# The impact of Covid-19, facilitative mediation, early intervention, and the new visual online dispute resolution – Part 2

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The Covid-19 pandemic has had widespread effects on mediation practice and on court practice, and notably on dispute resolution. Much of the change has the appearance of permanence. This is the second of two articles on this topic. The first touched on the pandemic and then looked in some depth at certain aspects of facilitative mediation (FM). This second article, by way of comparison, now addresses first early intervention (EM), a new form of mediation, and then the new visual online dispute resolution (ODR), that is FM and EI online. These two articles can be read separately but are designed as a coherent whole.

## Introduction

This is the second of two articles published at the point of consolidation of a revolutionary new step in alternative dispute resolution (ADR), at a particularly striking moment, the British government having, as at 19 July 2021, lifted substantially all formal, domestic restrictions imposed to curtail the spread of Covid-19.

Facilitative mediation (FM) has progressively become the dominant form of ADR process in the UK and more widely abroad. FM is now probably the dominant form in major international disputes and the principal form of ADR chosen by the International Chamber of Commerce in Paris. The main reason is that it works: cases settle; problems are solved. The first article was principally directed to that process.

Early intervention (EI), sometimes referred to as early intervention mediation, is a new form of mediation. It has evolved from the original concepts that have made facilitative mediation so successful, but with differences that can prove useful, in particular cases. It offers a wide range of methods to reach consensus and settlement. This second article now sets out, in fairly short form, some of the essential features of EI.

ODR has existed from some point after the launch of the internet and widespread use of email, from about 1999 onwards. Software systems now offer the opportunity to conduct both traditional mediation and early intervention remotely, in a manner that broadly replicates the original concept in each case, but in a radical new way, as a new and enormously enhanced form of visual ODR. This change has occurred with staggering rapidity. The Covid-19 pandemic and technology have made online mediation, and online EI, both a necessity and a credible, workable and effective new normal. This second article in large part also deals with this new visual ODR.

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At the end of this article there are conclusions that touch on the material covered in both the first and second articles.

Before turning to the main themes, this article looks very briefly at the nature of change and at dissonance between problems that become disputes, on the one hand, and the usual timetable for their resolution by formal process, on the other.

## Change

Change might be said to be generally of two types, evolutionary (often slow, progressive and incremental) and revolutionary (sometimes quite sudden, abrupt, wholly new). Twenty or 30 years ago, it was something of a revolutionary idea to use a process of mediation to seek to resolve commercial disputes. Such disputes would generally have found their way into litigation or arbitration, sometimes with little discussion beforehand. Indeed, it can be important, and in some cases essential, to act very quickly, for example to preserve (even seize) documents, evidence and to secure assets and cash. In England and Wales, such proceedings are highly developed and governed by well-established substantive and procedural rules. Both are adversarial decision-making processes, where the judge, judicial panel (on appeal), arbitrator or arbitration tribunal (or court on appeal) will all act in a wholly independent manner, reviewing the issues (by reference to a pleaded case), arguments and evidence to determine who is right (on some or all points). It is not their role to seek to reconcile the parties, to resolve their problems and to settle their disputes.

It was, of course, always the case that commercial disputes in litigation or arbitration would settle. The overwhelming majority have always settled, usually by negotiation, but often after they had progressed over some time, at significant cost. When such negotiation might start, how, and on what terms varied from case to case; and still does.

The idea that some material advantage might be seen in a voluntary process, where any party can walk out at any time, where an independent party might have little control of the parties, no powers to make order or give directions, no power to order production of documents, no power to require the production of expert evidence and no power to issue binding judgments or awards was revolutionary. It was even more revolutionary to devise (in the manner described elsewhere in these two articles) a dispute resolution model that entailed double confidentiality; that is, where the whole process would be confidential but the private meetings between the mediator (or mediators) and one party (or perhaps more parties) should be confidential to the parties attending those private meetings (or caucuses). Yet more so where at such meetings the parties might reveal anything that touched upon their interests and needs, even if adverse to their interests (or the assertion of their rights). Such is the nature of mediation.

It has been a slow burning revolution, taking years to take hold. That said, it has long since passed the tipping point (in large and commercial cases), although there are still disputes over which the spectre of *Jarndyce v Jarndyce*[1] looms large. Mediation has progressed from an uncomfortable and unwelcome heresy to orthodox practice, if not necessarily routine. It has then entered into a phase of evolutionary change. As set out in this article, what one might consider to be the 'standard model' of mediation has been progressively tweaked, adapted, and changed, with a few main objectives: first to break impasse, when parties will not even speak to each other (or will speak to some parties but not others); secondly, to accelerate the process of talking, to get to the nub or crux of the matter; thirdly, to save cost; and, finally, to seek to eliminate risk of a poor outcome. EI is a classic example of evolutionary change. This too has also taken time to attain acceptance and use.

The advent of the Covid-19 pandemic, with lockdown, remote working and inability to travel or meet has brought about further revolutionary change. Where previously the accepted model of mediation had entailed, at some point, convergence of the parties, or some or most of them, in the restrictions necessarily imposed over the last 15 or 16 months, another method was needed if problems were to be solved. Meeting online had seemed somewhat odd initially, in some ways it still does. But

[1] Vide Charles Dickens *Bleak House*.

progressively, and remarkably quickly, it has been largely accepted and adapted as a workable method of conducting business.

