

TRADITIONAL MEDIATION VERSUS E-MEDIATION: DOES ONLINE TECHNOLOGY HAVE A NEGATIVE IMPACT IN THE EFFECTIVENESS OF MEDIATION?

MEDIACIÓN TRADICIONAL VERSUS MEDIACIÓN ONLINE: ¿TIENE LA TECNOLOGÍA DE LA INFORMACIÓN UN IMPACTO NEGATIVO EN LA EFECTIVIDAD DE LA MEDIACIÓN?

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ABSTRACT: The paper seeks to assess the impact of online technology on traditional mediation as an alternative dispute resolution mechanism. In particular, it seeks to analyze to what extent online environments do or not alter the effectiveness of mediation according to its natural spirit and purpose.

Keywords: Mediation, e-mediation, online mediation, alternative dispute resolution, online dispute resolution, online technology.

RESUMEN: El trabajo tiene por objeto evaluar el impacto de la tecnología de la información en la mediación como un mecanismo alternativo de resolución de disputas. En particular, busca analizar hasta qué punto escenarios en línea u online alteran o no la efectividad de la mediación considerando su espíritu y objetivos específicos.

Palabras clave: Mediación, mediación electrónica, mediación en línea, resolución alternativa de controversias, resolución de controversias en línea, tecnología de la información.

INTRODUCTION

Conflicts have always been present in our society. At various times in our lives we face different types of disagreements and in this regard litigation has been the main way to resolve disputes, bringing them to an end and ensuring that people can validly enforce their rights¹. However, traditional litigation has some important disadvantages, such as cost and delay, which means a number of organizations have developed “ways of resolving legal disputes without a formal court hearing, protracted delay or the need for expensive lawyers”². Private legal conflicts are therefore increasingly being resolved through alternative dispute resolution (ADR) which is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.

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¹ GENN (1999) p. 12.

² GENN (1999) p. 13.

Within the field of ADR, mediation has traditionally been conceptualized as a process of facilitated negotiation, where the mediator is a third neutral facilitator or advisor (instead of decision maker) who simply assists the parties in reaching a negotiated resolution. In this context, the decision whether to mediate or not is made exclusively by the parties, as is the decision whether to settle or not. In brief terms, there are two main characteristics of a mediator's function, namely: the non-determinative nature of his authority and the non-partisan alignment within the parties' negotiations³. From a psychological point of view "the mediator seeks to achieve results by building a relationship of trust with the parties, so as to enable them to speak freely, openly and candidly"⁴.

The increased use of technology in the field of dispute resolution has modified the way in which ADR mechanisms are taking place. In this context, online dispute resolution (ODR) refers to the use of ADR systems over the internet⁵ and mediation is not the exception. In fact, there are many websites offering online mediation in relation to different types of disputes. The use of this technology seems to be positive in many different ways: it increases access to justice (especially for low-income people), it is efficient in terms of time and financial costs, and it is suitable for cross border disputes⁶. In the field of mediation, whereas mentioned previously the mediator's essential role is to build a relationship of trust with the parties, the supposed benefits of online technology are at least debatable, since the main benefits of mediation are precisely connected to a sphere of close and face-to-face relationship between parties and mediators. In this regard, Kaufmann-Kohler and Schultz have stated that mediation is "a method which relies on conceptual proximity"⁷.

The foregoing becomes more relevant after the unforeseen and unprecedented Covid-19 pandemic, which suddenly and undeniably demonstrated the essential role that digital technologies play in various areas of life. Indeed, during the Covid-19 pandemic, these tools not only allowed companies to continue their commercial activities, but were also essential to alleviate the effects of the crisis and facilitate access to different services, such as education, health, etc. In relation to justice, Courts have proven to be creative and innovative in their responses to the Covid-19 pandemic, and in their ability to implement digitization of paperwork and, especially, remote hearings⁸.

In this context, the purpose of this paper is to assess the impact of online technology on traditional mediation. In particular, it seeks to analyse to what extent online environments alter or not the effectiveness of mediation according to its natural spirit and purpose. First, the main advantages of online mediation will be described. Secondly, the specific features of traditional mediation will be addressed comparing whether these aspects are affected by online technology. Finally, this paper will analyze whether online environ-

³ STRASSER and RANDOLPH (2004) p. 42.

