Mediation: Concepts, Evolution And Practice In UAE, England And Wales

We live in a connected world. What impact will technology, artificial intelligence and automation have on the practice of mediation in the next decade (2020's)? Discuss with reference to relevant law, mediation theory and practice in one field of mediation (community, family, RJ, commercial), drawing examples from the jurisdiction of England & Wales and one other jurisdiction.

1) Introduction

Mediation is a form of dispute resolution wherein the Mediator, i.e. the problem solver or the moderator and in layman terms a peacemaker moderates and encourages parties to arrive at a settlement, while having a personal touch to the entire proceeding as compared to other commonly used forms of Dispute Resolution. In words of CEDR, “Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.”

Dispute Resolution means, “Dispute resolution generally refers to one of several different processes used to resolve disputes between parties, including negotiation, mediation, arbitration, collaborative law, and litigation”

“Mediation puts common sense back into dispute resolution”. With the other forms of dispute resolution being quite authoritative, mediation comes out to be considerable, therefore technology and automation are able to pave their way with the increasing demands to resolve disputes at a faster rate. “In the international business context, the e-revolution has influenced the nature of relationship-building, negotiating, transacting and resolving disputes.”

With e -commerce blooming in the early and late 90’s came e-disputes. “The brief history of ODR uncovers the potential of digital technology to generate a new relationship between private and public dispute resolution, one that overcomes what have seemed like intrinsic trade-offs between efficiency and fairness and between structure and flexibility, thereby strengthening both “access” and “justice”

“From automated blind – bidding procedures and e-mediators, to online mediation platforms with a human facilitator and online filing and case management in court connected programs, ODR has many faces.”

“As lawyers, we have an obligation to the client to look for tools that will aid us in achieving the client’s goals”. Therefore with technology and digital it makes mediation a convenient and a user friendly means of dispute resolution. Bruce Leonard stated in 1998 that, “the idea of electronic, virtual or online mediation is indeed valid but still ahead of its time” but with EBay paving way for online dispute resolution or ODR things relevantly changed. [8: K, Jeffery. Taking Mediation Online: Using Digital Communications Technology 1 Law Prac. Q. 19(2000)] [9: B,

Bruce Leonard. Online Mediation: Has its time come. 15 Ohio St. Journal on Disp. Resol. 735 (2000)] [10: https://pages.ebay.com/services/buyandsell/disputeres.html] [11: Online Dispute Resolution (ODR) is often referred as a form of ADR which takes advantage of the speed and convenience of the Internet and ICT – Dr. C, Pablo. CSLS Oxford 28th October

Moving to the two main jurisdictions, United Arab Emirates (hereinafter referred to as UAE) and England & Wales, one can see the basic difference in the legal structure of both the said jurisdictions. As pointed out by Andrew Tarbuck & Chris Lester On one hand UAE laws are more civil in nature and one can see influences coming from the Egyptian laws and Islamic Sharia laws, whereas England & Wales follow a common law system. What's interesting with technology in mediation is that jurisdictions can be irrelevant mostly because the need to physically be present diminishes. giving parties the ease to carry on with their day to day business. [12: T, Andrew & L, Chris. Dubai's Legal System: Creating a Legal and Regulatory Framework for Society: Motivate Publishing]

Furthermore, cyberspace is an area where technically grabbing a hold of a certain specified jurisdiction can be of imminent difficulty but if seen from a perspective where there the difference in laws and culture might initiate more complications, mediating online seems only fair, as one of the methods incorporated under Online Dispute Resolution.