## Dissonance and speed

Commercial transactions can progress remarkably quickly. Some are necessarily subject to deadlines, for example annual review or renewal on fixed dates. A dispute might arise on an annual policy of insurance in, say, April or May, which must be renewed at the end of September. It might be necessary, let us assume essential to resolve that dispute before renewal. There are, of course, expedited processes to resolve disputes by litigation or arbitration, say by preliminary issue or summary judgment. However, it would be difficult if not impossible to commence and serve proceedings, bring on an application for summary judgment, have that application heard and determined and judgment issued in due time. The timetables of commercial transactions and legal process necessarily beat to a wholly different rhythm.

Conversely, if it were necessary to bring the parties together (in person or now online) to make a deal that might well be done by FM or by EI; provided the parties are willing to talk.

## Early intervention

Much of early intervention will be familiar to anyone who is familiar with facilitative mediation or who has reviewed the description in my first article. There is a great deal of common ground and the use of a common set of skills and expertise in the party conducting the early intervention, also described as a mediator.

However, where traditional mediation might be a meal mainly chosen from a largely fixed menu, early intervention might be a veritable *smorgasbord* of choices.

### *When, early or late?*

Early intervention can be conducted at any time, be it early or late in the process. The original objective when early intervention was first devised[2] was to ensure that the process could start early and quickly. The mantra for early intervention is 'informed solutions sooner', but it is equally applicable to disputes nearing trial, including intractable disputes.

### *The need for expertise*

Early intervention requires a skilled intermediary, most usually a skilled mediator, probably with specialist subject matter expertise. Having engaged in the process, one might observe that early intervention may well impose greater demands on the mediator because it necessarily requires the mediator to do (much) more to manage the parties (or even to instigate the process, when requested), (much) more to sustain momentum and (much) more to bring them to a process of negotiation and conclusion.

### *Essential characteristics, confidentiality and compromise*

Early intervention is private and confidential. It is also without prejudice, in the manner described in my first article. In this, it shares the same issue that mediation has where the underlying proper law of the dispute is not English law. A question often asked is: Can early intervention can be conducted where the proper law of one or more of the underlying contracts (where it is a contractual dispute) is not English law? It certainly can, but the parties need to be aware that foreign systems of law may have quite different rules that bear upon the process in terms of privacy, confidentiality and, most particularly, legal privilege (which may not exist). These are risks that need to be managed by the parties (not by the mediator).

It is a sweeping generalisation to say that all legal systems have a protected process in which parties negotiate without damaging their prospects in any subsequent formal decision-making procedure (if there is no settlement). To the knowledge of the writer, however, many do. The enormously widespread use of mediation in common law jurisdictions, in civil law jurisdictions and in the

[2] See SeaMediation Chambers https://seamediation.com/.

Far East suggests that early intervention and mediation are both capable of functioning within a protected environment, whatever the underlying system of law. That protected environment is essential to enable the parties to engage in a degree of openness, even transparency that will enable them to inform the mediator and their opposing parties or contract partners of their various positions, to enable them ultimately to draw up an effective compromise.

*Regulation: a signed agreement?*

Like mediation, early intervention requires contract terms to regulate it, whether embodied in a written agreement or incorporated into the process by reference (where permissible and effective[3]). This is essential, such that the process itself and all parties to it can equally be protected, including the mediator and his co-mediator, assistant or any observer. All of the participants must be able to function within this protected regulated environment and be subject to its obligations.

*Appointment, unilateral?*

With traditional mediation, meditators can be appointed by pre-existing contractual agreement (for example in the equivalent of a jurisdiction or arbitration clause) or they may be agreed ad hoc between the parties and their respective legal advisers, after a dispute has arisen. Yet further, and this is perhaps one of the first unusual features to absorb in early intervention model as devised in the SeaMediation Chambers in 2015, a mediator can be appointed unilaterally to embark on the process of early intervention even when some other parties will not engage.

There is probably insufficient data to determine whether the prospects of success in concluding settlements are equally high where there is a unilateral appointment rather than a consensual appointment. SeaMediation Chambers does gather some statistics on success or failure at settlement or non-settlement in matters referred to early intervention. As that data set expands, the reliability of conclusions made upon it should become more robust. In this, early intervention shares an objective with traditional mediation. Indeed, all dispute resolution processes might benefit from a wider system of data-gathering in a common format, such that analysis can be made and reliable conclusions drawn in reliance on the eloquence of numbers, and parties guided accordingly.

The broad observation of the SeaMediation Chambers mediators is that the statistical probability of success in resolution in early intervention (as a whole, not looking at unilateral appointment as a subset) is generally similar to that in traditional mediation. It works; cases settle.

*The breaking of impasse*

Early intervention was devised, in part, as a process to break impasse, most particularly in cases that are or seem unlikely to go to mediation. It offers an opportunity to communicate with parties who may be wholly resistant to approaches from opposing lawyers or even commercial parties. This can perhaps be one of the most frustrating features of legal disputes. They can then have the tendency to expand as they become entrenched, and generally they do not get better with time. An untended wound rarely heals well.

The process of early intervention itself might be useful in laying the ground for a traditional mediation. It is a method to gather parties together and forges some sort of workable communication or exchange, for example such that resistance or even hostility to traditional mediation practice might be excised.

