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Worldly Perspectives

Is Mediation Becoming a Core Component of Justice in England and Wales?

BY GIUSEPPE DE PALO AND MARY B. TREVOR

Mediation in England and Wales has come a long way from its peripheral status to a position where its role in the justice system is undergoing a significant transformation.

Legislative reforms, judicial interventions, and an evolving regulatory landscape are positioning mediation, traditionally seen as an alternative to litigation, as a mainstream

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This month's column was prepared in collaboration with Bryan Clark, who is a Professor at Newcastle University Law School, U.K. He is a leading academic in the mediation field and in its interaction with lawyers and civil justice. An experienced teacher and trainer, he is Co-Director of Newcastle's LLM in Mediation and International Commercial Dispute Resolution. He was named ADR Academic Researcher of the Year at the 2024 National Mediation Awards.

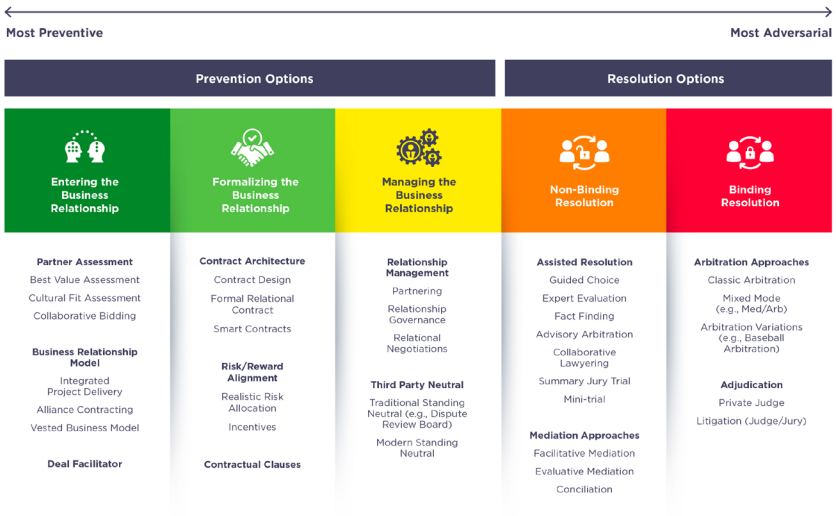
Clark is also a member of the central editorial team for the forthcoming publication *Rebooting Mediation*, in which country reports from around the world will explore the status of civil and commercial mediation. Clark conducted the England and Wales study from which the accompanying article is derived.

The *Rebooting Mediation* project, a large-scale study directed by De Palo for DTC, aims to provide policymakers with scientific, data-driven evidence to guide policy recommendations for achieving Access to Justice goal (16) of the United Nation's Sustainable Development Goals. In this column about England and Wales and in future columns, the authors will present a summary of a forthcoming country report that has resulted from the *Rebooting Mediation* project study.

The Return

The *Worldly Perspectives* column by Giuseppe De Palo and Mary Trevor returns to *Alternatives* with this article. The mission is the same as the original version, which appeared in these pages from October 2009 through January 2013: to advance understanding of how conflict resolution is practiced in countries around the globe. (The original columns are available on Lexis and Westlaw.) The authors—credits appear above—seek to advance the mission of the nonprofit Dialogue Through Conflict Foundation, which seeks broader global use of ADR techniques to address conflict, under United Nations Sustainable Goal 16 on peace, justice, and strong institutions. The column previously focused on Europe and included some nations in the Middle East and Africa; now, the authors plan to cover the world more widely. As part of the foundation's Sustainable Conflict Resolution Initiative, this material will serve as a resource for policymakers and scholars, providing empirical evidence on policies that effectively increase mediation use. By fostering global dialogue and integrating diverse perspectives, the efforts seek to strengthen institutional frameworks and promote long-term conflict prevention, aligning with international sustainability goals. The column is expected to appear monthly.

Figure 2. Detailed Dispute Management Continuum



dispute resolution mechanisms for resolving a dispute.

As authors, we advocate organizations turn first to non-binding dispute resolution mechanisms, which enable parties to have control over resolving the dispute. This typically yields a faster and more cost-effective resolution than binding resolution options.