2) United Arab Emirates (UAE)

E-commerce-'the new communication technology' is the latest way of doing business. With Dubai and other Emirates being gradually becoming into commercial giants, disputes are bound to arise. There are centers as Dubai International Financial Centre-London Chamber of International Arbitration(DIFC-LCIA), Emirates Maritime Arbitration Centre, Dubai International Arbitration Centre and Abu Dhabi Commercial Conciliation and Arbitration Centre that have been holding the fort for alternative dispute resolution with Mediation as one of its primary means of dispute resolution. With international transactions and variations in jurisdictions, culture, language, time and business policies, mediating online for commercial matters will prove to be a futile option. [13: 'An introduction to eCommerce', S.G.E. Garrett & Pj. Skevington, BT Technology Journal; Jul 1999; 17, 3; ABI/INFORM Global pg. I1.] [14: http://www.difc-lcia.org/overview.aspx] [15: https://www.emac.org.ae/en/Pages/default.aspx] [16: http://www.diac.ae/idias/] [17: http://www.adccac.ae/English/Pages/Default.aspx]

2.1) Relevant law

His Highness Sheikh Mohammed bin Rashid Al Maktoum, the Vice President and Prime Minister of UAE by Federal Law Number 17 of 2016 i.e. the Mediation Centre Law, paved the way for the establishment of mediation and conciliation, for cases and/or disputes of civil and commercial nature. Even historically speaking, traits of mediation can be seen through the culture and tradition of Muslim faith. Since, UAE is a country with clear dominance of people of Muslim faith, "Sulh or amicable settlement has a long history within Arab and Islamic societies and has it's roots in pre-Islamic Arabia. Sulh is the preferred result and process in any form of dispute resolution." [18: https://www.imimediation.org/2018/09/27/mediation-and-conciliation-in-uae/] [19: ibid]

With the development of free zone (comprising of Dubai Internet City, Dubai Media City and

Dubai Media Oasis, Abu Dhabi Global Market), there has been a significant and distinct growth in the commercial transactions based or arising out of as a contract between UAE and/or any third party.

Dubai International Arbitration Centre (hereinafter referred to as DIAC) and Abu Dhabi Arbitration Centre (hereinafter referred to as ADAC) have been promoting dispute resolution through Alternative Dispute Resolution (ADR). “The DIAC has already commenced significant online activities within the organization through remote deliberations and decisions of its Board of Trustees.” [20: J, Virginia La Torre; A, Hanna; C, Mearl; M, Faiza Farooq, E-Transaction Law and Online

Dispute Resolution: A Necessity in the Middle East, 20 Arab L.Q. 43 (2006)]

What’s interesting to note is that the Dubai Chamber of Commerce have a smart mediation application for online mediation. Being a non -profit organization their mission is to represent, support and protect the interests of the business community in Dubai. It can be rightly said that with the advancement of technology, the future where people can seek remedies online is certainly at the doorstep. [21: http://www.dubaichamber.com/who-we-are/about-dubai-chamber] [22: http://www.dubaichamber.com/dubai-chamber-mobile-services]

Furthermore, the Law No,16 of 2009 provides for settlement by amicable methods. “Dubai Courts has developed a center entrusted with tasks of settling disputes amicably, before referring them for trial through communication with the parties to the conflict, and finding a settlement based on the regulations and legal systems in order to achieve justice and ensure the rights of all the parties by mutual consent.” They can take matters where the claim is not more than ‘AED’ 50,000 and is comparatively quicker, cheaper and preferable alternative method to resolve a dispute. [23: http://www.dubaicourts.gov.ae/jimage/Info_services/Eng/A8%20eng.pdf] [24: United Arab Emirates Dhiram]

Even the Dubai Land Development or “DLD was founded in May 1960 to establish the most prominent real estate sector at regional and international levels” and since, its establishment it has come quite a long way. With its digital application or online service for settlement of Rental cases, all one has to do is, download their application of “Rental Dispute Centre” and they get appropriate redressal from a range of Registration to the topic of the hour, i.e. Online Mediation cases. [25: https://www.dubailand.gov.ae/English/AboutUs/Pages/About-DLD.aspx] [26: ibid] [27: https://www.dubailand.gov.ae/English/Pages/SmartApplications.aspx]

2.2) Mediation theory for mediation in UAE

With face to face or regular mediation practice it is quite simplified for an experienced Mediator to facilitate the entire proceedings. The essence of being physically present in the same room as the parties does create a difference in the most positive sense but as discussed with growing disputes and need for automation and technology it becomes empirical to understand the theories behind resolving a dispute via mediation. This is when Epistemology and Ontology enter the picture.

