**The COVID-19 Response as a Mediation Blueprint for the Future? Mediators’ Perspectives on the shift to Remote Mediation in Civil Disputes**

Abstract

The COVID-19 pandemic caused a rapid acceleration towards methods of dispute resolution which enabled disputants to participate remotely. Whilst important research has been published on its impact on participants in court proceedings,[[1]](#footnote-1) very little empirical research has been conducted on the effect that the enforced pivot to online operation had on mediation. Drawing on data obtained from a survey of mediators registered with the Civil Mediation Council across England and Wales, this paper provides an insight into mediators’ experiences of conducting mediations online, including whether the necessary transition to remote mediation has had any impact on the number of mediations conducted, rates of settlement, and perceived levels of satisfaction of mediating parties. This data is used to establish whether there is a future for online mediation post COVID-19 and, if so, whether any areas of common best practice can be identified to optimise the way in which online mediations are conducted.

Introduction – Background, Context and Purpose of the Study

For some time, commentators have predicted how information technology, used appropriately, can provide the legal sector with significant opportunities to widen participation, improve service delivery[[2]](#footnote-2) and save parties to disputes both time and cost.[[3]](#footnote-3) Technology can achieve this in a variety of different ways, depending on the level of intervention and disruption to, inter alia, the status quo and the removal or enhancement of core human involvement.[[4]](#footnote-4) On 23rd March 2020, the UK government introduced a series of measures in response to a novel and hitherto unknown coronavirus, COVID-19.[[5]](#footnote-5) Legal restrictions were placed on citizens leaving their home save for limited reasons,[[6]](#footnote-6) non-essential businesses and venues were closed[[7]](#footnote-7) and gatherings of more than two people in public spaces were prohibited.[[8]](#footnote-8) Actors within the English and Welsh civil justice system, including those delivering mediation services, were forced to conduct their business exclusively online.[[9]](#footnote-9) Indeed, technology has enabled many justice systems to continue to operate effectively during COVID-19.[[10]](#footnote-10)

The transition occurred at an unprecedented pace[[11]](#footnote-11) and forced dispute resolution processes, which to that point had been conducted almost entirely face to face,[[12]](#footnote-12) to become online dispute resolution (ODR) processes.[[13]](#footnote-13) In a June 2020 article concerning the place of virtual mediation in a post COVID-19 world, Rab posited that ‘dealing with the current challenges on a sustainable basis post-pandemic will require significant innovation, flexibility and enterprise from lawyers. Virtual mediation may be the best bet in these circumstances’.[[14]](#footnote-14) As government restrictions were gradually eased, the discourse surrounding the ways in which technology and dispute resolution could be embedded ‘at the heart of the justice system’[[15]](#footnote-15) increased, with the ‘opt out’ mediation pilot being extended as part of Online Civil Money Claims[[16]](#footnote-16) and, most recently, the Civil Justice Council recommending that compulsory mediation be introduced for parties to disputes with a value at risk of less than £500.[[17]](#footnote-17) Integrated into these proposals was the notion that some dispute resolution processes will be conducted remotely in the future.

Outside of projects seeking to embed remote mediation more formally into the civil justice system, according to research conducted by the Centre for Effective Resolution 16,500 mediations took place in England and Wales during 2020, an increase of 38% from the same time period in 2018.[[18]](#footnote-18) This demonstrates the increasing significance of private mediation in resolving disputes outside of the court process.

This article therefore seeks to identify the impact which the enforced incorporation of technology has had on civil mediation in England and Wales, with a view to informing the way in which remote mediation is used in the future. The questionnaire which forms the foundation of this study sought mediators’ perspectives on what makes their clients more or less likely to engage in mediation online and how mediation using that forum can best be managed, as well as eliciting data on common and best practices which can be adopted to enable remote mediation to continue its recent ascendency in popularity, to create a provision which is viewed as a genuine, cost-effective and useful alternative to judicial determination. Data also emerged concerning the motivation of participants to engage in mediation, both online and otherwise during both the early stages of the pandemic and throughout the temporary releases from the most stringent lockdown restrictions which followed. This tests whether Hensler’s view that the high costs and lengthy delays associated with the court process are the main driving factor behind parties to civil disputes engaging in alternatives to the judicial process remains the case following the pandemic.[[19]](#footnote-19) These are the questions which the data presented in this article is seeking to address. There is therefore much value in using the experiences of those who have been at the forefront of the unexpected and enforced shift to remote mediation to explore any lessons which can be learned from them.

It should be clarified from the outset that this study is not seeking to promote the use of online mediation is every dispute, nor will it attempt to review or cover the vast range of literature regarding the advantages and disadvantages of online dispute resolution. It is focused on the ways in which mediators can perhaps use the experiences shared by others resulting from the COVID-19 pandemic to optimise their practice and inform decisions on when and in what circumstances online mediation may be a suitable forum and method to resolve disputes. It is also intended to build on existing literature about the use and impact of online mediation during and post COVID-19.[[20]](#footnote-20) The data gathered and presented in this article can be used for two purposes. Firstly, for mediators who continue to use the online forum as part of their practice, the ideas shared by the participants of the research survey may assist with developing new and more effective methods of conducting remote mediations. Secondly, for practitioners who perhaps remain skeptical about online mediation, the conclusions drawn from the data gathered and the range of suggested solutions to potential problems shared by the research participants may assist in their decision about whether to incorporate online mediation into their practice in the future, and if so, what steps can be taken to mitigate any perceived disadvantages of using an online forum for particular types of disputes. It should also be noted that the study concerns mediations taking place online via videoconferencing platforms, and therefore does not speak to any of the literature or debates which surround asynchronous methods of dispute resolution.[[21]](#footnote-21)

The first part of this article will explore literature on traditional mediation, the second part will consider the development of online mediation with an accompanying summary of the main critiques in order to provide context to the findings set out in part four. The third part will set out the methodology and methods used to gather and analyse the data, with the fourth discussing the findings of the survey conducted by the author. The article will conclude by presenting recommendations informed by the data, which will add to the existing evidence base concerning how online mediation can be used in the future. This can then be used to contribute to guidance, practice and policy.

**Part 1: Traditional Mediation**

The growth of the alternative dispute resolution (ADR) movement has been underway since the 1960s,[[22]](#footnote-22) however it was not until the 1990s that it expanded in England and Wales.[[23]](#footnote-23) Mediation was the primary method of ADR which was promoted, receiving formal endorsement through Lord Woolf’s Access to Justice reports,[[24]](#footnote-24) Lord Justice Jackson’s Review of Civil Litigation Costs[[25]](#footnote-25) and, most recently, in Lord Briggs’s Civil Court Structure Review.[[26]](#footnote-26) Embedded within the procedural code of conduct, the Civil Procedure Rules (CPR),[[27]](#footnote-27) is the expectation that parties consider ADR from the point at which a dispute arises and the CPR include the power for the courts to encourage this through the discretionary imposition of costs sanctions on those parties who are deemed to have unreasonably refused to engage in ADR.[[28]](#footnote-28) These provisions emerged, at least in part, in an attempt to address the historic, repeated and well publicised problems of civil litigants experiencing high levels of delay, complexity and cost[[29]](#footnote-29) with litigated cases, as well as party dissatisfaction with their outcomes.[[30]](#footnote-30) This was coupled with a contemporaneous political objective to eventually render the civil justice system self-financing.[[31]](#footnote-31)