Mediation may only be avoided because of lack of familiarity, or unease in commitment to a process that is still new, and in many respects wholly unlike traditional decision-making, the archetypal model in most jurisdictions. How can a voluntary, non-binding, non-compulsory process possibly resolve problems that may be heated and apparently intractable? And why would anyone tell an independent person anything about their interests, needs and concerns when what they really wish to establish is that they are fully entitled to the things they demand? The answer may still be, to anyone not previously exposed to the process in operation, something of a revelation. It is part of

[3] A topic on which there is a substantial legal literature.

the modern phenomenon of the spread of negotiation, on which a great deal has been written. It pays to talk.[4]

*No set process*

In contrast to traditional mediation, which has developed into a broadly consistent model as described in my first article, there is no set process. Early intervention can take almost any form. It is not necessarily, in contrast to formal mediation, that the parties should reach a point where they can agree a bundle of documents to be used by the mediator and the other parties on the day. Even in traditional mediation, this can be a headache where preparation is (even now) sometimes made late such that each party, one or many of them, may wish to put different documents before the mediator than the other parties. The practical effect of this is to extend the whole process of review and analysis in exploration in the pre-mediation period and creates the risk that it can intrude into the exploration process on the day. It is thoroughly to be deprecated.

*Headcount, documents and prospects of success*

Every case is different. However, the likelihood of rapid resolution seems to decline in inverse proportion to the *numbers of parties* attending or participating and, worse, *the numbers of representatives of each party* attending. Equally, the prospects of success and the time required can respectively decline and increase in proportion to the *volume of documentation* put into the mediation. Too many cooks spoil the broth and may even result in disputes internally within groups who should be working together, for example joint venture partners (which the writer has observed being subjected to a mediation within a mediation; time-consuming and difficult). Too many documents can cast a pall over what otherwise should be a light, vigorous process, albeit also a hard, penetrating process when needed. Indeed, the position is the same for facilitative mediation or early intervention. The archive of lever arch folders prepared for main hearings or trials are hardly ever needed for mediation or EI.

*Position statements*

Position statements, however, are useful. It is always useful for the mediator, the opposing lawyers and opposing commercial parties to see something set out of the reasons for the dispute. Sometimes they can provide a real a moment of sudden clarity, a 'lightbulb moment', especially if a dispute has become progressively obscured by technical legal language. This is precisely why in EI, just as in mediation, a position statement should not be a bare recitation of the matters in issue abstracted from pleadings, crafted in the arcane terminology of the law. It should be a pitch to a jury not a summing up to a judge. Accuracy, brevity and clarity are the order of the day. Ease of understanding and concentrating on what really matters should be the guiding principles. Any matter, however complex, a topic addressed in the first article, can be expressed in some way in short form by those who know what really matters. Position statements have a role in this, and they should be used. They should not be long, legalistic, and certainly should not be tedious or tendentious.

One thing particularly to be avoided is to offer one position statement for exchange and then read out another wholly different statement on the day. These sorts of shock tactics (which the writer has certainly observed in practice), like long, vituperative opening statements, might offer the author some personal satisfaction, perhaps catharsis but, in the experience of the writer, are generally wholly counterproductive if the objective is to settle. It can be a shocking discourtesy in the misuse of time. A metaphorical chill descends on the room. Mediators might or might not be vigilant to ensure that such opening statements are not made, but they might be necessary if really needed to serve a particular purpose.

[4] There is a vast amount written on this, visible in the archives of material published (notably) by the Harvard University Negotiation Project (https://www.pon.harvard.edu/tag/the-harvard-negotiation-project/). The subject is now deeply engrained in university and business school educational programmes, because it works. For a host of reasons, it has profound attractions when weighed against the alternative of handing a dispute to a third party (whoever that may be) and losing control both of the process and the outcome.

*Logistics, quite different*

Early intervention, at least in its initial phases, has no fixed day, no obligation to travel, no weight of logistics in terms of hotels and venue. In that sense, it has a far less weighty time commitment and planning commitment written into it. It is therefore generally capable of being much lighter, more flexible and adaptable than a traditional mediation.

*The value of pre-mediation*

Just as interaction in mediation is expanded in pre-mediation, most particularly to iron out the issues, identify the relevant paperwork, identify what really matters and segregate it from things that might appear to matter but might or do not, early intervention offers substantial scope for early interaction. Indeed, that might go well beyond the emergent category of (enlarged) 'pre-mediation'. Even though the process is crafted to be lighter, more flexible and adaptable, there is scope in early intervention for an altogether wider and deeper process than an orthodox mediation itself. This offers a greater opportunity to develop trust and understanding between the participants without a loss of objectivity. Those who ultimately are drawn into the process of early intervention (since the matters to be resolved touch upon their interests, they may be ultimate decision makers), may have had little to do with the genesis of the original problem. They might therefore greatly appreciate the opportunity to understand what is at issue and to develop trust and understanding with their commercial partners. This is precisely the opposite of what might be one consequence of an adversarial process.

*A multiplicity of contacts*

It has been seen that in traditional mediation that there was the preparation of a written position statement, the agreement of a common bundle, some measure of interaction with the mediator in advance (sometimes confidential) and then appearance at a main meeting day (sometimes, although less likely a series of meetings on several days), at a particular date, place and time. By comparison, early intervention offers a whole range of contact variously between all and any of the parties engaging in the process by telephone, email, the conducting of chaired mediations by particular groups or client groups (and now online, on which see further below). This enables the mediator to promote understanding, to divert the parties from unproductive confrontation and, worse, stonewalling. This again illustrates the weight of the process of EI on the mediator and the need to identify individuals with the relevant skills, patience and persistence, to conduct it.

