

The Tenth Mediation Audit

A survey of commercial mediator attitudes and experience
in the United Kingdom



1 February 2023

Introduction

This report marks the tenth occasion on which CEDR (The Centre for Effective Dispute Resolution) has undertaken a survey of the attitudes of civil and commercial mediators to a range of issues concerning their personal background, mediation practice and experience, professional standards and regulation, and priorities for the field over the coming years. The primary focus of the survey is to assess how the market and mediation attitudes have changed over the past two years.

- The survey was undertaken using an internet-based questionnaire, which was open to all mediators in the United Kingdom, regardless of organisational affiliation. It was publicised by way of CEDR's website and direct e-mail to the mediator contacts both of CEDR and of other leading service providers and members of the Civil Mediation Council.
- This particular report is based upon the 328 responses that were received from mediators based in the United Kingdom. This is a statistically significant sample that represents approximately 50% of the individual membership of the Civil Mediation Council. As in any survey, not all participants answered every question.
- Alongside our survey of mediator attitudes, we conducted a parallel survey of lawyer attitudes in order to provide a client-oriented perspective to some of the questions raised, and we have cross-compared the responses from the lawyers' survey with that of the mediators' survey.
- It is important to emphasise that this is a survey of the civil and commercial mediation landscape, a field we have defined as encompassing any and all mediation activity that might reasonably fall within the ambit of the Civil Mediation Council. This reflects the background of the surveying organisation, CEDR, and the channels through which survey responses were canvassed.
- We do not, therefore, claim to cover either community or family mediation (although some of our respondents do report also being active in those fields).
- Furthermore, we do not include the statutory ACAS service or the HMCTS Small Claims Mediation Service, quite simply because the scale of their activities would each far outweigh the other findings of this survey.

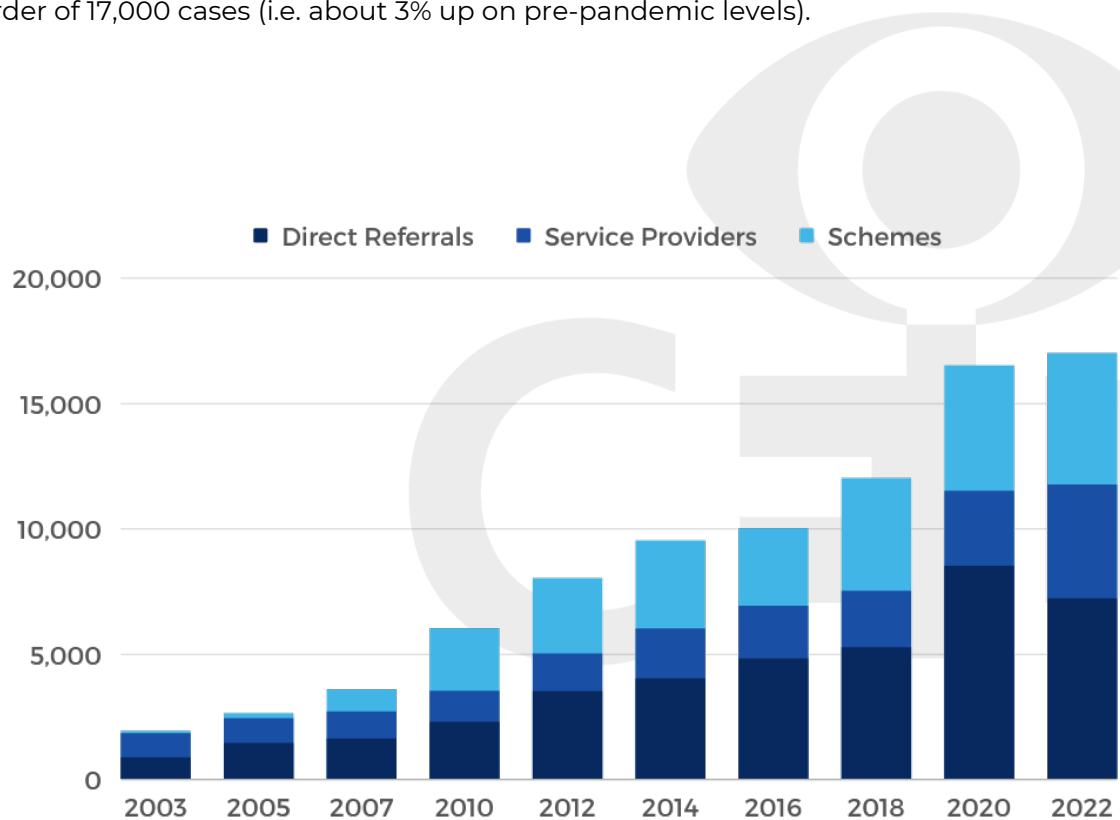
CEDR is grateful for the support not only of its members, who make our important research work possible, but also for the support and assistance of all of those who have assisted us in identifying the research themes and promoting the survey. In addition, we are grateful for the time and trouble taken by all of those mediators who have contributed their views and experience to our Audit.

