

Technology and dispute resolution: contemporary developments

By Andrea Soriano*

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Introduction

In a speech delivered at the Inaugural Supreme Court ADR¹ Address in September 2018, Bathurst CJ of the Supreme Court of New South Wales remarked upon technology and the future of alternative dispute resolution, as well as the courts.² He concluded that collaboration between stakeholders – courts, ADR professionals, and the public alike – are essential to cultivating effective technology solutions that improve access to justice. In line with this notion of collaboration, the Australian Disputes Centre (ADC) has embarked upon a consultative study to analyse the unique technology landscape for Australian dispute resolution practitioners.

While interest in technology, and increasing spend on Legal Technology (LegalTech) is well-documented, there is limited information available on how technology is used on a day-to-day basis by industry practitioners. It is likewise unclear how technology has impacted dispute resolution and litigation practices specifically. This report attempts to address these knowledge gaps by analysing the broad impact of technology on the practice of dispute resolution, litigation, and adjacent practice areas.

The report combines a review of existing literature, as well as primary data sourced through interviews by the ADC research team. The interviews were open-ended and conversational, to ensure that interviewees had maximum flexibility to make clarifications and express opinions where appropriate. The ADC interviewed industry professionals at various levels, including senior lawyers, junior lawyers, and paralegals. To ensure a more holistic picture of how disputes are managed prior to formal escalation, legal professionals who practice outside the litigation & dispute resolution space were also interviewed.

Law and technology: recent trends

The 2018 annual State of the Legal Market report showed significant increase in firm expenses, with particular growth in technology-related expenses.³ The Thomson Reuters and Lawyers Weekly 2018 Tech and the Law Wrap-up likewise reported a three-fold increase in global legal technology investment, while highlighting significant barriers to technology adoption within Australia.⁴ Barriers

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¹ The acronym 'ADR' can refer to Alternative, Assisted, or Appropriate Dispute Resolution.

² Hon Tom Bathurst AC, 'ADR, ODR, and AI-DR, Do we even need courts anymore?', (Speech delivered at the Inaugural Supreme Court ADR Address, New South Wales Supreme Court, 20 September 2018)

³ Thomson Reuters, *2018 Australia: State of the Legal Market* (2019) Thomson Reuters Insights, 7 <<http://insight.thomsonreuters.com.au/resources/resource/state-of-the-australian-legal-market-2018>>.

⁴ Thomson Reuters, *Tech and the Law 2018 Report* (2019) Thomson Reuters Insights <<http://insight.thomsonreuters.com.au/resources/resource/tech-law-2018-report>>

to technology adoption are primarily budgetary,⁵ although some respondents have highlighted platform compatibility and lack of internal expertise as other constraining factors. Additionally, the 2019 Asia Pacific State of Legal Innovation Report cites that that only 3-4% of internal firm expenditures is dedicated to Legal Technology and Operations.⁶

The 2018 Tech and the Law Wrap-up included a broad survey of what technology platforms respondents used on a regular basis.⁷ The most common platforms were legal research and practice management (matter or spend management) platforms, which were used by the majority of respondents. Only 30.2% use legal technology for workflow management, and 15.1% for eDiscovery.⁸ The report partially accords with our study's findings; as discussed further below, both workflow management platforms and eDiscovery play essential roles in the day-to-day work of dispute resolution practitioners, in addition to legal research and practice management platforms.

Online Dispute Resolution

Much of the discussion around dispute resolution and technology in the literature focuses on Online Dispute Resolution (ODR). ODR platforms support dispute resolution processes with technology-based solutions. EPIQ, for instance, offers eHearing, eArbitration, and online evidence presentation services.⁹ RDO, an Australian-based platform, offers an end-to-end ODR service, including online case management, secure file sharing and communication, and a digital settlement builder.

Discussion around ODR in the literature concentrates primarily on the technology's potential to enhance access to justice for traditionally under-served populations.¹⁰ ODR pilot programs overseas, such as the Netherlands' Rechtwijzer and British Columbia's Civil Resolution Tribunal are both court-annexed platforms designed to assist parties in low-value disputes.¹¹ There is also significant discussion in the literature about the use of ODR where parties to a dispute require physical separation, such as in cases of intimate partner violence or abuse¹². Within a commercial context, the discussion on commercial ODR is often focused on its role in resolving low-value disputes over e-commerce transactions¹³.

⁵ Ibid., at 7.