In parallel to the central commercial issues or disputes between two or more parties, there might also be a more thorough exploration of internal issues and, perhaps, insurance issues with parties who might otherwise be external to the process. This, together with commercial exchanges, offers more time to test the reality of the commercial position and the insurance position, say, and to lay the ground for deal-making covering all heads, taking care to ensure that this can only be done if protected by suitable terms. However, it is not intended to be a process of introspection. The objective must always be clearly in mind, namely to obtain clarity to achieve resolution.

*The widening of participation?*

One incidental benefit of early intervention may be that it offers the opportunity for more junior lawyers to be more heavily engaged in the process. The junior lawyers might see themselves less as the principal gladiator on whose efforts the fate of his clients turn than might be the case in traditional mediation. Those in such capacity may then find that they can engage more easily in interaction with the mediator and perhaps those of the junior personnel of the other parties, who might be viewed less as adversaries. This may facilitate dialogue. This was not why early intervention was devised, but in practice this appears to have emerged as an interesting and useful unintended consequence.

*The role of the parties themselves*

Traditional mediation offers, at particular times, the opportunity for the mediator to have direct access to the commercial parties, those engaged in the dispute and those authorised to settle it. This might take place in the presence of the legal advisers, or when the legal advisers are not present at

all, for example in a private meeting. (Such meetings might more easily take place when the parties are gathered together, physically.) Because of the nature of early intervention, this may occur less. In this, early intervention is perhaps more commonly limited to interaction with lawyers, a feature of the process that may evolve. Ideally, commercial parties themselves need to participate actively to make robust deals.

*Wider, deeper and the need to sustain impetus*

Depending on the path any particular dispute might take, early intervention offers greater time to obtain information, to explore facts, to obtain expert advice and to explain. It offers time for access to experts and counsel for specialist advice and opinions. Early intervention does not have the same pressure of the one-day closing event, in that it offers greater time to reflect. It might be said that this is a disadvantage, in that it is harder for the mediator to sustain impetus. This is another reason why early intervention may be best handled by skilled practitioners, although for it to spread and gain greater engagement it is almost certainly essential that that body of EI mediators should expand. For all that, such aspirant mediators (and those who appoint them) will need to grapple with the conundrum of the chicken and the egg.

*Snapshot assessment and statistics*

Making a snapshot assessment of those matters addressed here, in early intervention it might be perceived that it would take more time to reach a conclusion and closure than formal mediation, turning as the latter does around a fixed date and time. That said, it is not the case that the majority of cases that settle in mediation settle on the day. Overall, about 75 per cent or more might actually settle on the day or after that. The percentages that actually settle on the day itself might have at some early point been about 60 per cent, with 40 per cent settling thereafter. However, one hears anecdotally that these percentages may now be reversed. In other words, it is now less likely that mediations will settle on the day (even if they do settle), but that about 40 per cent will settle on the day and about 60 per cent thereafter, although this should certainly not be taken as an expectation. Perhaps with a larger data set one can form more reliable conclusions as to whether one process (such as FM) is more rapid than another (such as EI), or whether by different means they reach final resolutions at similar speeds.

*Cost, different pricing and budgeting*

It is possible that early intervention offers a saving in costs in comparison to formal mediation, although that is not necessarily so. It is not something to choose if the objective is simply to attempt to save costs. It is almost certainly the case that early intervention requires greater time, effort and therefore expense on the part of the mediator herself. However, there might perhaps be a potential reduction in internal costs and commitments of parties, since they are able to carry on some measure of business as usual, whilst remaining engaged in the early intervention. The one does not necessarily preclude the other. The ability to continue to transact other pending business must be an attraction (compared to traditional mediation) but one on which to keep a careful eye to ensure that it does not create the risk of drift. Similarly, there is probably a need to keep a careful eye on costing and to run a rolling managed budget as the process unfolds (in comparison to the turn-key model of fixed fees in traditional mediation).

*Strengths*

One particular strength that should be observed in drawing together the threads of this short comparison is that because early intervention does not necessarily require convergence at a particular date, time and place (say, in London), it is likely to offer saving in cost and time to parties and potentially likely to offer a solution that might otherwise not be available at all. In that respect, the writer refers to disputes between multiple parties scattered in numerous jurisdictions who simply will not and cannot converge to a single date, time and place. Or it may be that there are smaller disputes which, although they might have some significance in themselves, do not justify the time and expense necessarily required to devise, agree and participate in a formal mediation. EI might be well suited to such matters.

*A final comparison*

Pausing there, early intervention is a new sort of mediation. It has many similarities to traditional mediation but important differences. It can be commenced earlier, unilaterally and more quickly. If necessary, it can be wider and deeper than a traditional mediation, if that is what is required. It has subtly different dynamics to traditional mediation. It is flexible and adaptable. It offers the scope for that which was its original objective when devised, namely 'informed solutions sooner', but it can equally be applied to other matters, including difficult matters, much later in time.

## The new visual ODR: online mediation in the world of the Covid-19 pandemic

Covid-19 became manifest in about January 2020. It might have been in existence before that, but its impact in the West was really only felt from January onwards. Whatever the realisation of the scientific community, the business world and possibly the political world simply did not seem to understand the likely significance and the consequences of the imminent Covid-19 pandemic, nor its impact on individuals, business, society and the economies of states. From the point at which lockdown of various societies had been devised or announced in the West, on 23 March 2020 in the UK for example, many matters have emerged with greater clarity.

