

## Editors' note

Pablo Cortés

*University of Leicester, UK*

[pablo.cortes@le.ac.uk](mailto:pablo.cortes@le.ac.uk)

Maria Federica Moscati

*University of Sussex, UK*

[M.F.Moscati@sussex.ac.uk](mailto:M.F.Moscati@sussex.ac.uk)

Since the previous issue in this journal the theory and practice of mediation has continued to expand and to move towards the digital medium. The last semester was characterised again by the severe mobility restrictions caused by the COVID-19 pandemic, where the use of technology remained to be indispensable in the delivery of mediation services. The Centre for Effective Dispute Resolution (CEDR) published its ninth Mediation Audit in May 2021.<sup>1</sup> This report, which is based on a biennial survey of commercial mediators in the UK, made interesting findings, including that the number of mediations carried out in England and Wales increased by 38 per cent (from 12,000 mediations in the previous report, to 16,500 mediations in the last one). The overall settlement rate was 93 per cent, an improvement from 89 per cent in the previous audit, with 73 per cent of cases settling on the day and a further 21 per cent settling shortly afterwards thanks to progress made at the mediation itself. Unsurprisingly, while only a very small number of mediations were

held online prior to the pandemic (2%), the number of online mediations grew exponentially to 89 per cent. The move to the online medium is also happening to courts and other ADR processes, where the use of online dispute resolution (ODR) communications is increasingly rapidly, in particular for holding preliminary meetings and hearings.

A growing preference for early consensual settlements over adjudication has led to significant number of noteworthy developments. For instance, in England the government has recently launched a £1 million voucher scheme to encourage those attending a Mediation Information and Assessment Meeting (MIAM) to proceed to a full mediation. With the goal of increasing conversions, parties attending a MIAM will be informed of the possibility of applying for a £500 voucher towards the cost of their mediation.<sup>2</sup> The voucher scheme is not means tested and it is administered by the Family Mediation Council. Another significant development in England has been the introduction of the Boundary Disputes Mediation Service. This is an area which has experienced growth during the pandemic as people spent more time confined at home, and where litigation costs are often disproportionate.

Technology-mediated software is also being used to promote early settlements that avoid court litigation. In this regard, a number of pre-action protocols now require prospective litigants to explore a settlement via an online portal before they are allowed to escalate their claims to court. These pre-action processes are increasingly supported by ODR platforms that facilitate the negotiation between the parties and their legal representatives. Two important initiatives in this field in England are the Claims Portal for personal injury claims from road traffic accidents and the new Whiplash Portal for low-value personal injury claims also resulting from road traffic accidents. The Whiplash Portal, which was only launched on 31 May 2021, seeks to reduce fraudulent cases, resulting in a reduction of vehicle insurance premiums. The new Portal, formally known as the Official Injury Claim, is free of cost, and it can be used by claimants with minor personal injuries when the compensation sought is under £5,000 for personal injury, and up to £10,000 for other losses, such as loss of earnings or damages to the vehicle.<sup>3</sup> Unlike the Claims Portal, the Whiplash Portal processes claims where liability is disputed, and notably it allows parties to refer an element of the claim to the court (say liability), the court will review the evidence entered by the parties in the Portal and will adjudicate the element of the dispute after a hearing.

Once the contested issue is resolved, the case will resume in the Portal so that the parties can reach a settlement.

The Master of the Rolls (who is the head of civil justice in England and Wales and the most senior judge after the Lord Chief Justice) has noted that the ongoing court digitalisation program will further integrate ADR into the civil justice system.<sup>4</sup> He announced the development of ‘online funnel’ to link pre-court ADR schemes with the court process, which digital process will seek to identify the most suitable moment (e.g. after the admission of liability or the availability of expert reports) to refer the parties again to ADR. He observed that:

At present, ADR initiatives are patchy and often hindered by the ability to opt out or the failure of one or other party to opt in. Every dispute has a sweet spot at which it is most susceptible to resolution. The programmes can themselves learn to detect when that occurs in any particular type of case, and then offer the mediated intervention that is most likely to be effective.<sup>5</sup>

Thus, the ongoing court digitalisation program, which in two years’ time expects to deliver online processes for most types of civil claims (including money, damages, employment and family disputes), will have a single entry point via this online funnel, where pre-action engagement and ADR will gain greater prominence. The legislative underpinnings for the new digital wave were introduced in parliament on 21 July 2021 in the Judicial Review and Courts Bill, which inter alia creates a new Online Rules Committee with authority to require court proceedings to be conducted online, from the start to the final hearing. The new committee will also be able to draft procedural rules that ‘support the use of innovative methods of resolving disputes’ (i.e. ADR and ODR).