⁶ Future of Law Innovation Program, *The State of Legal Innovation 2019* (2019) Lawtech.Asia, <<https://www.flip.org.sg/post/state-of-legal-innovation-in-asia-pacific-report>>

⁷ Above n3, at 3.

⁸ Ibid, at 3.

⁹ EPIQ Global, *eHearings and Arbitrations* (Web Page, 9 May 2019) <<https://www.epiqglobal.com/en-au/experience/ehearings/services/ehearings-arbitrations>>

¹⁰ Michael Legg, 'Online Alternative Dispute Resolution' (2017) 141 *Precedent* 32; Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co. 5th ed, 2016).

¹¹ Michael Legg, 'The Future of Online Dispute Resolution: Online ADR and Online Courts' [2016] UNSWLRS 71

¹² Fernanda S. Rossi et. al, 'Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse' (2017) 55(3) *Family Court Review* 390.

¹³ Kanake Chinthaka Liyanage, 'The Regulation of Online Dispute Resolution: Effectiveness of Online Consumer Protection Guidelines' (2012) 17(2) *Deakin Law Review* 251.

Low-value ODR programs have had mixed success. While the BC Civil Resolution Tribunal continues to be operational, the Rechtwijzer project has since been dissolved,¹⁴ due to lack of consumer uptake. Ebay's SquareTrade online dispute platform likewise continues to be operational; platforms of such nature have since received some attention in various jurisdictions, with the OECD and Australia issuing best practice guidelines for e-commerce ODR.¹⁵ In addition, private sector players continue to generate innovations in the global ODR space. In 2018, a blockchain-based smart contract arbitration court called Kleros was launched in Europe.¹⁶ This platform is unique in its ability to manage disputes arising out of smart contracts – a class of dispute that either courts or traditional ADR processes may not be able to service. WeChat's mobile microcourt also received particular attention in the State of Legal Innovation Report as an unusual innovation that integrated a private sector solution to court-annexed proceedings.¹⁷

There is currently no literature that addresses the role of ODR platforms in higher-value disputes, and there appears to be significant variation across the industry in terms of anecdotal experience. Some commercial firm practitioners interviewed for this project have stated that high value arbitration, litigation, and any incidental preparations are largely conducted without technological assistance. In addition, some have expressed scepticism about the value of tech transformation in certain aspects of the dispute resolution process, such as case management automation and settlement builders. The primary concern was the impact of these technologies on cost; where cost-reduction is minimal or absent, practitioners were reluctant to commit resources to digitisation for its own sake.

On the other hand, there were a number of commercial practitioners who noted that digitising dispute resolution processes became necessary to managing the cost of conducting large-scale dispute resolution proceedings. A barrister interviewed for this project remarked that the sheer volume of materials used in commercial arbitration or litigation proceedings was simply too large to manage without digitization. It was suggested that digital briefing and workflow management platforms are increasingly the standard mode of communication between barristers and solicitors. It was also suggested that online court and remote attendance of arbitration proceedings were becoming the norm, with clients increasingly comfortable with videoconferencing technology.

While it is likely that ODR adoption will increase across the board, it is unlikely that it will be adopted in a uniform manner, as appetite for the technology varies significantly across the profession. In addition, decision making processes on technology investments differ significantly across different firms and organisations. While some firms prefer to rely on ad-hoc committees to prospect the

¹⁴ Roger Smith, 'Goodbye, Rechtwijzer: hello, Justice42', Law, Technology, And Access to Justice, 31 May 2017 <<https://law-tech-a2j.org/advice/goodbye-rechtwijzer-hello-justice42/>>; Maurits Barendrecht, 'Rechtwijzer: why online supported dispute resolution is hard to implement', Law, Technology, And Access to Justice, 20 June 2017 <<https://law-tech-a2j.org/odr/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/>>

¹⁵ Above n23, at 256.

¹⁶ Clement Lesaege & Frederico Ast, Kleros Short Paper v1.0.6. (Webpage 9 May 2019) <<https://kleros.io/assets/whitepaper.pdf>>

¹⁷ Above n4, at 30.

viability of certain technologies, other firms have dedicated in-house innovation teams who proactively source and test platforms to be integrated within their firm’s product suite. Differences in the structure of organisational decision making on technology would likewise impact the pace of how ODR is adopted within the industry. While the presence of dedicated Innovation Teams may make certain firms more likely to adopt ODR platforms, Legal innovation practitioners interviewed for this project have stated that their projects are more broad-based. None of the Legal innovation professionals interviewed for this project have planned or executed dispute resolution-specific projects, and suggested that they were unlikely to do so in the immediate future. A decision maker interviewed for this project has also remarked that firms will likely proceed with a “fast-follower” mindset in adopting technology; while willing to adopt new technology with promising results, firms are hesitant to be the *first* to test a new platform.