*The impact of innovation, the imposition of WFH*

Up to that point, with the progressive spread of computerisation and many of the remarkable inventions of the information technology companies, the possibility for individuals, most particularly in professional services, to work remotely from offices had been there, for many years. Some of the software systems may date back as much as 15 years, albeit business investment in that software and the necessary hardware, as well as training for use, may be much more recent.

All businesses suffer in some degree from inertia. Remote working might have been effective or ineffective, attractive or unattractive for particular individuals or businesses, but whatever the position it was not a widespread practice. The idea that whole businesses might suddenly designate themselves as WFH (working from home or working remotely) was certainly not an imminent prospect. Indeed, it ran wholly counter to most business thinking, with a focus on physical proximity, teamwork, availability, supervision, training, mentoring, risk management and, in some cases, control. It ran counter to certain business planning and therefore to investment in business premises, one of the largest and least flexible of business investments or commitments.

It is rare that there is significant change brought about by innovation alone. Something more is needed. This principle is widely applicable. Business practice is like matter, in that it continues in its existing state of rest or uniform motion in a straight line, unless that state is changed by an external force. Suddenly, from about the middle of March 2020 onwards, change has become for many a pressing necessity and a new reality. The Covid-19 pandemic was the external force, the catalyst for change. And the longer individuals are WFH, the longer they work remotely (even now when some might consider that the threat of the pandemic has abated), the longer the practices will (or have) become settled and fixed. New habits are formed by making such choices and by repetition. This has every appearance of permanent change, as one hears from policies now being implemented across businesses and society generally, even as the need for lockdown and quarantine progressively eases.

*The inevitable necessity of dispute resolution*

Trade continues, and goods in an era of globalisation have continued to move in enormous quantities. Those businesses engaged in the maritime trade, for example, including their legal advisers have and have had an inevitable need to continue to manage and resolve the disputes that arise, in an efficient and economical matter. The maritime trade (amongst others) has significant risks, not merely the perils of the seas. Court process, taking the functioning of the English commercial court as an example, has responded remarkably well; and there has been in parallel an inevitable new emphasis on remote dispute resolution.

This is not what had previously been described as ODR, using email and online systems (communication by the written word, much like correspondence but at or near the speed of conversation). The new visual ODR has arisen from the identification and then use of software systems such as those devised by Zoom, Microsoft Teams and Skype for Business, to conduct virtual meetings with participants potentially scattered across the globe (or in the house or office in the next street, town or city). These electronic packages enable parties to conduct dispute resolution in a manner that substantially replicates traditional mediation or early intervention, as described in this article and the previous article. Indeed, in some respects it might be particularly suited to early intervention with a multiplicity of interactions with multiple different parties and locations, spread out over an extended period of time.

*Differences, personal presence and the virtual world*

There are some notable differences in the practical application of the procedures by use of these online systems. It might be useful to touch here on some of the similarities and differences, with a particular focus on mediation. These should be kept under review, in order to see what sort of further adaptation (or further evolution) might be required to make better use of online systems. These are generic observations about the practice, not specific observations about any particular mediation (or, for that matter, EI).

*Booking and planning*

It is necessary to ensure that a particular time is booked well in advance, say two months in advance, in order that the parties can carry out their planning around that date. It is not necessary that there should be an ADR order, as such, inserted into the body of the timetable agreed at a case management conference, although the fixing of a particular date certainly focuses the mind and maintains a measure of pressure of process. It is not necessary that a subsidiary timetable within such a fixed programme should be fixed by court order (for the stages of the mediation). The parties should be perfectly capable, in conjunction with the mediator, to draw a timetable between themselves for the exchange of crucial documentation, in particular position statements and documents or an agreed bundle of documents. A suitable end-date concentrates the mind. Artificially short deadlines are counterproductive and present the hazard that the parties 'convene' unprepared. This serves no-one well. Conversely, 'excessively' long deadlines are equally unhelpful. They encourage or at least allow a certain lassitude, where there may always be something else of greater priority that is dealt with first. Or worse, the preparation simply does not get done promptly because work tends to slow and expand to fill the available time.

*Compliance and reality*

No-one should be surprised if the traditional demands are much honoured in the breach. It is not unusual for a position statement which should be exchanged, say, seven days in advance, and where there may even be a commitment to do so in the body of the mediation agreement, to be exchanged at a much later period and sometimes at the eleventh hour the day before or the night before the mediation itself. The same is true regarding the agreement of a bundle of documentation to be shared by the parties for the purpose of the mediation. It is wholly unsurprising if the parties do not reach the point at which they agree a common bundle, but it would save time if they were to do so and again focuses the mind. Once a fixed bundle of documentation is identified, it is far easier for all of the parties to absorb the information contained in it, the better to manage their negotiation and to reduce time otherwise wasted in exploration, or alternatively to identify what is missing and ensure that it is included.

*Regulation, the need for terms, mediation agreement*

As with traditional mediation or with early intervention, it is essential to regulate the process by a mediation agreement and that that agreement should be circulated well in advance and signed by the parties. It is essential that all of those who are to be engaged in the process, namely the commercial parties, their legal advisers, the mediator, his assistant and any observers should all

subscribe to and sign the mediation agreement, in order that they should be protected by its terms and subject to its obligations. Mediators are always vigilant to ensure that mediation agreements are signed in order that they should not be drawn into unnecessary controversy after the event, and in the event that there is no settlement (to the extent possible); sometimes even if there is. It is uniformly the case that mediation service providers and individual mediators or mediation organisations are vigilant to ensure that mediation contract terms incorporate provisions prohibiting the parties from requiring the mediator to play any role whatsoever in any subsequent conduct of a formal dispute. There are, of course, the usual exceptions to this, for example in order to prohibit the conduct of criminal behaviour, but that is beyond the scope of this article.