⁴ STRASSER and RANDOLPH (2004) p. 42.

⁵ BETANCOURT and ZLATANSKA (2013) p. 79.

⁶ PARTRIDGE (2009) p. 12.

⁷ KAUFMANN-KOHLER and SCHULTZ (2004) p. 1.

⁸ KRANS and NYLUND (2021) p. 1.

ments have a negative impact in mediation and in which contexts e-mediation is still as effective as traditional mediation.

1. THE MAIN ADVANTAGES OF ONLINE MEDIATION

E-mediation has certain benefits not only for the involved parties but also for mediators. For the involved parties, online mediation means convenience; it is cheaper than both litigation and traditional mediation, and there is often no need to resolve issues of jurisdiction⁹. Furthermore, Bordone says, "in Cyberspace, unlike any real community, communication transcends time, space, and physical reality"¹⁰.

When considering Bordone's parameter of time, the involved parties are able to make their submissions and file evidence whenever they want, giving them time to respond to any particular requirement or question. Furthermore, unlike traditional mediation, where responses are instantaneous, in some types of online mediation third party neutrals have the time to consider the details and review the information in depth before providing their answers. This aspect (known as the asynchronous nature of e-mediation) has been argued to be one of the most important benefits of e-mediation, where potentially impulsive answers can be avoided, resulting in better communication among the parties¹¹.

With regards to reduction in cost, whereas in litigation and some traditional mediation processes a lawyer's fee is often very high, in online mediation parties may be able to save significant amounts of money, because the need to hire a lawyer is frequently unnecessary. Furthermore, and similar to other ODR mechanisms, e-mediation is a good option for people who are unable to afford travelling long distances, an aspect that is especially important in cross-border disputes. However, this hypothetical or potential advantage may only be advantageous for some types of disputes since in other cases the lack of legal counsel could cause an imbalance between the parties.

Thirdly, issues regarding jurisdiction of courts over the dispute often exist in the field of dispute resolution. However, in the context of online mediation, parties bind themselves to resolve the dispute through an agreement, avoiding these types of difficulties¹².

From the mediators' perspective, online mediation opens a new market of opportunities for them as they can become members of e-mediation platforms or work independently. Thus, being able to participate as mediators in many more processes than they would do using traditional mediation.

⁹ BORDONE (1998) p. 179.

¹⁰ BORDONE (1998) p. 179.

¹¹ BORDONE (1998) p. 179.

¹² BORDONE (1998) p. 9.

2. THE SPECIFIC FEATURES OF TRADITIONAL FACE-TO-FACE MEDIATION AND WHETHER THEIR ABSENCE COULD BE A POTENTIAL PROBLEM IN E-MEDIATION

Traditional mediation has a number of specific features, for example: it provides parties with greater control over the proceedings and outcome; it can be used in different types of dispute, for instance family, labour and civil disputes among others; it is less expensive and faster compared to litigation; as a non-adversarial process it tends to preserve the relationship between the parties; and parties are able to adopt more creative solutions instead of the limited solutions available in adjudication¹³. In this section, this paper focuses on specific features of traditional mediation that can be affected by online technology, in order to assess to what extent, if at all, online environments negatively impact the effectiveness of mediation.

There are three main types of mediation: facilitative, evaluative and transformative. They have the following features in common: (i) they provide a voluntary, confidential and private conflict resolution mechanism; (ii) there is an impartial third party who assists parties in reaching a solution but does not decide the case; (iii) the process is conducted by a privately retained mediator¹⁴. However, they differ mainly in the extent to which a mediator can "intervene" in a conflict¹⁵.

Firstly, in facilitative mediation the mediator does not express a view on the strengths of the case and does not suggest the terms of settlement¹⁶. In this type of mediation neutrality must be untouchable and mediators should strictly respect this principle. That is why this form of mediation has been described by the literature as "non-interventionist" and "minimalist"¹⁷.

