

Online Dispute Resolution in Bangladesh

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Abstract: Online Dispute Resolution (ODR) allows individuals to resolve disputes according to their convenient time without travelling to the courtyards and enjoying some flexibilities in compliance of complex and time-consuming procedural issues that are mandatory in traditional court or alternative dispute resolution process. Therefore, ODR is seen as increasingly important and compatible mechanism of dispute resolution since it is inexpensive and can provide service anytime anywhere. Particularly, emergency arrangement of virtual court during the pandemic of COVID-19 strengthens the reasons for accommodating ODR in the legal system of Bangladesh. However, ODR systems, alongside the traditional dispute resolution process, have been developing in many parts of the world since the time before emergencies created by this pandemic. The reason is that ODR has the potential and sufficient evidence to concurrently run with the traditional justice system as well as modernising the latter. This paper, therefore, argues for accommodating the technology assisted dispute resolution process applicable for all kind of disputes within the existing legal framework of Bangladesh, but not replacing the traditional justice system as a whole. To this purpose, it tries to broadly analyse the feasibilities of setting ODR under the existing legal setup of Bangladesh along with the challenges that might be faced in implementing it.

Keywords: Access to justice, information technology in judicial system, ODR, traditional justice system, and virtual court in Bangladesh.

1. Introduction

In the current time, while gradually everything is becoming technology based and every aspect of our lives are rapidly moving towards online, it is incontrovertible that the traditional justice system, especially alternative dispute resolution (ADR) requires to be flourished with technological mechanisms. New technologies influence our lifestyle “not only by changing how we do things but by changing how we think about what we are doing, what needs to be done and what can be done.”¹ Technology has gradually changed the approach of law, i.e., the way to practice it, the way to do business, etc.; and finally, at the crossroad of these trends, technology has begun to change the way to resolve disputes.² Keeping pace with this change and changing need, online dispute resolution (ODR) has the potential to run concurrently with the traditional dispute settlement mechanisms. In fact,

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¹ Orna Rabinovich-Einy and Ethan Katsh, ‘Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment’ (2014) 1(1) International Journal of Online Dispute Resolution 1, 6.

² Thomas Schultz, *Information Technology and Arbitration: A Practitioner’s Guide* (Kluwer L.I. 2006) 6.

the potential of ODR to resolve disputes efficiently and to effectively reduce the backlog of cases eventually attracted the attention of lawmakers, courts and tribunals around the world.³ However, ODR is not the direct replacement of ADR, rather the updated version with technology assisted regulation to help people reach solution; consequently, it can be easily juxtaposed with ADR and run concurrently. Therefore, ODR itself is not a distinct idea, but more like a technology-based support system for mediators, conciliators, and arbitrators handling individual disputes,⁴ since ADR operates in multiple forms around the world.⁵ In addition, ODR can make court processes more efficient, expanding and modernising the methods of access to justice and reducing the necessity of extensive physical court infrastructure.⁶

Though most people are now well acquainted with ADR mechanisms, ODR system is yet to catch on thoroughly. Even then, it is no longer a fiction as there have many successful ODR providers in international level like the SmartSettle,⁷ Cybersettle,⁸ SquareTrade,⁹ etc. Besides, many international organisations are now well-equipped with ODR systems to resolve consumer claims. For instance, the World Intellectual Property Organization has handled over 10,000 cases so far,¹⁰ and the European Union (EU) is using ODR system to enforce consumer rights since 2016.¹¹ The EU justified its initiative to launch and facilitate the online resolution of standard consumer complaints in the opening recitals of 2001 recommendation, which describes that:

The continuing development of new forms of commercial practices involving consumers such as electronic commerce, and the expected increase in cross-border transactions, require that particular attention be paid to generating the confidence of consumers, in particular by ensuring easy access to practical, effective and inexpensive means of redress, including access by electronic means.¹²

³ Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 ML Journal 39, 41.

⁴ Orna Rabinovich-Einy and Ethan Katsh, 'Lessons from Online Dispute Resolution for Dispute Systems Design' in Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2012) 52.

⁵ Richard Michael Victorio, 'Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century' (2001) 1(2) Pepperdine Dispute Resolution Law Journal 279, 280.

⁶ Cashman and Ginnivan (n 3) 41.

⁷ For details, please see <<https://www.smartsettle.com>> accessed 02 July 2021.

⁸ For details, please see <<http://www.cybersettle.com>> accessed 02 July 2021.

⁹ For details, please see <<https://www.squaretrade.com>> accessed 02 July 2021.

¹⁰ Arno R. Lodder and John Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (CUP 2010) 75.

¹¹ Regulation (EU) No. 524/2013 on Online Dispute Resolution for Consumer Disputes 2013 (Adopted 21 May 2013, Entered into force 19 January 2016) O J L 165, 1.

¹² Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (notified under document number C (2001) 1016) Official Journal L 109, 56-61. Furthermore, Recital 6 clearly represents the high expectation and need

Thus, the existing ADR mechanisms of EU have been made technologically developed to keep pace with time. Though only commercial disputes in domestic and cross border levels are provided with ODR services by most of the existing ODR providers, in 21st century's technologically developed world it is quite expected to adopt ODR for all kind of disputes both under national and international legal norms. More significantly, the rapid moving towards the technological change is raising the need of setting ODR system in all spheres besides the mainstream dispute resolution processes. In addition, human rights and dignity, justice, equality, gender equality, and peacebuilding are ascertained as possible outcomes of ODR by "the ODR Forum"¹³ participated by the developed countries and the CIDA¹⁴ fellows in their evaluations of ODR system.¹⁵

Moreover, the movement towards technology has been furthered by the pandemic crisis for COVID-19. To respond the crisis, the Government of Bangladesh has recognised the need of virtual settlement process and enacted the laws to initiate online court proceedings via-video conference and other digital media.¹⁶ In so doing, courts needed to use information technology. The new law empowered the courts to use the technology for the virtual presence of the parties in trial, testimony, hearing, inquiry, argument, order and judgment.¹⁷ Government took the step when "the backlog of cases was on the rise and the litigants were being deprived of getting justice due to the ongoing shutdown over covid-19 pandemic."¹⁸ However, few concerns are still remaining because the uses of smartphones, softwares, and other new capabilities to be online and connected all the time for processing information may accelerate the chances of arising problems

concerning online dispute Resolution by stating that "new technology can contribute to the development of electronic dispute settlement systems, providing a mechanism to effectively settle disputes across different jurisdictions without the need for face-to-face contact, and therefore should be encouraged through principles ensuring consistent and reliable standards to give all users confidence."

¹³ The full form is International Forum on Online Dispute Resolution. It convened June 18–19, 2008 in Victoria, British Columbia. See, Doug Leigh and Frank Fowlie, 'Online Dispute Resolution (ODR) within Developing Nations: A Qualitative Evaluation of Transfer and Impact', (2014) 3 *Laws* 106 <https://www.researchgate.net/publication/294425972_Online_Dispute_Resolution_ODR...and_Impact> accessed 22 February 2021.

¹⁴ The full form is Canadian International Development Agency. It was established in 1968 with the aim of reducing poverty, promoting human rights, and supporting sustainable development..

¹⁵ Leigh and Fowlie (n 13) 108.

¹⁶ On 7 May 2020, the Government of Bangladesh issued the Use of Information Technology by Courts Ordinance 2020 (Ordinance No. I, 2020). Later the ordinance was repealed and replaced by the Use of Information Technology by Courts Act 2020 (Act No. XI, 2020).

¹⁷ Use of Information Technology by Courts Act 2020, ss 3-5.

