

# CHAPTER TEN

## ON-LINE MEDIATION

### Electronic Dispute Resolution Processes

#### WHAT IS “EDR” ?

EDR is short for Electronic Dispute Resolution. You may also see it referred to elsewhere as “ODR” or online dispute resolution. I prefer to refer to it as EDR because this covers all the forms of modern electronic communication available for use by the modern ADR practitioner and is not limited to web based internet communication systems.

Essentially EDR covers the use of internet based and other modern electronic communication systems for the three way transmission of information between the parties to a dispute (including their representatives) and a privately appointed settlement facilitator or judge.

#### WHY USE EDR (or for that matter ADR?)

ADR (Alternative Dispute Resolution) is a range of private processes for the resolution of disputes, independent of state / court based judgement. It embraces both negotiated settlement and private determination, where the facilitator or arbiter is chosen directly by the parties or by a contractually approved appointment mechanism.

ADR ensures confidential information is kept out of the public arena, a very important factor for many commercial enterprises. If a potential client becomes aware of the fact that your firm is being sued it might conclude that your firm is unreliable and you may consequently lose business. Furthermore public trials can result in business secrets being disclosed, giving away a valuable advantage to the competition.

ADR is considered to be quicker than the courts. Domestic courts tend to take between two to seven years (the time scale varies from country to country) to resolve anything beyond the smallest of commercial claims. Mediation, fast track arbitration and adjudication take between four to eight weeks on average to complete the settlement process. Traditional arbitration takes between six to nine months on average. Examples of where it has taken longer are not however difficult to find – but usually this is because of the parties and their additional demands rather than because of the nature of the process.

The shortened time scale to resolution of ADR often means that the continual years of antagonism that are commonly associated with the court process are avoided. At the end of a trial the parties have often developed such high degrees of animosity towards each other, particularly when the trial has pitted one against the other, giving evidence which portrays the other in a very unfavourable light, that no future trading relationships are possible. By contrast, it is usual for post mediation litigants to resume business. Adjudication parties often never stop working together. Even the parties to arbitration are often able to pick up their business relationships after delivery of the award.

ADR is considered to be cheaper than the courts. The relatively short timescales for ADR processes to achieve settlement mean that legal bills are kept to a minimum. Whilst the cost of the ADR trial is not subsidised by the state, increasing the base cost of ADR, thereafter the rest tends to be less expensive because of the short time factor.

ADR is considered to be more convenient than the courts. It is more flexible and has the ability to provide for a trial at a location convenient to both parties, at a time of their choosing, rather than in a place and at a time set by the court.

ADR avoids the formality of the courts. Appearing in court is often viewed with dread by even the most sophisticated of business managers, whereas the relaxed atmosphere common to ADR processes is not

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considered to be particularly intimidating. ADR also enables the parties to self represent themselves or to engage non legal advisors. Such advisors tend to be less threatening than lawyers and are usually less expensive and more approachable.

ADR is not tied to the law and jurisdiction of any state, so it can cross national boundaries, thereby better serving the international community. The parties are free to chose the governing law, to select ADR practitioners that have no national bias and to select a neutral territory as a venue for the settlement of their dispute. ADR can even completely dispense with the law if the parties so require, ensuring an outcome based on fairness and commercial practice alone.

Arbitration awards are enforceable world wide, whereas court judgements are limited to the state and to states (if any) who have made bilateral arrangements for the enforcement that court's judgements.

EDR further enhances the pre-existing advantages of the ADR, making it even more attractive to the user.

### **EDR AND PRIVACY**

EDR maximises security and privacy in that EDR relies on web-based communications processes, which are more secure than proprietary e-mail provider services, backed up by telephone and video conferencing facilities, fax, and finally postal services (what the Americans caustically refer to as "snail mail").

### **EDR AND SPEED**

EDR speeds up domestic and international communications, making ADR even quicker. On line EDR facilitates a seamless single session real time dispute resolution process, or alternatively enables the parties to deal incrementally with separate stages or elements of a dispute on a session by session basis.

### **EDR AND COMMUNICATIONS COSTS**

EDR reduces communication costs, making ADR even more cost effective, compared to face to face communication, which involves travel and accommodation costs, both for the parties, the third party facilitator/arbitrator and for the hire of the venue. Even the cost of sending documents express by DHL, and similar providers, can be avoided.