Secondly, in evaluative mediation the mediator plays a more active role in determining the outcome of the mediation. Partridge explains that this style focuses on an assessment of the strengths and weaknesses of the dispute by the mediator, who plays a more directive role in leading the parties to adapt their positions in order to arrive at a settlement situation somewhere between the opening offers¹⁸. Of course, the range of the intervention will vary depending on the nature of the dispute. According to Love, however, there are several reasons which demonstrate that activities followed by evaluative mediators are inconsistent with the essential role of a mediator¹⁹. For instance, evaluation promotes polarization and positioning, since it tends to create an adversarial atmosphere and "pulls mediation away from creativity"²⁰.

¹³ BOULLE & NESIC (2008) p. 5.

¹⁴ GENN (2012).

¹⁵ BOULLE and NESIC (2005) p. 21.

¹⁶ GENN (2012).

¹⁷ ROBERTS and PALMER (2020) p. 181.

¹⁸ PARTRIDGE (2009) p. 93.

¹⁹ LOVE (1997) p. 938.

²⁰ LOVE (1997) p. 945.

Finally, the school of transformative mediation does not see itself as a tool for dispute settlement, but "as a way to help people gain a deeper understanding of themselves and those they interact with"²¹. Hence, the main role of mediators under this doctrine is to transform the quality of the interaction of disputants.

As we can see, approaches to defining the practice of mediation can vary within these three conceptual notions, which highlights an underlying philosophy emphasizing values, principles and objectives²². Notwithstanding these different theories about the mediator's role, there are some essential features of traditional mediation that have been seen as positive tools not only by the literature, but also by users and lawyers: the physical and emotional aspects of traditional mediation; its confidentiality; the lack of technological barriers; and that it is a system suitable for different types of disputes. In the following subsections these specific features will be assessed considering their treatment in an online environment.

A) PHYSICAL AND EMOTIONAL ASPECTS OF TRADITIONAL MEDIATION, ARE THEY REALLY ABSENT IN ONLINE MEDIATION?

As Brown and Marriott argue, "the power of words and physical things to represent deeper meanings for people may have a profound effect on how they function and make decisions"²³. In particular, non-verbal communication is important for mediators in order for them to understand the participants true thoughts and feelings, and thereby improve the effectiveness of communication among the parties²⁴. In this regard, it has been said that mediation is a very useful method of resolving disputes especially where emotions run high, such as in divorce and family disputes²⁵. According to D'Zurilla "there is almost universal agreement that mediation is most effective if the parties to the dispute are physically present before the mediator"²⁶. Consequently, because of the importance of the physical component of mediation, one of the main challenges for mediators is to create and maintain a favorable climate during the whole process. This characteristic is particularly important since mediation is supposed to be a collaborative process, where parties have direct contact, under an informal and non-adversarial atmosphere.

Thus, mediators have to adopt certain strategies and techniques in order to improve a climate where intense emotions are often involved. There are some specific strategies for improving this climate, such as promoting a positive tone and relieving tension through humour²⁷. Additionally, it has been argued that mediators should also be able to: control the expression of hostility; encourage venting of the emotion by parties, especially in cases where parties are inhibited in expressing emotions without encouragement from the third

²¹ WALDMAN (2011) p. 22.

²² BOULLE *et al.* (2008) p. 6.

²³ BROWN and MARRIOTT (2020) p. 491.

²⁴ BROWN and MARRIOTT (2020) p. 481.

²⁵ GOODMAN (2003) p. 5.

²⁶ D'ZURILLA (1997) p. 352.

²⁷ BOULLE and NESIC (2010) p. 58.

neutral²⁸; model appropriate behavior; and express optimism that a real solution is possible, among others²⁹.

As Brown and Marriott have argued "many mediators place a high value on the ability to read body language, as an important communication skill"³⁰. Additionally, these authors highlight the importance of the mediators' empathy, arguing that their efficiency lies in their ability to understand and read all the non-verbal messages given by the parties, for example tone of voice, facial expressions, and cues and clues³¹. In general, therefore, emotional intelligence is a skill that plays an essential role in the mediation process and, as has been argued by Schreier, emotional competencies must be incorporated in mediation training programs³².