The mediation marketplace

Activity levels

On the basis of mediators' reported caseloads, it is clear that the civil and commercial mediation market in England & Wales has fully recovered from the slump caused by the pandemic.

In the year to 31 March 2020 (i.e. the period immediately before the pandemic), our previous Audit estimated the overall size of the market as being in the order of 16,500 cases per annum. However, the impact of the covid-19 pandemic triggered a downturn in mediation activity, and overall activity dropped by 35% over the period March to September 2021. In the past year, however, this deficit has been recovered and our latest analysis shows that, for the year ended 30 September 2022, the total market was in the order of 17,000 cases (i.e. about 3% up on pre-pandemic levels).



Within that 17,000 figure, the latest Audit confirms the emergence of online mediation with 64% of commercial cases being conducted online. This figure is well below the 89% that we saw during the pandemic period but seems to show that the nature of the field has permanently changed.

As in previous Audits, a significant proportion of ad hoc mediations arise through direct referrals to mediators rather than going through service providers. For the first time, however, our Audit reveals a reversal in the longer-term trend towards direct referrals, with 61% reported by mediators this year as compared to 74% of their caseload two years ago. The Audit results do not offer any clear explanation for this change.

Mediator profiles

In terms of personal mediation experience, respondents were split between three broad categories:

- 76% Advanced mediators – who described themselves as “reasonably” or “very” experienced;
- 16% Intermediates – who categorised their lead mediator experience as “some” or “limited”;
- 8% Novices – who were generally accredited but had no experience as a lead mediator.

This overall profile is consistent with the trend observed in previous Audits, with an increasing proportion of mediators now identifying themselves in the Advanced category (up to 76% from 65% in 2020 and 62% in 2018). This trend is mirrored by the changes in mediators’ professional backgrounds, with 67% of these Advanced mediators being qualified lawyers, a significant increase from the 56% reported in 2020. Because it generally takes a newly trained mediator some time to reach an Advanced level, this change might suggest that lawyer mediators have been more successful in sustaining their careers across the turmoil of the past few years. There is, however, still a sizeable group of successful mediators with a wide range of professional backgrounds, including accountants, construction and workplace professionals, business consultants and managers.

The majority of Novice and Intermediate mediators reported personal involvement in no more than four mediations a year. Advanced mediators reported more extensive practices with 76% characterising themselves as “full-time” mediators (up from 60% in 2020). Clearly, however, there is still a wide variation of activity within this group, with 49% (2020: 51%) reporting undertaking less than ten mediations a year. Amongst those who are not full-time mediators but still have other jobs, an average of 19% of their professional time was spent working as a mediator.

The average female mediator who responded to our survey is 54 (2020: 53), whilst the average male mediator is considerably older, at 63 (2020: 60). The Advanced mediator group are two years older.

Age	Mediators	Solicitors (for comparison)	Advanced Mediators	Partners in Practice
Under 30	3%	8%	-	
30 - 40	5%	27%	5%	
40 - 50	33%	29%	28%	
50 - 60	30%	23%	35%	
60 - 70	23%	11%	25%	
70 - 80	7%	3%	7%	Average age is 52. No further details are available.

Female involvement in the field has improved significantly since the 2018 level of 24% in the Advanced group although, at 37%, it has slipped back a little since 2020 (41%). In this regard, the mediation profession is, therefore, now quite close to comparators such as the Law Society,¹ where 51% of solicitors in private practice (or 33% of private practice partners) are women. The mediation profession does, however, still fall short in the area of ethnic diversity where only 8% of respondent mediators report coming from ethnic minority groups compared to 17% of solicitors.

6% of mediators report having a disability whilst 5% define themselves as being either lesbian, gay or bisexual, both figures which are similar to the legal profession².