*A remote protocol?*

If the mediation or early intervention is to be conducted remotely, and this is particularly so of mediation, it is almost certain that there will be a remote protocol annexed to and forming part of the mediation agreement itself. Generally, this will be a simple document, but again it is essential. It is necessary for the parties and their advisers to read it, understand it, subscribe to it and sign it. One particular matter that the remote protocol will touch on is the manner in which the parties can conduct interaction with the mediator, outside the open engagement of the mediation itself. In other words, if the parties have private meetings (caucuses) with the mediator, with their lawyers or otherwise, the mediator (and the parties) they will wish to ensure that that privacy and confidentiality can be preserved absolutely in the exchanges which occur. There are variety of means of achieving this (just as there are to achieve communications with counsel in court cases that are heard online). One way of doing it is to use a wholly separate software channel for such communications (email, SMS message, WhatsApp and the like). It needs a certain lightness of touch and sure-footedness, generally acquired by practice and familiarity. No-one wants to be cast into the ether, into silence if accidentally disengaged while in the flow of negotiation, nor to appear suddenly unannounced in a 'private meeting room'. It is possible to conduct private meetings within the 'same' Zoom meeting or booked session, say. But some mediators decline to do this to eliminate risk of loss of confidentiality. That may be wise. A separate conduit is then essential.

*Traps for the unwary?*

There may be new traps for the unwary. There is a need to master the mute button and establish who controls it. Video images can be on or off, but who chooses? Parties can be held in speaker view or gallery view. There is a new need for discipline in controlling body language, which is subjected to a different scrutiny while online. Human expression and behaviour can matter a great deal in social and business interaction (certain materials on these topics are touched on in my first article). They may well be important in mediation. It is not usual in business or social interaction to be faced with a gallery of faces. This is one of the most curious features of the new 'Zoom culture'. Any sort of detailed review of this subject is beyond the scope of this article, but it is noteworthy that in 'normal' human interaction one simply cannot look at two people at the same time, whereas in gallery view on Zoom one would be looking directly at many faces, unnaturally compressed into the field of vision, and therefore be scrutinised by many others at the same time, even while not speaking.

There is new hazard of online weariness of which to be aware. Mediation days are often hard working days, but there is something curiously tiring about being on screen through most of a full mediation day, again with direct facial contact with many parties. There is a new study of these aspects of this new form of human interaction to be made at some point. Suffice it to say here is that it is obviously very similar to 'normal' experience, but subtly different, and those differences may be important.

*Participants*

There are no rules, but the usual considerations apply in terms of who attends and participates. The parties themselves and their legal advisers will almost always participate. They may choose to include barristers (counsel) but often not. They may choose to include experts (but often not). They will almost certainly choose not to include any witness of fact, whether that person is one of the ultimate decision-makers or not. The considerations when it comes to choosing those who will

participate are not simply a matter of cost but one of utility and perhaps of risk. Parties will be asking themselves and their advisers: Who is it that is necessary that should attend, the better to conduct the mediation to maximise the chance of concluding a settlement? This is something that is best not left to the last minute.

*Negotiation in good faith?*

It is the case that with any mediation some parties do not attend for the purpose of seeking to reach a settlement, whatever they may say. They attend for the purpose of probing and fact-finding, looking to identify possible weaknesses or witnesses, or simply better to understand an opposing case in order to gather evidence designed to defeat it. There is little or nothing that can be done about this. The objective is that parties who embark on mediation should do so in good faith, with the expressed purpose of concluding resolution such that the parties can reach closure, and really for no other purpose. Taking this as a starting point obviously maximises the prospects of resolution. A dispute must somehow be ripe for resolution. It is a matter of some skill to identify when that might be, or to take steps to bring it about. This might be achieved 'artificially' by the imposition of a mediation/ADR order made at a CMC (case management conference), or otherwise.

*Pre-mediation, essential*

As with traditional mediation, pre-mediation meetings are wise, probably inevitable with visual ODR (perhaps all the more reason to get the mediation agreement signed early). It may be very useful for all concerned, whatever view they may have of the dispute and the other parties involved, to engage in an open forum which all attend, say four to six weeks beforehand and subsequently private forums with a mediator shortly before the mediation itself takes place. This lays the ground. It enables the parties and the mediator to do much of the work which might otherwise be spent in exploration on the day, which with the benefit of experience might not be the best use of time. One never knows; sometimes it is absolutely essential that exploration is done in order that the other parties involved should really understand, even be confronted with, what is at stake and the interests and needs of opposing parties. This simply may not emerge in any other way other than on the day.

There may or may not be a new art of mediation advocacy, but it certainly pays to give careful thought to what will be said, and not said. Words and language really matter, and it is not merely a matter of truly understanding what is said, although that is hugely important and not necessarily obvious. Since English is so often used, the assumption may be that all understand what is said and what is going on, but that is not necessarily so.[5] Further, it is axiomatic that, as one hears in the history of broken relationships (personal or commercial), something once said often cannot be unsaid or salved by retraction or apology.