As it can be seen, elements such as the mediators' personality, interpersonal skills, intellectual capacity and linguistic abilities are highly important in understanding and capturing the needs, interests, emotions and motives of the parties³³. In the mediation process "a full understanding of these components of the dispute is often essential to its resolution"³⁴. The development of such abilities, therefore, is part of the basic work of mediators in order to fully understand the dispute and provide the best atmosphere in which to resolve it accordingly.

However, in the online environment, communication "is usually limited to emails and web-based textual communications"³⁵. Accordingly, I would tend to think, *a priori*, that online mediation is not as successful as traditional mediation in the understanding of the needs and emotions of the parties. But, is that totally true? How does online mediation confront this difficulty? What skills, strategies and techniques are required to develop an effective online mediation? These are some of the questions that arise when comparing traditional mediation to its online version. I will now evaluate whether and to what extent the absence of face-to-face contact can be dealt with in the online environment, and whether e-mediation may be able to promote a climate where mediation can be carried out effectively.

Research has looked at these particular questions, trying to explore the field of e-mediation and specifically its effectiveness and applicability. As a matter of example, one specific piece of research recorded the experience of mediators and parties in different e-mediation simulations using different types of disputes, from insurance claims to family conflicts³⁶. There were fifteen experienced mediators involved and thirty-six parties from different backgrounds, who had previously participated in face-to-face mediations but had no experience with online mediations. The participants also had different levels of comput-

²⁸ BOULLE and NESIC (2010) p. 64.

²⁹ GOODPASTER (1997) p. 218.

³⁰ BROWN and MARRIOTT (2020) p. 493.

³¹ BROWN and MARRIOTT (2020) p. 493.

³² SCHREIER (2002) p. 118.

³³ YOUNG (2000).

³⁴ YOUNG (2000).

³⁵ KAUFMANN-KOHLER and SCHULTZ (2004) p. 23.

³⁶ HAMMOND (2003) p. 261.

er knowledge and skills³⁷. According to this piece of research, there are certain aspects that influence the effectiveness of ODR and specifically online mediation, which include: prior preparation; the mediator's interventions; the parties' experience communicating online; the effect of the medium on the communication process; among others.

Firstly, according to the results prior preparation or tutorials are essential for the success of online mediations. In fact, over 70% of participants (mediators and disputants) found information given in advance both necessary and helpful³⁸. In other words, factors such as: virtual demonstration tours; explanations regarding compatible technical requirements, for example the appropriate web browser; and the simplicity of the instructions are aspects that have to be present in any e-mediation which intends to be truly efficient.

Secondly, regarding the interventions made by mediators, "the majority of mediators said they were able to translate the skills, strategies, and techniques that they use in face-to-face mediation into the online environment"³⁹. Based on this information it can be argued that online technology does not seem to be a real barrier for mediators in order to provide their basic and essential duties. Furthermore, it was also considered by the majority of mediators that roles such as building trust, facilitating communications, motivating the parties, gaining empathy and managing the pace, are all possible in online contexts. In fact, 70% of mediators said that they were able to help parties to develop trust between them and also to be confident regarding the process⁴⁰. At the same time, parties agreed that the professional level of mediators was high and well demonstrated in this online environment.

The experience of parties communicating online and the effect of the environment in the communication relationship were also subject to study. In brief, the results indicated the following⁴¹: (i) the vast majority of parties said that their communication were open and honest; (ii) the majority also considered that their experience in the online platform was similar to their face-to-face experiences, noting, however, that there was greater efficiency and clarity in the former; (iii) from the mediators' perspective, all of them said that the asynchronous feature of some e-mediation mechanisms allowed them to look at the whole conflict, rather than only the immediate interactions, while also being able to take their time to respond to the parties effectively. In this regard, parties also said that this aspect had a positive impact on their communication; (iv) regarding the feeling of disputants, most of them said that they felt more confident and less hostile in the online atmosphere with less pressure and intimidation than traditional mediation; (v) curiously, most of the parties said that the absence of body language did not affect the effectiveness of their communication. In sum, the majority of participants (100% in case of the mediators and 90% in case of the parties) stated that online mediation can be used in a successful way to resolve disputes.

