

Is Online Dispute Resolution here to stay? – The Opinion of ADR Practitioners and Clients

By Aaron Zou

As of October 6th 2021, 89% of New South Wales residents and 83% of Victorian residents have had their first COVID-19 vaccination.¹ With two of Australia’s most populous states scheduled to exit lockdown by December, face-to-face Alternate Dispute Resolution (ADR) sessions will once again be an option for many Australians.

The question for practitioners is whether clients will return to traditional ADR post-lockdown, or is Online Dispute Resolution (ODR) here to stay?

Opinions have been mixed. Mr Kanazawa, a former trial lawyer and a current mediator and arbitrator, has become a staunch supporter of ODR during the pandemic, claiming an online platform ‘does not make a difference in the outcome of the mediation.’² Other practitioners have been more cautious in their approach, suggesting ODR is merely “an opportunity to enhance – rather than replace –

In the 2020 study ‘Conflict Resolution in the Virtual World’, Dr Elena Bastidas surveyed 53 alternative dispute resolution practitioners on the impacts of moving their services online.

Is Online Dispute Resolution here to stay?

Practitioners were asked whether they planned to continue offering services through an online platform:

- 62.3% (33 out of 53) said ‘definitely’;
- 28.3% (15 out of 53) said they will ‘possibly’ offer both online and in-person services.

Advantages of ODR?

Practitioners were asked what they consider to be the benefits of ODR:

- 86.8% (46 out of 53) said the minimised need to travel;
- 79.3% (42 out of 53) said the convenience; and
- 47.17% (25 out of 53) said efficiency and technical advantage.

traditional ADR.”³

Although the legal industry has historically been slow to embrace change, the majority of ADR practitioners intend to incorporate ODR into their services moving forward. Australian practitioners

¹ <https://www.9news.com.au/national/coronavirus-vaccine-rollout-australia-state-by-state-guide-covid19-vaccination-rates-single-dose-double-doses-explainer/abacde8f-d35e-45ee-83bc-069ede212ecf>

² <https://www.law360.com/articles/1317501/why-online-mediation-may-be-here-to-stay>

³ <https://www.lexisnexis.com.au/en/COVID19/blogs-and-articles/when-you-cant-meet-in-court-online-alternative-dispute-resolution-during-coronavirus-covid19>

have rapidly developed the skills necessary to facilitate ODR, and clients have become more acclimated to online legal services (such as the transition to virtual hearings in NSW courts).

The least number of practitioners found the ‘efficiency and technical’ aspect of ODR to be an advantage. Younger practitioners who are digital-natives likely found the transition to ODR seamless. However, the average age of arbitrators in the ICC is 51.9 years old, with only 34% of arbitrators being under the age of 50.⁴ Combined with the practitioner’s limited capacity to resolve poor internet connections, webcam and computer issues, it is unsurprising that the majority of practitioners do not consider the technical aspects of ODR to be beneficial.

Regardless, the technical difficulties of ODR have deterred few, with more than 90% of respondents likely to continue offering ODR in the future. ODR is likely here to stay, and practitioners should continue to develop their technical skills for facilitating ODR.

Skills to develop for ODR?

Practitioners were asked what additional skills they felt they needed to be successful in an online setting:

- 47.2% (25 out of 53) said more skills in communicating and managing emotions effectively online;
- 58.5% (31 out of 53) said tips on how to minimise online user fatigue; and
- 45.3% (24 out of 53) said further training and practice with the online platform.

A large proportion of practitioners struggled with communicating and managing parties’ emotions online – parties can be more comfortable sending hostile or insulting messages through an online medium, and can more easily misinterpret text messages and facial expressions. A study from the University of California suggests 55% of interpersonal communication is from visual cues we see from the speaker’s facial and body movements.⁵

An effective ODR practitioner should facilitate effective visual communication by helping clients with their ODR set-up. This includes:

1. Having the camera positioned to show the upper body so the parties’ gestures can be seen;
2. Adjusting the lighting so facial expressions can be seen; and
3. Using break-out rooms and emojis to manage the tension in the room.

An unavoidable drawback of ODR is online user fatigue. This can be attributed to participants joining calls at irregular hours due to the parties’ different time zones. Fatigue caused by sitting in the same spot for a long duration can be solved by scheduling breaks throughout the session.

⁴ <https://hsfnotes.com/arbitration/2020/07/30/2019-statistics-show-a-record-year-for-the-icc/>

⁵ <https://www.law360.com/articles/1317501/why-online-mediation-may-be-here-to-stay>

Practitioners can continue to overcome the challenges posed by ODR by remaining sensitive to the needs of the parties and encouraging the parties to communicate when they are experiencing

In the 2020 SIDRA Survey 'International Dispute Resolution Survey: 2020 Final Report', SIDRA surveyed 226 clients of Alternate Dispute Resolution practitioners on their experience.

Why do clients choose ODR?

Clients were asked what factors influenced their use of an online process in arbitration:

- 44.6% (101 out of 226) said the dollar value of the dispute;
- 13.7% (31 out of 226) said number of anticipated witnesses and/or experts; and
- 8.0% (24 out of 226) said the complexity of the issue.

difficulties.

The survey shows that if the sum in the dispute is low and the issue is straightforward, clients are more willing to use ODR.

However, traditional ADR still has a place for resolving complex or important matters involving large settlement sums. In the survey, only 21% of client respondents were willing to engage in ODR to settle a divorce. This number fell further to 8% when child custody was in issue.

Moving forward, practitioners can still expect traditional ADR to be the first choice for clients involved in serious or complex matters. However, in straightforward matters that are less emotionally charged and concern relatively low sums, the current widespread adoption and practice of ODR will likely be here to stay. It will be the responsibility of practitioners to recommend the most appropriate channel for resolving the dispute.