More recently, there has been a significant and continuing reduction in physical frontline court provision which has been justified on the basis that a suitable digital alternative is being developed and implemented to replace it. As part of government strategy to reduce the Ministry of Justice budget by £265 million by 2024, between 2015 and 2019 HMCTS closed 127 courts and tribunals[[32]](#footnote-32), with a further 77 to be closed by 2026.[[33]](#footnote-33) Staff numbers were also dramatically reduced, from 19,704 Full Time Equivalents in 2011 / 12[[34]](#footnote-34) to 16,100 Full Time Equivalents by 2018 / 19[[35]](#footnote-35) with an intended further reduction of 5000 staff by 2024.[[36]](#footnote-36) The aim was to render the civil justice system ‘more efficient’,[[37]](#footnote-37) however the impact, for example on county court waiting times, has been significant. By 2019, the average waiting time was 37.2 weeks between issue and trial, up from 29 weeks in 2000. This was in spite of the number of matters proceeding to trial decreasing from 55,836 to 47,037 over the same time period.[[38]](#footnote-38)

Research conducted by the Centre for Effective Dispute Resolution demonstrated an increase in the numbers of parties engaging in mediation in order to settle disputes,[[39]](#footnote-39) leading commentators to conclude that the ongoing efficiency measures being implemented by HMCTS are having a direct impact on the popularity of mediation amongst litigants and that this will continue to increase over the coming years.[[40]](#footnote-40) Mediation offered a way to divert litigants from needing court intervention thus, in theory, reducing state expenditure and increasing efficiency,[[41]](#footnote-41) following Sander’s view that, ‘…mediation specifically is an effective way to alleviate docket pressures, while bringing disputants a convenient, cost-effective, and faster way to resolve their disputes’.[[42]](#footnote-42) However, whilst these factors combined have led to a substantial growth in the role of ADR in resolving civil disputes over the past twenty years,[[43]](#footnote-43) for various reasons[[44]](#footnote-44) the formal relationship between mediation and the civil justice system in England and Wales remains, at best, ‘semi-detached’.[[45]](#footnote-45)

Traditional mediation typically involves a negotiation between two or more parties, facilitated by an unbiased, impartial third party who has no interest in the outcome.[[46]](#footnote-46) According to Sime and others, a standard mediation will go through four key stages: the opening stage, the exploration (or information stage), the negotiation (or bargaining) stage and the settlement (or closing) stage.[[47]](#footnote-47) However, whilst these are common phases of a mediation, it is, at its core and by design, a flexible process.[[48]](#footnote-48) It is the role of the mediator to assist parties with creating, developing and agreeing mutually acceptable solutions to their dispute by enabling them to share information, understand the nature of each other’s positions and instil a willingness to reach an agreement.[[49]](#footnote-49) This is achieved through the utilisation of a ‘toolbox’ of techniques which allow the mediator to break down barriers of communication, to facilitate conversation and to build trust between the parties:[[50]](#footnote-50) something which is typically difficult given the underlying basis for them attending mediation in the first place.[[51]](#footnote-51) However, the question is how this ‘toolbox’ needs to expand or change to optimise the way in which mediations are conducted remotely. Before this can be considered in full, it is necessary to review how online dispute resolution, and particularly online mediation, developed prior to the COVID-19 pandemic.

**Part 2: Online Dispute Resolution and Online Mediation**

Braeutigam argues that, at least initially, online dispute resolution (ODR) gained popularity for the same reason as its traditional counterpart: the promise of a convenient, cost-effective, efficient way of resolving disputes.[[52]](#footnote-52) Rule defines ODR as ‘…any use of technology to complement, support, or administer a dispute resolution process’:[[53]](#footnote-53) a definition which comfortably encompasses mediating disputes online. As set out above, traditional mediation involves three parties: two disputants and a third-party mediator.[[54]](#footnote-54) However, with ODR, Katsch has also identified a theoretical ‘fourth party’:[[55]](#footnote-55) the technology itself. He comments that the fourth party is more than software, in the same way that the first, second, and third parties in alternative dispute resolution are more than simply human beings.[[56]](#footnote-56) Gaitenby builds on this: ‘to know the fourth party, researchers need to explore how users make online environments and practices meaningful’.[[57]](#footnote-57) This study centres around the gap in literature and understanding which Gaitenby identifies here.

Attitudes to the use of remote technology to conduct mediation have been mixed since ODR first began to be used in mainstream dispute resolution practices.[[58]](#footnote-58) Commentators such as Ponte have submitted that online mediation simply involves the use of traditional mediation techniques, only in an online environment,[[59]](#footnote-59) with the only distinguishing feature being that the parties do not simultaneously share the same location.[[60]](#footnote-60) Braeutigam elaborates on this, explaining that:

The online mediation process mirrors many aspects of the traditional offline process. The process starts with opening statements by the mediator to all parties to explain the process. Then, the parties are invited to give their story. Interests and concerns are explored in a series of discussions, and options are discussed. The mediator may address the parties jointly and in private meetings. If the mediation is successful, the parties will agree on a solution and an agreement is posted for review and acceptance.[[61]](#footnote-61)

The argument here is that, fundamentally, the process is broadly the same whether conducted online or in person. The same stages occur as in traditional mediation, set out by Sime and reproduced in the previous section of this article. However, whilst this may be case, there has also been much scepticism about the impact which remote mediation can have on the nuances of the process. Eisen, for instance, states that one cannot simply replicate techniques used in traditional face-to-face mediation, as cyberspace is not a mirror image of the physical world.[[62]](#footnote-62) He goes on to posit that it is commonly accepted amongst mediators within the practice community that mediation is most effective when all parties are physically present and that without face-to-face communication, mediators cannot fully meet the objectives of the process.[[63]](#footnote-63)

In fact, Beal argues that for some mediators, physical presence is the ‘sine qua non’, or essential component, of mediation,[[64]](#footnote-64) with Broadbelt remarking that ‘…there is broad consensus that it can be more difficult to build a rapport with others online, and conducting the occasional side conversation is effectively impossible.’[[65]](#footnote-65) The rapport which is referred to here speaks to the heart of way in which the relationship develops between the mediator and the participants which, at its core, is dependent on the level of trust which can be established. This is perhaps the biggest challenge which needs to be addressed by mediators who conduct mediations online; Rule for instance describes the internet as ‘woefully lacking in trust’.[[66]](#footnote-66)

What emerges from the literature therefore is that there are two major hurdles to be overcome by mediators to enable parties to have confidence in the process. Firstly, not only must participants have trust in the way that ODR is designed,[[67]](#footnote-67) but also ‘…each potential participant in ODR will need to be convinced they can trust that mediators can overcome distance-related challenges and that they have the skills required to help them online. They must feel able to rely on the technology being employed: that it is up to the task, is sufficiently user-friendly to accommodate them, and will not freeze up mid-process, crash their computer, or otherwise affect them or the interaction detrimentally.’[[68]](#footnote-68) This provides a useful lens through which to consider the comments of mediators who took part in this research study, to establish the methods and techniques they used to build the trust of participants given the additional challenges presented by the online forum.

Further potential difficulties with online mediation have also been identified by Gibbons, who comments on the way in which ‘online mediation may limit opportunities to observe the opposing party's spontaneous body language or verbal responses throughout the mediation process. Even if spontaneous body language or verbal responses are perceptible, the communicative media alters how they are understood.’[[69]](#footnote-69) However, he does go on to acknowledge that there could be advantages to this, as well as drawbacks. ‘Under some circumstances, the lack of body language may be an advantage. Due to the lag time in online mediation, the parties will have more opportunity to think about their disputes and to respond in a manner that will promote resolution to the dispute’.[[70]](#footnote-70) There is therefore some scope to view the disadvantages of conducting mediations remotely as positives, provided those potential barriers are acknowledged and managed pragmatically.

Although online mediation enjoyed a small increase in popularity prior to 2020, its use increased dramatically following the introduction of government restrictions in response to the COVID-19 pandemic.[[71]](#footnote-71) As Sourdin comments, ‘…the pandemic effectively put the emerging technological efforts on steroids’.[[72]](#footnote-72) This was accompanied, Ebner argues, with a change in attitude from some mediators who had previously resisted the use of online mediation.