¹ "Trends in the solicitors' profession Annual Statistics Report 2021", The Law Society (September 2022)

² "Diversity Profile of the Solicitors' Profession 2019", The Law Society (November 2020)

Mediator earnings

The Audit asked mediators about their earnings during the 12-month period from October 2021 to September 2022 (i.e. the post-pandemic period). Firstly, we asked about their average earnings for a typical one-day mediation; this revealed a wide range of figures:

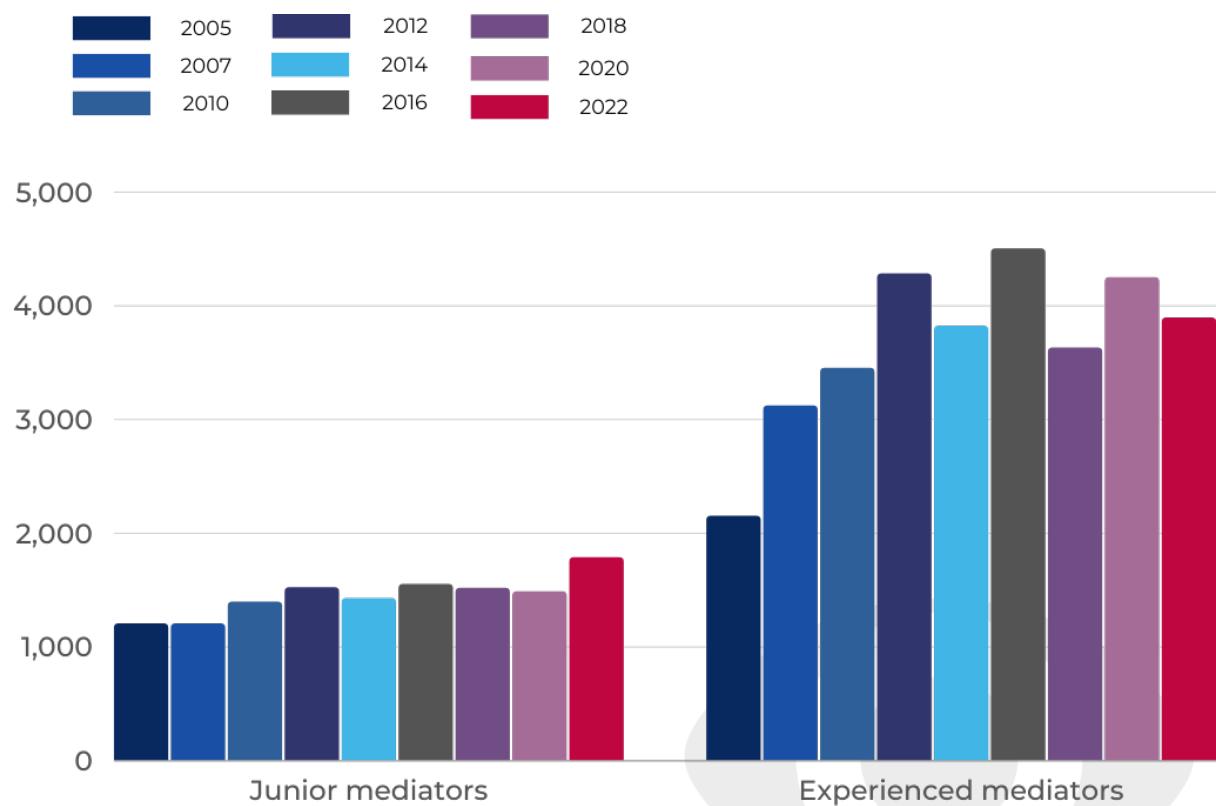
	2022	2020	2018
Pro bono only	5.5%	2.9%	3.1%
Under £500	3.6%	7.2%	5.0%
£501 - £1,250	18.2%	20.3%	22.6%
£1,251 - £2,000	19.1%	24.6%	22.0%
£2,001 - £2,500	12.7%	10.1%	18.2%
£2,501 - £3,000	10.0%	5.1%	5.7%
£3,001 - £3,500	6.4%	7.2%	7.5%
£3,501 - £4,000	7.3%	4.3%	5.7%
£4,001 - £4,500	2.7%	1.4%	2.5%
£4,501 - £5,000	5.5%	5.1%	2.5%
£5,501 - £6,000	3.6%	4.3%	0.6%
£6,501 - £7,000	1.8%	1.4%	0.6%
£7,001 - £7,500	0.9%	0.7%	0.6%
£7,501 - £10,000	1.8%	0.7%	3.5%
£10,000 +	0.9%	2.9%	1.9%

Averaging out these figures showed that:

- average fees of the less experienced mediator group for a one-day mediation have increased by 20% over the past two years to £1,781 (2020: £1,481);
- however, average fees for more experienced mediators have decreased by 8% to £3,893 (2020: £4,247).