The matters of words and language, behaviour and expression bring to mind that visual ODR may well not offer an essential something compared to traditional mediation by convergence and managed meetings. Where all parties meet physically in one place, usually for a whole day, a long day, possibly more, there is far greater scope for formal or informal interaction, within the scheme and format of the mediation itself, its formal structure, within the shape of the day and multiple meetings. All this is generally designed by the mediator, in advance or in response to what may be said or what may occur on the day. Unplanned interaction outside that structure, between meetings, over lunch or in corridors can offer new opportunities to talk, to ease misunderstandings, to provide explanations for matters that might otherwise pass unseen, to exercise a measure of tact, diplomacy and persuasion that might otherwise be very problematic to achieve on screen. It is far more difficult to be bluntly dismissive when parties may have the prospect of close physical interaction.

[5] For this reason, the writer has been organising the publication of a variety of materials on mediation in multiple languages for nearly 20 years, being 'free' translations of core, original texts originally published by the writer in English, so that readers can see the same concepts and ideas but each in their mother tongue. Given the modern importance of China-related trade, a paper entitled 'The phenomenon of mediation' (which contains much generic material) has now been published in dual language text English and Chinese by SSRN, to follow previous dual language texts English/French and English/Italian. See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3818173.

*The protection of confidentiality*

Pre-mediation, just like traditional mediation, offers the opportunity for interaction on a confidential basis with the mediator and the opportunity to provide to the mediator confidential documents that will never be revealed to any of the opposing parties, unless the mediator is so authorised. Some such documents may never be so released. This is one means by which mediators can be better informed about the interests and needs of parties, even if the mediator is not provided with full written evaluation criteria by all parties (which hardly ever happens, if ever, although it may be the subtext to matters discussed privately). By this means, the mediator may then be better equipped to embark on the subtle and difficult process of forging a consensus to settlement.

*Parallel formal process?*

Perhaps the aspiration had been when mediation was first devised that it should be possible, without the necessity of any sort of legal process, whether litigation or arbitration, to make deals. Conceptually, the early idea of early intervention was that it should be possible, perhaps, to crack disputes even before legal process commenced and the problems simply became harder and more entrenched, spread out over a wider canvas. It is the experience of the writer, however, that ADR is best conducted against the backdrop of formal process and that mediation is most readily engaged in parallel to litigation or arbitration. This is equally true of traditional and online processes. For this reason, mediation has probably become an intrinsic part of litigation in England and Wales, by the imposition of rules (ADR orders and costs penalties). In large part, it may also be an intrinsic part of arbitration, particularly large-scale commercial arbitration, not by rules but by client choice.

*Pleadings, the core issues*

If it is the case that legal process has been engaged, then one set of documents always put into a mediation is the pleadings. This is the condensed set of writings, usually prepared by counsel when the legal process first starts. This will set out with the greatest possible clarity those matters that are in issue between the parties, which must then be proven by evidence. The relevant issues are generally easier to abstract from pleadings than from weeding through mountains of *inter partes* correspondence, whether exchanged between legal or non-legal minds, but would almost always require a trained mind. The law and formal dispute resolution have many similarities to science, but largely founded on words with less emphasis on numbers (although almost all disputes may be essentially about money).

*Position statements*

Position statements are useful in formal mediation and in early intervention, and are probably necessary, if not vital. The same is true in online mediation by Zoom, Teams or Skype for Business. Such position statements should be short, say a maximum of 10 pages, expressed in non-technical language. It should not be recitation or a rewriting of the pleadings in a case nor the lengthy quotation or abstractions or paraphrases of counsel's advice on any particular issue. It should be a pitch to a jury not a summing up in a trial, an expression routinely and repeatedly used since it conveys a certain tone and content that has proved particularly apt to the process. It should be readily understood by legal and non-legal minds in order that opposing parties, both their lawyers and the commercial individuals themselves, can understand exactly what is going on. Extracts from decided cases, arbitration awards, statutes and academic texts are probably surplus to requirements. That said, however, sometimes it can be essential that some of this sort of material is incorporated where parties might see that others have genuinely failed to appreciate the consequences of some highly significant technical point. The position statement might offer just such an opportunity to set out such material, in an easily comprehensible form.

*Learning new skills*

Over the last many months professional service providers of all types, including solicitors, barristers, accountants, insurers, mediators and members of the judiciary have all had to become much more familiar with the operation of the relevant online systems in particular Zoom, Teams and Skype for Business. That said, knowledge and expertise inevitably varies. One thing that all professional

service providers need to do, if they have not already done so, is to familiarise themselves thoroughly with these and other similar systems. For online ADR, a higher degree of knowledge and familiarity is probably needed than that which is used for typical 'internal' office meetings, especially if there were to be rapid shifting or shuttling between multiple confidential 'Zoom rooms'.

Current methods of working remotely from offices are likely to be here to stay for two reasons: first, because there may be little other choice for many (more) months; and, secondly, because it has been seen that in particular for international business there can be considerable advantages in time and cost. These are factors of enormous importance. *CLICK*[6] might become compulsory viewing. Innovation will not stop now; it will move forward, probably exponentially. This is likely to require investment in hardware and software but, most especially, in skills.

*A new brevity and exploration?*

One can observe that the practice of such online mediations or early interventions is different to that which had occurred previously. This is also true when comparing online court hearings to traditional court hearings conducted by attendance in court in the presence of solicitors, counsel and members of the judiciary. As a sweeping generalisation, introductions and opening statements tend to be shorter. One should not expect much scope for florid rhetoric. The written word attracts greater importance, albeit that too might be shorter. If pre-mediation has been thorough, and this sort of new process tends to encourage that, there may be much less need to embark on extended exploration (although in some cases it might be essential). Prolixity can often be the death of engagement. This can be seen in the eyes of participants, just as much as with any audience. At some point, it is necessary to cut to the core of what matters.