‘This quantum shift online has immense implications for the field of negotiation and dispute resolution, as it does for many fields. Before looking ahead, though, I’ll note that it [the COVID-19 pandemic] clearly exposed much of the objection to ODR, and in particular, to conducting negotiation and mediation processes online, for what it was: resistance to change. Resistance to change is human; the capacity to stave off change *over time*, however, is a luxury and a privilege few can afford. Ask any seismologist: Shift happens. In the early weeks of the Covid-19 era, resistance to online practice of negotiation and mediation was swept away in a heartbeat, and the entire field shifted online’[[73]](#footnote-73)

This is supported by American mediators such as Robert Creo, who articulated this transition from his own perspective: ‘I held serious doubts about the staying power of online mediation once the pandemic was over. I believed that practices would be normalized back to our tried-and-true ways and means… however the virus has done in a few months what years of proselytizing has failed to do: normalize online mediation and other forms of dispute resolution as not only a viable option, but in many instances the first choice’.[[74]](#footnote-74) Similar positive anecdotal evidence can be seen in Scotland, with Graham Boyack, Director of Scottish Mediation positing that ‘…many mediators are reflecting that not only does online work but that there are some real positives about the process. Participants have said they feel more comfortable mediating from their own homes, there’s no travel involved and that the process can be truly flexible. My conclusion is not that all mediation will be online but that for those who have access to the technology it will be a great option for the future’.[[75]](#footnote-75)

What therefore emerges from the literature is that there is a general belief and sense that online mediation will play an increasing part in the post-COVID-19 dispute resolution landscape, and that ‘…a change in mindset about the way we approach dispute resolution methods will be one of the legacies of the Covid-19 pandemic, with remote mediation and other forms of alternative dispute resolution (ADR) expected to be here to stay.’[[76]](#footnote-76) The central purpose of this study is to contribute to the existing literature on whether, ultimately, there is a future for online mediation beyond COVID-19 and whether the enforced shift towards it caused by the pandemic has led to a genuine change in attitudes and working practices and, if so, whether there are any common techniques which can be adopted to optimise the way in which online mediations are conducted. The next two sections set out how the study was conducted, the methodology which underpinned the data collection and the methods used to analyse it, followed by the results of the study itself.

**Part 3: Methodology**

As set out above, the wide-ranging impact of COVID-19 coupled with the delays to trial caused by the ongoing reduction of the court estate has led to an increase in the use of private online mediation to settle disputes.[[77]](#footnote-77) The aim of this research is to build on the growing base of evidence concerning the approaches of mediators to dealing with the transition from traditional face to face mediation to conducting it almost exclusively online, including the circumstances in which online mediation might best be used in a post-COVID-19 world.[[78]](#footnote-78)

The primary research method was the use of an online questionnaire consisting of a mixture of open and closed questions and designed to elicit information from participants about their experiences with online mediation between March 2020 and March 2021. The study received ethical approval from the University of Sunderland Ethics Committee. Only mediators registered with the Civil Mediation Council were included as the sample for the study, and participation was limited to those undertaking civil mediations, excluding family matters.

As highlighted by Chui, questionnaires are particularly useful to gain access to as wide a range of research subjects as possible,[[79]](#footnote-79) taking into consideration other key practicalities such as time and resource limitations of the researcher.[[80]](#footnote-80) However, despite the practical advantages of using questionnaires to generate data there are also a number of disadvantages against which to mitigate. Surveys and questionnaires have notoriously low response rates,[[81]](#footnote-81) with questions arising over whether those who responded are different in some way from those who did not.[[82]](#footnote-82) Doherty describes them as ‘blunt instruments’, with what the researcher gains in terms of numbers and generalisability needing to be offset against what is lost in terms of the nuance and depth which, for example, interviews can provide.[[83]](#footnote-83) That is not to dismiss the role of the survey in providing valuable data, however it does need to be taken into consideration when ascribing weight to the conclusions.

Furthermore, the design of the questionnaire itself requires testing to firstly confirm that the questions draw relevant information from the responder and secondly to ensure that no biased or leading questions are included in the study.[[84]](#footnote-84) To reduce the risk of this, a pilot of the research questionnaire was sent to a small group of mediators local to the University of Sunderland, where the lead researcher was based.[[85]](#footnote-85) Those mediators were registered with the Civil Mediation Council, to enable their responses to be included in the sample provided no issues with the questionnaire were identified. The pilot participants were informed that if they felt the questionnaire elicited the required information and was free from bias and that they were able to respond to the questions in full, their responses would be included in the research data for analysis purposes. If they identified any issues with the draft questionnaire which necessitated amendment of any question, they were informed that they would be excluded from the study. This was to ensure reliability, consistency and validity of the data which was gathered.[[86]](#footnote-86) Four mediators responded to the pilot study in full, with no issues being reported.

The questionnaire was hosted on a survey platform called Qualtrics. This is a subscription service which allows surveys to be hosted and distributed, whilst also containing tools enabling quantitative data to be analysed. The request to participate in the study was sent to 507 mediators. Participants were required to complete a ‘participant consent form’ prior to commencing the study,[[87]](#footnote-87) which included background information highlighting the nature of the project. The sample included all mediators registered with the Civil Mediation Council and whose contact details were displayed on their website as at 7th December 2021. Once participants gave their consent to taking part in the study, they were allowed to proceed to the questionnaire.

A mixture of open and closed questions was used, the content of which was primarily informed by the author’s review of the pertinent literature. This was to allow for the collection of both quantitative and qualitative data, which have distinct advantages when used together as part of the same study. According to Rahman, one of the key advantages of quantitative research is that it ‘…focuses on those aspects of social behaviour which can be quantified and patterned rather than just finding out and interpreting the meanings people bring to their own action’.[[88]](#footnote-88) However, solely adopting this method can also have disadvantages, specifically that it can only give a broad picture of a particular phenomenon or set of variables without providing a deeper meaning behind the data.[[89]](#footnote-89) Qualitative analysis on the other hand can offer such insight[[90]](#footnote-90) and this was the basis for including open questions in the study, allowing participants to provide context to their responses and record their views in a less restrictive format.

The survey questions are set out below in Table 1.

Table 1: Survey Questions

|  |  |
| --- | --- |
| Question Number | Question |
|  |  |
| 1 | On an average monthly basis, did you conduct more, fewer or roughly the same number of civil (excluding family) mediations during the period 23rd March 2020 to 23rd March 2021 when compared with the same period the previous year?   * Much more * Somewhat more * About the same * Somewhat less * Much less |
| 2 | Please explain your view on the reasons for any increase or decrease in the number of monthly mediations you conducted during the period 23rd March 2020 to 23rd March 2021. |
| 3 | Have you offered mediations remotely / virtually?   * Yes * No |
| 4 | If you have offered mediations remotely / virtually, please provide further information about the way in which you have conducted remote mediations, including any observations about how parties have reacted to the mediation taking place remotely and any positive effects or any difficulties you have encountered. |
| 5 | In the time period 23rd March 2020 to 23rd March 2021, have more, fewer or roughly the same number of monthly mediations resulted in a successful settlement when compared to the time period 23rd March 2019 to 23rd March 2020?   * Much more * Somewhat more * About the same * Somewhat less * Much less |
| 6 | Do you have any comments to give context to your response to question 5? |
| 7 | From the remote mediations you conducted in the time period 23rd March 2020 to 23rd March 2021, was the feedback you received from parties on the effectiveness of remote mediation generally positive or generally negative?   * Extremely positive * Somewhat positive * Neither positive nor negate * Somewhat negative * Extremely negative |
| 8 | Is there any more detail you can provide to give context to your response to question 7, citing examples where possible whilst maintaining confidentiality. |
| 9 | From the remote mediations you conducted in the time period 23rd March 2020 to 23rd March 2021, do you feel that conducting mediations online has made participants more or less likely to engage in mediation than they would have been had it been face to face?   * Much more likely * More likely * Just the same * Less likely * Much less likely |
| 10 | Is there any more detail you can provide to give context to your response to question 9, citing examples where possible whilst maintaining confidentiality. |
| 11 | Have any of the remote mediations you conducted in the time period 23rd March 2020 to 23rd March 2021 failed to complete due to any of the participants experiencing technical difficulties?   * Yes * No |
| 12 | If any of the remote mediations you have conducted failed to complete due to technical difficulties, please provide further information about the nature of the difficulties and your perception of how those difficulties it materially impacted on the likelihood of settlement. |
| 13 | Have you continued to conduct mediations remotely since government restrictions have allowed a return to face to face mediations?   * Yes * No |
| 14 | How likely are you to continue to offer to conduct mediations remotely in the future?   * Extremely likely * Somewhat likely * Neither likely nor unlikely * Somewhat unlikely * Extremely unlikely |
| 15 | Please explain any reasons for your response to question 14 above. |