The most common non-binding dispute resolution mechanisms fall into two categories: assisted resolution and mediation approaches.

Category 5: Binding Resolution—The last category in the Dispute Management Continuum is Binding Resolution. Binding dispute resolution uses an adjudication process. Adjudication–defined by CPR–is the resolution of the dispute by a neutral third party vested (by law or agreement) with authority to bind the disputants to the terms of an award. Common adjudicative processes are arbitration and litigation.

Because the book's focus is on dispute prevention rather than dispute resolution, as authors, we have purposely chosen not to go into detail about dispute resolution mechanisms.

Informative and Inspirational

One of the goals was to create a book that was not only informative, but also inspirational and could be used as a guidebook. We intentionally share inspirational examples of how real organizations are having real results by adopting dispute prevention mechanisms. For each mechanism, we share a case study that we hope will pique the readers' interests in piloting dispute prevention mechanisms in their own organizations.

A second goal for the book was for it to be a guidebook. For example, if you are already familiar with and using a particular dispute prevention mechanism, you can easily skip ahead and explore the mechanisms you want to learn more about.

The Bottom Line

The bottom line? It is your bottom line. Organizations that adopt dispute prevention practices can reduce the cost and time associated with disputes. But it starts with the right mindset and the adoption of dispute prevention mechanisms.

From a mindset perspective, dispute prevention means acknowledging that no relationship is perfect, and no contract can cover every eventuality. A dispute prevention mindset embraces this reality and provides mechanisms to help the parties maintain alignment as their relationship evolves.

This is especially important when working in more strategic and longer-term business relationships, such as strategic outsourcing agreements, large construction projects, franchise agreements, and critical supply contracts.

From an adoption perspective, this means being willing to learn about and try out dispute prevention mechanisms you may not be currently using.

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dispute resolution tool.

Mediation's evolution in England and Wales provides insight into its trajectory from a voluntary mechanism to one increasingly marked by structured mandates and institutional acceptance. See, e.g., Giuseppe De Palo & Mary Trevor, "Worldly Perspectives: Is Mediation Moving Out of the Shadows and Into the U.K. Practice Mainstream?" 30 *Alternatives* 173 (October 2012).

Early Foundations And Resistance

The journey of mediation in England and Wales began in earnest during the late 20th century, spearheaded by the Civil Procedure Rules (CPR) of 1998. Introduced after Lord Woolf's seminal review of the civil justice system, the CPR aimed to address issues of cost, complexity, and delay in litigation.

These reforms emphasized the court's duty to promote settlement, making alternative dispute resolution a key component of civil justice. Mediation was encouraged as an efficient way to resolve disputes without engaging in protracted litigation.

Despite these reforms, resistance to mediation persisted, rooted in legal traditions that favored adversarial litigation. Judges, while empowered to encourage mediation and impose cost sanctions for unreasonable refusals, avoided making mediation mandatory. This reticence was exemplified in cases like *Halsey v. Milton Keynes*, [2004] 1 WLR 3002 (available at https://bit.ly/3jy8FZw), which upheld party autonomy as a cornerstone of the legal process. The judiciary's cautious approach mirrored the

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broader skepticism within the legal profession, where mediation was seen as ancillary rather than essential.

The Shift Toward Mandates

The reluctance to embrace mandatory mediation began to wane in the 2010s, as economic pressures and caseload burdens on courts underscored the need for alternative mechanisms.

The tide turned decisively with the introduction of automatic referral schemes for small claims and the landmark case of *Churchill v. Merthyr Tydfil Borough Council*, [2023] EWCA Civ 1416 (2023) (available at https://bit.ly/3A5Tmmt). In *Churchill*, the Court of Appeal recognized the judiciary's power to compel parties to mediate under certain conditions, breaking new ground for the role of mandates in civil justice.

This shift reflects an acknowledgment of mediation's value in achieving timely and cost-effective resolutions. Small claims, a significant area of litigation, have been at the forefront of these developments.

As of April 2024, parties in small claims cases are automatically referred to mediation through a free telephone service. While participation remains technically voluntary, the procedural integration of mediation marks a significant departure from earlier frameworks.

