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Alternative Dispute Resolution

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The benefits of video mediation

LUIGI BENETTON

Face-to-face mediations won't go away, but for cost reasons, they sometimes give way to video-conferencing.

Some professional mediators are banking on this trend. "It's a great time to do online mediation," Petra Maxwell says. The founder and CEO of New York-based MediationLine LLC, a "veteran" of about 15 video mediations (plus portions of others) gives several reasons why online mediation should take off. For starters, legal bills can quickly add up, and as the current economic climate continues to take a toll, people's interest in saving money rises. Meanwhile, divorces, business disputes and other events calling for conflict resolution continue to occur.

There's also an increasingly techno-comfortable market segment that expects such services. "In a divorce I recently mediated, the male was in New York, while the wife had already moved to California," Maxwell explains. "They heard I handled mediation online and called me, asking to use Skype."

Mark Shapiro is a newbie compared to Maxwell, having only participated in one commercial mediation so far. While with his former firm, the Toronto-based partner at Dickenson Wright LLP found himself in the offices of dispute resolution service provider ADR Chambers with the mediator (live) and the other party (via video feed from Ottawa).

"Sometimes you get cases in which dollar values aren't huge, and this makes mediation cost-effective," Shapiro says. "To mediate otherwise, lawyers and clients would have to travel."

Allan Stitt, president of ADR Chambers, admits cost savings may be the only reason to use what his company calls eVideo mediation. "People can be in different cities and can cost-effectively participate in mediation," he explains. "If somebody has a three-hour mediation, they're only there for three hours."

Driving home the cost savings point, he openly states that ADR Chambers charges $250 per remote location, "so lawyers ask whether they would rather pay the $250 or fly to another location for face-to-face meetings." (Maxwell's home page states that her services start at $249.)

Joan Kessler is another newcomer to video mediation. "I conducted a mediation where one party was in Korea," says the Los Angeles-based expert on intercultural communications, and mediator and arbitrator for ADR Services Inc. "He did not want to fly to L.A., so we arranged with the attor-

See **Video** Page 10

Alternative Dispute Resolution FOCUS

Encouraging settlement in arbitration

> *I consider a negotiated agreement infinitely superior to arbitration.*
> *—President John F. Kennedy*

> *Conflict is normal; we reach accommodation as wisdom may teach us that it does not pay to fight.*
> *—Judge Learned Hand*

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HARVEY KIRSH

The drafters of the International Chamber of Commerce (ICC) Rules of Arbitration chose to refer to arbitration as a method for the "settlement," rather than the "resolution" of disputes. For example, Art. 1(1) of the ICC rules provides that "(t)he function of the [International Court of Arbitration] is to provide for the settlement by arbitration of business disputes of an international character in accordance with the Rules of Arbitration of the International Chamber of Commerce." Article 1(2), however, concedes that the court "does not itself settle disputes."

In fact, an informal survey of the ICC Rules, as well as the arbitration rules of some of the other major institutional ADR service providers, does not disclose any rule, procedure, protocol or mandate which directly imposes an obligatory process on the disputing parties to attempt to settle their underlying dispute or claim. For example, although the following arbitration rules all contemplate the implementation of a negotiated settlement by the issuance of a consent award, they do not, for the most part, purport to shepherd the parties through any mandatory process of settlement discussion or negotiation:

- the American Arbitration Association (AAA) Construction Industry Arbitration Rules;
- the Judicial Arbitration and Mediation Services (JAMS) Engineering and Construction Arbitration Rules and Procedures;
- the London Court of International Arbitration (LCIA) Rules;
- the Chicago International Dispute Resolution Association (CIDRA) Arbitration Rules; and
- the recently revised UNCITRAL Arbitration Rules.

By way of contrast, Ontario's *Rules of Civil Procedure* provide that one of the express purposes of a pre-trial conference is "to provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing" (Rule 50.01), and that "(t)he possibility of settlement of any or all of the issues in the proceeding" is one of the matters to be considered at a pre-trial conference (Rule 50.06). Furthermore, Rule 24 calls for mandatory mediation in specified actions "in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes." And Rule 49 promotes settlement by laying out a protocol for the exchange of settlement offers, which, if not accepted, could possibly lead to costs sanctions if the offer is not accepted and the offeror does better at trial.