The survey was released on 14th December 2021 and closed on 31st January 2022. Its dissemination was very kindly assisted by the Civil Mediation Council, who included a short piece in their January 2022 newsletter encouraging members to respond to the survey request. From the 507 mediators to whom the survey was sent, 96 participated: a response rate of 18.9%. This means that the data gathered cannot be regarded as being representative of mediators’ general responses to the questions asked. However, it is submitted that there is still value in the data which has been gathered and is presented as part of the findings of this study.

Analysis of the quantitative data was carried out by the Qualtrics software. The qualitative data obtained from mediators completing the open text box responses to questions 2, 4, 6, 8, 10, 12 and 15 was analysed using thematic analysis. According to Braun and Clarke, thematic analysis is a ‘method for identifying, analyzing, organizing, describing, and reporting themes found within a data set’ which can produce ‘trustworthy and insightful findings’.[[91]](#footnote-91) King builds on this, concluding that thematic analysis is a flexible and helpful way of considering multiple research participants’ perspectives, highlighting similarities and differences, and generating unanticipated insights.[[92]](#footnote-92) However, with this flexibility also comes risk of inconsistency and lack of coherence when developing themes derived from the research data.[[93]](#footnote-93)

In order to mitigate this risk, the author adopted the six-phase procedure for conducting thematic analysis set out by Lorelli and others.[[94]](#footnote-94) This involved becoming familiar with the data gathered, generating initial codes, searching for themes, reviewing themes, defining and naming themes and, finally, producing a report.[[95]](#footnote-95) The author therefore began by reviewing all of the data from the open text boxes of the questionnaire, and coded this data using NVivo, a programme designed to assist with both efficiency and reliability of the coding process.[[96]](#footnote-96) It ought to be acknowledged at this point that a potential weakness of the study is that the author conducted this process alone: conducting this research as part of a team could have augmented the reliability of the results. The questionnaire also did not ask mediators’ to confirm the specific legal discipline in which they practiced and from which their experiences were informed. The results therefore cannot be ascribed to any particular area of practice, although some mediators did make reference to disciplines where they felt online mediation was more suitable. Once the data was coded, themes were developed, and it is those codes and themes which form the foundation of the findings and results presented below.

**Part 4: Findings**

A high percentage of the participants (97%) offered mediations remotely between March 2020 and March 2021, with the remaining 3% not having done so. This is perhaps unsurprising given the public health situation at the time. Interestingly, 71.64% of the mediators who took part in the survey indicated that the number of mediations they conducted on an average month between March 2020 and March 2021 either stayed the same (37.31%), slightly increased (19.4%) or significantly increased (14.93%) when compared with the previous 12 month period. This demonstrates that, if nothing else, the availability of online mediation was able to allow mediators to keep practicing and allow parties to continue to use mediation to resolve disputes throughout the pandemic despite the legal limitations on social contact.

Four key themes emerged from the thematic analysis of the survey data: the benefits of online mediation, the challenges associated with conducting mediations online, the spectrum of emotional security experienced by participants in taking part in mediation remotely and the motivation of participants to engage in online mediation and the future. This section is therefore split into four, with each subsection covering the findings relating to each of the themes.

**4.1 The benefits of online mediation**

Within this category, three sub-themes emerged from the data: convenience (for both parties and mediators), choice and optionality and time travel and expense. There was a clear appreciation of the flexibility which online mediation provided to both clients and the participants themselves. One mediator commented that ‘…people with caring or other responsibilities can attend a virtual mediation and still feed or home school children in between sessions. It is a great leveller’, while another stated that ‘there are some instances where "in person" is better but many where the flexibility of "online" is advantageous.’ The comments regarding flexibility and convenience then fed into how mediators’ perceived clients viewed remote mediation once the initial, heaviest restrictions were lifted.

‘Remote mediations are now an option that most clients appreciate. Some clients if they do not have the technology will always want in person mediations but generally having the options of either a remote or an in-person mediation makes mediation as process much more accessible.’

The benefit of optionality and choice were also cited in the comments made by the participants of the study. However, this seemed to go beyond the parties having only a binary choice of either face-to-face or remote mediation. Perhaps with reference to the ‘toolbox’ of techniques which allow the mediator to break down barriers of communication, to facilitate conversation and to build trust between the parties set out by Cole and Blankley[[97]](#footnote-97), one mediator commented as follows:

‘The ability to work online is one of the new process choices to discuss in preparing for a mediation. A new tool in the mediator tool box. Yesterday I mediated hybrid - some of each team present in person, me with them F2F and 3 attendees attending on a screen. This worked well and got good feedback with all participants having an active and equal ability to participate’.

Travelling time, accommodation costs and availability, value for money for clients and the convenience for parties who were geographically distant were all repeatedly referred to as major advantages of conducting mediations online, particularly for small claims and those with a low value at risk.

‘In simple debt claims, the ability to give a safe space for the dispute to be aired remotely and to do so at lower cost, was well received.’

‘Most parties seem at ease with online mediation, and the convenience and cost savings involved mean I will continue to offer it as my preferred option for smaller cases.’

A number of mediators also explained that the increased scheduling flexibility which resulted from the parties not needing to take geographical location, travelling time or accommodation availability into consideration meant that the speed from initial enquiry to resolution of the matter was increased substantially when compared with scheduling a face-to-face mediation. This was also cited as a reason for participants being in favour of retaining remote mediations as an option in the future.

One participant also commented on the efficiency advantages they had found with the online process: ‘The Covid experience has proved the concept - and in some areas (prior preparation particularly with principals) it has improved efficiency considerably.’ All of these factors combined led a number of participants to conclude that, at the very least, online mediation would continue to be offered as an option to parties and, at most, that it would replace more traditional face-to-face mediation as the default format.

‘I see no reason to insist parties return to a 'face to face' environment.’

‘Remote mediations suit all the parties involved; face to face mediations will happen but they will be in the minority from now on.’

‘This is an addition to our service which some parties esp[ecially] those who are based in different localities would be attracted to’

‘I am comfortable with both face to face and online mediations. Both have slight advantages / disadvantages over each other. Ultimately I think face to face has slightly more upsides BUT where oppty [opportunity] or parties are more comfortable online then that works. Online is here to stay & correctly so.’

A number of mediators also commented on the environmental benefits which flowed from all of the parties to a mediation not having to travel to a physical meeting space. This aligns with both the spirit and specific terms of the Mediators Green Pledge,[[98]](#footnote-98) launched in October 2020. Amongst other things, the Mediators Green Pledge contains a commitment to encouraging the use of screen sharing or video technology where it is appropriate, accessible and acceptable to all concerned, as well as encouraging parties and their advisers to consider the necessity of participants attending mediation in person if that attendance involves significant travel and is not necessary.[[99]](#footnote-99) It is therefore positive to see that this is being actively considered as an advantage by the mediators who took part in this study.