¹⁸ 'Ordinance promulgated allowing IT use in court proceedings', UNB News (May 10, 2020) <<https://unb.com.bd/m/category/Bangladesh/ordinance-promulgated-allowing-it-use-in-court-proceedings/51355>> accessed 22 February 2021.

like hacking, forgery, and similar digital offences.¹⁹ Thereby, concernment to develop a system of safe and easy online resolution has been increased worldwide. Since ODR provides settlement for disputes off-line also, the process has become attractive and convenient worldwide.

2. Understanding ODR: Setting the Scene

ODR being a growing concept in most of the countries does not have a long history worldwide to make a clear understanding. Even then, ODR proponents believe that soon it will become the ordinary resolution process²⁰ “for addressing conflicts that arise between parties who are geographically close to one another.”²¹ Though the concept is now well established and running successfully in some developed countries (even in the late 1980s and early 1990s software platforms for administering dispute resolution cases were being sold),²² in under-developed and developing countries like Bangladesh it is yet to set an abstract idea of ODR. Whatever the notion of ODR is, the ultimate target is not anything new rather the same as were and are in traditional dispute resolution process that is to reach an agreement among the parties over any disputed issue. The only difference is that in ODR every stage of settlement process get completed and the agreement is reached through online, even it does not require any processing and exchange of paper-based information, except in some special reasonable grounds. Thus, ODR saves time and cut costs for both the courts and litigants. Basically, ODR adds the use of information and communications technology with traditional justice system and ADR to help parties and adjudicating authorities resolve disputes early and easily.²³ That is why a good understanding of dispute resolution as well as proper skill to use information and communications technology is must to use the technology appropriately in the same platform. In this respect, a report states that “rather than digitising litigation procedure and practices, successful ODR models re-engineer how dispute resolution processes can be designed to benefit users.”²⁴

¹⁹ E. Katsh and D. Rainey, ‘ODR and Government in a Mobile World’ in M. Poblet (ed.), *Mobile Technologies for Conflict Management: Online Dispute Resolution, Governance, Participation* (Springer 2011) 85.

²⁰ Robert J. Condlin, ‘Online Dispute Resolution: Stinky, Repugnant, or Drab?’ (2017) 18 *Cardozo J. of Conflict Resolution* 717, 732.

²¹ Orna Rabinovich-Einy and Ethan Katsh, ‘Access to Digital Justice: Fair and Efficient Processes for the Modern Age’, (2017) 18 *Cardozo J. of Conflict Resolution* 637, 650.

²² Colin Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (Jossey-Bass Publications 2002).

²³ Colin Rule, ‘Expanding Access to Justice through Online Dispute Resolution’, *The Digital Edge* (American Bar Association, 13 February 2018) <<https://legaltalknetwork.com/podcasts/digital-edge/2018/02/expanding-access-to-justice-through-online-dispute-resolution/>> accessed 02 July 2021.

²⁴ Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (Report, Civil Justice Council 2015) 4-5 <<https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>> accessed 04 July 2021.

As we are focusing not only on adapting technology in dispute settlement process but on the way people can get speedier and easier resolution through the support of technology, clear perception of ADR surely can help us to get to comprehend about ODR thoroughly.

ADR has been widely accepted as a more proficient system of settling disputes out of court and appreciated for reducing the time, cost, and number of suits in many countries.²⁵ Bangladesh has gained tremendous success in reducing the backlog of cases and increasing access to justice for indigent litigants by adopting ADR.²⁶ The concept of ADR was first introduced in this sub-continent by the Code of Criminal Procedure 1898 during the British rule. It prescribes ADR for petty criminal cases in the form of compounding offences.²⁷ Later in Pakistan period, ADR was familiarized in informal civil litigations, i.e., Muslim domestic cases through the Muslim Family Laws Ordinance 1961 in the form of arbitration.²⁸ The government of Bangladesh extended the application of ADR to the formal civil litigations in the form of compromise or reconciliation while it established Family Courts in 1985.²⁹ The success in quick settlement of domestic disputes through mediation in the Family Courts inspired the government/legislature to incorporate the ADR mechanism through amendments in most of the vital enactments, like the Code of Civil Procedure 1908,³⁰ *Artha Rin Adalat* Ain 2003,³¹ Bankruptcy Act 1997,³² and Income Tax Ordinance 1984.³³ Since ADR is regarded as a common method of obtaining appropriate and early resolution, it has been set as mandatory before the final trial of cases. Thus, the preference of ADR for resolving the cases than traditional dispute settlement of courts leads us to consider ODR as the most efficient mechanism in line with the development of technologies. “ADR has moved dispute resolution away from litigation and the courts”³⁴ on the one hand; on the other, online dispute resolution extends this trend even further.³⁵

²⁵ Emmy Latifah, Anis H. Bajrektarevic and Moch Najib Imanullah, ‘The Shifting of Alternative Dispute Resolution: from Traditional Form to the Online Dispute Resolution’ (2019) 6(1) *Brawijaya L.J.* 27, 28.

²⁶ Shahiduzzaman Khan, ‘ADR helps people get justice speedily’ *The Financial Express* (January 18, 2020) <<https://www.thefinancialexpress.com.bd...protect%20its%20reputation>> accessed 22 February 2022.

²⁷ Code of Criminal Procedure, 1898 (Act NO. V OF 1898), s 345.

²⁸ Muslim Family Laws Ordinance 1961 (Ordinance No. VIII OF 1961), ss 6-9.

²⁹ Family Courts Ordinance 1985 (Ordinance No. XVIII OF 1985), ss 10, 13, and 14.

³⁰ Code of Civil Procedure 1908 (Act No. V of 1908), ss 89A-89E.

³¹ *Artha Rin Adalat* Ain 2003 (Act No. VIII of 2003), ss 22-25.

³² Bankruptcy Act 1997 (Act No. X of 1997), ss 43-44.

³³ Income-tax Ordinance, 1984 (Ordinance NO. XXXVI OF 1984), ss 152F-152S.

³⁴ Clyde W. Holsapple and Andrew B. Whinston, *Decision Support Systems: A Knowledge Based Approach* (West Publications Company 1996) 212.

³⁵ Eugene Clark and Arthur Hoyle, ‘Online Dispute Resolution: Present Realities and Future Prospects’ (17 BILETA Conference, April 5th - 6th, 2002, Free University, Amsterdam) 24 <https://www.academia.edu/1050428/_On_line_Dispute_Resolution...Prospects_> accessed 11 July 2021.

The synonymous term of ODR is “electronic-ADR” (eADR), “online-ADR” (oADR), and “Internet Dispute Resolution” (iDR).³⁶ Julia Hörnle stated ODR as “the dispute resolution process carried out by combining the information processing powers of computers with the networked communication facilities of the internet.”³⁷ These processes use web-based programs and computer mediated communications (CMC) to resolve disputes.³⁸ While “ADR took the resolution of disputes outside of the courtroom”, the Internet/ODR has brought the same directly to the parties’ handsets, personal laptop, tablets, ipad or other like devices having internet access.³⁹ In absence of a uniform definition, “ODR is seen as private dispute resolution based on the consent of the parties in the same manner as ADR models work.”⁴⁰ It also often is the case that ODR solves disputes from cyberspace as well as disputes outside of it.⁴¹ Using information and communication technology, litigants have an access in an electronic environment to resolve the disputes.⁴² Use of the modern technology enables the uses of the Internet in comparatively faster implementation of existing ADR models.⁴³ Therefore, ODR can enable parties to settle their disputes early, “freeing up court and judicial resources to deal with complex and serious matters.”⁴⁴ It is such a process where there is no requirement for the parties to meet directly in a courtroom like traditional methods of dispute resolution. In this case, the parties attend the settlement process through virtual presence- sitting in front of personal computers, communicate/submit the pleadings (claim/defence) by electronic means, and try to resolve their dispute by online negotiation and making an agreement once the negotiation is successful; otherwise (if the parties do not prefer negotiation, mediation or conciliation), they can submit their dispute to an online arbitral tribunal or a cyber-court.⁴⁵ Hence, ODR provides a broad platform for dispute settlement encompassing many forms of ADR and incorporating “the use of the internet, websites, email communications, streaming media and other information

³⁶ Karolina Mania, ‘Online Dispute Resolution: The Future of Justice’ (2015) 1 International Comparative Jurisprudence 76, 78.

