] ("**IT Act**") is intended to promote and mainstream e-commerce. It supports this perspective by adopting a legal definition for electronic records and digital signatures. The IT Act aims to provide a legal framework for electronic substitutes to traditional paper-based communication and information preservation. When read together with Section 65B of the Indian Evidence Act, 1872[1064], this acknowledges the evidentiary value of electronic records.

Under Section 4 of the IT Act, any statutory obligation for information to be in writing, printed, or typed is satisfied if such information is made available in an electronic format and capable for future reference. Section 5 also provides validation of the use of digital signatures by stating, any legal requirement for use of a handwritten signature is satisfied with the use of a recognized digital signature. Importantly, the Act recognizes the principle of party autonomy and imposes no limitations on the parties offering methods or laws that will govern their relationships and procedures, notwithstanding their mutual consent.

In addition, the use of electronic records--and of electronic signatures for governmental transactions--is clearly authorized by Sections 6, 7(e), and 8 of the IT Actthat address official communications, the retention of electronic records, and creating electronic gazettes, respectively. Also, Section 72 of the IT Act addresses the admissibility of telephonic and videoconferencing in legal proceedings. Courts have even established precedents that telephonic and/or videoconferencing modalities may serve as a valid alternative to the traditional formal hearing process--which can allow for a more effective and simpler arbitral process--it is still important to consider if the tribunal can deal uniformly with any party's request to conduct hearings this way.[1065]

In Grid Corporation of Orissa Ltd. v. AES Corporation, the Court held that "if effective consultations can happen through electronic communication and remote conferencing there is no need for the parties to consult each other in person—unless the law or the applicable contract between the parties specifically states otherwise." This decision illustrates the courts' acceptance of technology as a valid and effective means for satisfying procedural requirements. As a result, both the statutory scheme and the case law established by the Supreme Court of India recognize and encourage the use of technology for dispute resolution, thereby supporting online dispute resolution (ODR) as a valid and effective medium.

Challenges in Making Institutional Arbitration A Success in India

India has every fundamental component to establish itself as a global arbitration centre, however, certain fundamental issues continue to persist in spite of progressive changes incorporated into the Arbitration and

[1063] The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).
[1064] The Indian Evidence Act, 1872, No. 1, § 65B Acts of Parliament, 1872 (India)
[1065] Union of India v. Niko Resources Ltd., 2012 SCC OnLine Del 3328 (India).

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Conciliation Act, addressing these issues through appropriate amendments is necessary for India to be at par with the existing international arbitration centres of Singapore, Germany, Hong Kong, London and the U.S.A. This section highlights some of these key issues and suggestions for institutional and legislative improvement.[1066].

1. Limited ADR culture:

A significant portion of the Indian legal profession remains unaware of or unconvinced by the benefits of alternative dispute resolution (ADR) processes such as mediation, conciliation and negotiation. It was not until 2002 that court-annexed ADR processes were formally introduced through statutory mandate, but their implementation - particularly in subordinate courts - have mostly been perfunctory or received nothing more than 'lip-service.' A major obstacle hindering the wider use of ADR is the reluctance of practicing advocates, many of whom see ADR as a threat to their livelihood. This attitude limits how far and effectively a progressive legal system based on efficiency, access and justice can evolve.

2. Ad-hoc Arbitration versus Preference for Institutional Arbitration:

Institutional arbitration in India remains largely unconsumed when compared to ad-hoc arbitration. At present, more than 90% of arbitral proceedings are ad-hoc, which has an inherent number of objections including having no pre-established panel of experts, uncertainty about any qualifying body of law, no established rules of procedure, and very little, if any, institutional support. As a result of these systemic issues, Indian litigants will continue to favor tried institutions in the international contract arbitration space, where they can achieve better consistency, professionalism and procedural certainty.

3. Delays in enforcement of arbitral award:

Difficulties are encountered while enforcing the awards too especially in case of foreign arbitral awards. There is too much of interreference by the courts in the overall proceedings that may extend the entire process to an alarming six to eight years and hence parties run to other countries for dispute resolution.