The data therefore suggests a general consensus that mediation will be offered remotely as an option for parties going forward. 91% of participants in this study have continued to offer mediation remotely since the most severe of the legal restrictions on social contact were lifted, with 74.63% being extremely likely and 7.46% being somewhat likely to continue to offer remote mediations in the future. This suggests that, for a majority of mediators who participated in this study, providing parties with the option of remote mediation is something which has a place in the post-COVID world.

**4.2 Challenges associated with conducting mediations online**

The main challenges identified by participants centred around concerns from parties about confidentiality and issues with technology for both the parties to the dispute and the mediator themselves. The open questions in the survey elicited useful information about the nature of the difficulties which the participating mediators encountered with integrating the ‘fourth party’[[100]](#footnote-100) into the mediation process, as well as providing a platform for them to advance the ways in which they mitigated those difficulties.

On confidentiality, mediators had to overcome two main concerns from mediating parties, which supported some of the issues surrounding trust identified by Ebner and discussed earlier in this article. The first related to a nervousness about the technology itself, with anxieties that conversations with the mediator could be heard by the opposing party. One mediator commented: ‘…the parties were concerned about being overheard in the private discussions so I have tended to close down and open up new Zoom meetings for each dialogue session which works fine.’ This led to the second main concern identified, which related to the parties’ confidence in the mediator’s ability to manage the process such that confidentiality of communication was not at risk. Breakout rooms were identified by participants as the main way in which they controlled parties’ anxieties over the technology compromising confidentiality. As an extension of this, some mediators also stated that they carried out demonstrations of the technology for the parties on either side prior to the scheduled mediation taking place as part of their standard pre-mediation meeting. This enabled those parties to see how their discussions with the mediator on the day would be kept confidential from the other party, for example:

‘…clients have commented on the privacy in breakout [rooms]- once they have experienced this they are reassured by the process, there can be initial mistrust in confidentiality of the mediation process online until explanation and demonstrations are offered.’

Demonstrations also served the dual purpose of increasing the levels of confidence which mediating parties had in their mediator to protect the confidential nature of their discussions. Multiple participants in the study referred to embedding exercises into the pre-mediation meeting which demonstrated how the technology would work, which in turn put the participants at ease. This was particularly helpful for parties who had not experienced mediation previously:

‘In my experience most people who have NOT had a mediation before come out more comfortable after a well-structured pre mediation call or well managed 'on the day' mediation.’

‘I send out a "mediating by Zoom - how it works" information paper and organise a pre-mediation Zoom meeting with solicitors and sometimes clients to be sure everyone is comfortable with the technology. Any initial reluctance is normally dispelled at that point’

‘I always provide a check in online prior to the mediation so that the clients can 'test' out the platform and experience being moved to break out. Feedback from clients is that this check in meeting has been an important step in ensuring they are comfortable with the experience and the process and it is an opportunity to ask questions prior to the mediation itself.’

The difficulties with the technology reported fitted into two categories. The most commonly reported issues with the technology itself concerned wifi connection dropping out and parties being unfamiliar with the platform which was being used. In the majority of cases this was not terminal to the mediation completing: 88.5% of participants stated that no mediations had failed to complete due to technological issues, however there were reports of delays being caused by technological failings: ‘one of the claimants [sic] IT connections failed so we had to have a 2-day postponement which was unfortunate as the Mediation lost momentum’. The remaining 11.5% of those who participated in the survey had experienced issues which had been so significant that they caused the mediation to be abandoned. Again, however, there were a number of mediators who shared techniques for ensuring the mediation continued despite any glitches encountered with the technology:

‘The Society requires its remote mediators (around 400 people) to have a parallel system running in case of issues - and this can include a second server access point or having an observer/co-mediator running a different system elsewhere’

‘Though not had difficulty - always had plan B 'just in case' telephone/email etc...’

‘No, but there have been technical difficulties and it is stressful when I drop out. I tend to use a co-mediator for this reason, but then I have to share the fee with them.’

Therefore, whilst parties clearly encountered issues with the technology, many mediators were able to put in place safeguards to ensure that a mediation could continue even in the face of these occurring. The remaining challenges with the technology centred around the way in which parties to the dispute engaged with it, how they used it and their behaviour towards it. Many of the participants in the study noted the correlation with age of the participant and level of comfort with the technology, with older parties coping less well than those who belonged to younger generations. Mediators also raised points regarding parties turning their cameras off so that they were invisible on screen and gave examples where parties had left the mediation more readily when compared with face-to-face mediations. Numerous participants specified that issues with lay parties were more common than those they experienced with lawyers who appeared remotely, who seemed largely more familiar with the technology.

‘Sometimes people would login and not turn on video only using audio. One challenge with remote/virtual was people just leaving the mediation and only being able to try and talk with them remotely rather than being able to talk with them face to face.’

‘One factor I think is the fact that most people seem to operate on devices which have relatively small screens and so working through documents on a shared screen has not, in my very limited experience, been terribly easy. Big screens help course, but not everyone has them.’

These challenges also caused mediators to have difficulties with reading participants’ body language, assessing a party’s reaction to another’s proposal, managing parties talking at each other as opposed to with each other and reacting themselves to visual clues. This supports the contentions put forward by Gibbons on the way in which online mediation poses difficulties to the observation of parties’ body language or verbal responses throughout the mediation process.[[101]](#footnote-101) Mediators indicated that this led to a loss of human connection between the mediator and the parties, with one participant stating that ‘I do feel less connected with the parties and am sure they [the parties] feel the same’. This speaks to the challenges with building a rapport with clients online identified by Broadbelt and discussed above.[[102]](#footnote-102)

However, mediators also commented that this could be mitigated by them working harder at the outset to create trust and rapport with the client, as the ability to do this throughout the online process was diminished: ‘My experience has been that the mediator has to build empathy and rapport with the parties in advance of the mediation otherwise there is less empathy between the mediator and the participants’. This supports Eisen’s position, that one cannot simply replicate techniques used in traditional face-to-face mediation, as cyberspace is not a mirror image of the physical world.[[103]](#footnote-103) Strategies need to be put in place to recognise the difference between the two mediums.

The comments made by participants to the study on confidentiality and trust in the technology align with the trust issues identified by Rule and Ebner, with distrust of both the technology and the mediator’s ability to create an environment in which the participants had confidence present in the data gathered. However, whilst such issues were clearly problematic, a majority of the mediators who took part in the study developed fall back provisions to mitigate against the worst effects of the challenges they encountered. What emerged from analysis of the data was that, in a large number of the cases overseen by participants, those techniques enabled parties to feel at ease with the process and to make progress with their dispute.

‘I found it very efficient and user-friendly but everything depends on the mediator being on top of the technology and installing confidence in the parties.’

‘Mostly people were nervous about the process but I always offer a test call and it only takes a short while to become familiar with Zoom, they soon get over their nerves.’

It is undoubtedly a positive that the development of techniques to address parties’ primary concerns led, in some cases, to parties overcoming their anxieties with the online forum. This serves to demonstrate that, in cases where remote mediation can offer a more flexible, speedier and cost-effective method of dispute resolution when compared to it being conducted in a more traditional, face-to-face manner, concerns over confidentiality and issues encountered with the technology can be overcome by effectively preparing parties for the process and managing their expectations of it. The information provided by mediators on the challenges they experienced enhance knowledge about the integration of the fourth party into mediation practices, with the comments made on the techniques used to address those challenges advancing the literature on how, as Gaitenby referred to it, the online environment and practices can be made meaningful.[[104]](#footnote-104)

**4.3 Mediators’ views on the spectrum of emotional security experienced by participants in taking part in mediation remotely and its impact.**

The third major theme which emerged from the data was the emotional security felt by parties who engaged in mediation online. Many of the mediators commented on the positive impact that being in their own surroundings had on the parties. Participants in the study put this down to reduced stress because parties did not need to travel and the fact there was no risk of them meeting the other party to the dispute.