By combining fee rates with reported activity levels, we can project average incomes for differing levels of mediator activity:

- Those undertaking between 20 and 30 mediations a year are earning between £20,000 and £145,000 with an average of £81,000.
- Those mediators undertaking between 30 and 50 mediations a year are earning between £110,000 and £390,000, with an average of £175,000.
- Those undertaking over 50 cases a year are earning are earning between £50,000 and £660,000, with an average of £312,000.



Mediation outcomes

The overall success rate of mediation remains very high, with an aggregate settlement rate of 92% which is not significantly different from our 2020 findings.

	2022	2020	2018
Settle on the mediation day	72%	72%	74%
Settle shortly after the mediation day	20%	21%	15%
Total settlement rate	92%	93%	89%

Settlement rates amongst the Advanced mediator group have, however, slipped back from an overall 92% in 2020 to 85% this year.

Settlement rates reported by mediators were validated by the findings of our separate survey of lawyers' views.

The mediation process

We asked mediators to provide a breakdown of the number of hours they spent on a typical mediation. This revealed that the average time spent has risen slightly since our last Audit, reversing the trend seen previously. The decrease since 2018 has apparently come in the area of reading briefing materials, although other elements of the process are taking slightly longer.

	2022	2020	2018
Preparation			
Reading Briefing materials	3.9	4.0	4.8
Client Contact	2.4	2.0	2.2
Mediation			
Work on the day	7.4	6.8	7.4
Post-mediation			
Follow-up/on-going role	2.1	1.8	1.9
Total	15.8	14.6	16.3

A significant proportion of mediator time continues to be unremunerated – an average of 4-5 hours was unpaid, either because the mediator did not charge for all of the hours incurred or because he/she was operating a fixed fee arrangement.

The Audit sought mediators' views about any changes they may have seen in mediations in recent years. We asked about both the popularity and the effectiveness of various techniques which are commonly adopted. The table below shows average scores across the range -2 for "significant decrease", -1 for "slight decrease", 0 for "no change", +1 for "slight increase" and +2 for "significant increase":

	Mediators		Lawyers	
	Popularity	Effectiveness	Popularity	Effectiveness
Pre-mediation contact with parties	0.89	(0.09)	0.41	0.41
Pre-mediation contact with lawyers	1.03	(0.40)	0.71	0.53
Pre-mediation submissions tailored to the mediation	0.51	0.10	0.50	0.56
Pre-mediation submissions that largely comprise the pleadings	0.59	0.37	(0.44)	(0.31)
Joint meeting at opening of mediation	0.23	0.40	0.00	0.25
Joint meeting during mediation - lawyers only	0.49	0.24	0.75	0.75
Joint meeting during mediation - party representatives only	0.02	0.37	0.50	0.63

These results suggest that pre-mediation contact with both lawyers and parties is increasingly popular but, perhaps surprisingly, mediators regard it as of diminishing effectiveness. However, lawyers take a different view. There are also differences in views about pre-mediation submissions in that lawyers are seeing, and apparently approve of, a decline in the practice of simply setting out the pleadings, but that is not what the mediators perceive. Both groups do, however, report slight increases in the popularity and effectiveness of targeted meetings both at the opening and during the course of the mediation.

As for other procedural trends or changes in the conduct of mediations which respondents have identified in recent years, the most significant items, beyond the well-documented emergence of online mediation, are that a number of mediators report greater awareness and, as a result, more effective use of the process by lawyers. Less positively, a number report an increased tendency for mediation papers to be submitted at a very late stage, thereby limiting the time available for preparation.

Future growth areas

Mediators' views as to which types of dispute or sector are likely to see the most growth in mediation usage over the next two years are largely unchanged from our previous audit.

The mainstream area of general civil and commercial disputes remains the most frequently mentioned sector, particularly in the light of the ongoing consultations about mandatory mediation, whilst Employment/Workplace, Professional Negligence and Personal Injury were also prominent. Mediators also cited both the current economic climate and social changes arising from the lockdown as likely to contribute to increased mediation activity in the future.

Comments on the current mediation field

Our invitation for mediators to offer their thoughts on any additional matters not covered elsewhere in the Audit attracted a broad range of comments, including:

The profession

"It is an exciting time to be a mediator"

"It is an extremely difficult field to get started in."

"I would like to see mediation recognised as its own profession and not lumped in with all other forms of ADR."