Artificial Intelligence and Dispute Resolution: eDiscovery, Document Review, and Document Generation

Although discovery and document review are not themselves part of dispute resolution proceedings, they have a significant impact on the preparatory stages of a proceeding, and therefore the costs. In its March 2019 Bulletin, the ADC published a brief review of the potential role of eDiscovery in large arbitral proceedings.¹⁸ Apart from raising examples foreign jurisdictions mandating predictive coding in discovery proceedings,¹⁹ the article noted the expansion of eDiscovery services offered by large international and national firms.

In addition to eDiscovery, there is significant coverage in the literature of the benefits of AI-assisted document review and generation. A test by LawGeex in 2018 showed that their AI-assisted contract review platform correctly identified legal issues in NDAs more frequently than experienced lawyers did. The same study showed that the platform took 26 seconds to review the same number of NDAs that lawyers in their study needed an average of 92 minutes to accomplish. As a result, document review can now be done at a pace and at a level of accuracy that was not achievable without technological assistance. Legal document generators such as LawPath also offer automated deeds of settlement, similar to what would be offered on a bespoke ODR platform.

The 2018 Tech and the Law Wrap-up reports that 38.1% of legal practitioners use document automation platforms; it is unclear if this figure includes both automated document review and generation.²⁰ The same report also states however that 50.4% of legal professionals are interested in integrating document automation within their day-to-day practice, making document automation the most desired technology platform according to the survey.²¹ While only 15.1% of practitioners use eDiscovery for their day-to-day practice, the figure includes legal practitioners outside of dispute resolution and litigation; the figure is likely to be different if only dispute resolution and litigation

¹⁸ Australian Disputes Centre, *eArbitrations – Bridging the gap in international arbitration* (Webpage, 9 May 2019) < <https://www.disputescentre.com.au/earbitrations-bridging-the-gap-in-international-arbitration/> >

¹⁹ *Brown v BCA Trading and others* [2016] EWHC 1464 (Ch).

²⁰ Above n3, at 3.

²¹ Above n3, at 8.

practitioners are surveyed.²² When asked if practitioners *wanted* their firms to invest in eDiscovery, the figure increases to 21.5%.²³

Legal practitioners interviewed for this report who have responded as having used automated document review extensively in their day-to-day practice, suggest that this significantly reduces the man-hours required to conduct this aspect of key preparations. When asked if there were certain types of disputes that were more likely to require automated document review or e-discovery, those interviewed responded in the negative, stating that no particular type of matter was more or less likely to use assistance from these platforms; their use was largely determined by the necessity based on scale.

Dispute Resolution, Technology, and Changing Commercial Realities

In addition to having a direct impact on the way that dispute resolution and related processes are done, technology has also had an indirect impact on the likelihood of disputes and how clients are choosing to address them. Practitioners interviewed have raised a variety of approaches to either manage dispute proactively or to avoid dispute altogether.

An article in 2009 reported that as many as 50% of IT contracts escalated into disputes.²⁴ When asked about this statistics, Technology, Media, and & Telecommunications (TMT) lawyers responded that their experiences vary greatly. For typical IT procurement deals, it was suggested that the likelihood of disputes have since declined significantly, with clients taking a more pre-emptive approach. Clients have since become more tempered about their expectations over service delivery, and are accustomed to allowing make-good and service credit provisions for delivery shortfalls. On the other hand, deals concerning complex IT product builds and implementation, disputes remain fairly common. The novelty of such projects make them inherently difficult to scope comprehensively ahead of time, making it difficult for parties to establish certainty over expectations and deliverables at the beginning of projects. In either case, it would be ideal for even transactional lawyers to have an awareness of dispute escalation risk, and how best to address conflict when it arises.

A viable approach to dispute resolution within a technology development context is the AdROIT principles.²⁵ Designed by a team of experienced lawyers, technology mediators, and arbitrators, the 7 AdROIT principles were formulated to guide organisations in designing an internal escalation process in order to minimise disputes in technology development projects. The principles as stated in the *Computers & Law Journal* are:²⁶

1. *An organisation must have attained an Organisational Dispute Management Competency of at least 3 or 4.*

²² Above n3, at 3.

²³ Above n3, at 8.

²⁴ Philip Argy, 'The AdROIT Principles: Lessons for plaintiffs' lawyers' (2009) 92 *Precedent* 36.