‘In fact, the online world seems to provide an emotional buffer that allows people to open up and contribute.’

‘For me it works very well in inheritance disputes where you might have older clients who are less stressed by being able to remain in their own home and not feel anxious about confrontation with other parties if they bump into them in the loo or in reception.’

‘Some parties find the exercise less intimidating than if they have to travel to a 'strange' office for the day, and therefore are more relaxed (and possibly more amenable) than they would be if mediating in person’

The reference to inheritance disputes specifically is interesting. Whilst no further context was offered in the responses, it is possible that the generally inherently personal nature of such disputes means that the parties being physically separated generates a less tense atmosphere, allowing for a more focused mediation. Another particular area which was referenced a number of times by mediators as more suitable for remote mediation was small claims, debt related matters. Mediators commented that this was generally to do with the substantial cost savings over face-to-face mediation, leading to parties not being as worried by the cost of the exercise relative to the value of the dispute. It may be that online mediation in those areas are therefore suitable for the focus of future research.

In terms of outcomes, for some mediators more progress was made during the course of the mediation as a direct result of the parties being more comfortable in their surroundings, with one mediator commenting that ‘some mediations have ended with an agreement simply because the parties did not have to meet face to face’. It is particularly interesting that the mediator’s perspective was that the primary factor behind settlement being reached was that the parties did not have to meet physically. This perhaps suggests, for particularly acrimonious matters, affording the parties the option to mediate remotely may be something which can benefit the facilitation of an agreement.

A further point made concerned the behaviour of legal representatives online when compared with face-to-face. Mediators commented that often legal counsel also appeared more relaxed and that they were therefore more conciliatory, which had a knock-on effect on the general attitude of their clients. That said, comments were mixed on parties being physically separate from their legal representative. In some cases, the comfort of the home environment was sufficient to outweigh any disadvantages parties felt of not being physically in the same room as their legal representative: ‘…participants in their home surroundings have seemed to cope with the process far better than those who have travelled to join their lawyers.’ However, that was not the same for all parties: ‘for many participants it is more comfortable - although some clients find the lack of immediate contact with their advisers challenging and it is difficult if they need support.’ The sense from the data analysed is that this is very much a matter of the client’s primary needs and whether the more relaxed nature of all parties mediating remotely would outweigh any anxieties they would feel in not having their legal advisor physically present with them.

However, whilst the comfort of parties mediating from their home environment was perceived to be a good thing in some cases, in others it led to difficulties:

‘People having downtime (when not required) 'at home' has plusses & minuses. On the one hand they are relaxed but on the other the focus of 'being on site with one mission' can sometimes mean it’s too relaxed or momentum needs to be regained.’

‘The mediation that failed to settle did not achieve resolution, because as mediator I could not convince both parties that their approach was over-confident to their legal position that they were clearly being advised to maintain. Had this been a face-to-face mediation then it would have been possible to exert greater influence on the parties. It is difficult to control the environment and focus of attention of the participants. In the case of the mediation that did not settle, the claimant was in a holiday rental property with his family and not giving his undivided attention to the mediation. The defendant party clearly had a third-party in the room with him but refused to disclose this.’

Common issues therefore centred around the lack of physical space and presence leading to a loss of focus from the parties, with mediators experiencing difficulty in energising parties to re-establish momentum. This reflects much of what has been written about zoom fatigue, or zoom exhaustion, where parties who are engaged with online platforms for lengthy periods of time lose concentration and, thus, motivation.[[105]](#footnote-105) Many of the comments made reference to attention fading over time, with the length of the mediation directly correlating with the attention span of the participants. Alongside this, other mediators suggested that mediating remotely presented challenges to promoting a more conciliatory attitude in parties whose positions were particularly deep rooted:

‘In some disputes parties have become more entrenched and in others the lack of personal contact means the parties are less likely to settle’

‘Remote mediations are harder to move parties past their 'sticking points', partly because the pressure of being in the same physical space is lessened’

‘Zoom appears to bring out the worst in people as they feel protected by not being present in person.’

This clearly contrasts with the comments discussed earlier in this section, specifically that parties who were more entrenched in their position prior to the mediation were more likely to find common ground due to not being in the physical presence of the other party. It would be interesting to explore this point further in future research.

**4.4 Motivation of participants to engage in online mediation and the future**

A significant number of comments were passed by mediators on the reasons for parties engaging in online mediation in the first place, and this segued into further representations about the future place of online mediation in dispute resolution. The majority of representations made, perhaps unsurprisingly, referred to COVID-19 being the primary motivating factor behind parties engaging with online mediation. Multiple references were made to the remote format being used as it was parties’ only option or, once the heaviest of restrictions were lifted, due to residual nervousness of meeting other people indoors. Much of this focused on face to face mediation as the natural starting point, with reliance on the online format emerging through necessity rather than choice. Even then there were instances reported where parties deliberately chose to wait until face-to-face mediations could resume before engaging in the process, such was the initial resistance to conducting them online. There was also evidence of the number of virtual mediations reducing as restrictions were released:

‘Some participants are still very keen to meet face to face and so will wait until this can be done (as courts are equally slow moving, some have no drivers to prioritise resolution)’

‘A number of mediations were put on hold because the parties really wanted to wait until they could mediate face to face’

‘Whenever government guidance changed hinting that face to face might be possible, online bookings dwindled in the hopes that F2F might be possible again.’

‘It has varied- early days many more mediations done virtually and people were very keen, but as time has gone on less mediation but those that mediate are as keen’

However, that said, some mediators also viewed this as a transitional period, where initial resistance was gradually replaced by an appreciation of the benefits of conducting mediations remotely. Indeed, 46.88% of participants in the study felt that the likelihood of disputants engaging in mediation was unaffected by the online transition, with 34.48% and 10.94% indicating that parties were more likely and much more likely to engage in remote mediation in comparison with face-to-face respectively.

‘I think all parties recognised that participation in person is generally preferable in principle but were content to do so remotely in the circumstances. I don't think any party would have refused to participate if only F2F mediation were possible. I did not encounter any material resistance to remote participation.’

‘Again at this stage it was seen as a necessity. Since Summer 2021 freedom of choice and expediency now makes remote mediation a much more realistic option’

The data also demonstrated that the listing delays in the county court was another significant motivation for parties to engage in online mediation. These delays have continued, with the Civil Justice Quarterly statistics for October to December 2021 recording a mean time of 51.4 weeks between issue and trial for small claims and 74 weeks for multi-track claims.[[106]](#footnote-106) For the same time period in 2019, pre-pandemic, these figures were 37.1 weeks and 61 weeks respectively.[[107]](#footnote-107) This demonstrates the extent of the delays which are currently being experienced in the county court, and therefore provides context to mediators’ comments here:

‘Recognition by parties that due to COVID the backlog of cases in court would be likely to lead to severe delays, and that a mediated solution would be preferable.’

‘I think that there was a delay in the courts system timetable for progressing claims and the court timetable is a key driver of people deciding or being suggested that they participate in a mediation.’