³⁷ HAMMOND (2003) p. 263.

³⁸ HAMMOND (2003) p. 267.

³⁹ HAMMOND (2003) p. 269.

⁴⁰ HAMMOND (2003) p. 271.

⁴¹ HAMMOND (2003) p. 271.

Moreover, according to Melamed, "we often automatically assume that real time communications are preferable. Yet, whatever the benefits, there are many problems with real time discussions, particularly in the world of conflict"⁴². For instance, some parties can be reluctant to be in the same room together; disputants can be "difficult people" in terms of high polarised positions, high level of emotions, and difficulty in hearing the other⁴³, which are all difficulties that can be avoided or at least reduced in an online environment.

In addition to the perceptions showed in the study mentioned above, it is necessary to look at the current state of technology in order to see how new developments in online communications have helped to balance and minimize the lack of body language and non-verbal clues in e-mediation. In fact, there are new technological tools through which mediation can take place giving the parties the possibility to experience similar interaction as in traditional face-to-face encounters. These new applications for computers, mobile phones and tablets, such as Skype, FaceTime, Google Meet, Zoom, Microsoft Teams, Webex, video links, among others, allow all parties involved to see each other. In this way, e-mediation can be conducted in the same way as it would be done in traditional mediation but without a physical encounter⁴⁴. The continuing development of technology suggests that methods such as videoconferencing are becoming more commonplace⁴⁵ and a real replacement for face-to-face encounters⁴⁶. The online mediation world is becoming more and more real⁴⁷.

Based on what has been discussed to this point, e-mediation appears to be an effective dispute resolution system, which is becoming more similar to traditional mediation, despite its lack of body language or non-verbal cues, that are considered essential by the literature in ordinary mediation. In other words, the online environment seems to be positive or at least adequate for resolving dispute through mediation. However, I cannot completely agree with this thought yet without considering other issues that are relevant when analyzing the effectiveness of online mediation, namely: confidentiality, accessibility, and suitability of e-mediation to resolve disputes. These aspects will be assessed in the following subsections.

B) CONFIDENTIALITY AS ONE OF THE MAJOR CONCERNS IN E-MEDIATION

Within the field of ADR, confidentiality is one of the most important elements. When it comes to mediation, according to its essential nature as a private mechanism of dispute resolution, all the information given during the process, between the parties themselves and between parties and mediators, should remain confidential. In terms of scope, confidentiality "includes protection of both documents produced in preparation for the mediation and those actually produced at the mediation"⁴⁸. Considering the specific purpose of mediation, confidentiality is essential since it promotes openness and frankness,

⁴² MELAMED (2000).

⁴³ BROWN and MARRIOTT (2020) p. 491.

⁴⁴ MELTZER (2013) p. 4.

⁴⁵ BEAL (2000) p. 736.

⁴⁶ KATSH *et al.* (2000) p. 718.

⁴⁷ MELAMED (2000).

⁴⁸ MELAMED (2000).

and consequently, a more effective process of dispute resolution, as the parties assume that the information provided will not be shared or exposed in any way.

As a consequence of its importance, confidentiality in traditional mediation has been subject to particular protection. For instance, as Roberts and Palmer state, "in certain parts of the United States, there are now very rigorous confidentiality rules governing information disclosed in the course of mediation"⁴⁹. Whereas in an online environment mediation faces considerable threats to confidentiality and privacy. In fact, every statement given through the internet could provide a permanent record accessible by an individual third party who has not been involved in the mediation process⁵⁰. This risk does not exist in traditional mediation, where the information passes verbally between mediators and the parties, without tape recorders or microphones. Thus, the information could potentially become publicly available as it could be saved, printed and distributed. Additionally, in the digital world problems regarding the authenticity of the user arise because communications and passwords can be intercepted, and databases can be accessed by hackers who are permanently developing new technologies⁵¹. Moreover, mediation providers could use the information given by the parties internally for training purposes⁵².