Epistemology “is the study of knowledge and justified belief”. It is necessary for artificial

intelligence to be able to interpret and apply this theory in a way that a person seeking a remedy should be able to get the redressal in the same manner if the entire proceeding would have taken place in physicality. [28: Ontology, Epistemology & Research Paradigm. https://www.youtube.com/watch?v=hkcqGU7l_zU] [29: https://plato.stanford.edu/entries/epistemology/]

In epistemology it is benevolent to a condition behind a certain piece of knowledge, its sources, structure and its limits as well. Mediators apply this in a way that the entire dispute resolution process automatically becomes a smooth affair for them. In an online mediation it would be necessary to understand the level of knowledge one has and accordingly take in question to facilitate mediations from behind a screen. Specifically, for commercial mediation cases being conducted online or through automated intelligence, the online mediators and the developers would have to understand the cultural difference, the growing rate of commercial activities, mentality and financial concerns & concepts of the investors as well the functionality of a legal system which is based on a combination of Federal Laws, Islamic Sharia Laws and Civil Codes. [30: Supra note 10]

As for Ontology, it is “a branch of metaphysics concerned with the nature and relations of being”. John Locke particularly, was influenced by ancient opposition to Scepticism. Being skeptical literally means being unsure. If the mediator is unsure of what to answer or about the approach or for example lacks knowledge about the UAE laws, then it would certainly be difficult to conduct a proceeding online. As a suggestion, in automated intelligence this theory should be applicable in a way that the automation should be able to predict the accurate answers to the questions or query given in by the user. A person seeking mediation in the UAE in the commercial sphere would most definitely not have time to waste and that would have precisely been the reason of choosing automated or online mediation. Suggestively, Ontology with research based on statistics of commercial queries raised can help achieve this vision. For example, Square Trade, which is “eBay’s preferred dispute resolution provider”. “Square Trade handles over 150,000 cases every year, with a 90% success rate for completed cases”. It can be said, that with the research method mentioned above, Online Dispute Resolution either through negotiation or mediation is paving its path to a stronger future, even in a country like the UAE, with laws being diverse like it’s cultural and business values. [31: https://www.merriam-webster.com/dictionary/ontology] [32: A, Michael. LOCKE Epistemology and Ontology. Routledge Publishing (1993)] [33: https://www.squaretrade.com/merchant/pop/fees_effective_odr.html] [34: ibid]

3) England and wales

“There is no obligation or compulsion to settle, and decisions as to whether to settle or not are made by each party with the benefit of their own privately tendered legal advice, with plenty of time to consider options and risks. This is why mediation and other settlement processes must be essentially voluntary as to continued participation in the process.” In lieu of Tony Allen’s word’s one can seek to negotiate for a settlement through ADR, Mediation being one of the methods. [35: A, Tony. Mediation Law and Civil Practice: Bloomsbury Publishing Plc pg. 12] [36: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct]

“The courts in England and Wales had begun to devise an express duty on lawyers to consider ADR.” The Practice comprised of practioners advising their clients to consider ADR as a

possible attempt to resolve disputes and to keep them well informed through procedures such as mediation and conciliation. [37: Supra Note 35 at pg. 57] [38: ibid]

In a way, settlement can be contemplated to be an inexorable component of the United Kingdom legal system. The fact that even in the entire Brexit scenario, Karl Mackie states that, “A third party mediator can come to the table, look at both parties interests and better establish and maintain constructive dialogue.” [39: Supra note 26 at pg. 13] [40: M, Karl. Brexit Negotiators and the ‘Ancient Regime’ – where are the Mediators: https://www.cedr.com/blog/brexit-negotiations-and-the-ancient-regime-where-are-the-mediators/]

3.1) Relevant law in united kingdom

The Civil Procedure Rules is undoubtedly the governing law for mediation in the country. With its introduction and the government’s willingness to promote settlement Mediation became a necessary topic to be covered by disputants.

In terms of how technology has paved way or how automation has helped or is helping to improve the scenario, the information listed below shall enlighten this statement.