In so doing, ADR will be further imbedded into the civil justice system, eroding even more the ‘alternative’ component of ADR. This view was recently acknowledged by the Master of the Rolls when he observed that ADR ‘should really be renamed as “Dispute Resolution” since it is not alternative at all’.<sup>6</sup>

The symbiotic relationship between the courts and ADR has been entrenched in the family field for quite a while, and it is now making inroads across the entire spectrum of civil justice. The White Book, which contains the Civil Procedure Rules, states in its Preface that a case should not proceed to trial without the parties having considered some form of

ADR.<sup>7</sup> The trend of promoting ADR is underpinned by the growing recognition that judicial (but also private) adjudication is often not the best process to resolve many private disputes. The shift towards recognising ADR in general, and mediation in particular, as the preferred method of dispute resolution for civil cases can be seen in the Online Civil Money Claim (OCMC) service. The OCMC, which has already processed over 200,000 cases since its launch in 2018 and is still operating on a pilot-basis for money claims under £10,000 brought by litigants in person, has recently launched a sub-pilot. Under the new trial scheme, instead of asking parties to opt-in to the free telephone mediation offered by HM Court and Tribunals Service (HMCTS), parties are automatically allocated to a mediation slot, though litigants can still opt out without the need to provide a justification. HMCTS is at the time of writing this Editorial conducting an evaluation of this opt-out mediation sub-pilot.

These small claims, which represent the lion's share of cases determined at trial in civil courts, have been the focus of a recent interim report published by the Civil Justice Council. A key conclusion in their report is that cases should not proceed to a hearing when parties have requested mediation. This is because, currently, over a third of the requests are not allocated to a mediation due to limited number of mediators, time restrictions, and parties' availability on the allocated day.<sup>8</sup> The report observes that judges do not refer cases to the telephone mediation scheme because they are aware that the system is overburdened. Moreover, noting the variety in value and complexity of small claims it suggests that certain cases (e.g., construction disputes or when expert evidence is required) may be better suited for private mediation, for which an effective court-annexed system would need first to be put in place. The report also discusses the variety of practices in county courts nationwide, praising the Birmingham model, which was implemented during the pandemic to deal with the growing backlog of cases. In Birmingham where parties with small claims are allocated to a 30-minute telephone preliminary hearing in advance of the final hearing, resulted in the disposal of nearly half of the claims (47.5%) at the end of the preliminary hearing.<sup>9</sup> It suggests that this model might merit its expansion (subject to a cost analysis after the telephone mediation system is able to capture all the requests) and it recommends asking parties in the allocation questionnaire whether they consent to a dispute resolution hearing in advance of the final hearing.

Furthermore, the provision of mediation and the finality of settlements can contribute to make the UK as a more attractive destination for international business. To that end, taking advantage of the flexibility gained after Brexit to enter into international agreements independently from the EU, the Lord Chancellor has announced a forthcoming consultation to explore the suitability of the UK to sign and ratify the Singapore Convention on Mediation, which facilitates the enforcement of mediated settlements in cross-border matters. The UK government believes that ratifying the Convention would help ‘to maintain London and the UK as an attractive Dispute Resolution hub, and, more generally, would promote international mediation. This would give parties even greater opportunity to access to justice.’<sup>10</sup>

The present issue contains two practice papers and two research papers. In the first practice paper, Cathia Moon, Susan Raines and Laffon Brelland discuss the findings of an online survey carried out with 41 mediators in the United States after their first mediation with regards to how their training prepared them for their professional practice. After a brief literature review on the different training models, the authors discussed the findings, which noted that the participants voiced a desire for more observations and co-mediation of cases, or at least to be able to participate in more role-play practice.