³⁷ Julia Hörnle, *Cross-Border Internet Dispute Resolution* (CUP 2009) 75.

³⁸ Orna Rabinovich-Einy and Ethan Katsh, ‘Technology and the Future of Dispute Systems Design’ (2012) 17 Harvard Negotiation Law Review 151, 164-168.

³⁹ Martin C. Karamon, ‘ADR on the Internet’ (1996) 11 OHIO ST. Journal on Dispute Resolution 537, 548.

⁴⁰ Latifah, Bajrektarevic and Imanullah (n 25) 30.

⁴¹ Enas Qutieshat, ‘Online Dispute Resolution’ (2017) 18(2) British Jou. of Humanities and Social Sciences 10.

⁴² Mirèze Philippe, ‘ODR Redress System for Consumer Disputes Clarifications, UNCITRAL Works & EU Regulation on ODR’ (2014) 1(1) International Journal of Online Dispute Resolution 57.

⁴³ Susan Nauss Exon, ‘The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution’ (2010) 12(19) Cardozo J. of Conflict Resolution 19, 20.

⁴⁴ Cashman and Ginnivan (n 3) 41.

⁴⁵ Thomas Schultz and others, *Online Dispute Resolution: The State of the Art and the Issues* (University of Geneva 2001) 13.

technology as part of the dispute resolution process."⁴⁶ ADR works through different forms like negotiation, mediation, conciliation, arbitration etc. face-to-face while ODR runs through the same forms but online, where the basic difference between these two systems lies.

2.1. Recognised Forms of ODR

In online negotiation, parties try to come at a settlement through conversation via online server without the help of any neutral third party.⁴⁷ It is the most common way to get a resolution even in all the traditional resolution processes. But, here the parties do not meet directly rather they communicate online and then negotiate over the conflicting issue. Once an online request is made by the complainant, the automated negotiation provider contacts the other party to reach an agreement following due procedures.⁴⁸ ODR institutions provide only a secure site including all required facilities. Though there is no binding effect of this outcome, at least the disputed parties agree to talk each other and reach a solution that creates a peaceful situation to live alongside. In negotiation under ADR, parties sometimes feel uninterested to meet directly as there is no third party but in ODR they can easily meet online without any hesitation. Here they only need to get access to the service provider following the process and negotiate each other. Though some authors claim that "parties to e-mail negotiation might be less motivated than face-to-face negotiators,"⁴⁹ other online communication forms work appropriately. Websites named Cybersettle, SettlementOnline,⁵⁰ and clickNsettle⁵¹ offer this type of service. They act as a neutral arena to exchange settlement offers.

As opposed to face-to-face mediation, in which "an impartial third party called the mediator facilitates the negotiation process between two or more people,"⁵² e-mediation takes place in the virtual presence of the mediator. In online mediation, a third neutral person cooperates the conflicting parties in negotiating their dispute using electronic communication and brings them in a common virtual place to make the way easier for resolution. Like negotiation, parties have the same decision-making authority in mediation but here they get help from a neutral one

⁴⁶ Anusha Reddy, 'Online Dispute Resolution: A New Approach for E-Commerce Disputes' (2017) 13(4) South East Asia Journal of Contemporary Business, Economics and Law 11, 13.

⁴⁷ Julio César Betancourt and Elina Zlatanska, 'Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?' (2013) 79(3) International Journal of Arbitration, Mediation and Dispute Management 256, 259. Negotiation, in essence, can be defined as any type of communication between two or more people with the aim of reaching an agreement.

⁴⁸ Hörnle (n 37) 79.

⁴⁹ Noam Ebner, 'Negotiating Via Email' in M. Benoliel (ed) *Negotiation Excellence: Successful Deal Making* (World Scientific Publishing 2011) 397.

⁵⁰ For details, please see <<https://settlementonline.ca>> accessed 02 July 2021.

⁵¹ For details, please see <<https://www.clicknsettle.com>> accessed 02 July 2021.

⁵² Gabrielle Kaufmann-Köhler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004) 22.

to reach a solution. Though this third party has no power to make or impose any decision, he can assist parties to communicate and thereby help them move towards a mutual agreement. Like mediation under traditional resolution process, parties mutually can choose a person to mediate through online. Here the mediator's main role is to introduce the process followed in online mediation to the disputants, and to set up some basic rules to conduct the discussion between parties.⁵³ Then the following procedure are almost same as like other conflict resolution forms, such as both the parties are given opportunity to state their conflicting issues, to question each other, and finally to reach a settlement. By this time, the mediator just helps parties to express their opinion online, to inform them each other's statements, and to get a reciprocal conciliation. The most mentionable convenience of online mediation is that here "parties and mediators can engage in discussion without the immediate time pressure and other dynamics associated with synchronous, face-to-face conversations."⁵⁴ Goodman has summed up the whole process in the way that:

Once the parties' data is entered into the website, ... software uses it to develop settlement packages for the parties to consider. The facilitator continues to work with the parties to evaluate settlement packages and to refine preferences. If the parties choose the same settlement package or "solution," the software attempts to generate improvements in order to maximize the benefits to both parties. Once a party wishes to terminate the negotiation, a final written agreement is drafted with the current solution and signed by all of the parties.⁵⁵

Today several mediation firms are providing this cyber-mediation service using sophisticated software and neutral third party. Some well-established websites facilitating the resolution of disputes through online mediation are Immediation,⁵⁶ SquareTrade, OneAccord,⁵⁷ and Webmediation.⁵⁸ They use the technologies of e-mail, listservs, chat rooms, and instant messaging along with incorporating some traditional communication methods into the negotiation process.⁵⁹

In the same vein, online arbitration is currently at its infancy because of its practical expediency. Though Colin Rule described online arbitration as private judging, it almost replicates the offline traditional way of analysing and decision-making process through using technology-based server. Therefore, E-arbitration may be

⁵³ Rule (n 22).

⁵⁴ Noam Ebner, 'E-Mediation' in M.S. Abdel Wahab, E. Katsh and D. Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2012) 373.

⁵⁵ Joseph W. Goodman, 'The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites' (2003) 4 *Duke Law and Technology Review* 1, 4.

⁵⁶ For details, please see <<https://www.immediation.com>> accessed 02 July 2021.

⁵⁷ For details, please see <<https://www.oneaccord.co>> accessed 02 July 2021.

⁵⁸ For details, please see <<https://www.webmediation.fr>> accessed 02 July 2021.