The Ministry of Justice through their website provides the citizens of England and Wales a source to resolve disputes via their online mediation service. Depending upon the type and hours needed the fee ranges from GBP50/- to GBP 450/- (excluding vat), varying for claims up to GBP 50,000/-. [41: https://civilmediation.justice.gov.uk/] [42: ibid] [43: Greater Pound]

What’s fascinating is to see organizations like the “ADR-ODR International” that train mediator’s lawyers and/or other professionals not only in arbitration or the regular mediation practice but ODR as well, besides which it to state it for informative purposes comprises of Online Mediation too. Having branches, globally including United Arab Emirates and current focus, i.e. England and Wales. Even, the ADR group offers Online Mediation services for corporates and businesses, being one of the largest and most recognizable service provider for Dispute Resolution. [44: https://www.adrodrinternational.com/about] [45: http://www.adrgroup.co.uk/]

When talking about commercial business, how can one not consider finance. There is a service known as the Financial Ombudsman Service, that is United Kingdom’s in resolving financial issues. Moreover, websites like ODR Contact Point provides information to the buyers to access the Online Dispute Resolution system. One can also not ignore the fact of Mediation agreements. A well drafted Mediation agreement can turn out to be fruitful in terms of automated mediation or online mediation if the concerned mediation agreement contains a well detailed clause. [46: https://www.financial-ombudsman.org.uk/about/index.html] [47: https://www.odrcontactpoint.uk/content/introduction]

3.2) Mediation theory for mediation in england and wales

E-mediation usually denotes different concepts ranging from a cyberspace mediation, e-commerce mediation or mediation conducted with the help of video conferencing and emails. With this notion being stated, England and Wales can be said to be the hub of dispute

resolution processes. Since Epistemology is related to nature of knowledge and the process of figuring out what is true, England and Wales with the aforementioned statement seems to have figured out the involvement of this theory in Mediation. With Ministry of Justice being involved in getting its citizens the appropriate remedies show the desirability and the constant work of the government to be directly involved in understanding the knowledge behind an issue, understanding what caused it and proving an easy and a convenient remedy to those who need the ease of dispute resolution with bare minimum knowledge. With civil procedure and centers like the London Chamber of International Arbitration (hereinafter referred to as LCIA), mediation theory can seem to be in place and working. [48: Mistelis, A Loukas. ADR in England and Wales, 12 AM. Rev. Intl. ARB. 167, 214(2001).] [49: Supra note 27]

Speaking about Ontology it's about identifying things that are actually present and needing to figure out the answer to the question. Using this theory, as discussed above in lieu of its application in the UAE of being able to understand the question either by a mediator online or through automated mediation, England and Wales can suggestively, do so by expanding the online mediation service through centers that already well established. With LCIA and Chartered Institute of Arbitrators with London being a hotspot for ADR and with the ease of technological advancements, this country can massively outperform the theory of Ontology in either automated mediation or both, i.e. inclusive of online mediation with a mediator being involved in real time. [50: Supra note 29]

4) Conclusion

"ODR is still in its infancy, but will come to the fore as new generations of lawyers and potential users accustom themselves to performing all kinds of tasks online. Ultimately the concept of interaction in a virtual reality will likely transform many of our concepts of negotiating and adjudication and even our notions "in court" and "out of court", a view given in 2004 can now with the statements, evidence and suggestive applications stated in this paper, it can be said that this new generation of lawyers have come a long way. We now have Online and automated Mediation in a place like UAE which was once considered to be quite backward in comparison to other countries. But now, with ever expanding business and trade the scenario is changing. [51: S, J Thomas.ADR and the Vanishing Trial" The Growth and Impact of Alternate Dispute Resolution, I. JEmpirical Legal Stud (843) 2004]

As for England and Wales, a country which is developed, has been implementing technology and using mediation to address the problems of its citizens by incorporating legislature. Moreover, in the kind of the current political scenario of Brexit, online mediation can suggestively turn out to be a feasible option for Medium and Small Enterprises and for businesses with not much as capital involved.

The next decade, indeed looks quite sharp with automation, artificial intelligence and technology being involved in 2020's.