Confidentiality and Enforcement: Persistent Challenges

One of mediation's defining features is confidentiality, yet its application in England and Wales remains nuanced and sometimes contentious.

Some jurisdictions have a codified mediation privilege, whereby confidentiality is explicitly established in legislation, providing strong legal safeguards. In jurisdictions without such codification, like England and Wales, confidentiality relies on contract law and the common law principle of "without prejudice," encouraging open discussions without fear of later repercussions.

This framework, while effective in many cases, has limitations. Courts have carved out exceptions where mediation behavior is deemed unreasonable or where public policy considerations demand disclosure, as seen in cases like *Farm Assist Ltd. v. Secretary of State for Environment, Food and Rural Affairs (No. 2)*, [2009] EWHC 1102 (TCC) (available at https://bit.ly/4gvwlcn).

The enforceability of mediated settlements has evolved over time. Agreements reached through mediation can be formalized as legally binding contracts or integrated into *Tomlin Orders*, which grant them the same enforceability as court orders. The 2008 European Union Mediation Directive, which provided a framework for the recognition and enforcement of mediated agreements in cross-border disputes, is no longer applicable to the United Kingdom because of Brexit.

Because of this regulatory difference, it is now more difficult to implement mediation agreements between parties from the U.K. and the EU. To guarantee the efficacy and enforcement of the results of cross-border mediation, the U.K. must now create more robust domestic procedures.

Market-Led Regulation and The Mediators' Role

Mediation in England and Wales remains largely self-regulated. Bodies such as the Civil Mediation Council (CMC) have established accreditation standards and codes of conduct, but membership is not mandatory, unlike other some other jurisdictions.

Italy's mandatory mediation model, for example, contrasts sharply with the self-regulated approach in England and Wales. Italy introduced compulsory mediation for specific civil and commercial disputes in 2011, requiring parties to attempt mediation before proceeding to court. This system is state regulated.

Data collected for the England and Wales *Rebooting Mediation* study by Bryan Clark underscore mixed perceptions about current mediation standards. Among respondents, 40% found existing standards sufficient, while 32% believed them to be insufficient or nonexistent. This divide likely reflects the different professional backgrounds of respondents. Those in sophisticated, high-value disputes may find the current regulatory environment adequate, while others dealing with more complex or lower-value cases may feel different.

A significant portion of the data collected for the study examined judicial promotion of mediation. While 54.9% of respondents indicated courts had discretionary powers to refer cases to mediation, only 21.57% believed courts were proactive in doing so.

Similarly, 48% of respondents stated there was no mandatory mediation, while 40% acknowledged its application in limited cases. These results suggest an uneven awareness and implementation of mediation mandates across different dispute areas.

The study's data also highlighted gaps in mediation understanding among professionals. For instance, 33.33% of respondents mistakenly believed that mediation confidentiality was guaranteed without exception, contradicting established case law referenced above that permits exceptions under specific circumstances.

Furthermore, 25.49% erroneously assumed confidentiality adhered strictly to the 2008 EU Mediation Directive, despite the directive's post-Brexit abolition. These findings underscore the need for improved education and awareness about mediation's legal framework.

Turning Tide

This month's *Worldly Perspectives* jurisdictions: England and Wales.

The acceptance: Mandatory mediation is spreading, with automatic referrals in small civil cases as of a year ago.

The resistance: It's waning, and ADR is on a path toward wider U.K. use. But post-Brexit, enforcement of international mediation agreements no longer has an EU directive to rely upon for enforceability.

Judicial and Legislative Developments

Judicial prompting remains a critical driver of mediation in England and Wales. Cases such as *Dunnett v. Railtrack*, [2002] EWCA Civ. 303 (available at https://bit.ly/4hM1gSP) and *Halsey* (noted above) established cost penalties for unreasonable refusals to mediate. The 2023 *Churchill* case, however, has also marked a turning point here, granting courts the power to mandate mediation in appropriate cases.

Respondents in Bryan Clark's study reflected mixed awareness of these developments, with some reporting inconsistent application of judicial encouragement.