"It is disjointed and seen by many lawyers as a nice retirement gig and not as a serious profession for younger proponents. As with most things they touch, the lawyers are spoiling it through self-interest, if nothing changes mediation will go the same way as adjudication - not delivering what was intended and something many people would rather avoid."

"There are still far more mediators than mediations and some training bodies do not properly explain this to participants on their courses, which leads to disillusionment."

The future

"...recently I think that CEDR, other such providers and the CMC have made a much better fist of educating many in society as to the benefits of mediation. Now the Government needs TO DO FAR MORE in that respect given that if there is more ADR, ipso facto there should be less demand on HMCTS and thus the tax-payer."

"There is still an enormous education task that needs to be tackled, especially with litigation solicitors who continue to see mediation as just a form of settlement process involving only negotiation and do not understand the ways in which it can bring about effective resolution of conflicts in a non-adversarial way by exploiting interest-based solutions rather than rights-based solutions."

Readiness for mandatory mediation

Market capacity

The Government is currently considering the introduction of a requirement to attempt mediation for all proceedings allocated to the small claims track of the County Court (generally, most types of claims valued under £10,000). Under this proposal, unless an exemption is granted by the court, all parties to a defended small claim would be required to attend a free mediation appointment with the HMCTS Small Claims Mediation Service³ before their case could progress to a hearing.

The Government's immediate proposal would be addressed by an expansion in the capacity of the SCMS. However, any broader expansion of mandatory mediation may well create a wider need for mediators even if only by raising its profile. Hence, in order to gauge the existing capacity of the mediator marketplace to handle additional work that might then become available, we asked mediators how many days per year (in total) they might be available to mediate such higher value cases (i.e., case values over £10,000). We specifically asked about availability in terms of days so as to avoid any complications about whether the mediations would be full-day or time-limited matters.

As to be expected, our mediator respondents reported a wide variety of availability figures, with a median response of 50 days and an arithmetical mean of 83 days. Extrapolating this mean figure over the entire membership of the Civil Mediation Council (currently 649 mediators) would imply a market capacity of almost 54,000 days.

³ Whilst parties in small claims are already referred to the HMCTS Small Claims Mediation Service, it is reported that, whilst 55% of cases mediated via the SCMS result in a settlement, only 15-21% of parties utilise the service, with the evidence suggesting this is because many court users do not understand the mediation process and its benefits (<https://consult.justice.gov.uk/dispute-resolution/increasing-the-use-of-mediation>)

Income expectations

In order to provide a baseline for any upcoming discussions about mandatory mediation and an expected increase in the number of cases if the remit was to extend into case values above £10,000, we asked mediators about their billing practices on typical lower value cases.

	Case Value		
	Under £10,000	£10,000 - £25,000	Over £25,000
Median Hourly Rate	£150	£175	£250
Average case duration	5 hours	7 hours	11 hours
Total Fee	£750	£1,225	£2,750

These figures provide some insights on working and billing practices on individual cases. However, because many mediators will work a portfolio of case values, this data may not, when taken in isolation, present an accurate view of individuals' broader aspirations.

Accordingly, our Audit also asked about mediators' overall income goals for undertaking work on cases of over £10,000. These results showed a wide disparity, with quoted daily income targets ranging from £100 per day right up to £5,000. The arithmetic mean target was £1,826 per day but, as the table below demonstrates, this average has been skewed upwards by a number of particularly high requirements that may well be unrealistic given the nature of work involved:

	Daily Income Target
First Quartile (i.e. lowest 25%)	£460
Second quartile (i.e. 26% - 50%)	£1,216
Third quartile (i.e 51% - 75%)	£2,100
Fourth quartile (i.e. 76% - 100%)	£4,179

As for mediators' flexibility in the event that their desired rates were not available, the survey results suggest that, for the majority, fee levels are not a major consideration; if fees of only half of their target rate were offered, average availability would drop by only 2% and, similarly, if fees were doubled, mediators' reported availability would rise by only 3%. These results are consistent with the general evidence that there is considerable surplus capacity within the mediation marketplace and that, provided that they achieve a sustainable income level, the majority of mediators are currently more concerned with gaining experience through taking on more cases than they are with increasing fee rates.

Building on this analysis, we also asked mediators whether they would be prepared to work to a fixed fee for cases valued at over £10,000. 83% of respondents said that they would be prepared to do this, and their average quoted fee rate was £185 per hour.