⁵⁹ Goodman (n 55) 4-5.

defined as “an electronic version of offline arbitration”.⁶⁰ In comparison with traditional arbitration, online arbitration proceedings are conducted entirely by email or other means for electronic communication.⁶¹ Unlike all other ODR methods, the arbitrator has a decision-making authority and can make it binding on the parties. Schwarzenbacher rightly agreed that “online arbitration could provide the parties with a binding solution which could be enforced in the offline world.”⁶² However, practically it can be non-binding, self-enforceable, or legally binding.⁶³ Therefore, e-arbitration has the ability to transcend most of the areas plagued by conventional arbitration, such as jurisdiction, flexibility, cost, and time through its use of technology all through proceedings.⁶⁴ The major components of eArbitration Software are eFiling, ePayment, eAllocation, eNotices, eBooking, eHearing/Virtual Hearing, eProceedings, eSignatures/Digital Signatures, eCertified Copy, and Personal Dashboards.⁶⁵

Another mode of ODR mechanism is online summary jury trials or mock trials, which is the counterpart of summary jury trials. Summary jury trials “provide parties with an insight into the way a trial would view the case without the expenditure of time and money required for a full trial.”⁶⁶ The system was much relied on by the American Judiciary because a demand for trials beyond the ability of the courts to try would result in collapse of the whole judicial system.⁶⁷ Since “the jury’s verdict is purely advisory, unless the parties agree to be bound by the verdict”⁶⁸ and “there is no single method as to how summary jury trials are conducted,”⁶⁹ online summary jury trials have evolved an efficient form of ODR. In online jury trials, a jury of peers makes a non-binding determination of the issues via a website. This mechanism offers two types of online presentations: live

⁶⁰ Chinthaka Liyanage, ‘Online Arbitration Compares to Offline Arbitration and the Reception of Online Consumer Arbitration: An Overview of the Literature’ (2010) 22 Sri Lanka Journal of International Law 173, 175.

⁶¹ C. G. Coteanu, *Cyber Consumer Law: State of the Art and Perspectives* (Humanitas 2005) 92; Daniel Velizarov Dimov, *Crowdsourced Online Dispute Resolution* (eLAW - Leiden University Center for Law and Digital Technologies 2017) 37.

⁶² Paul Schwarzenbacher, ‘Online Arbitration: A European and US Perspective’ (2018) 10 Bocconi Legal Papers 387, 412.

⁶³ Dimov (n 61).

⁶⁴ Karen Stewart and Joseph Matthews, ‘Online Arbitration of Cross-border, Business to Consumer Disputes’ (2002) 56(4) University of Miami Law Review 1111; see also Ijeoma Ononogbu, ‘The emergence of e-mediation and e-arbitration’ (*Jus Mundi*, Jun 30, 2020) <<https://blog.jusmundi.com/the-emergence-of-e...-and-e-arbitration/>> accessed 11 July 2021.

⁶⁵ Indian Dispute Resolution Centre, ‘E-Arbitration’ <<https://theidrc.com/content/e-arbitration>> accessed 18 September 2021.

⁶⁶ Thomas D. Lambros and Thomas H. Shunk, ‘The Summary Jury Trial’ (1980) 29(1) Cleveland State Law Review 1.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ Evan R. Murphy and others, ‘Understanding the Summary Jury Trial: Perspectives from the Judiciary’ (2021) University of Illinois Law Review 113, 115.

online mock trials or self-paced asynchronous mock trials. In latter case, the parties upload their respective pleadings and evidence onto the site, and the 'jurors' can ask questions and render an online verdict, recommending how the dispute should be solved.⁷⁰

2.2. Standards and Procedures Followed in ODR

The core elements of ODR do not vary anywhere. All ODR mechanisms must have information technology service and expertise in appropriately using it. But certainly, there is no single set of systems and standards wholly applicable/mandatory for all ODR; rather it generally varies according to different phenomenon and environment like ODR for commercial purposes, ODR for general civil suits, etc. The existing ODR procedures followed by different countries are "based either on a *sui generis* form of dispute resolution that focuses on the needs of Internet users, or on the dispute resolution forms already developed by the ADR movement transposing offline experiences."⁷¹ Since ODR systems are expedited by different technological tools,⁷² based on the forms of modern communication, ODR is divided into two types.⁷³ The first type is "ODR with a synchronous communication approach, in which the disputing parties can communicate with each other in real time using possible media such as skype, teleconference, and other media."⁷⁴ And the second type is "ODR with an unsynchronized communication approach, where party communication is not carried out at the same time."⁷⁵ The means that can be used to facilitate information exchange between the parties to the dispute include e-mail, SMS messaging, web-based forms, and special dispute environments created for the very purpose of ODR.⁷⁶ Herein, understanding the different online communication options is essential to be able to design appropriate ODR systems. Moreover, whether ODR systems can succeed basically depends on to what extent the algorithms used and programmed to run the systems are reasonable, caring, and fair.⁷⁷

Lodder and Zeleznikow exposed that the ODR mechanism must have three steps process to ensure the most effective ODR environment, in which online disputes are best resolved.⁷⁸ First, the negotiation support tool informs the parties about the

⁷⁰ Hörnle (n 37) 82.

⁷¹ Schultz and others (n 45) 1.

⁷² Vivi Tan, 'Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice' (2019) 24 Deakin Law Review 106.

⁷³ Lodder and Zeleznikow (n 10) 73.

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Rule (n 22) 245-264.

⁷⁷ Condlin (n 20) 734.

⁷⁸ Arno R. Lodder and John Zeleznikow, 'Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model' (2005) 10 Harvard Negotiation Law Review 287, 301.

probable outcome of the dispute in case the negotiation process fails. As a result, parties can easily compare between the results of successful negotiation and failed one. If they are satisfied that they will be better off if the negotiation process is successful, they feel encouraged to come with a consensual conclusion of the negotiation. Second, the tool uses dialogue techniques to mitigate existing conflicts between them. Third, for the issues, which still remain unresolved even after going through step two, the tool employs compensation/trade-off strategies. Finally, if the result come from step three is not accepted by the parties, they are allowed by the negotiation tool to return to step two. Accordingly, the whole process is repeated continuously until either the dispute is resolved or the parties quit for deadlock occurs.

Like Lodder and Zeleznikow, Briggs, LJ in his final report submitted to the Lord Chief Justice explained three stages of ODR that are expected to be implemented step by step.⁷⁹ In stage one, LJ Briggs suggested online evaluation process, which is different from the first one of Lodder and Zeleznikow. Online evaluation process is described as an automated one from the court. It will run without any third party assistance in which the litigants will be supported in finding their claims or defences online and uploading supporting evidence. Stage two is online facilitation that is quite close to the step two of Lodder and Zeleznikow. Online facilitation process will consist of conciliation and case management conducted by case officers, who will help the parties to resolve their dispute avoiding the cost of expensive judicial determination. At this stage, the case officers will be empowered to manage the case for resolution, evaluate the claim, and find the most appropriate means of conciliation. Finally, stage three- online judging will take place if the matter cannot be settled at stage two. In this stage, online judges will determine the case either based on the evidences and documents by telephone or by video conference. LJ Briggs thinks the online judges should enjoy the discretionary powers to transfer cases to the conventional courts if it seems to be proper on some reasonable grounds. In addition to these stages, LJ Briggs also recommended to have a stage 0, a stage 0.5, and bypasses. Respectively under these stages, there will have guidance and free advice, chances to ascertain whether there really is a dispute, and finally chances for parties not to have to go through the next stages.

These are just two examples of ODR procedures and stages, which countries could follow to introduce ODR mechanisms if they think these compatible to their system as well. And there are some other ODR procedures and steps followed by different ODR providing authority, but the basic rules and requirements of conducting ODR are almost same in all cases. In fact, the whole ODR mechanisms

⁷⁹ Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (Judiciary of England and Wales 2016). <<https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>> accessed 02 July 2021.

need to be set according to the convenience of each country's legal and other systems.

