

LEVERAGING TECHNOLOGY TO RESOLVE BUSINESS DISPUTES WITH ONLINE DISPUTE RESOLUTION

ODR has been around since the 1990s, but only in recent years has the technology made it a viable arbitration alternative

BY MARK SMALLS

It would be pretty hard for anyone to argue against the fact that technology has significantly changed how most law firms do business. Technology has allowed companies to more effectively market to current and potential customers using everything from customer relationship management (CRM) tools to “geo-targeting.” Technology has enabled businesses to accept payments more efficiently, whether it be through the organization’s website, via payments providers like PayPal, or in the retail segment by just having the purchaser swipe their smart phone.

Yet despite some of changes to the business landscape that technology has enabled, many businesses still find themselves in disputes, whether with another business, a customer, disgruntled employee or any number of other situations. The cost to resolve these disputes can often be staggering, and also why 69 percent of companies reported having litigation budgets of \$1 million or more in 2014, according to Norton Rose Fulbright’s May 2015 in-house counsel survey.

Given what it costs to litigate disputes in court (not to mention the years that process can often take), many businesses turn to some type of Alternative Dispute Resolution



(ADR), such as mediation or arbitration to get their disputes resolved. There are often significant advantages to going this route, ranging from reduced time and expense to the ability to preserve a business relationship where a court trial might render this unlikely.

However, despite some of the advantages that ADR can offer versus litigation, it still takes time to get all the parties involved in the case (plaintiff, respondent, outside counsel, insurance representative) in one

place. If any one of those parties is in a different geography that further complicates matters. The good news is that there are now technology-enabled processes that allow certain types of disputes to be resolved without the parties needing to be physically in the same place. These new platforms are part of a growing field of ADR solutions known as online dispute resolution (ODR).

ODR has been around since the 1990s, but it is only in recent years that the technology and applications

have reached a point where they are being seriously considered as viable alternatives to traditional mediation or arbitration. A number of ODR platforms have been developed including several that use algorithms and other quantitative tools to help parties reach an accord. The parties input data about the case along with settlement “bids” or ranges, and then the platform works to identify a mutually acceptable monetary settlement.

In addition, several companies and entrepreneurs have developed platforms that incorporate video as a key feature. Video has long been used during court trials as well as in arbitrations, typically involving taking testimony or a deposition from a witness who is not local. More recently, video has been incorporated into online mediation offerings, thereby creating an experience that is much closer to a traditional mediation. Mediators and the various parties to the case can interact much like they would if they were all assembled in a physical location.

The increased interest in the potential of ODR to help resolve business disputes is not confined to the United States. In fact, in many ways the pace of adoption is even higher abroad. In North America, Canada has been an early adopter, and there are ADR providers that offer clients an online option. In Europe there has been a recent flurry of activity, including multiple measures that have passed or are pending, that promote the use of ODR to resolve various types of disputes. Part of the reason that ODR is getting so much attention in places like Europe is the large amount of cross-border transactions, requiring a more efficient way of resolving low and moderate value disputes between entities in different countries. The United Nations Commission on International Trade Law (UNCITRAL) has a working group focused mainly on establishing protocols for cross-border electronic copy transactions.

While many legal professionals may find the concept of ODR

intriguing, the question remains: How can it help businesses today? The primary way it can help is by lowering the cost of arriving at settlement. This is achieved due to the fact that online sessions are designed to resolve matters quickly, in some instances as fast as two hours. This is far less than typical mediation sessions, which can range from a half-day to multiple days depending on the complexity of case. Not only are ODR offerings typically priced at a significant discount versus an in-person model, it also eliminates the time and expense of getting all parties to the venue where a traditional mediation would be heard. One constituency that has expressed interest in ODR are insurance providers that would rather have their adjusters at their desk attempting to get cases resolved than traveling to represent the providers at a session held at an ADR provider or a law firm’s office.

It remains to be seen how outside counsel will react to the emergence of ODR as an alternative for resolving disputes, since it could mean a reduction in billable hours for matters resolved in this fashion. Ultimately, the outside counsel is charged with meeting the needs of their client, and savvy law firms won’t resist at least considering an option that might be appropriate for a particular case.

This brings us to the question of what type of cases are appropriate for online dispute resolution appropriate? It is generally accepted that ODR, at least in its current form, works best for cases where the amount in dispute is not large. That is because cases of \$100,000 and under generally do not have as many underlying issues to resolve as would a multi-million dollar case. With video-enabled ODR, the mediator and the parties can not only verbally communicate points and ask questions, but pick up visual cues, note voice inflection, etc. Documents can still be uploaded, and settlement agreements signed, all within an online environment. Examples of case types where ODR should be considered are personal injury, auto claims,

slip and fall, property damage and similar case types where the dollar amount in dispute is sometimes low, and the facts fairly straightforward.

It’s clear that technological advances have certainly expanded the options that businesses have for resolving disputes. There are implications for companies, academic institutions, insurance providers and attorneys that handle cases where maximizing efficiency and controlling costs are key factors along with achieving an acceptable settlement outcome. Early users of ODR have an opportunity to shape the functionality by giving feedback to providers about what platform functionality they need. Given the pervasiveness of the web in today’s business world, parties involved in disputes will eventually start to wonder whether there is an online solution to quickly resolve matters that are not overly complex. Forward-thinking attorneys and other legal professionals are wise to be ahead of the curve in order to meet or exceed their client’s expectations.

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