Although some laws and privacy policies have been established to protect confidentiality, for example the Uniform Mediation Act in the United States⁵³, they have proved to be insufficiently adequate to protect communications given in an online environment, since potential enforcement in this context is fraught with complications⁵⁴. Furthermore, if specific remedies to safeguard confidentiality in the online environment are permitted by law, additional issues of jurisdiction arise, which should be considered by parties prior to the mediation process.

From the mediation providers' perspective, most of them have developed their own privacy policies to ensure the security of communications and they generally maintain the process under a strict level of confidentiality but in case of breach the same difficulty abovementioned arises.

In e-mediation, confidential agreements have to be agreed before the mediation is started and "should cover both a contractual commitment to confidentiality by the parties and technological assurances about confidentiality and privacy in the ICT system"⁵⁵. In this context, another problem that should be mentioned is related to the variety of laws and statutes available. As mentioned above, there are several rules that protect confidentiality and privacy. This variety of regulations creates problems of applicability. In the U.S. for instance, the existence of statutes in each state makes it almost impossible to correctly classify which rule is applicable in a specific case.

⁴⁹ ROBERTS and PALMER (2020) p. 213.

⁵⁰ GOODMAN (2003) p. 12.

⁵¹ MELTZER (2013) p. 9.

⁵² MELTZER (2013) p. 1.

⁵³ MELTZER (2013) p. 10.

⁵⁴ MELTZER (2013) p. 10.

⁵⁵ BROWN and MARRIOTT (2020) p. 593.

Moreover, the protection of privacy and confidentiality is not only problematic in online mediation but also in ordinary mediation. In fact, according to Brown and Marriott "there cannot be an absolute guarantee of confidentiality, and most Codes, guidelines, model procedures and standard forms of Agreement to Mediate should reflect the qualified nature of this obligation"⁵⁶. Hence, as confidentiality is a permanent issue even in traditional mediation, it seems unlikely that the risk regarding this aspect will be fully covered in online mediation, especially if the essential nature, dynamism and continuing development of the online environment are taken into consideration.

Some years ago, Katsh argued that in terms of confidentiality the most important is not how to avoid the copying of information or how to enforce rules regarding that aspect, but "whether there exists some means to encourage parties in the electronic environment to reveal information about themselves in a way that will not, at some later date, place them at some disadvantage"⁵⁷. The construction of any online dispute resolution system requires this approach and to achieve this goal the following things are required: (i) first, at the beginning of the mediation process, it is necessary to notify the parties of possible consequences of participating in e-mediation; (ii) as technology is changing all the time, permanent development of new technologies that protect privacy and confidentiality are needed⁵⁸; (iii) coordinated work between software engineers and dispute resolution professionals since confidentiality protection is also a matter of software knowledge⁵⁹; (iv) implementation of a unified regulatory framework with minimum standards of service that providers must adhere to⁶⁰; and (v) an effective enforcement system to be used in case of breach or abuse with its subsequent remedy⁶¹.

In addition, the massive and inevitable use of third-party software systems in Courts during the Covid-19 pandemic, such as Google Meet, Zoom, Microsoft Teams, etc., raised issues of security (and therefore confidentiality) that need to be addressed even in developed countries⁶².

Even though confidentiality cannot be fully guaranteed, if these measures are implemented to safeguard online communications and constantly reviewed in accordance with developments in technology, the field of online mediation will be better able to deal with confidentiality issues which are and always will be a major risk.

C) ACCESS TO TECHNOLOGY AS AN OBSTACLE IN ONLINE MEDIATION

Another aspect that has raised concern in the field of ODR is access to technology, especially in those disputes that arise in contexts of off-line transactions⁶³. ODR systems must be easy to use in order to be accessible to everyone, adaptable to persons what-

⁵⁶ BROWN and MARRIOTT (2020) p. 524.

⁵⁷ KATSH (1996).

⁵⁸ MELTZER (2013) p. 10.

⁵⁹ KATSH (1996).

⁶⁰ MELTZER (2013) p. 11

⁶¹ MELTZER (2013) p. 11.

⁶² KRANS and others (2020) p. 7.

