

Its the Medium not the Message :

A Practical Perspective for Online Dispute Resolution

Explaining Online Dispute Resolution (ODR) in a way that is immediately encouraging of its use by dispute professionals (lawyers, mediators, arbitrators and judges) is a challenge. In this presentation I will address the nature of that challenge and suggest how this can be overcome and, indeed, why it is in the interests of professionals and clients that it is overcome. In so doing I will demonstrate the issue with a live role-play case in a shipping dispute run on my company's online mediation platform at www.TheMediationRoom.com.

The first mistake often made by those involved in disputes, whether as parties, advocates, neutrals facilitating (mediators, conciliators) or neutrals determining (judges, arbitrators) resolution is failing to see ODR in its full and true context. Focusing just on the concept it is, understandably often seen as a novel, quirky, if not downright 'geeky', practice. How can lawyers and dispute neutrals, steeped in the traditions and skills of person to person discourse, possibly take seriously the concept of a virtual courthouse or a virtual mediation room? If there is any interest generated it is probably something that is best left for the future when other, perhaps braver, souls have taken what is seen as the first 'leap'. Worse than that, many may see it as a direct challenge to their professional status and skills, if not fee earning, and feel that it their duty to advocate against it.

The true message for ODR is that it is not the message. In contrast, and expanding on McLuhan's well known theme, it really is no more than the 'medium'. But what a powerful medium and what benefits it has to deliver. Instead of, or, importantly, in addition to, presenting argument and/or negotiating in traditional forms of writing, as well as orally or in meeting or a forum, with or without the assistance or determination of a neutral, much can now also be done on a secure and convenient online file. It is the phrase 'in addition to' that is the key. Use of ODR does not dictate that you cease to use other media or forums. When the fax was invented, we did not criticise its output as not being as acceptable as surface mail. Nor did we cease to use surface mail. Fax is used when it adds benefit over surface mail, such as immediacy. Just as it is important to not reject the fax machine simply because the paper does not have the same thickness, texture and depth of colour as surface mail. Use it for what it brings to the party ... the benefit of immediacy.

ODR does not challenge the importance and benefit of the visual and aural clues of face-to-face mediation or in-person arbitration, nor the value and worth of professional representation and advocacy. Rather the very nature of the medium adds benefits that extend the market for professional skill and dispute resolution services, as well as improving the success rate of such services.

As to the market, the online medium enables mediators and arbitrators to assist with cases that otherwise would be beyond their reach, e.g. because the parties are at such a geographical distance from each other that the cost and time of travel is too costly and disruptive as to be economic and justified by the value of the dispute. Further ODR systems that attract direct use by the public, inevitably promote knowledge of the whole art of mediation and other techniques for dispute resolution that can only bring more business to the dispute professions. In empowering the public with techniques of dispute resolution, it advances knowledge and appreciation of the work of all mediators, conciliators, arbitrators and judges.

ODR should also not be seen as an alternative to what is already an alternative – ADR. Rather it is an additional tool. Even in face-to-face mediation, for example, preparatory secure online discourse in a mediation structure such as on www.TheMediationRoom.com can only increase the prospects of success at the eventual face-to-face meetings. Prior to a mediation meeting, the mediator's understanding of the matter is usually limited to a statement in writing by the parties and possibly, but not always, a telephone conversation. Much of the initial time in the first private caucus meetings is taken up with the mediator gaining a more in depth understanding of the facts and what the dispute means to the parties. He may often have to try to assist the parties in controlling any negative emotions provoked by the dispute and the other party. He will also need to help the parties understand fully, and be confident of, the impartial nature of his role. This can take up much time, certainly often the whole of the first two private meetings. However, by using secure and confidential private discussion areas to 'talk' to each party, the mediator will be able to significantly improve his understanding of the matter,

and help the parties address the mediation in a positive frame of mind, before the date of the meeting. Thus, when the 'face to face' part of the mediation commences, the mediator will be able to 'hit the ground running' to improve the prospects of a successful solution being found before the time allowed for the meetings expires. This will be particularly important for short time period mediations.

In disputes where damage is growing daily, such as often is the case in shipping disputes, the mediation process can commence immediately online so that the heat can be taken out of the situation and perhaps some arrangements reached on peripheral issues to stem the flow of damage pending a later face-to-face mediation.

