

## Editors' note

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The current issue is published during a pandemic which has seriously disrupted social life across the world. This unprecedented public health crisis has had a significant impact on mediation practices too. Mediators have been called quickly to adapt their practice to accommodate remote communications, enabling parties to participate in mediations at a distance, often via telephone or video-conferencing commercial applications, such as Zoom and Skype. New challenges and opportunities have emerged, raising many questions, including about the nature and suitability of online mediation, the principles governing this process, appropriate responses to power imbalances between the parties, and implications for access to justice.

Whereas the literature on online mediation and its pros and cons have been growing for quite a while, there is still very limited empirical research that examines the impact of technology in the dispute resolution process. It is nonetheless clear that while some in-person signals are

limited or even lost in the online process, online communications can overcome physical distances, making the online mediation as an important, and often the best process, for many disputes. Indeed, examples of online mediation to resolve a variety of civil disputes have been developed in numerous legal systems ranging from the UK to China (Palmer and Roberts 2020; Cortes 2010, 2017). The shift from the offline to the online world has been particularly notable for (often low-value) consumer disputes. This has been fuelled by the ADR Directive 2013/11/EU and the Online Dispute Resolution (ODR) Regulation (EU) 524/2013, which require publicly certified ADR entities in the EU to resolve consumer disputes without the physical presence of the parties (Directive 2013/11/EU, articles 5.2(a) and 8(a)).

Outside the consumer realm, ODR processes have for some time been used to adjudicate disputes between domain name holders and trademark owners. Notably, Nominet, which resolve disputes over .uk country code domain names, offers cost-free online mediation to disputants (Nominet 2020). Similarly, as noted in our previous Editorial, HM Courts and Tribunal Service offer free of cost one-hour telephone mediation for most civil claims under £10,000 which are allocated to the Small Claims Track and assigned to a county court. This trend digitalising the courts and tribunals is increasingly accompanied with a conciliation stage in the procedure (e.g. the Online Civil Money Claim). This approach has also been seen outside the UK, notably with the Civil Resolution Tribunal in British Columbia, Canada, which has informed the design of the English Online Civil Money Claims and offers mandatory online third-party facilitation as part of its procedure.

However, what has also been new in the last eight months is the impact of COVID-19 on online mediation. The recourse to online mediation does not seem any more a real choice; it is now a necessity and often the only available option to resolve many disputes while health concerns and travel restriction measures remain in place. The lack of alternatives to online means of communication could arguably question the commitment to the principle of voluntariness, and to limit the availability of plurality of dispute resolution methods advocated by the ADR movement (Menkel-Meadow 2016).

When distanced means of communications is the preferred option for the parties, the advantages of using them during the mediation process have become increasingly evident during the pandemic. Anecdotal data

collected by the editors of this journal suggest, for instance, that the number of requests for online mediation has increased significantly and that its use might be encouraging assertiveness in parties who would otherwise be shy or less articulated in putting forward their case in a face-to-face setting. At the same time, however, online mediation during the pandemic can exacerbate power imbalances between the parties. Thus, it is crucial that mediators become aware of how the digital medium impacts on their parties' abilities to present their views. How should a mediator respond when one of the parties struggle to use the technology? What if the quality of the sound is poor or if the camera does not work for one of the parties?

Academic research can help to identify best practices and inform mediators on how to conduct the process in a more effective and fair manner. Accordingly, there is an urgent need to carry out empirical research to assess how the use of online communications impact in the mediation process and how and when it is more appropriate its use. Questions which need to be addressed in the near future include:

- Can it be argued that offering online mediation on different platforms including Zoom, Skype and WhatsApp is a dimension of that plurality of methods advocated by the ADR movement?
- How best can online mediation manage power imbalance?
- Is online mediation really mediation?
- Can issues of domestic abuse be handled in the online process?
- Is online family mediation effective, and if so, in which circumstances?
- Does mediator impartiality become more difficult to maintain? And do we need to refurbish ethical standards?

Without the aim of giving answers to the all the questions above, but with the purpose to start a conversation among mediators on their experience with online mediation during the pandemic, this issue includes two case studies that reflect on the practical implications that the COVID-19 pandemic has for mediation practices. Jo O'Sullivan and Stephen Anderson, drawing upon their practice experience, reflect on two disputes they mediated using online means of communication. O'Sullivan discusses handling a dispute which she characterises as hybrid mediation because it involved a combination of civil and family models of mediation, relational mediation, and using Zoom. She reflects on the processes, the parties and also on the role of the solicitors supporting the parties in

disputes. Anderson considers some technical issues that arose during an online in-person hybrid family mediation involving a former senior police officer and her husband. He offers insights into the manner in which technical issues concerning access to the Internet and technology might play a significant impact on power imbalances between the parties. He concludes noting that limited access to technology can exacerbate already existing power imbalances.

This issue also includes two research articles. The first is by Cynthia-Lee Williams and examines the mediation selection process of police oversight agencies in the USA. Specifically, this study considers the long-standing tension experienced between the police and certain groups (e.g., minorities, youths, and residents of disadvantaged communities) and unearths the groups are more or less likely to meet with officers to resolve police complaints. The data, obtained from the New York City Civilian Complaint Review Board and United States Census, allow for an analysis of complainant demographic and neighbourhood characteristics. Interestingly, the results of this study demonstrate that minorities are more likely to select mediation.

The second research article is by Amy Schmitz and explores the potential for ODR in settling consumer disputes arising from eCommerce. Building on her book *The New Handshake* co-authored with the ODR pioneer Colin Rule, Schmitz observes that face-to-face dispute resolution can be costly in terms of time and money, and even dangerous in these times of COVID-19. She proposes that a well-designed ODR system can incorporate business and consumer commonalities that help parties to reach win-win solutions for e-commerce disputes. While she acknowledges that not all ODR is fair and efficient, that the digital divide remains a concern and that the internet undoubtedly generates vulnerabilities for consumers, she explains that online communications and ODR also create opportunities for consumer empowerment. She argues that the time is right to take advantage of those opportunities and create a unified ODR system that provides fast and fair resolutions worldwide. The article discusses ideas for such a system to create a 'new handshake' that inspires trust in e-commerce.

The issue concludes with a review of Tony Allen's book *Mediating Clinical Claims* (Bloomsbury Professional, 2018) by Sarah Barclay. Although the book was published before the COVID-19 pandemic, it remains very relevant as it is written by a leading mediator in clinical

negligence claims who unveils the intricacies of the mediation process in this growing sector.

Finally, we wish to remember and pay tribute to the memory of Anne-Marie Hutchinson and her significant contribution to the theory and practice of family mediation in the UK.

## References

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