Recent legislative reforms also point to a broader integration of mediation into civil justice. Automatic referral schemes for small claims have been implemented, with plans to expand similar mechanisms to other areas. But the study revealed that economic incentives for mediation remain limited. While 64% of respondents reported no financial incentives, 28% noted modest measures, such as reduced court fees, that encourage mediation. Expanding these incentives could play a pivotal role in fostering mediation's adoption.

Expanding Mediation's Reach

One of the striking findings from Clark's study is the relatively low level of awareness among practitioners about the broader benefits and applicability of mediation.

While the commercial sector has embraced mediation to a significant extent, other areas, such as community and family disputes, remain underrepresented in mediation practices. This disparity is also reflected in the annual estimates of mediated cases. The study indicates that while some respondents believe the annual market size to be between 10,001 and 50,000 cases, others estimate much lower figures, pointing to inconsistencies in perception and data collection.

Another issue highlighted is the lack of uniformity in mediator training and accreditation. Although the CMC has established guidelines, there is no overarching regulatory body to enforce uniform standards across the board.

The study revealed that only 20% of respondents considered current training and accreditation standards to be strong, with a significant portion advocating for more stringent requirements. This lack of standardization not only affects the quality of mediation services but also undermines public confidence in the process.

The role of technology in mediation is another area that deserves attention. The Covid-19 pandemic accelerated the adoption of online mediation, yet regulation in this area remains largely absent. Respondents noted that while online mediation offers convenience and accessibility, it also poses challenges related to confidentiality, variations in participant technological proficiency, and the dynamics of virtual communication. Addressing these challenges will be crucial as online mediation continues to gain traction.

Employment and Public Sector Disputes

Employment disputes and public sector conflicts represent significant areas where mediation could be used more effectively. The *Rebooting Mediation* study found that while mechanisms like the early conciliation offered by the Advisory, Conciliation and Arbitration Service, or Acas (available at acas.org.uk), have been successful in resolving employment disputes, mediation awareness and use remain limited in other public sector contexts.

For example, disputes involving local authorities, healthcare providers, and educational institutions often escalate to litigation due to a lack of mediation infrastructure.

Expanding mediation's reach in these areas will require targeted initiatives, including training programs for mediators specializing in public sector disputes and awareness campaigns to educate stakeholders about the benefits of mediation. Additionally, integrating mediation clauses into public sector contracts could serve as a preventive measure, ensuring that disputes are addressed before they escalate.

Economic and Social Impacts

The economic benefits of U.K. mediation are well-documented.

According to the study data, mediation can resolve disputes in a fraction of the time and cost required for litigation. For example, a dispute worth €200,000 resolved through mediation takes an average of 87 days and costs about €9,000, compared to 333 days and €51,000 for litigation. These figures underscore the potential for significant cost savings, not only for the parties involved but also for the judicial system.

Beyond economic considerations, mediation also offers social benefits. By fostering collaborative problem-solving, mediation can help preserve relationships and promote a culture of dialogue. This is particularly important in community and family disputes, where the preservation of interpersonal relationships is often a priority. The study highlights several case examples where mediation has successfully de-escalated conflicts, leading to mutually beneficial outcomes.

The Path Forward

Mediation's journey in England and Wales is emblematic of broader shifts in dispute resolution. From its roots in voluntary practice to its emerging status as a quasi-mandatory process, mediation is reshaping how justice is delivered.

The move toward structured mandates, exemplified by the small claims scheme and judicial referrals, signals a growing recognition of mediation's potential to reduce litigation costs and court backlogs.

The study shows, however, that challenges remain. Ensuring confidentiality, standardizing mediator qualifications, and increasing public awareness are critical to mediation's sustained integration. Better education among legal professionals and litigants is needed to dispel misconceptions about mediation's processes and benefits. Expanding regulatory frameworks and economic incentives could further enhance mediation's role within the justice system.

As mediation evolves, it holds the promise of transforming dispute resolution in England and Wales. The question is no longer whether mediation will play a central role but how it can most effectively adapt to the demands of a modern justice system while preserving its core principles of flexibility and neutrality.