²⁵ Philip Argy, 'AdROIT Principles' (2008) 72 *Computers and Law* 12.

²⁶ *Ibid.*

2. *Organisations must have a Relationship Management process/programme in place prior to any contract.*
3. *Must follow a suitable Project Management Methodology.*
4. *An organisation's contracts must conform to the ADRoIT Contract Recommendations.*
5. *An organisation's contracts must incorporate a Dispute Review Board or other proactive dispute avoidance technique.*
6. *The Business Case must be reflected in the Specifications of an organisation's procurement contracts, and there must be a policy for realising the benefits of the project.*
7. *There must be an independent Chairperson of any Project Steering Committee.*

When asked about whether or not clients have asked for advice on implementing internal dispute resolution systems, none of the practitioners interviewed responded in the affirmative. This suggests a low level of awareness of the AdROIT amongst practitioners and clients. This may also indicate that clients are hesitant to dedicate resources to a systematic internal approach to addressing these forms of disputes, at least for the time being.

Some practitioners interviewed have also raised that some clients prefer to incorporate “no disputes” clauses, which preclude mediation or arbitration for certain agreements. This has the effect of discouraging contract parties from attempting to escalate low-level disputes arising from imperfect contract performance. However, this also has the effect of making litigation the default forum for disputes that nevertheless materialise. Some practitioners have also raised that clients have taken the approach of avoiding arbitration or mediation clauses in the contracts – an alternate approach to express “no disputes” clauses. The preference tends to be against mediation or arbitration clauses where parties expect a low-level of compromise between each other. The belief is that mediation and arbitration would merely prolong rather than resolve disputes, making mandatory provisions for such processes counterproductive to the objective of de-escalation.

Another relevant development in legal technology relevant to dispute resolution is increasing interest from clients themselves. Stuart Hall, a director of Relativity US, a leading global eDiscovery platform, affirmed in a recent podcast that their company has started dedicating resources to developing direct business with corporate clients.²⁷ In a recent talk at the Sydney Law School, Graeme Grovum, Former Head of Innovation at Corrs Chambers Westgarth, remarked upon how clients often drive firms in Australia to venture into use of technology.²⁸ In his speech, he noted that clients tend to be more receptive to testing new technologies than their law firms are, and are frequently occasionally frustrated by how their firms lag in terms of technological integration. This then raises the possibility that in-house teams themselves will increasingly be concerned with dispute resolution and ADR practice.

²⁷ Lawyer's Weekly, 'Building an e-discovery toolkit', *Lawyer's Weekly Podcast*, 22 December 2017 (William Magee, Stuart Hall and Nathan Wigginton).

²⁸ Graeme Grovum, 'Corrs Chambers Westgarth: Artificial Intelligence and the Law' (Speech delivered at the Sydney Law School, Sydney Law School Law Foyer, 18 April 2018).

The impact on dispute and conflict resolution practitioners

These emerging technological commercial developments present new opportunities for dispute and conflict resolution practitioners. Firstly, technology potentially allows new practitioners to compete more effectively with more established players. Younger practitioners willing to be more experimental in their use of new technologies may develop a niche in offering cost-effective remote mediation and dispute resolution services. In the existing market, established practitioners have the advantage of expertise and reputation. However, technology-driven dispute resolution is a separate market altogether.

Secondly, emerging technologies allow dispute resolution practitioners to deliver a quality of service that was simply not possible in the past. The use of tools that automate low-skill, labour-intensive processes at the preparatory stage in disputes, such as discovery, due diligence and contract review, allows practitioners to build their cases in a manner that is more efficient, systematic, and arguably more accurate than before. Although not yet available in Australia, Litigation outcome predictors such as Lex Machina²⁹ and Lex Predict³⁰ produce insights about settlement values, judgments and probability of success based on previous litigation. These are of use to International Arbitrators, and other practitioners who have cross border dealings.

Thirdly, dispute and conflict resolution skills are now essential to the broader commercial and legal community and not just litigation and dispute resolution specialists. As clients and transactional lawyers alike address potential conflict from dealings in a more pre-emptive way, up-to-date knowledge of conflict and dispute management techniques will be more essential in their day-to-day work.

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²⁹ Lex Machina, *Lex Machina: How it works* (2018) Lex Machina, <<https://lexmachina.com/what-we-do/how-it-works/>>.

³⁰ Lex Predict, *Lex Predict: About Us* (2018) Lex Predict <<https://www.lexpredict.com/about/>>.