⁶³ GOODMAN (2003) p. 12.

ever equipment they have and disabled people⁶⁴. However, it has been argued that not all members of society have access to computers, connection to the internet, or simply the knowledge to engage in online platforms⁶⁵. The lack of access to technology could be a significant problem in those situations where the use of online platforms to resolve disputes is compulsory, for instance in those jurisdictions where online courts have been implemented. Again, this is an issue that does not exist in traditional mediation.

As Susskind has argued, there is quite a lot of speculation among lawyers about the number of people who use the internet. He highlights that during the last years, 85% to 90% of people in the U.K. use the internet in one way or another⁶⁶ and that those people without the knowledge to use the internet could be helped or represented by someone on their behalf. Thus, people effectively excluded from using the internet are actually less than 4% of the population, which is a smaller percentage than has been typically assumed⁶⁷.

In general, the percentage of people who have access to internet in developed countries is quite important⁶⁸. According to a recent report of the Economic Commission for Latin America and the Caribbean (ECLAC), access to internet in the region has increased; in 2019, 430 million people were internet users (equivalent to 67% of the population)⁶⁹. Notwithstanding this growth, access to the internet in this region is considerably lower than those countries which are members of the OECD. This is a cause of concern especially considering one of the advantages of ODR: its ability to resolve cross-border disputes.

In an increasingly digital landscape, accessibility is an issue present not only in the field of ODR, but also in all services provided by the internet. However, it is particularly important in ODR, considering that the function of online courts, as the administration of justice, is public and has a duty to be accessible to everyone. In fact, it has been argued that "issues of digital exclusion need to be addressed in the policies and practices of a range of subject disciplines relating to human services"⁷⁰. The use of the internet for different purposes is increasing and this tendency will probably continue growing in the near future, which is why several governments have developed strategies to deal with people digitally excluded, such as older people, low income families, new immigrants and persons with disabilities⁷¹. Related to this is the quality of the connection, also considered to be a matter of accessibility especially in rural areas. However, according to the ECLAC these issues have been improved in Latin America and the Caribbean over the last years, and in general terms internet connection is reaching more places with a better quality.

The previously mentioned percentages given by Susskind suggest that digital exclusion is not a big issue in the U.K. (or at least not one that is concerning enough to exclude the application of ODR). However, Susskind argues that it is necessary to face digital

⁶⁴ SCHULTZ (2002) p. 15.

⁶⁵ GOODMAN (2003) p. 12.

⁶⁶ SUSSKIND (2017).

⁶⁷ SUSSKIND (2017).

⁶⁸ MANIA (2015) p. 85.

⁶⁹ UNITED NATIONS, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, LC/TS.2021/20 (2021).

⁷⁰ WATLING and CRAWFORD (2010) p. 206.

⁷¹ WATLING and CRAWFORD (2010) p. 214.

exclusion through assisted digital services⁷². Furthermore, the simplicity of any ODR platform is crucial for its success in resolving disputes and inducing trust⁷³. An accessible platform must be easy to understand and adaptable to new conditions and cultural differences in cross-border conflicts⁷⁴. In this regard, private mediation providers have a lot of work to do in understanding how people behave when confronted with an online service, and then subsequently improving this service so that it is clearer and more accessible.

Therefore, generally speaking, if less people are excluded by technological divisions, ODR will be more used and more successful. Thus, governments and private providers of ODR services should create strategies to deal with the challenge of digital exclusion, and develop and improve assisted digital services. If this happens, I think that ODR will be as effective as traditional ways of dispute resolution.

D) SUITABILITY OF ONLINE MEDIATION

As mentioned above, the use of online tools changes the rules of communication, depriving them of their essential character and, sometimes, its verbal elements. Based on this thought, it has been argued that e-mediation is not appropriate for all types of conflicts⁷⁵. Specifically in terms of suitability, the following disputes have been suggested as appropriate for online mediation: (i) cross-border disputes or cases where traditional mediation is not feasible; (ii) cases where the monetary value does not justify face-to-face encounters; (iii) highly contentious cases where parties are not comfortable being in the same room; (iv) disputes that need to be resolved as fast as possible in order to avoid further damages (for example cases where complaints made in social media damage the business reputation of a person or company). Whereas, other authors have said that cases with a large number of parties, high value disputes or conflicts where building personal relationships is needed, are not suitable for online mediation, arguing that they must be resolved through traditional mediation or any face-to-face system⁷⁶.