Nonetheless, it should be noted that video-conferencing facilities are quite expensive. However, compared to international travel and accommodation they still represent an economically viable alternative proposition.

### **EDR AND CONVENIENCE**

EDR, by enabling the parties to participate in the ADR process from the comfort of their own work station, provides maximum convenience. Face to face dispute resolution results in major lost opportunity costs. An executive's time and energy is best spent engaging in commerce, not travel. The EDR process can be arranged at times most convenient to the parties and compatible with other working commitments. Also, by working out of the home based office environment, the familiar back up secretarial facilities of the office and filing systems are readily available if needed.

### **EDR AND PRELIMINARIES**

EDR is ideal, for all forms of ADR, to deal with the preliminary stages of the dispute resolution process, even if EDR is not used for the final settlement / trial process. All claims, defences and counterclaims can be dealt with by EDR. This is a facility virtually universally used by ADR in the modern age, whereas few judicial systems have taken real advantage of this to date, requiring documentation to be physically delivered in red-tape bound bundles.

Case management can be conducted via EDR including administration and logistics. Even the most modern and technologically advanced of court systems depends upon face to face case management sessions with the judge in attendance at the court house. All exchanges and disclosures during ADR processes can be facilitated by EDR, which can even use electronically transmitted digital video evidence in appropriate circumstances.

### **EDR AND PAPER ONLY TRIALS**

EDR is the perfect communication medium for paper only arbitration, and paper only adjudication. The process is kept moving by setting and maintaining strict deadlines for all concerned. The usual target is 28 days from submission of claim – but longer or shorter timescales are permitted for more or less complex

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disputes. Whilst back up copies of documents may be sent by post, fax or email submissions enable the arbiter to quickly get on with the job, long before the signed original arrives – to confirm the status of the document – so that most of the thinking and processing work is complete by the time the hard document arrives. The time lag between communications is therefore minimal.

### **THE EDR VIRTUAL TRIAL USING VIDEO-CONFERENCING FACILITIES**

The way this works is that the parties and the mediator link together using video cameras and microphones hooked up to on line computers. By using a split screen the viewer can see and hear the two other parties at all times. The viewer can zoom in on either of the images and is likely to do so when someone is speaking for any length of time. Where technicians are at hand to operate the cameras video-conferencing gets as close to a physical presence as it is possible.

Video-conference trials preserve all the central features of the traditional trial, at a fraction of the cost and without the inconvenience of physical attendance at the forum. The immediacy of the trial (trial atmosphere) is maintained complete with witness statements and cross questioning. It is equally suitable for adversarial and inquisitorial trials. All of this is achieved without the requirement of displacement of the parties and their legal teams and the expensive hire of a venue and hotel accommodation.

Unfortunately, not all countries have yet acquired good quality broad band internet connections, the basic requirement for sending video messages. Even in countries such as the UK, which is well served by the telecommunications industry, there are black hole regions which do not yet have broadband. Without broadband the video image is very slow, jerky and lacks a sense of reality and natural movement.

Another limitation is that good quality video-conferencing facilities are not yet available everywhere. A basic video-conference set up may feature one single fixed camera. Most people today have basic video cameras attached to their computers. The problem is that fixed cameras can give a static feel to proceedings. Ideally, two cameras and cameramen who can track the parties are required, to allow movement by the speakers and to be able to switch between speakers, particularly for cross questioning witnesses and experts. The split screen facility offered by the more sophisticated video-conference system providers is preferable since it provides security in that it ensures that witnesses are not being coached behind the scenes. However, this is not such a serious problem because when someone is being coached, there are likely to be noticeable gaps in the flow of conversations and the speaker may well be observed concentrating into the distance at cue cards. The professionalism of legal advisers should prevent this occurring.

### **EDR ON LINE TEXT TRIALS**

Both parties log on to a live, secure inter-net virtual court room for the trial. The spontaneity of the trial is maintained in that the parties must respond promptly without the luxury of time to compose answers. The lack of visual/physical presence detracts from the drama of the traditional trial – but the ability to read and re-read the text avoids misunderstandings. The charisma of witnesses has no bearing on the outcome – which is either a great benefit of a disadvantage, depending upon the circumstances.

