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Catch Up or Get Left Behind... Arbitrating Online in 2019

In the autumn of 2015, I had the privilege of interviewing colleague Colm Brannigan for a podcast presented by the Canadian Condominium Institute on Online Dispute Resolution (ODR).

In the course of recording, I asked Colm what was preventing feuding parties from addressing their disputes online at that time. While Colm expressed that there was nothing technically preventing parties from addressing their disputes online, he offered that he had experienced resistance from those unfamiliar with how ADR processes would work on an online platform. Colm suggested that ODR would need legitimacy to be better embraced and that government was well positioned to assist.

Fast forward almost four years later and we have seen ODR platforms emerge throughout the world, including here at home. In fact, Canada is quickly becoming a leader on the world stage in combining technology with dispute resolution.

This increasing legitimacy of ODR is enhanced through government adoption of it as part of the justice system and should offer a clear signal to ADR practitioners that they need to include technology in their practices to stay relevant. After all, society is only increasing its reliance on technology in many aspects of life.

While we have seen a trend in some mediation practice areas of parties doing away with joint session, there remain many with strongly held beliefs about the novelty of in-person mediation. From non-verbal cues to establishing greater empathy “in the flesh”, it remains that several practitioners remain hesitant about the notion of on-line mediation in private practice.

Arbitration, however, is different. The advantages to the parties that are often cited in support of in-person mediation do not apply to the adversarial nature of arbitration. In fact, a major obstacle in the way of online arbitration is not so much the sentiment that in-person arbitration is superior but rather the lack of online process knowledge, comfort or familiarity of many arbitrators.

presented by Marc Bhalla, Hons.B.A., C.Med, Q.Arb, MCI Arb

While Marc is a member of the Condominium Authority Tribunal (Canada’s first fully online tribunal), his participation in this presentation is offered in his private capacity as an arbitrator who helps address conflict outside of the Tribunal’s jurisdiction and offers ADR services online.

Marc is not presenting on behalf of the Condominium Authority of Ontario or the Condominium Authority Tribunal in any way. All aspects of Marc’s involvement in this presentation are offered by Marc Bhalla alone.



Consider...

- How technology can help someone struggling with a mental health challenge to have a more comfortable procedural experience and their testimony more fairly considered than in traditional arbitration processes.

Example: A witness with anxiety has difficulty making eye contact and is a nervous public speaker. Options of providing testimony in a pre-recorded or electronic, written fashion may alleviate the potential of the arbitrator/adjudicator mistaking their anxiety for a lack of credibility.

- How a self-represented party may be better able to participate in an arbitration that takes place through a series of asynchronous events.

Example: An individual representing themselves is able to review multiple drafts of their submissions before submitting them, allowing for the removal of an initial emotional outburst from damaging the strength of the position they put forward.

- How comfort with technology could level the playing field.

Example: Rather than being intimidated by the legacy of a senior lawyer representing the other party in an arbitration proceeding, a new lawyer is able to participate as an equal through their pre-existing comfort making use of technology as they go about their lives.

Takeaway

The time has come for arbitrators to take a serious look at how they can incorporate ODR into their practices.

While arbitrating online can overcome many existing challenges and hurdles, it also introduces new ones that merit advanced consideration in order for arbitrators to best serve their clients.

In many ways, this is similar to the advantages that come with advanced reflection around ethical considerations that can arise in practice.

There are many ways that technology can be incorporated into the arbitration process. It is not a one size fits all consideration and private practice arbitrators should consider what online services they could be offering.

Tip: One obvious advantage of offering arbitration online is that it overcomes distance challenges. Any arbitrator looking to expand the market in which they offer their services should check in with their insurer to ensure that they have coverage in place to do so. This especially applies to those with ADRIC designations, who are required to carry insurance.

Notes

The Illusion of Distance

New Power Dynamics

Managing Expectations

New Challenges