4. Cost and Time Considerations:

Arbitration still faces a very important challenge in India with regards to cost and time. Although arbitration has been anticipated as a reasonably fast and cheap alternative to litigation, it has become both costly and time-consuming. Unreasonably high fees paid to arbitrators, high rates for renting arbitration hearing rooms, exorbitant administrative costs, and high fees for legal representation all make the process expensive and time-consuming. Subsequently, arbitration in India has not been able to address the growing volume of commercial disputes, which acts as a barrier to arbitration as a preferred option for dispute resolution.

5. Choice of the arbitrator:

The provision providing for appointment of an arbitrator under Section 11 of the 1996 Act is not being used properly. The practice of appointing retired judges is highly disapproved as it has the effect of bringing in courtroom culture in arbitration.

6. Foreign counsels working towards international arbitration in India:

Resistance from Indian fraternity against foreign lawyers practicing international arbitration in India is step backwards and may prove to be counterproductive to India's dream to become a preferred seat for arbitration

7. Unwarranted interference from the courts:

Judicial interventions with arbitral proceedings and awards in India are another major area of apprehension which needs to be eliminated. Indian courts have rendered a numerous

[1066] Dr. Neelam Tyagi: "CHALLENGES TO MAKING INSTITUTIONAL ARBITRATION A SUCCESS IN INDIA: A SKETCH TO PROMOTE ARBITRATION" soft copy on www.indianbarassociation.com.

decision that are often obviously inconsistent with each other and with the letter of the law.

8. Limited professionalism:

Arbitrators are under a duty to be fully conversant with all the rules guiding them. There is 'judicialization of arbitration' in a way that evidence is asked for; witnesses are examined, parties are represented by counsels practicing in courts who treat arbitration as a 'side business' and lack professionalism.

9. Implementation of its interim measures:

Provisions requiring arbitral tribunals to impart effective interim measures at par with the authority of a national court needs to be relooked. Effective mechanism for carrying out the interim measures should be put in place.

10. Need for Legislative Reform:

It is clear that there is a real need for specific legislative measures to resolve legal ambiguity affecting the arbitral process. Section 34 of the Arbitration and Conciliation Act, 1996 is a clear example of abuse in that it allows the losing party to delay or evade enforcement of the arbitral award all together, simply by filing a set-aside application, without depositing any part of the amount awarded. This misuse of process happens regularly, creating a barrier to the finality and enforceability of arbitral awards. Legislative change is needed to protect the provisions in a manner meant to uphold its original purposes of speed and facilitating dispute resolution.

Promotion of Arbitration.

In order to uplift India's arbitration system to global standards against its international peers, it is imperative to swiftly and decisively respond to a number of long-standing issues with the arbitration ecosystem, as follows:

- Reform Provisions:

i. The term "public policy," often relied upon in resisting enforcement of foreign arbitral awards, should be narrowly defined to limit interpretation and potential manipulation.

ii. Interim measures rendered by arbitral tribunal should be enforceable in an enduring and coercible manner to further the efficacy of interim measures and enforceability follows.

iii. The introduction of stricter timelines is warranted in respect of certain speaking processes regarding arbitrations such as invoking or obtaining orders of enforcement is presented to court, or a party is served with an arbitration notice, in any event, the accelerated timeline begins upon service of notice or any required notice to any party pursuant to arbitration, and subject to the timeline of notice delivery and/or service being undertaken at least 5 days prior, and the time limit would compel the disposal of arbitration within 60 days (and fines of a minimum value for non-compliance being established).

iv. the framework would purposefully limit or establish a statutory prohibition on judicial oversight of arbitral awards, particularly those rendered in foreign arbitrations, to promote party autonomy, finality and enforcement of decisions through arbitral awards and mediation while limiting or prohibiting interventions unless in the smallest of exceptions further articulated.