3. Prospects of ODR in Existing Legal Setup of Bangladesh

Possibilities are endless as technologies progress.⁸⁰ For the time being, people tend to get settlement of disputes within a short time while the court-based resolution processes are time consuming and troublesome as well. Though most of the educated people are inclined to face any dispute directly before court, local communities (who are the main convenient seeker of traditional dispute resolution out of court) are unable or in some cases reluctant to get disputes resolved before court for many obvious reasons. Therefore, if ODR could be established through a thorough planning and with expertness, it would get support from the stakeholders and run smoothly around the country. Since it is the demand of mass people to settle any dispute speedily out of court, it will be easier for the government to set the system of ODR throughout the country for all kind of disputes. In reality, "Courts in various parts of the world are already in different phases of introducing ODR schemes."⁸¹ Though in terms of bringing the efficiency and effectiveness in the justice system ODR is especially suitable for the low-value disputes, it can make dispute resolution more accessible for the litigants even in the community with high-volume disputes.⁸² Even if the ODR mechanism are primarily set with the target to resolve the low value disputes, nearly half of the pending cases can be brought under the system. In 2019, Law Minister placed a statistics in the parliament, according to which "more than 35.82 lakh cases are now pending with the higher and lower courts across the country."⁸³ Among them, the number of cases pending at lower courts is above 30 lakhs.⁸⁴ Access to justice, which is an essential element of the rule of law as well as an inalienable human right enshrined both in national and international legal instruments, is the main reason behind this concernment.⁸⁵ Moreover, access to courts or tribunals is a key goal of the civil justice system. Therefore, failure to ensure meaningful access to justice results in great social or financial cost for disputes may go unresolved otherwise.⁸⁶

⁸⁰ Amy J. Schmitz, 'There's An "App" For That: Developing Online Dispute Resolution to Empower Economic Development', (2018) 32 Notre Dame Journal of Law, Ethics & Public Policy 1, 32.

⁸¹ Rabinovich-Einy and Katsh (n 21) 654.

⁸² Cashman and Ginnivan (n 3) 42.

⁸³ 'More than 35.82 lakh cases now pending: Law minister' *The Daily Star* (June 18, 2019) <<https://www.thedailystar.net/country/news/more-3582-lakh-cases-now-pending-law-minister-bangladesh-1758820>> accessed 22 February 2021.

⁸⁴ *ibid.*

⁸⁵ Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, Attorney General's Department 2009) 2. See also Cashman and Ginnivan (n 3) 50-51.

⁸⁶ *ibid.*

Moreover, almost everyone now have a smartphone in their hands as well as easy entrance to internet, which will facilitate the way to access ODR server if only once they get understand the system. In fact, smart phones have launched new avenues to the Internet and ODR in developing countries.⁸⁷ The Global System for Mobile Communications Association (GSMA) in its latest report shows that in 2020 41% mobile phone users in Bangladesh had smartphones, and the GSMA also predicts that the smartphone user rate will reach 62% here by 2025.⁸⁸ Therefore, Larson rightly demonstrated that children and younger are now immersed in technology and this number is surprisingly increasing day by day.⁸⁹ Though Bangladesh till now is regarded as least developed country, present generation here is much accustomed to using computer and internet widely. They are learning to communicate online from their early age and will continue to rely on technology in almost all sphere of life. The whole situation proves that in near future this generation will demand and easily adapt with dispute resolution processes designed technologically both for online and offline controversies. Notwithstanding that some ADR theorists and practitioners assumed that the absence of direct meeting in ODR would obstruct the process, Lodder and Zeleznikow assert that “ODR’s lack of in-person interaction can actually be an advantage for disputes especially in which the emotional involvement of the parties is so high” that they prefer not to see each other.⁹⁰ Hence, the policy makers should think about having and developing the system at this instant.

Information technology (IT), certainly the essential ingredient of ODR by its nature, is referred to as a fourth party by many ODR experts where the disputed parties are first and second party, the independent third party is mediator or arbitrator or conciliator, and finally the fifth party is the provider of dispute resolution services. Accommodating IT within the judiciary, many countries are clearing the huge backlog of cases. For instance, Singapore took only ten years to turn their old-fashioned, slow-working judicial organization with enormous backlogs into a smooth-functioning, modern judiciary with hardly any backlog.⁹¹ If they can use IT in such a vast area of judiciary, introducing it in traditional dispute resolution process in Bangladesh would not be so difficult, as it is comparatively less incommodious than judiciary. Moreover, the government is promising enough towards the technological improvement. The promise was evidently reflected in the urgent measures taken during the COVID-19. In its

⁸⁷ Fl’Avia De Almeida Montingelli Zanferdini and Rafael Tomaz De Oliveira, ‘Online Dispute Resolution In Brazil: Are We Ready For This Cultural Turn?’ (2015) 24(1) *Revista Paradigma* 68.

⁸⁸ Mohsin Bhuiyan, ‘62% Bangladeshi users to have smartphones by 2025’ *The Business Standard* (28 August 2021) <<https://www.tbsnews.net/tech/62-bangladeshi-users-have-smartphones-2025-report-294121>> accessed 22 February 2022.

⁸⁹ David Allen Larson, ‘Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR’ (2006) 21(3) *Ohio State Journal on Dispute Resolution* 629, 636-639.

⁹⁰ Lodder and Zeleznikow (n 78) 302.

⁹¹ Lodder and Zeleznikow (n 10) 72.

prompt response to the pandemic by the Government of Bangladesh, an ordinance introducing virtual courts was issued by the President on 9 May 2020. Just three days later, on 12 May 2020 Bangladesh started its journey of conducting virtual courts. Within first 55 days of the journey of virtual courts, “a total of 73,075 accused were released on bail and a total of 143,961 cases were disposed of through virtual hearing.”⁹² Another study of UNICEF shows that “more than 500 children were granted bail through the virtual courts, which were established with UNICEF support by the Bangladesh Supreme Court in May.”⁹³ Though no comprehensive study on total number of cases disposed through virtual courts is yet to be published, the statistics available now prove that the judiciary of Bangladesh has done an outstanding achievement. Most importantly, the fact that proves the readiness of the judiciary of Bangladesh to welcome ODR is that “a total of 945 judges, court staff, officials from the Attorney General’s office, lawyers were trained on conducting virtual courts.”⁹⁴

Further, analyzing the ADR success of Bangladesh shows that local people are more or less satisfied with the legal services provided by traditional dispute resolution process. This scenario indicates their inclination to appreciate any updated system of getting settlement in the way they are used to under traditional process, since their one of the main points of satisfaction is easy access to dispute settlement system. Moreover, the convenience of ADR is preventing people from filing unnecessary suits and at the same time this system is lessening the burden of case backlog before courts. Therefore, if the process of getting settlement out of court be made easier through ODR, it would attract people to come before technology based legal aid, which will ultimately help to minimize case log and benefit all the stakeholders.

In recent times, settlement outside the court has been encouraged under most of the procedural laws of Bangladesh, which asserts that the government’s concern about providing the opportunity of reaching agreement without the parties being simultaneously present before the forum. Currently ADR mechanism is working in Bangladesh both under supervision of the Court and without supervision of the court. ADR without supervision of the court is basically run under the Muslim Family Laws Ordinance 1961, the Conciliation of Disputes (Municipal Areas) Board Act 2004 and the Village Courts Act 2006. For the family issues relating to

⁹² ‘73,075 get bail through virtual courts’ *The Business Standard* (07 July 2021) <<https://www.tbsnews.net/bangladesh...bail-through-virtual-courts-271579>> accessed 22 February 2022.