One significant drawback of the on line text trial is that it is difficult if not impossible to guard against the coaching of witnesses and experts. The parties have to rely on the professional status of the lawyers not to engage in such practices. On the other-hand, many ADR practitioners can easily spot coached information, which is often given away by repetition of language peculiar to a particular individual and which others would be unlikely to adopt. Again, mirror experiences by different individuals at different times and locations are clear indicators of coaching and collusion. Coaching often produces unconvincing evidence which does not fit the other facts and circumstances.

### **VIRTUAL MEDIATION USING VIDEO-CONFERENCING**

Video-conferencing preserves all the central features of the traditional mediation, at a fraction of the cost and without the inconvenience of physical attendance at the forum. Visual presence retains most of the immediacy of face to face communications, particularly during the caucus / private session. The parties can make valuable use of otherwise lost time, whilst the other side is caucusing in private session.

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The way this works is as follows. Both parties log on to a live text mediation – a secure form of inter-net virtual conference room. The session will be set up to last for a minimum period of time and requires all parties including the mediator to be permanently available for three to six hours or more. The three way on-line forum during the joint mediation session ensures everyone feels involved. The two way on-line live conference process recreates a real time conversational dynamic that enables the mediator to effectively explore issues with each of the parties in turn during caucuses / private sessions. Written questions make it hard for someone to act in an evasive manner. By establishing a real time, limit hearing time frame to the mediation, as with the face to face mediation the pressure to negotiate grows as the clock ticks away and the deadline for throwing a deal away approaches, thus increasing the likelihood of achieving a settlement, since neither party wishes to be seen as the one that subsequently incurs the legal costs of a trial by being unreasonable, and secondly neither party is likely to want to spurn a reasonable offer that might not be available at trial.

### OFF LINE MEDIATION – FOR PAPER ONLY MEDIATION

The way this works is that the mediator opens the forum and initiates dialogue using a web based permanently open email communications system. The parties respond in turn, at their own convenience, but subject to strict time limits set by the mediator. All text goes on line and is accessible throughout the process. Caucus / private session dialogue is private to the mediator and the relevant party.

Under a more relaxed version of this processes, which is useful for mediations crossing broad time zones, the mediation may last for several days (or even weeks). The major draw back is the risk of a loss of momentum and the further risk that the parties can dwell over issues and reinforce their prejudices between sessions, inhibiting settlement. On the other-hand the parties have the opportunity between sessions to draft well thought out and considered responses and to seek out evidence and the answers to questions which would not be achievable in a face to face or real time mediation. Tele-conferencing is common to break impasses and to recreate momentum.

It is possible to recreate a simple form of off-line mediation using ordinary e-mail or fax facilities. It is then up to the parties to maintain a record of proceedings and a readily accessible log of communications. The main draw back is that the security measures involved in web-site in house communications are lost and the single source of shared or pooled information does not exist.

A developing area of ADR practice is “contracted mediation” or dispute review board. The contracted mediator or board is appointed at the beginning of the program, sits throughout the program and assists the parties, consulting with the parties and providing reality checks or informal advice on a regular basis, either monthly or at three month intervals. If a matter cannot be settled informally and a dispute arises then the a mediation or a review board convenes to facilitate a negotiated settlement or to deliver either a recommendation or a decision. Mediated settlements are immediately binding and enforceable. Recommendations are usually accepted, bringing the dispute to an end. Decisions are immediately binding and enforceable, again bringing the dispute to an end. Off-line communication processes are ideal for this process since information from all previous sessions remains available on the web to all parties, creating a log of progress on the work.

The standard benefits of having a fully informed board of one or three members of the board who are up to speed on the developments on the project mean that as and when disputes arise during the course of the project, the board can provide a rapid response. The virtual board can be established and maintained at the fraction of the cost of a traditional DRB.

The virtual board is ideal for use by regulatory bodies, since the on line process can easily accommodate multi-party hearings, transactions and open transparent decisions. The developing law of the regulated industry gets immediately transmitted and publicised to all concerned, ensuring that all concerned know and understand which forms of behaviour are unacceptable and equally which forms of conduct are approved by the regulator. This avoids the need for newsletters to update the industry and the weight and significance of regulatory board proceedings ensures that all concerned will read and act upon the advice of

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the board, whereas a newsletter can be put to one side by a secretary and its contents ignored, leading to embarrassing problems later.