This confirms that, whilst perhaps not the primary driving factor, there is still much justification for Hensler’s view that the high costs and lengthy delays associated with the court process are the main driving factor behind parties to civil disputes engaging in alternatives to the judicial process remains the case following the pandemic.[[108]](#footnote-108) The Ministry of Justice have confirmed that they do not expect the current delays to reduce in the immediate future,[[109]](#footnote-109) and therefore it is reasonable to assume that the representations made by mediators on case backlog within the county court driving parties to engage in online mediation will remain relevant for some time yet. When this is taken into consideration alongside mediators’ comments regarding the benefits of online mediation in small claims, this suggests that there will be a continuing place for online mediation specifically in low value debt recovery matters. This may therefore add weight to the Civil Justice Council’s recommendation to introduce compulsory mediation for parties to disputes with a value at risk of less than £500 and for remote mediation to form a part of that policy.[[110]](#footnote-110)

This therefore leads to consideration of what the data gathered for this study shows about the future of online mediation. To what extent does the data support Robert Creo’s contention that online mediation has been normalised by the covid-19 pandemic, that it is no longer merely a viable option, but in many instances the first choice,[[111]](#footnote-111) and what does the data show about whether the enforced transition has led to some form of blueprint for the future? 91.04% of the mediators who participated in this study indicated that they have continued to offer online mediation as an option to parties, with 74.64% confirming that they are very likely to continue to offer remote mediations in the future. Overall, mediators indicated that, despite initial resistance and trepidation, most of the parties, legal representatives and mediators themselves had adjusted and found that mediating online was easier than expected. The sense emerged from the data that, for some cases, pragmatic considerations coupled with some clients benefitting from the less formal nature of online mediation mean that it is going to be an option which is offered in the future, provided appropriate steps were taken to mitigate any concerns the parties had.

‘There are benefits to working online connected to the efficiency of the process and time saving which make it attractive to continue in this way. There are also benefits in starting the process online by way of pre-mediation contact. While this does not mean that the mediation meeting has to be online familiarity with the online process through pre-mediation contact in this way reassures parties that the whole process can be online.’

‘In the case I conducted entirely remotely I think all parties were reasonably content as the cost in time and money of participation in person would have been substantial in relation to the sum in dispute. That was the reason for a remote procedure, not Covid concerns.’

However, there were also a number of comments which made clear that traditional, face-to-face mediation remains preferable:

‘My preference is for face to face mediations as it is easier to (i) control the environment and the participants, and (ii) build empathy and rapport with the participants, and (iii) influence the participants as the mediator moves towards persuading the participants to close the gaps in differences between the parties.’

‘Face to face is much better- they think twice about lying indiscriminately’

‘Depends on parties wishes but face to face has better chances of revealing the underlying motives and hopes of both parties rather than a scripted position’

This context is important when considering the quantitative data. 80% of the mediators who participated in the study indicated that their clients were either somewhat positive (40%) or very positive (40%) about their online mediation experience, with only 1.54% being somewhat negative and 0% being extremely negative about it. Furthermore, 65.15% did not feel that there had been a difference in settlement rates, with 16.67% indicating that more cases, on average, had settled during the period 23rd March 2020 to 23rd March 2021 when compared with the same time period the previous year. Only 18.19% indicated that they had experienced a lower rate of settlement when compared with pre-pandemic levels.

This is perhaps evidence of the way in which the pandemic has potentially distorted the data a little. When left with a binary choice between mediating online or not mediating at all, the evidence from this study suggests parties do seem to have been happy with the way in which the remote provision was delivered and managed overall. This is borne out by the statistics on mediators’ views on settlement rates and the positive feedback which online mediation received. It will be interesting to see whether the positive experiences will be sufficient to establish online mediation as a genuine alternative now that the most significant COVID-19 restrictions are over, or whether parties and mediators will revert to face-to-face where possible. The data points towards remote mediation being an option to be used where pragmatism and client need dictates, with face-to-face most likely returning as the default format, at least in the short term.

**Part 5: Conclusion and Future Areas for Research**

This research examined the responses of mediators to the enforced shift to remote practices following the declaration of the covid-19 pandemic to establish the place of online mediation as mediators and disputants move into the future. The findings from this study show that important steps have been taken, not only towards the acceptance of remote mediation as a genuine alternative to face-to-face in the right circumstances, but also towards the bolstering of the mediators’ toolbox of techniques to allow for effective mediations to take place online.

The data confirms clear benefits of mediating online, as well as providing key insights into the methods adopted by mediators to mitigate against the broadly accepted disadvantages. The reduced financial burden on parties, the scheduling benefits arising from not having to arrange accommodation or build in time for travel leading to mediations being organised more quickly, the reduced carbon footprint and the convenience for both mediators and parties are significant advantages of mediating online. This makes it an attractive option when the current waiting times for trials in the county court are considered, particularly when these advantages are coupled with the emotional advantages of being in their own home which were experienced by participants involved in more acrimonious matters. It will be interesting to see through further research whether the ongoing delays in the county court continue to motivate parties to engage in online mediation in the future.

The data showed that especially in cases where parties are geographically far apart, where the value at risk of the dispute is low, where parties are on edge and overcome with anxiety at the prospect of occupying the same physical space as their opponent, techniques can be successfully adopted by mediators which enable an effective online mediation to take place. Trust issues can be overcome by embedding a thorough and comprehensive demonstration of the way in which the mediation will run and how the ‘fourth party’ will be used for the parties’ benefit. Although inevitably not the case in all situations, this reassures parties that safeguards are in place to ensure their discussions are kept confidential and that issues with connection or technology can be overcome by having an alternative plan, whether that be, for example, telephone or the inclusion of a secondary mediator. Ebner contends that if the mediation process is designed with the integration of the fourth party in mind, in a way which addresses the needs and concerns of disputants then this will lead to a natural increase in levels of satisfaction and, ultimately, familiarity with mediating in this way. The data gathered for this study suggests that the pandemic has enabled a significant step to be taken towards the familiarity to which Ebner refers.

Despite the advantages however, it is important to bear in mind the wider challenges reported. Mediating online can cause parties to lose focus, the mediation to lose momentum and participants to fail to take the mediation seriously. However great the convenience and financial benefits are, it is important to keep in mind the potential impact on the chances of settlement in situations where mediations are likely to be particularly lengthy or where is seems clear that one or both parties are disinterested in engaging in the process. All participants, ultimately, need to feel that they have benefitted equally from a remote process as they would have done had the mediation taken place physically. This gives rise to another area of further research which stems from this piece; a wider study on the experiences and needs of the parties to remote mediations themselves.

Creo’s view of online mediation being normalised post pandemic was perhaps too ambitious. The evidence of this study points to it being used during the pandemic primarily as a means to an end, with reversion to the familiarity of face-to-face mediation ways once an ‘experiment’ is over. However, the data obtained suggests that a step towards normalisation has been achieved. The pace of learning will perhaps slow down slightly now that restrictions on social contact are no longer being imposed, however there is no doubt that remote mediation occupies a much bigger space in the range of options available to mediating parties than it did prior to the pandemic. Not only that, but it is also clear that mediators are better able to deliver online mediations more effectively.

This aligns with the optimistic view put forward by Chandler in 2002. Regarding online mediation, he said that ‘any medium facilitates, emphasizes, intensifies, amplifies, enhances or extends certain kinds of use or experience whilst inhibiting, restricting or reducing other kinds… it always involves a ‘cost’. There are losses as well as gains.’[[112]](#footnote-112) This study has provided an insight into what those losses and gains are, as well as how they can be used to determine whether online mediation is a suitable option for mediating disputes in the future.