⁹³ Iftikhar Ahmed Chowdhury, ‘In Bangladesh, virtual courts ease COVID-19 risk: Virtual courts are helping expedite the release of young people from overcrowded detention centres’ (UNICEF, 29 June 2020) <<https://www.unicef.org/coronavirus/bangladesh-virtual-courts-ease-covid-19-risk>> accessed 04 July 2022.

⁹⁴ South-South Galaxy, ‘Virtual Court: New dimension in the Judiciary’ <<https://my.southsouth-galaxy.org/en/solutions/detail/virtual-court-new-dimension-in-the-judiciary>> accessed 22 February 2022.

divorce, polygamy and maintenance, Muslims are bound to seek the decision from arbitration council formed under the Muslim Family Laws Ordinance 1961.⁹⁵ Whereas, Conciliation Board is more often used by peoples in municipal areas who want to settle petty criminal cases and civil disputes outside the court to save money and reduce harassment. Similarly, village courts do the same work at the union level. In these cases, the Village Courts or the Conciliation Board, as the case maybe, can try those cases, where the amount of compensation awarded or the amount of money ordered to is not more than 75 (seventy five) thousands taka.⁹⁶ Since ODR system is claimed to be especially suitable for the low-value disputes, these above mentioned ADR mechanisms can be easily replaced by ODR.

Unlike the ADRs without supervision of the court, the ADRs under supervision of the courts range from law value disputes to high value disputes, from pure domestic issues to money suits, tax cases, bankruptcy cases, etc. Furthermore, unlike the ADR under the Muslim Family Laws Ordinance 1961, the ADR introduced under the Family Courts Ordinance 1985 deals with domestic issues irrespective of the religion of the parties. Its jurisdiction is limited to guardianship, maintenance, dissolution of marriage, dower and restitution of conjugal rights. Whereas, the *Artha Rin Adalat Ain* 2001, the Bankruptcy Act 1997, and the Income Tax Ordinance 1984 Provide ADR mechanism for high value disputes, but still they are successfully working. Most importantly, insertion of ADR mechanism in the Code of Civil Procedure 1908 has ensured the opportunity of ADR for all types of civil cases, irrespective of values of the disputes,⁹⁷ issues to be resolved,⁹⁸ and stage of the case.⁹⁹ Above all, in popularising the concept of ADR among various stakeholders including the government, banks and financial institutions, corporate houses, lawyers and even law students, and making substantial progress in the journey of ADR of Bangladesh, the Government of Bangladesh is being

⁹⁵ Muslim Family Laws Ordinance 1961 (VIII OF 1961), ss 6-9.

⁹⁶ Village Courts Act 2006 (Act No. IX of 2006), s 7; Conciliation of Disputes (Municipal Areas) Board Act 2004 (Act No. XII of 2004), s 9.

⁹⁷ Under section 19 of the Civil Courts Act, 1887 (Act No. XII of 1887), the jurisdiction of a Senior Assistant Judge and an Assistant Judge shall extend to all suits of which the value does not exceed 25 (twenty five) lac Taka and 15 (fifteen) lac Taka respectively. Moreover, Joint District Judge, Senior Assistant Judge, and Assistant Judge may be conferred with the jurisdiction of a Judge of a Court of Small Causes under the Small Cause Courts Act 1887 (Act No. IX of 1887), for the trial of suits, cognizable by such Courts, up to such value not exceeding twenty thousand Taka in the case of a Joint District Judge or ten thousand Taka in the case of a Senior Assistant Judge or six thousand Taka in the case of an Assistant Judge (section 25 of the Civil Courts Act 1887). On the other, the jurisdiction of a District Judge or Joint District Judge extends to all original suits for the time being cognizable by Civil Courts (section 18 of the Civil Courts Act 1887).

⁹⁸ According to section 9 of the Code of Civil Procedure 1908, the Civil Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

⁹⁹ Through insertion of section 89C in the Code of Civil Procedure 1908, the Appellate Court is also now entitled to mediate in an appeal or it can refer the appeal for mediation to settle the dispute or disputes in that appeal.

continuously backed by Bangladesh International Arbitration Centre.¹⁰⁰ To summarise, the government is now working on incorporating ADR in other different existing laws in order to making the dispute resolution system easier and less time-consuming.¹⁰¹ In this regard, building strong and effective technological infrastructure remains a priority within the near future plans of the government. Hence, all the efforts taken by the government and other recognized organizations who are working on making ADR services available for general people together with the ADR success rate shows positivity adapting ODR mechanisms under the present legal norms of Bangladesh.

4. Challenges to Accommodate ODR

Despite the conspicuous advantages and prospects of ODR, the processes followed here show some shortcomings, which need to be handled technically and carefully. Being fully online-based service, ODR requires a well-developed technological support that may seem intricate to setup accurately. For instance, Schmitz significantly mentioned that in developing countries, “only 41.1% of households have Internet access and only eighty-three of the ninety-six developing countries had affordable entry-level broadband services, defined as less than five percent of the average monthly income.”¹⁰² Similar problem was witnessed in Bangladesh, when it initiated virtual classes for the higher secondary and tertiary level education during the pandemic. On the one hand, it was great hardship for a largest portion of students or their families to buy internet package from the internet service providers for excessive price. On the other, internet service is very poor in the rural areas, where most of the indigent litigants come from. Though Bangladesh is now digitized in many aspects, this strong and affordable IT requirement would need special consideration to lead all people benefited from ODR services. Practically, in spite of having the potential of digital technology to enhance access to justice, “a digital justice gap exists,”¹⁰³ which varies according to the ODR environment. Thereby, despite the strong reasons to believe that justice seekers will accept ODR in many spheres and the use of ODR will expand, it is not clear whether different users, particularly ODR interested litigants can evenly access to the ODR mechanisms and whether ODR mechanisms will operate in a fair and efficient manner.¹⁰⁴

As in every dispute resolution form, ODR system requires cost from the parties to continue due processes that starts with filing the application and ends with the final decision. Moreover in ODR, occasionally it becomes dire need to make video conference or teleconference to replace the face-to-face communication. For as

¹⁰⁰ Khan (n 26).

¹⁰¹ *ibid.*

¹⁰² Schmitz (n 80) 7.

¹⁰³ Rabinovich-Einy and Katsh (n 21) 655.

¹⁰⁴ *ibid.*, 656.

much, “email, texting, and online chat are not famous categories of in-depth conversation, and the reasons for this may outweigh the advantages.”¹⁰⁵ Thus, ODR processes ask for some extra charge from the parties to arrange video or teleconference that does not need in traditional system, though Wang explained ODR as less expensive than other methods of dispute resolution.¹⁰⁶ Even emphasizing on this extra charge, “many ODR architects and providers have focused largely on cost and efficiency without sufficient attention to transparency and fairness.”¹⁰⁷ This additional charge, therefore, may make the parties feel uninterested to go through the ODR process. Though Pablo Cortés mentioned about setting competitive fees by the various dispute resolution providers in order to meet this extra costs,¹⁰⁸ it is best suited only in commercial disputes and would not much effectual in other cases. Because commercial ODR providers offer competitive fees mainly to attract the consumers, but there is no such interest in case of other general disputes.