If a face-to-face mediation does not result in an immediate resolution of the dispute, further attempts to resolve the matter can continue to take place online, thus improving overall the prospects of success. This occurred recently on our platform in a complex IT case in Australia. This is very important in time based mediations where often the pressure of time leads, if not to non-resolution, to something worse, a rushed resolution that does not stand up afterwards.

In disputes in which there are a number of people with an interest, our platform can enable them to be involved in pre-mediation discussion or simply to 'watch' the process. This may be useful when those directly involved may not have fullest authority to settle. An online monitor with authority can give that authority as and when a suitable proposal is reached.

One of the most important benefits when using an online platform additionally to traditional techniques of mediation is that it provides a useful shared resource of documents and evidence, which can be consulted and reviewed at any time to further help preparation and shared understanding. In casework on www.TheMediatorRoom.com the parties and the mediator can have the benefit of the running of graphic reconstructions. A picture really does paint a thousand words, particularly in disputes with a technical background. An example movie is available in the shipping dispute role-play.

During face-to-face mediations, the online file can be accessed to log proposals and clarify in writing any significant statements. In this way, while the mediator is in private meeting with one party, the other party could be reviewing the observations of the mediator, which may include some suggestions for resolution, as well as any significant statements and/or could be putting in writing any thoughts, or clarifying any information, as requested by the mediator. In this way more productive use can be made of the time that is available. Further, the negative, paranoia related issues of a party being left to wait whilst the mediator talks in private to the other party can be reduced.

If use has been made of the online file during the pre-mediation phase prior to the meetings, the mediator can access the file to remind himself of relevant issues and facts as explained to him in posted messages. For example, he could be reading the posted discussions from a private online session with one party whilst in private meeting with that person, to identify any shift in position, or indeed whilst in meeting with the other party.

When one party makes a suggestion, the other party's view of the suggestion is often partly coloured by suspicion of motive. On www.TheMediatorRoom.com, an area can be set aside for the anonymous posting of suggested solutions. Anonymising the proposal helps focus attention on the proposal itself. For obvious reasons this will only be of value when there are more than two participants ('if it wasn't me then it must have been you'), but that can include lawyers and other representatives.

Overcoming negative perceptions is not difficult. They just have to be addressed. These thoughts have developed from discussions with various stakeholders who have now entered into arrangements with my company to make our online mediation platform available to their members. To date these have included the Law Council of Australia (the member body for all State Law Societies throughout Australia), the Commonwealth Telecommunications Organisation (the member organisation for technology companies in the telephony industry throughout 51 countries), the ADR Group (one of the leading mediation training and provider organisations in Europe and the first in the UK), LEADR (one of the leading mediation training and provider

organisations in Australia) and Quadrant Chambers, a leading barristers chambers in London. In all cases we have built configurations of our platform branded to these organizations.

The model we have used can be seen in this role-play case on which all will be able to participate after this course. We have had developed a unique piece of software that provides simple and intuitive usability in the form of a collaborative negotiations. Each dispute file contains a set of message areas. The message areas displayed will vary for each participant. The reason for this is because each participant is strictly controlled as to access to and, use of, the message areas. If they have access to an area, then the system will control whether such access allows the participant to post messages or only to read them. For example, one area will be accessible only to the mediator and one party and his or her lawyer, if any, and another by the mediator and the other party and his or her lawyer. In this way the mediator can have private and confidential sessions with each side. There will be another area in which the mediator can post messages to both sides, who can read them but not respond to them and also ,at his option (some mediators prefer not to) , he can access an area where he can keep private notes to which no-one else has access.

Every time a message is posted to one of the message areas, everybody with power to read such messages receives a system generated email alerting him or her to the fact that a new message has been posted with a link to the site.

In tailored and branded versions of this platform, multiple party disputes can be catered for. In all versions full confidentiality can be maintained within the various groupings of participant

CONCLUSION

ODR has much to deliver to widen the available market for dispute resolution services and to improve the output of its skilled practitioners. But the obstacles of inappropriate perception need to be overcome. ODR as a generic term does not describe either a system or a service. It describes a medium, now available and operational, that is of direct and practical benefit to all those in the dispute resolution industry.

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