### WHO SHOULD USE EDR ?

ADR / EDR can be valuably used for the settlement of all forms of dispute, be it **public** (e.g. government contracts / collaborations), **private** (e.g. construction and plant contracts / labour contracts – employer/employee), **commercial – finance contracts, purchases, sales and services** (e.g. transport) and **social** (e.g. disputes with neighbours over planning and the environment) etc.

Mediation is not best suited to the recovery of debts where there is no underlying dispute, though it can be used to broker arrangements for the rescheduling of debt repayments – which is a better alternative to bankruptcy proceedings.

ADR will not help to shape the law, so if the parties wish to establish what the law is on a matter it is not really suitable. It should also be noted that ADR is not suitable for areas of legal practice which are the sole preserve of the courts, such as crime and divorce, though it is valuable for divorce settlements.

### COMMERCE AND EDR

EDR is ideal for commercial disputes because most businesses are familiar with the technology, have access to the technology, and trust the technology because they rely on it for the conduct of their day to day business affairs. For many firms therefore, the use of IT for the transmission of claims and defences etc does not involve any increased costs either in hardware, software or in personnel training.

### EDR AND TRUST

Trust is a major barrier that international commerce has to over-come. It is one of the primary reasons for the existence of trade bodies. Membership indicates to commerce the quality and standing of the member organisation. Many such organisations provide a membership kite mark that members can add to their advertising and mail. Some organisations also provide a dispute resolution service between members and their clients. By providing independent dispute resolution services to customers, traders can gain the trust of potential clients – since a guaranteed trial process and remedy is provided against non- delivery and defective goods and services. Experience shows that traders who provide ADR services are more successful than those who do not. It is usual for the service provider to pay the entire costs of the dispute resolution process, so that the client has nothing more to pay and will thus be very happy to use the process. Increased profit and trade easily off set the cost of providing this service.

Large numbers of such schemes are now in operation. Originally pioneered for the travel industry by the Chartered Institute of Arbitrators, the concept now covers a very wide range of commercial ventures, most notably the home builder industry in the United Kingdom and consumer sales in the USA.

### CONCLUSION : ADVANTAGES OF EDR

EDR is an attractive option for busy people, bridging social, cultural and international barriers. It provides a particularly cost effective range of dispute resolution processes which are ideal for international goods and services contract disputes. The various forms of on-line adjudication, arbitration and DRB process have much to commend them for construction contracts and for the purchase, supply and installation of manufacturing processing plant and equipment. It will always be a matter of judgement by the parties with the advice and assistance of the ADR service provider / facilitator or arbiter, as to how much of the EDR process is useful in any particular situation. Even where a face to face trial is needed, the preparatory work can still be done using EDR, thus making considerable time and cost saving in the run up to the trial.

## Self Assessment Exercise No 10

1. Consider the advantages that electronic web based communications offer to commerce and in particular to the dispute resolution industry.
2. Consider what, if any, potential drawbacks may attach to using EDR in lieu of a formal face to face mediation process.

### ADDITIONAL READING

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- Summers Raines, S.** (2005) *Can Online Mediation be Transformative? Tales from the Front* *Conflict Resolution Quarterly*, 22: 437-451.

#### Web sites

**The Mediation Room** : <https://www.themediationroom.com/>

**Intersettle On Line Dispute Resolution** : [Intersettle.co.uk](http://Intersettle.co.uk)

**Consensus Mediation** : e-mediator

**Online Narrative Mediation.** <http://www.tridentfoundation.net/mediation.html>

**Integrating the Internet into ADR.** with Jim Melamed. <http://www.to-agree.com/odrresources/index.cfm>

**Square Trade** : <http://www.squaretrade.com/cnt/jsp/index.jsp>

**THE PROS AND CONS OF ONLINE DISPUTE RESOLUTION: AN ASSESSMENT OF CYBER-MEDIATION WEBSITES** <http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html>

**ODR INFO** : <http://www.ombuds.org/center/pubs.html>