To settle any dispute it is needed to ensure trust and credibility from the side of service providers, because building rapport and trust among the litigants is essential to resolve disputes. Otherwise, the stakeholders for whom the service is committed to be given would lose their interest in using ODR for proper resolution in excuse of unreliable situation. Trust is considered “a vital precondition for sharing information, arousing generosity and empathy, and reciprocating trust-building moves in a negotiation process,”¹⁰⁹ because “people who do not trust each other may act tentatively and keep important information to themselves,”¹¹⁰ which hampers the way of delivering justice. Though providing ODR is easier and less troublesome than traditional forms of dispute resolution if guided appropriately, this process being a new pathway in Bangladesh would need to fight strongly to achieve people’s trust and perhaps, will take a long time to make people fully trusted towards ODR providing authority. Herein, ODR programme or software must be designed in such way that the public will accept it as an efficient and effective way of managing their disputes.¹¹¹ Therefore, at the beginning period,

¹⁰⁵ Condlin (n 20) 741.

¹⁰⁶ Faye Fangfei Wang, *Online Dispute Resolution- Technology, management and legal practice from an international perspective* (Chandos Publishing 2009).

¹⁰⁷ Amy J. Schmitz, ‘Building Trust in Ecommerce through Online Dispute Resolution’ in John A. Rothchild (ed), *Research Handbook on Electronic Commerce Law* (Edward Elgar, 2016) 328.

¹⁰⁸ Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union*, (Routledge Publications, 2011).

¹⁰⁹ Noam Ebner, ‘ODR and Interpersonal Trust’ in M.S. Abdel Wahab, E. Katsh and D. Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2012) 206-207.

¹¹⁰ Dimov (n 61) 41.

¹¹¹ M. Abdel Wahab, ‘Does Technology Emascuate Trust? Confidentiality and Security Concerns in Online Arbitration’ in ICC International Court of Arbitration (ed), *ICC Bulletin Special Supplement 2004: Using Technology to Resolve Business Disputes* (ICC 2004); P. Gillieron, ‘From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy’ (2008) 23(2) *Ohio State Journal on Dispute Resolution* 301, 323; Ebner (n 109).

obtaining reliability from the parties would be a tough challenge to overcome, since people's trust mostly depends on emotional and physical expressions, which are absent in ODR process. In this regard, Larson rightly put a valuable question "how can we trust someone when we cannot scrutinize his/her face, when we cannot search for the slightest flinch and cannot see whether another's eyes are averted."¹¹² However, he concluded mentioning a research result saying "communication is by phone, or text, or face-to-face is not determinative,"¹¹³ therefore, trust would not vary on the basis of the way how communication is made. Unfortunately, this conclusion did not get worldwide acceptance. In Bangladesh perspective, it is needless to say that gaining trust in online-based communication is a big deal. The thing, which is required most, is the special attention of the responsible authorities to set a successful online resolution system.

Accordingly, transparency, security and confidentiality being inextricably related to any kind of resolution process, ODR providing authority needs to maintain all these things carefully, because transparency and confidentiality may come into conflict in some cases. Especially, in the cases relating to security, sexual offences, defamation, etc., confidentiality may be the reason of losing transparency. It is required to disclose the procedural rules and the costs of the procedure, because participants may want to know what norms apply, and how the process is conducted. On the basis of such information, they can easily decide if they want to go for next steps or quit. Along with disclosing the information, ODR providers need to gather and store some sort of information in order to function. Considering this features of ODR, Wang opined that ODR process is more transparent than traditional ADR system since all the information is stored online and can be restored if necessary even after deleting and its easily traceable.¹¹⁴ Here arises the question of confidentiality. If all information relating to a dispute is so easy to trace, then how the confidentiality would be ensured? Thus, keeping confidentiality may make the question of transparency doubtful on the one hand, on the other if confidentiality is not maintained, people would never be interested towards online resolutions. Therefore, losing of transparency and confidentiality will make people neither to trust nor to rely on ODR mechanisms. Hence, on the fundamental level authority will have to make and maintain a rule and make a divide relating to quantity of information to be kept in confidential strictly and made open for general people. In this regard, Lodder and Zeleznikow unequivocally uttered that the "ODR provider should disclose what forms of security are applied for all online processes, and what kinds of security mechanisms have been put in place to safeguard participants' information."¹¹⁵ In

¹¹² Larson (n 89) 649.

¹¹³ *ibid*, 653.

¹¹⁴ Wang (n 106).

¹¹⁵ Lodder and Zeleznikow (n 10) 38.

a word, ODR systems must be accountable simultaneously to the authority, legal frameworks, and communities who they are committed to serve.

Moreover, ODR system that is especially conducted by human involvement, have to keep neutrality and impartiality strictly so that people do not feel like any biasness has occurred. Otherwise, no one will come to receive any ODR service. Herein, Vivi Tan accurately explained that “an ODR platform must not only improve access to justice; it must also be designed to encourage the appropriateness and neutrality of substantive outcomes in the case.”¹¹⁶ Therefore, failure to maintain equity could damage the whole process and the ultimate goal as well. Even the proponents of ODR like Rabinovich-Einy and Katsh agree that technology is not neutral.¹¹⁷ According to them, it is “designed by people who have their own set of biases, assumptions and values, and their impact needs to be uncovered and analysed.”¹¹⁸

Furthermore, parties must have an email address or something else to access ODR system, since there is no direct way to file complaint before someone/institution or to communicate directly. As a result, unlike traditional ADR, someone can easily file false dispute against any person to harass or misrepresent himself/herself under the ODR system. In that case, finding out the identity of false dispute filing parties or the person misrepresented oneself would be one of the difficult jobs to provide online resolution, as it is quite easy to change the email address or any other information online. Thus, the service provider would unnecessarily lose their valuable time in identifying the mendacious disputants that may cause delay in providing ODR service to the real disputants. On the other hand, people seeking resolution will also go away from ODR systems to keep themselves untouched from any unwanted irritation. Moreover, the whole system can be hacked anytime by someone who has expertise in hacking. Particularly, “criminals may exploit the information security vulnerabilities of the ODR platform in order to obtain unauthorized access to information related to the dispute and the disputants.”¹¹⁹ Herein, the main concern is the integrity of software-driven systems as they are always vulnerable to hacking or manipulation by those who understand how the software programmes work and can find new vulnerabilities to exploit.¹²⁰ In this regard, Condlin stated that “a software-based system for resolving disputes is vulnerable to manipulation in a way that human and hybrid systems are not.”¹²¹

¹¹⁶ Tan (n 72) 133.

¹¹⁷ *ibid*, 135.

¹¹⁸ Rabinovich-Einy and Katsh (n 1) 34.

¹¹⁹ Dimov (n 61) 40.

¹²⁰ Scott J. Shackelford and Anjanette H. Raymond, ‘Building the Virtual Courthouse: Ethical Considerations for Design Implementation, and Regulation in the World of ODR’ [2014] *Wisconsin Law Review* 635.

¹²¹ Condlin (n 20) 750.

Therefore, the point of hacking bears a big question mark, which is required to be faced and solved in a proper way.

Since the concept of ODR is anyhow related to the traditional ADR system, the concerned authority should keep in minds who are the stakeholders in general to get benefit from the traditional resolution process. If it were only about commercial resolution as most of the existing international ODR providers established for them, then the scenario would be something different. However, here the paper is concerned not only about setting ODR in commercial resolution but in all kinds of disputes arising across the country. In Bangladesh, most of the people, who are seeking settlement through ADR, are poor, not well-educated, and do not have enough money to proceed for traditional court based dispute resolution processes. Therefore, providing ODR to this community requires a total planning to be implemented with expertness and consciousness; otherwise all the effort will bring no fruitful outcome. In this regard, the explanation of Colin Rule that if the ODR system can be useful to a person sitting into the city, it would likely be useful to people around the country¹²² may not be suitable for Bangladesh. Because it is not only about benefit of the people (though that is the ultimate goal of setting ODR), but the way local community can get access to the system as well. Since it is totally online based and there is no chance to go to any lawyer or counselor to consult, in countries like Bangladesh where most of the local people are less educated till now and having little knowledge of law, it is quite tough to make local community interested in seeking settlement through ODR. And, the process cannot be called effective if the targeted section of people could not get benefited as expected.