- Change in Mindset and Approach:

i. Legal practitioners and judges need to openly support and embrace the principle of ADR and engender a new culture around ADR which values being efficient, conciliatory, and resolving matters without recourse to protracted litigation.

ii. Appointing a neutral, competent, and competent technical arbitrator can help keep the arbitration on an objective, smooth, and obstruction-free procedural path.

iii. There needs to be a reframing of arbitration, where arbitrators, judges, and practitioners regard arbitration as a reputable, wanted, and effective means of resolving disputes and not simply as a back-up.

iv. Adjournments on trivial or unreasonable bases must be stopped to ensure the integrity and timely resolution of disputes in arbitration.

- Furthering and Promotion of ADR Mechanisms:

i. There should be a methodical expansion of arbitration into a range of important sectors--e.g., infrastructure, maritime, and cross-border commercial--where the use of ADR can be efficient and effective.

ii. There should be strong international collaborations and partnerships with established arbitral institutions in respective jurisdictions to make cross-border arbitration easier.

iii. Law schools in India should play a more proactive role in advancing ADR research by developing degree programs, encouraging empirical research, and practical experience through centers focused on ADR.

iv. The government should pave the way in articulating the depth of knowledge of the merits and disruption capabilities of ADR mechanisms, creating sustained awareness would contribute to building a strong culture of international arbitration amongst legal practitioners, the judicial landscape, and the legal ecosystem.

- Further Strategic Commitments:

i. Institutional arbitration needs to be mandatory in all disputes arising out of corporations to provide methodical, even-handed and procedural framework for resolving disputes.

ii. Expedited adjudication should become a priority wherever international arbitration is taking place, recognizing the growth of fast-track arbitration which produces time-limited incorporated and enforceable decisions.

iii. Institutions should actively work towards adopting an Online Dispute Resolution (ODR) framework that keeps pace with modern developments and the needs of technology-based companies and institutions.

iv. Institutional development and capacity-building should include guidelines for delivering enhanced training initiatives to develop very high-quality professionals with experience managing complex disputes.

v. Institutions should also take measures to provide supplementary support services that are customized for the needs of the institutions without compromising quality—or to provide dispute resolution that is transparent, in confidence and with assurance between all parties.

Conclusion.

International commercial arbitration has become an important tool for cross-border dispute resolution. However, despite its promise, arbitration in India has not developed substantially because of the structural and procedural hurdles described above. As a result, India continues not to be seen as a seat for arbitration, and the general perception is that international arbitration institutions bring more professionalism, efficiency, and neutrality with them.Establishing India as the world's favored venue for international commercial arbitration would both enhance India's legal stature as well as its economic development. Attaining this goal will require an integrated, proactive plan that includes regulatory changes along with an arbitrator-friendly setting/atmosphere/culture, which should be adopted by India's leadership.

To restore confidence in India's arbitration regime, the identified challenges must be actively addressed. A strong, institutionalized system would greatly improve India's credibility and help attract multinational corporations looking for predictable and fast ways to resolve disputes. While there are some challenges to the full implementation of Online Institutional Arbitration, these are not impossible to overcome. The rapid growth of online ADR providers in recent years shows that a digital platform is a much cheaper and quicker option than traditional litigation courts. A commitment on the part of governments, consumer organizations, and other stakeholders is

important for widespread acceptance of online dispute resolution systems. A competent institution administering Online ADR guarantees important elements of due process and impartiality, while still providing certainty and finality of arbitral awards. As mentioned several times in this piece, a key aspect of revitalizing arbitration in India is to institutionalize and incorporate online ADR practices—making India the leader in a modern, fast and internationally trusted arbitration system.

Despite this, the natural flexibility of Alternative Dispute Resolution (ADR) will allow us to readjust the traditional format to, what may be more complexly carrying out online disputes. The current speed and flexibility of ADR provide some potential solutions to the legal issues created by the rapid advances in technology, and the global expansion of the digital economy[1067]. For it to be a successful transition though, it is important that people can trust the evolving practice, and understand that Online Arbitration does retain the basic principles of standard arbitration. The only difference is the delivery of it—not the essence. Also, the fast-growing number of Online Resolution (ODR) service providers in the past couple of years is evidence alone that ODR is a much more effective way to resolve digital disputes than ADR or litigation.

[1067] E. Casey Lide, Note, ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation, (1996), 12 OHIO ST. J. ON DISP. RESOL. 193, 222.