Similarly, the *Federal Rules of Civil Procedure*, which generally govern the practice and procedure for litigation in the U.S. federal courts, provide that one of the express purposes of a pre-trial conference is "facilitating settlement" (Rule 16(a)(5)). Furthermore, Rule 26(f) requires the parties to confer before any scheduling conference, and, in so conferring, consider "the possibilities for promptly settling or resolving the case." And Rule 68 also promotes settlement by creating a process whereby a defendant would serve a plaintiff with a settlement offer "to allow judgment on specified terms," which, if not accepted by the plaintiff, could lead to costs sanctions if the defendant does better at trial.

Despite these generally contrasting approaches between arbitration and litigation for settlement directives, the distinction is not entirely black and white. For example:

- The ICC's 2007 report, entitled "Techniques for Controlling Time and Costs in Arbitration," provides (at para. 43) that "(t)he arbitral tribunal should consider informing the parties that they are free to settle all or part of the dispute at any time during the course of the ongoing arbitration, either through direct negotiations or through any form of ADR proceedings." Furthermore, "(t)he parties may also request the arbitral tribunal to suspend the arbitration proceedings for a specific period of time while settlement discussions take place";
- The JAMS Engineering and Construction Arbitration Rules and Procedures provide that the "Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation" (Rule 28(a)); and that "(t)he Parties may invite the arbitrator to recommend another JAMS neutral to assist them in reaching settlement" (Rule 28(b));
- Rule R-10 of the AAA Construction Industry Arbitration Rules provides that, "(a)t any stage of the proceedings, the parties may agree to conduct a mediation conference under the AAA Construction Industry Mediation Procedures in order to facilitate settlement"; and
- Art. 1(4)(g) of the CIDRA Arbitration Rules provides that "CIDRA arbitrators are committed to...encouraging settlement where appropriate."

In these cited instances, however, the onus would be on both disputing parties to initiate the settlement process voluntarily, and would not arise out of any rule or procedure mandating them to do so.

The ADR Institute of Canada Inc.'s National Arbitration Rules are perhaps a bit more enlightened when it comes to the incorporation of settlement directives into the fabric of the arbitration process. Rule 22(c), for example, expressly provides that the arbitral tribunal is to call for a pre-arbitration hearing where "the parties shall establish time periods for taking steps to deal with any matter that will assist the parties to settle their differences..."; Rule 38 provides that at "any time before the hearing on the merits, a party may deliver to the other party an offer marked 'without prejudice' to settle one or more of the issues between it and any other party on the terms specified in the offer," and "(t)he Tribunal shall take into consideration the offer, the time at which the offer

See **Settlement** Page 13

Nobody claims video mediation is anything but second-best to face-to-face meetings

Video

Continued From Page 9

neys to use Skype.

"It lasted all day for us and well into the night for him. I could see he grew weary, but I had him in the loop."

Shapiro figures the typical mediation process supports the logic behind video mediation. "After the opening caucus, the mediator shuffles between parties sitting in different rooms. The parties are not in the same room 90 per cent of the time. Do they even need to be in the same city?"

The end-to-end service from ADR Chambers impressed Shapiro. "The settlement documents were prepared, PDFed, signed and returned as if a mediator was there," he says. "We left that mediation with a signed settlement agreement."

Stitt claims the concept isn't new. "At a conference in the States, I attended a session on online dispute resolution and I wanted to figure out how to create an online mediation system, to create the same feeling you get in a live mediation," he recalls.

The system at ADR Chambers differs from generic video-conferencing. "The mediator controls the process," Stitt explains. "People can be all on together, and the mediator can 'drag' people (the mediator included) into caucus and other 'rooms.' The mediator can 'knock' on the 'door' of a caucus, asking if the party is ready to speak.

"The mediator can pull up drawing tools to illustrate situations, fill in settlement agreements right on screen."

Maxwell and Kessler won't get such tailored features from services like Skype or Google Talk, but these services do have advantages: they're easy to install, easy to use, and free.

Nobody claims video mediation is anything but a second-best option to live, face-to-face meetings, especially given the ease with which mediators can perceive non-verbal communication from people in the same room.

"In one mediation, the couple sat together in a room and I was in another location," Maxwell says of a Google Talk session. "I couldn't see them both onscreen, so they had to shift the camera. I could not see all the cues, the rolling eyes, the fidgeting.

"It helps to do a face-to-face meeting first," Maxwell continues. "I need to see how parties interact with one another."

Skype reliability hasn't been perfect either, as Maxwell claims she has had to switch parties to conference calls several times.

Technical sophistication doesn't seem to be necessary. Kessler claims she isn't the most tech-savvy person, while Maxwell says she's comfortable with technology, and both quickly figured out Skype.

Maxwell plans to do follow-up coaching post-mediation using online video. "It will probably take me a few months to build this out," she says. ■