In the second practice paper, Andrew Sims reflects on his own interdisciplinary experience and invites mediators to expand their role and process by incorporating in their practice, when suitable, an ‘extended preparation phase’ following an initial pre-mediation meeting, and by extracting lessons from previous mediations, especially from an organisational level. He observes that there is much to learn from the use of mediation in other different sectors.

The study of mediation in different sectors is also the starting point of the research paper by Lesley Allport. Her paper builds on the findings of her doctoral research, which explored the similarities and differences of mediation across sectors. She observes that there are more commonalities among sectors than what is usually acknowledged among mediators, and found that the variations in practice are as much within the sectors as between them.

Last, but not least, Brian Barry’s research paper proposes a three-step model to help workplace mediators decide on the best strategy for mediating these disputes. His model is based on a modified version of a grid

for mediation orientations developed by Professor Riskin. The model first asks the mediator to consider the nature of the dispute based on three elements and then guide the mediator to decide the approach based on two aspects of the mediation strategy: how broadly the problem should be defined and the style of mediation that the mediator should use.

Finally, this issue includes an obituary Mohamed M. Keshavjee wrote in honour of Nourin Shah-Kazemi, who has contributed significantly to research concerning the impact of culture on negotiation and mediation.

## Notes

- 1 CEDR, *The Ninth Mediation Audit: A Survey of Commercial Mediators Attitudes and Experience in the United Kingdom* (London: Centre for Effective Dispute Resolution, May 2021), retrieved from [www.cedr.com/wp-content/uploads/2021/05/CEDR\\_Audit-2021-lr.pdf](http://www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-lr.pdf).
- 2 Ministry of Justice, '£1 million voucher scheme to help families resolve disputes outside of court', press release (26 March 2021), retrieved from [www.gov.uk/government/news/1-million-voucher-scheme-to-help-families-resolve-disputes-outside-of-court?utm\\_medium=email&utm\\_source=](http://www.gov.uk/government/news/1-million-voucher-scheme-to-help-families-resolve-disputes-outside-of-court?utm_medium=email&utm_source=).
- 3 See MIB, 'Official injury claim', retrieved from [www.mib.org.uk/managing-insurance-data/mib-managed-services/whiplash-reforms-programme](http://www.mib.org.uk/managing-insurance-data/mib-managed-services/whiplash-reforms-programme).
- 4 G. Vos MR, 'Reliable data and technology: the direction of travel for civil justice', Law Society Webinar on Civil Justice and LawTech (28 January 2021), retrieved from [www.judiciary.uk/announcements/speech-by-the-master-of-the-rolls-reliable-data-and-technology-the-direction-of-travel-for-civil-justice](http://www.judiciary.uk/announcements/speech-by-the-master-of-the-rolls-reliable-data-and-technology-the-direction-of-travel-for-civil-justice).
- 5 *Ibid.*, para. 38.
- 6 G. Vos MR, 'Recovery or radical transformation: the effect of Covid-19 on justice systems', London School of Economics (17 June 2021), para. 19, retrieved from [www.judiciary.uk/announcements/speech-by-the-master-of-the-rolls-at-the-london-school-of-economics-recovery-or-radical-transformation-the-effect-of-covid-19-on-justice-systems](http://www.judiciary.uk/announcements/speech-by-the-master-of-the-rolls-at-the-london-school-of-economics-recovery-or-radical-transformation-the-effect-of-covid-19-on-justice-systems).
- 7 Lord Justice Jackson (ed.), *White Book* (London: Sweet & Maxwell, 2021), Preface.
- 8 Civil Justice Council, *Resolution of Small Claims* (April 2021), para. 58 *et seq.*, retrieved from [www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf](http://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf).
- 9 *Ibid.*, para. 129.
- 10 Ministry of Justice and the Rt Hon Robert Buckland QC MP, 'Lord Chancellor's speech: London International Disputes Week' (13 May 2021), retrieved from [www.gov.uk/government/speeches/lord-chancellors-speech-london-international-disputes-week](http://www.gov.uk/government/speeches/lord-chancellors-speech-london-international-disputes-week).