1. To include N. Byrom and others, ‘The impact of COVID-19 measures on the civil justice system’ (Civil Justice Council, Legal Education Foundation, 2020) and J. Donohue, ‘The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice’ (2017) 80 (6) The Modern Law Review 995-1025 [↑](#footnote-ref-1)
2. Richard Susskind, The Future of Law: Facing the Challenges of Information Technology (Oxford University Press, 1998); Richard Susskind, The End of Lawyers?: Rethinking the Nature of Legal Services (Oxford University Press, 2008) 234; Richard Susskind, Tomorrow’s Lawyers: An Introduction to Your Future (Oxford University Press, 2017); Richard Susskind, Online Courts and the Future of Justice (Oxford University Press, 2019). [↑](#footnote-ref-2)
3. See most recently LawTechUK, ‘Using online dispute resolution to tackle the SME late payment crisis’ (2021) < <https://resources.lawtechuk.io/files/SME_ODR-LawtechUK_feasibility_study.pdf>> Accessed 1st March 2022 [↑](#footnote-ref-3)
4. Tania Sourdin, Bin Li and Tony Burke, ‘Just, Quick and Cheap? Civil Dispute Resolution and Technology’ (2019) 19 Macquarie Law Journal 17. Sourdin has previously suggested that there are three primary ways in which technology has already restructured the justice system. First, ‘supportive’ technologies which aim to inform, support and advise individuals involved in the justice system and include, for example, online legal applications (‘apps’). At the second level are ‘replacement’ technologies. These are technologies which replace the roles and activities traditionally conducted by humans and include, inter alia, e-filing processes and online mediation services. Finally, and at the most advanced level, are ‘disruptive’ technologies. These are technologies which fundamentally alter the way in which legal professionals work and include, for example, artificial intelligence judges or other algorithm-based decision-making programs that may reshape the judicial role. A justice system’s response to COVID-19 may incorporate any of these three categories. [↑](#footnote-ref-4)
5. Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. <https://www.legislation.gov.uk/uksi/2020/350/contents/made> accessed 24th February 2022, although note that the regulations were not formally brought into force until 26th March 2020. [↑](#footnote-ref-5)
6. S6 (2) Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. [↑](#footnote-ref-6)
7. S4 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. [↑](#footnote-ref-7)
8. S7 Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. [↑](#footnote-ref-8)
9. For example, see Judiciary of England and Wales*, Civil Justice in England and Wales: Protocol Regarding Remote Hearings* (Protocol, 26 March 2020) 1. [↑](#footnote-ref-9)
10. Jane Donoghue, ‘The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice’ (2017) 80(6) The Modern Law Review 995 [↑](#footnote-ref-10)
11. T. Sourdin and J. Zeleznikow (2020), ‘Courts, Mediation and Covid-19’ 48 (2) Australian Business Law Review 138 [↑](#footnote-ref-11)
12. Only 2% of respondents in a 2020 survey conducted by the Centre for Effective Dispute Resolution had conducted 10 or more mediations online in the year prior to 28th February 2020, see Centre for Effective Dispute Resolution, ‘The Ninth Mediation Audit: A survey of commercial mediator experience and attitudes in the United Kingdom’ (*cedr.com)* <https://www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-lr.pdf> Accessed 22nd February 2022 [↑](#footnote-ref-12)
13. Whilst there is no generally accepted definition of ODR, Lodder and Zeleznikow have suggested that it can be taken to mean using the internet to perform Alternative Dispute Resolution (ADR). See Arno Lodder and John Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press, 2010) [↑](#footnote-ref-13)
14. S. Rab, ‘Covid-19 & Virtual Mediation’ 170 NLJ 7891 [↑](#footnote-ref-14)
15. Gov.uk, ‘Views sought on Dispute Resolution Vision’ (*gov.uk,* 3rd August 2021) <https://www.gov.uk/government/news/views-sought-on-dispute-resolution-vision> Accessed 22nd February 2022 [↑](#footnote-ref-15)
16. 51R PD 10.1 (9B) [↑](#footnote-ref-16)
17. Civil Justice Council, ‘The Resolution of Small Claims’ (*judiciary.uk,* January 2022) <https://www.judiciary.uk/wp-content/uploads/2022/01/20220125-CJC-Small-Claims-Report-FINAL-2.pdf> Accessed 22nd February 2022 [↑](#footnote-ref-17)
18. Centre for Effective Dispute Resolution, ‘The Ninth Mediation Audit: A survey of commercial mediator experience and attitudes in the United Kingdom’ (*cedr.com)* <https://www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-lr.pdf> Accessed 22nd February 2022 [↑](#footnote-ref-18)
19. Deborah R. Hensler, ‘Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System’ (2017) 122 Dick L. Rev. 349 [↑](#footnote-ref-19)
20. Centre for Effective Dispute Resolution, ‘The Ninth Mediation Audit: A survey of commercial mediator experience and attitudes in the United Kingdom’ (*cedr.com)* <https://www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-lr.pdf> Accessed 22nd February 2022, T. Kenny, ‘Adapting to Mediation Online: the Irish experience’ (2021) 7(1) Journal of Mediation and Applied Conflict Analysis < <https://mural.maynoothuniversity.ie/15193/1/Research%20Online%20Mediation%20Use%20in%20Ireland%5B15678%5D.pdf>> accessed 28th February 2022, Anne-Marie G. Hammond, 'How do you write yes: A study on the effectiveness of online dispute resolution' (2003) 20 Conflict Resol Q 261 and T. Sourdin and J. Zeleznikow (2020), ‘Courts, Mediation and Covid-19’ 48 (2) Australian Business Law Review 138 [↑](#footnote-ref-20)
21. For an interesting discussion surrounding, inter alia, the advantages and disadvantages of asynchronous online mediation / dispute resolution, see Andrea M. Braeutigam, 'Fusses That Fit Online: Online Mediation in Non-Commercial Contexts' (2006) 5 Appalachian JL 275 [↑](#footnote-ref-21)
22. Jerome T. Barrett, Joseph Barrett, *The History of Alternative Dispute Resolution, The Story of a Political, Social and Cultural Movement* (John Wiley & Sons Inc, 2004) [↑](#footnote-ref-22)
23. H. Genn, ‘Solving Civil Justice Problems: What Might Be Best?’ (January 2005, Scottish Consumer Council Seminar on Civil Justice) [↑](#footnote-ref-23)
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25. Lord Justice Jackson, Review of Civil Litigation Costs at para 6.13, pxxii where he says that ‘ADR (particularly mediation) has a vital role to play in reducing the costs of civil disputes by fomenting the early settlement of cases’ [↑](#footnote-ref-25)
26. Lord Justice Briggs, ‘Civil Courts Structure Review: Interim Report’ (2015). Lord Briggs called for a cultural shift towards the normalisation of, amongst other forms of ADR, mediation as one of a variety of embedded options of methods to resolve disputes and see also Lord Briggs’s view that the term ‘Alternative Dispute Resolution’ should now be changed, supported by Sir Geoffrey Vos, Master of the Rolls and CJC Chair and Head of Civil Justice who considered, in response to the Civil Justice Council’s Compulsory ADR Report (June 2021) that “… ADR should no longer be viewed as ‘alternative’ but as an integral part of the dispute resolution process; that process should focus on ‘resolution’ rather than ‘dispute’ < <https://www.judiciary.uk/announcements/mandatory-alternative-dispute-resolution-is-lawful-and-should-be-encouraged/>> accessed 12th March 2022 [↑](#footnote-ref-26)
27. Currently, CPR 26.4 allows for parties to request a stay, or pause, in proceedings to allow for settlement efforts to take place with this power extending to the court being able to unilaterally order a stay to allow parties to attempt some form of ADR. Interlinked with this, at case management stage, parties are required to complete a directions questionnaire. For small claims the opening section is devoted to encouraging parties to take advantage of the free Small Claims Telephone Mediation Service and highlighting that under the CPR parties should make every effort to settle their case without going to court. For fast track and multi-track claims, parties are asked whether they would like a one month stay to attempt settlement and, if not, they are asked to justify this. CPR 44 gives the court the power to impose costs sanctions on a party who has unreasonably refused to take steps to settle their dispute, even those who subsequently are successful at trial. This is, primarily, driven by the expectation that more cases settling would lead to reduced cost of running the court service leading to reduction in delay and, ultimately, resources. [↑](#footnote-ref-27)
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