

The Latent Blossoming Of Remote Mediation

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The Street of a Thousand Blossoms by Gail Tsukiyama tells the story of a family living in Tokyo over 30 years. Two brothers, one a sumo wrestler and the other a maker of Noh theater masks, are forced to adapt their lives to changes in society in order to succeed in their traditional professions. In an exchange about the past giving way to the present, one brother observes to the other that "[e]verything seems simpler from a distance."

Both the story and sentiment could describe the present arc of online mediation. While there have long been proponents and some limited pockets of uptake, including auction disputes on eBay, remote mediation at large was born with the pandemic out of necessity. The impossibility of travel and of meeting in person has obliged many mediators to move their practices online. This trend is not likely to be immunized by a Covid-19 vaccine.

Mediators and disputing parties have come to appreciate the benefits of meeting online and are more comfortable with Microsoft Teams and Zoom. CREK and Modron Spaces offer platforms that are specifically targeted to dispute-resolution proceedings. Cross-institution collaborations, including the JIMC-SIMC Joint Covid-19 Protocol, provide for online mediation by default. These developments echo a growing appetite for the use of technology in mediation more generally reported in a study by the Singapore International Dispute Resolution Academy. As online mediation becomes more common, it is instructive to consider various ways that its use could improve mediation practice. The possibilities have particular implications for international commercial disputes.

Comparative Disadvantages

Before speculating about what might be possible, it is useful to acknowledge potential limits of mediation online. Hours staring at a screen can be tiring, and finding a convenient time to mediate may be difficult where participants are in different time zones. Establishing rapport between mediator and parties may be more difficult onscreen than face to face, though many mediators with online experience observe that this concern is overstated. There may be more environmental distractions as parties join from home or their offices, and there may be less scope for spontaneous exchanges over lunch or in a hallway that lead to breakthroughs outside the four corners of the planned process. The act of physically attending a mediation may itself favour settlement. The investment in time and resources required to be present in person may result in more meaningful engagement than where a mediation can be ended with the click of a mouse.

Comparative Advantages

Despite these potential limitations, remote mediation has the advantage of being more flexible and more cost and time efficient than mediation in person for evident reasons. Remote mediation, to borrow from Einstein, is free of fixed notions of space and time. The absence of a physical mediation space means that rooms do not need to be reserved and participants do not need to travel, lodge, and be supplied with printers and catered sandwiches. Time is elastic in the sense that mediations can be set up, adjourned, and reconvened with relative ease. The cost and time efficiencies that are inherent to mediation are thereby amplified in remote proceedings.

A consequence of the comparative flexibility of online mediation is that there is greater scope to customize mediations. A series of shorter meetings, for instance, can replace a single mediation event. Meetings can be arranged with parties individually without the need for other parties to be present at the same time. The implications of these and other variations on common practice are considered below.

More Mediations

The flexibility of remote mediation expands the range of disputes suitable for mediation. Small commercial claims are better candidates for mediation online than in person because the process is cheaper and easier to initiate. Complex commercial mediations are equally well suited to remote proceedings because distant mediators, parties, and other participants can be brought together more quickly and easily. Many of the scheduling conflicts and logistics that make complex proceedings difficult to organize fall away online. These features should make mediation attractive to a broader spectrum of disputants leading to more mediations.

Better Access to Mediator Training

The pandemic has engendered an explosion of online mediation instruction and accreditation courses. The Centre for Effective Dispute Resolution, the Chartered Institute of Arbitrators, the Harvard Program on Negotiation, the International Mediation Institute, the Resolution Institute, Sage Mediation, and the Singapore International Mediation Centre, for example, offer online mediation training and resources. With a reliable internet connection and a willingness to forgo sleep, it is possible to train and be accredited as a mediator with leading institutions from anywhere in the world.

Better Mediations

The relative ease of participation in remote mediations can improve the process. Attorneys, parties, and mediators can work together in configurations that might be impossible if physical meetings were necessary. Experts can be brought into proceedings more cost effectively while remote interpretation can be integrated into online platforms using Interpretify and Kudo. Senior decision-makers who could not travel to attend a physical mediation can come and go more easily online. These factors should improve the substance of negotiations, aid risk assessment, and bring dispute managers closer to the mediation process.

Remote mediation can also be tailored to accommodate the particular needs of individual disputes more easily than mediation in person. Mediation conceived as a one- or two-day marathon can be reconceived as a series of shorter meetings over the course of a few days. Mediator Geoff Sharp, for instance, has found benefit in using a series of short private sessions online over several days leading to a joint session after issues have been explored in private and a potential path to settlement has been worked out. Physical distance may aid this process. He observes that "without having to face people across a narrow boardroom table, there is a sense of room to breathe, to reflect and to make better decisions, without (I am told in feedback) the stress of trooping in and out of the joint room, time and again re-engaging with the counterparty."

A decompressed schedule can also enable a mediator to devote more time to discrete issues or discrete relationships in multi-party proceedings. Strategic breaks can be used more easily, free of a clock ticking towards return flights home, to allow a party to process new information or as a means of overcoming deadlock. The online environment makes such variations possible and gives mediators greater scope to tailor the proceedings to particular circumstances and modify the process as it advances.

Better Co-Mediations

Co-mediation, whose profile has risen in recent years, also has greater potential in remote proceedings. The online space makes it possible for distant mediators to work together to bridge linguistic or cultural divides between parties, which may help mediation to penetrate new markets. Mega mediations that might otherwise be unmanageable can be handled more easily by two mediators online. The ease of joining mediators may also make strategic mediator collaborations possible and enable co-mediators to take turns, divide labour, and alternate styles to better fit the circumstances of particular disputes.

More Mixed-Mode Proceedings

Integrating mediation and arbitration enables disputing parties to move more easily between the processes. Hybrid arrangements, notably the SIAC-SIMC Protocol, and model dispute resolution clauses, including those published by the ICC, the SCC, and WIPO, combine mediation and arbitration into unified dispute-resolution systems. The prospects of such mixed-mode processes have lately been receiving more attention in academic writing, working groups, and institutional protocols.

Remote mediation may expand the potential for mixed systems of dispute resolution. Mediation before arbitration is more likely where the process requires less planning and no travel. Once arbitration is underway, there is greater scope to use remote mediation to reattempt a global settlement or to seek to dispose of particular claims or disputes. The results of a forthcoming survey on the use of mediation in arbitration (LCAM-HSE Survey) find that more than 25% of mediator respondents had used mediation after document production in arbitration while about 6% had used mediation after arbitration hearings. The ease of mediation online makes such possibilities more feasible in a broader range of circumstances.

A Virtual Street of a Thousand Blossoms

Remote mediation has been winning over early skeptics among experienced mediators. Many say they will continue to mediate some disputes online after the pandemic and use hybrid mediations with some participants present in person and some joining remotely. This evolution in practice need not be limited to considerations about how physical mediation can be cut and pasted into the digital world in the name of efficiency. The online space offers the possibility of a process that is better tailored to individual disputes and that is more accommodating of new participants and new markets. Set in these terms, the present moment of change is an opportunity to reconsider how to better align mediation with the needs of a broader range of disputing parties.