According to Genn, not all disputes are suitable even for traditional mediation, arguing that one has to be careful about a situation where people are pressured into a mediation process disagreeing, consequently, with compulsory mediation's policies⁷⁷. Moreover, in the general field of ODR (especially in those countries that are implementing online court proceedings), only some types of disputes have been considered as resolved through online platforms. Similarly, according to Susan Acland-Hood, a member of the panel at the lecture given by Richard Susskind in February 2017, an online system is not suitable for all cases. This should be considered when implementing an ODR system as a part of the judicial apparatus⁷⁸. For instance, in the U.K., they have considered disputes such as low value claims

⁷² SUSSKIND (2017).

⁷³ SCHULTZ (2002) p. 17.

⁷⁴ SCHULTZ (2002) p. 17.

⁷⁵ MANIA (2015) p. 80.

⁷⁶ HAMMOND (2003) p. 271.

⁷⁷ GENN (2012).

⁷⁸ SUSSKIND (2017).

and divorces, having a permanent and strong concern in how people behave using online platforms and how to improve the system. In this context, Mania has argued that according to empirical research, ODR is more appropriate for cases with a low level of complexity⁷⁹.

However, one must note that the suitability of e-mediation for just some types of disputes is not a reason to challenge the effectiveness of it. On the contrary, it should be seen as a complement to traditional mediation and other methods of dispute resolution.

CONCLUSION

The continuing development of technology shows that ODR is inevitable and online mediation is not the exception. As Lee and Lim argue, "people are getting more comfortable with electronic rather than face-to-face communication"⁸⁰, process that was significantly accelerated by the Covid-19 pandemic. Where oral hearings are required, increasingly they are to be done by new applications for computers, mobile phones and tablets, such as those mechanisms abovementioned, and therefore we have seen the decline of face-to-face hearings⁸¹. Consequently, online technology already is, and will increasingly become, a common mechanism to resolve disputes.

The purpose of this paper was to evaluate whether or not e-mediation, as a consequence of online technology, is less effective than traditional mediation. Review of the literature has shown that the traditional assumption that face-to-face encounters are the most adequate mechanism of communication should be challenged⁸², especially in those cases where: disputants are not willing to be in the same room; the cases are highly contentious; or situations where the parties are "difficult people" in terms of polarised positions and high emotions.

Despite the potential problems of online technology mentioned in this paper, without this tool it would be impossible to resolve cross-border disputes, and those parties with small value claims would not be able to resolve their disputes, without spending a great deal of money and time. Furthermore, both disputants and mediators do not view the non-verbal nature and lack of direct contact of some e-mediation mechanisms as an insurmountable issue, especially as the lack of face-to-face communication is now being increasingly replaced with tools such as videoconferencing.

However, in this environment the role and skills of mediators are still crucial. If a mediator provides a thorough and skilled service using technological tools appropriately, online mediation can be as effective as traditional mediation, but if not, the fact of mediating online does not offer any particular advantage.

A further key area of online mediation was concern regarding confidentiality, which has been shown to be difficult to control or guarantee even in traditional mediation. How-

⁷⁹ MANIA (2015) p. 85.

⁸⁰ LEE and LIM (2016) Volume 1, p. 117.

⁸¹ KRANS and others (2020) p. 6.

⁸² LEE and LIM (2016) Volume 1, p. 117.

ever, measures to protect online communications should be implemented to eliminate or reduce the risk.

In addition, access to technology and the use of the internet has increased globally and the real percentage of people effectively excluded from this is much lower than originally assumed. However, governments and private platforms of ODR should still provide assisted digital services to face this problem and eliminate inequality of access.

Finally, in terms of suitability, e-mediation is not appropriate for all cases and there remain situations where ordinary mediation can be a better option⁸³. Even though the advantages of online mediation overcome its potential problems, one should not see this situation as a battle between e-mediation and traditional mediation, but as a complementary tool in the ODR movement.

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⁸³ LEE and LIM (2016) Volume 1, p. 118.

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