Reaching a settlement over any conflicting issue, whether through ADR or ODR, does not only mean an agreement between the parties but also it is expected to be implemented accordingly. In fact, if the agreement reached does not work in practice, then reliability of the service provider could become distrustful. However, a neutral third party does not give any decision himself rather helps the disputed parties to reach a solution in most of the ODR forms and there is no binding for the conflicting parties to follow the outcome. Colin Rule, the architect for the ODR system at eBay, claimed that enforcement under ODR is less of a challenge,¹²³ but in countries like Bangladesh execution of any such settlement agreed through ODR is tougher compared to that of the traditional resolution system, since it is a virtual resolution of an actual conflict. In case of traditional resolution system, decision come from the authority having physical appearance in that the parties feel obligation to comply with the decision and in some cases the decision makers come into play to execute the same. Whereas, the decision of ODR comes from a virtual authority, who cannot play any role in execution level.

¹²² Rule (n 22).

¹²³ *ibid.*

Therefore, the enforceability of ODR outcomes has always been seen as a major concern and drawback that should be given much emphasize to make it successful.

5. Concluding Remarks

From the discussion of the prospects, challenges and procedures of adopting online dispute resolution mechanisms in Bangladesh, it becomes clear that developing an appropriate ODR software programme service and ensuring impartiality, transparency, security, confidentiality, enforcement etc. are the key issues.

Designing all the IT for use on smartphones and tablets rather than just on laptops and desktops can provide the purpose of setting ODR appropriately, as it will make the whole process easier to all classes of people. In fact, this would be more efficient to reach all types of ODR seekers, from well-educated to illiterate users, rather than following traditional email systems.¹²⁴ In this regard, developing of an ODR app can be taken under consideration. For example, “ODR 4 Refugees” is a new development. It is a mobile application that “seeks to help refugees resolve disputes ranging from those emanating from sharing space in refugee camps to those dealing with discrimination, poverty, and lack of communication with camp administration officials.”¹²⁵ The app¹²⁶ is very easy to use even for those who have limited knowledge of the full functions of a smartphone. Therefore, if an ODR app can be developed that will be easier to use for resolving disputes arising among less educated persons, it will be suited for others as well. At the same time, the online platform needs to be made in Bangla language so that everyone can get access easily. Herein, ODR must abide by and uphold the laws in all cases whether it runs through any app or any other means, and the ODR providers must have

¹²⁴ Colin Rule and Chittu Nagarajan, ‘Crowdsourcing Dispute Resolution over Mobile Devices’ in Marta Poblet (ed), *Mobile Technologies For Conflict Management: Online Dispute Resolution, Governance, Participation* (Springer 2011) 99.

¹²⁵ ODR Europe, ‘ODR For Refugees’ <<http://www.odreurope.com/odr4refugees>> accessed 11 July 2021.

¹²⁶ In this app, the user will be free to choose the preferable way of communication from a variety of tools like email, Viber, SMS, what’s up, messenger, Facebook, live chat, video conferences etc. Refugees are guided by the application to select from a list the type of the dispute and to describe the issue in a couple of lines. Then they will add their contact details and those of the other side. The system processes all the data and appoints a mediator from a list of mediators who communicates with both sides. The whole mediation process can be conducted online through their smartphones by video conference, through a chat tool and in many other ways. Surprisingly, the process will have no formalities, no minutes, no agreement to mediate, and no settlement agreement in writing. Only a shake of hands if they are face to face or meet at a later stage, or a mutual apology or compromise reached on the smartphone screen. Finally, an online notification that an agreement has been reached will be send to both sides calling them to honor it and praising them for their contribution to a peaceful dialogue. Download and use of the application will be FREE for all refugees.

expertise in dispute resolution. Thereby, transparency, confidentiality, impartiality etc. can be best maintained.

Since the effective enforcement of any solution reached through ODR is one of the big issues, the enforcement mechanism under cybersettle can be taken as example, because the enforcement procedure in cybersettle cases is straightforward. The party that has to pay is asked in advance to provide the expected sum (or more) in the form of a (bank) guarantee, and if the case is settled, the required sum is transferred to the other party.¹²⁷ However, cybersettle provides ODR services mainly for the insurance companies and the amount they usually deal with is apparently much more. Therefore, here the amount should be fixed according to the economic condition of the parties so that they can get justice properly. However, all disputes are not about money only; rather more of them are related with other types of conflicts that demand effective way of implementation. Herein, appropriately encouraging the parties to materialize the outcome may act better since there is no way to make them bound to follow the resolution, except in case of arbitration award. However, present practice of civil courts to announce judgment according to settlement agreement can be best solution. In ODR mechanism, there should be added an additional stage in which the winning parties can be asked to submit the settlement agreement reached through ODR to a real court/judge assigned for that, who will issue an order in accordance with the agreement. In this regard, the existing provision that a judgment made under settlement agreement is not appealable can be followed in ODR as well.

It is argued that “justice is not justice at all if it takes too long, is too expensive for people or if it is not available to everyone.”¹²⁸ ODR obviously meets these requirements of justice by ensuring the conveniences of virtual meetings, i.e., attending meeting from any distance, no need to travel, asynchronous arrangement of meetings,¹²⁹ avoidance of unnecessary delay and hard-copy documentation. Documents filed on an online platform can be easily accessed from anywhere and anytime which overcomes distances. Moreover, the parties need not to meet at the same time in the online platform, thus avoiding co-ordination of busy schedules. Therefore, ODR has all the potentials to meet the ends of justice.

However, it is not possible to set and run ODR mechanisms overnight rather a gradual development through proper planning can make the system stronger. Herein, techniques followed by the countries like Singapore and Argentina that recently starts to establish ODR forms can be taken for example. Pablo Colin stated these countries are building ODR resources into their new dispute resolution

¹²⁷ Lodder and Zeleznikow (n 10) 76.

¹²⁸ Jashpal Kaur Bhatt, ‘Role of information technology in the Malaysian judicial system: Issues and current trends’ (2005) 19(2) *International Review of Law, Computers & Technology* 199, 206.

¹²⁹ Hörnle (n 37) 80.

programs,¹³⁰ so that when disputants are introduced to ADR they are exposed to ODR at the same time. In our country, as many people are interested getting settlement through ADR, they can easily be informed and encouraged to get it through ODR when they seek for ADR services.

Lastly, it is argued that ODR is gaining attraction in Asia, especially in China, India and Japan.¹³¹ The recent sharp increase of internet users and e-commerce has led India to embrace ODR to resolve disputes between buyers and sellers.¹³² However, "Japanese ODR is still in the experimental stages, and most ODR participants use it for consultation rather than resolution."¹³³ Whatever stages these neighboring countries are now in using ODR system and whatever purposes they are using ODR for, Bangladesh could take lesson from them about the way they are adapting this new process of resolution, since they are on the way of developing the idea.

¹³⁰ Rule (n 22).

¹³¹ Schmitz (n 80) 26.

¹³² Chittu Nagarajan, Timothy Sze and Zhao Yun, 'Online Dispute Resolution In Asia' in M.S. Abdel Wahab, E. Katsh and D. Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2012) 499–500.

¹³³ *ibid*, 505.