Again, the advantage of doing the work of exploration well in advance is that the time spent on the day might be very effectively devoted to negotiating, to turning to the matters that are really at issue almost from the very start. It may be true that disputes, particularly complex disputes involving significant amounts of money, offer little opportunity in traditional mediation or early intervention, or now in mediation or early intervention online, to persuade parties to change their minds. Experience shows that parties will rarely change their minds as a consequence of anything that their opponent or their opponent's lawyer may say. The remarkable strength of the facilitative mediation process (and all of that set out in these two articles really is an expression of that process, in whatever form or adapted model) is that it can enable two or more parties in conflict to identify a sufficient range of convergent interest and need such that they can effectively reach a working compromise and settlement, even if they had seemed to be implacably opposed. This is notwithstanding lack of resolution of intense, entrenched differences about matters that might be of less importance, some of which (but by no means all) may be found not to matter at all. Even cases involving credible allegations of dishonesty or fraud can be settled by mediation. Having observed and participated in just such processes, it is astonishing to witness.

*Success and statistics*

There is no common set of data on the performance and efficacy of mediation, whether traditional mediation, early intervention or visual ODR by these new online systems. Anecdotal evidence suggests that the settlement ratio remains similar to that which has always been observed; namely that about 75 per cent or more of cases tend to settle, of which something in the region of 40 per cent or more settle on the day and 60 per cent thereafter settling in the following days, weeks or even potentially months. The same is likely to be true of online dispute resolution. The process may be different, but the fundamental issues may ultimately be the same.

*The importance and management of parallel formal process*

One should always have in mind one obvious consequence of this. If a very substantial percentage of cases that can and will settle do not settle on the day, and if those cases are engaged in a formal

[6] CLICK is the BBC programme on modern technology, offered as an example https://www.bbc.co.uk/programmes/b006m9ry.

dispute process such as litigation (most particularly) or arbitration, parties simply cannot relax on the assumption the matter will settle and nothing else is therefore required, after disclosure of documents is completed. There remains pressure of process. The formal and ADR processes inevitably will need to function in parallel. Careful thought needs to be given as to how this can be achieved. No party to a commercial dispute, however large or small, and whatever might be the matters in issue, can abandon proper work and preparation of the formal part of a legal process in reliance on negotiation, mediation or early intervention by whatever means achieving a settlement. There should be no abandonment of legal process when deal-making reaches heads of terms.

There may be tactical steps to take and applications to make in formal process, but these need to be part of a larger strategic plan. Even if you might or will win in the last analysis (or so you might think) on applications or at trial or final hearing, ultimately can the opponent pay? Can the judgment or award be enforced? Is there a risk of winning the battles but losing the war? Is there is the risk of laying the ground for a Pyrrhic victory? This is a prospect to bear in mind in the handling of any parallel dispute resolution process. If not, every new pound spent will merely pile Pelion on Ossa.

This much is self-evident, but merits reiteration. Parties need to ensure that they do the necessary work in formal process but always keep an eye on the ultimate resolution. That work may well include the finalisation and exchange statements of witnesses of fact, the securing of signatures from those various witnesses wherever they may be abroad (for maritime cases potentially serving at sea in some obscure location). One should identify experts and obtain views of experts and at least an outline expert's report, if the same are a necessary part of the formal case.

In other words, the whole stretch of the formal process must be carefully handled, and held in mind, such that it can be run, ideally without more than the usual difficulties, in the event that a matter simply does not settle or, more frequently perhaps, but just as problematic, simply does not settle in time.

## Conclusions

These conclusions touch on the subject matter of these two articles.

Facilitative mediation (FM) has become the dominant form of dispute resolution process in the UK and more widely abroad. It is probably the dominant form of dispute resolution in major international disputes and now the principal form of ADR chosen by the International Chamber of Commerce in Paris, because it works.

Early intervention (EI) is a new form of mediation. It is grafted onto the original concepts which have made mediation so successful, but with differences and new features which can prove useful in particular cases. It offers a wide range of methods to reach consensus and settlement.

ODR has existed since the launch of the internet and widespread use of email, from about 1999 onwards. However, words alone cannot match the range and subtlety of discussion with words and visual images. Software systems such as Zoom, Microsoft Teams and Skype for Business now offer the opportunity to conduct traditional mediation and early intervention remotely and in a new manner that broadly replicates the original concept in each case, but in a radical new way. (The same is true, of course, for court hearings that can equally be conducted online.) This is the new visual ODR. This change has occurred with staggering rapidity but has the appearance of permanence.

As a general rule, change in commercial practice, but particularly change in the law and legal practice, is rarely rapid. It is generally evolutionary, not revolutionary. The growth of facilitative mediation itself may have been a revolution but a slow revolution which has taken place over years, if not decades. EI is new and has attained some traction in just five years, but it will take time to spread widely.

The stunning shift to compulsory remote working has, however, catalysed a huge and rather sudden change in mediation practice and made mediation (and EI) online, originally a necessity, now a credible, workable and effective new normal. This is a consequence and, perhaps, an incidental benefit of the Covid-19 pandemic.

For reasons of speed, convenience and cost, because of huge savings in time, in travel costs, in hotel costs, visual ODR (whether FM or EI, online) may well be here to stay, regardless of the success of any national or international vaccination campaign. Indeed, this may now be, regardless of some of its limitations and shortcomings, the dispute resolution method of choice.