As for other considerations that might influence mediators' decisions to take on such work, the two main issues identified by mediators were around reimbursement of travel costs, in many cases leading them to prefer online cases, and concerns about the administrative workload. These views were summarised by one mediator as being about:

"Efficiency of the interaction with parties - i.e. if the admin side of organising the mediation such as collecting the relevant papers from the parties, arranging the date of mediation etc was handled by someone else then it is much more attractive. The problem with lower value disputes (and therefore usually unrepresented parties) is that the admin and time involved in actually getting to the mediation is disproportionate to the fees available."

Issues around the participation of litigants in person in mediation

On the basis that any development of mandatory mediation is likely to trigger a significant uplift in the numbers of Litigants in Person (LIPs) going through the process, our Audit sought views as to whether their involvement presented particular challenges within the process.

Respondents identified a number of challenges in working with LIPs in mediation (the percentages stated represent the average frequency upon which mediators report having observing each issue in their practice).

Observations	Frequency of Observation		
	Under £10,000	£10,000 - £25,000	Over £25,000
LIPs have a good understanding of the legal issues involved in their case	20%	28%	33%
LIPs have a good understanding of the commercial issues in their case	39%	47%	55%
LIPs are able to represent themselves effectively	31%	38%	45%
LIPs look to the mediator for advice on the merits of their case	60%	60%	57%
If one party has legal representation and the other does not, the LIP is disadvantaged	50%	49%	48%
Implications			
Mediations involving LIPs are generally harder to settle	47%	49%	46%
Mediations involving LIPs generally take longer to settle	50%	49%	47%

As the table above indicates, there were perceived shortcomings in LIPs' understanding of their case and how to represent themselves effectively. These challenges were most significant in the lower-case value band but tended to diminish as case values increased.

Perhaps as a consequence, in spite of the greater sums at stake, the reported ease of settlement and duration of mediation in these higher value cases was virtually unchanged. Explanatory comments from our mediator respondents provide some further insights and explanations of the above figures. Many make the point that there is nothing problematic about LIPs *per se*, and that a well prepared and sensible LIP will generally be more helpful towards achieving a workable settlement than a dogmatic lawyer. There can, however, be a need for more preparation work with LIPs so that they are fully informed about the mediation process before going into it. It may also be that more educational materials need to be made available to LIPs to assist them in their preparations for mediation.

Issues around enforcement of mediation settlements

One of the objections to mediation which has been occasionally raised by its opponents is that, unlike a court order or arbitration award, a mediation settlement agreement is potentially unenforceable in the event that one party chooses to renege on a commitment. The traditional solution to this concern in the United Kingdom where litigation proceedings have commenced has been to arrange for a settlement agreement to be given the force of a court order by using a Tomlin or Consent Order.

Within the international arena, there is now the Singapore Convention on Mediation which addresses the enforcement issue at least in those jurisdictions which have ratified the Convention. The United Kingdom has yet to do so although an informal consultation by the Ministry of Justice in September 2019 received responses that were broadly favourable, with stakeholder feedback indicating that joining the Convention would raise the profile of mediation internationally and maintain the UK as an attractive dispute resolution hub.

In the light of possible growth in domestic mediation that might arise from the move towards mandatory mediation, our Audit surveyed mediators' experiences as to the frequency and nature of issues around the enforceability of mediation settlements. This revealed that the majority of mediators had either never or only rarely encountered such issues.

	Case Value	
	Under £25,000	Over £25,000
Never	74%	66%
Rarely	19%	25%
Occasionally	4%	5%
More Frequently	3%	4%

As to the nature of the issues that were encountered, these were generally either because one party had changed their mind about agreeing to a settlement or because there was some uncertainty about the nature of the agreement that had been reached or the mechanisms for its implementation. There was also a few matters where a party apparently did not have sufficient funds to pay an agreed settlement and others where an attempt was made to re-open a negotiation on the grounds that circumstances had changed, or new information had come to light.

Our separate survey of lawyers reported similar results, with over 60% never having encountered issues around enforcement of settlement agreements, and the remainder having done so only occasionally. A typical scenario cited was "*Defendant found raising funds more difficult than expected and there was a potentially missed deadline,*" a situation that could have arisen regardless of the settlement method employed.

We asked mediators who had encountered such issues whether, with the benefit of hindsight, anything could have been done either before or during the mediation that might have avoided such issues. Most responses placed the responsibility clearly on the mediator to ensure that parties fully understood what they were agreeing to - as one respondent said:

"Testing workability is a key role for mediators in the concluding phase of the day. Ensuring that the process builds in enough time for reflection is key - a good deal today will still be a good deal tomorrow. The mediator is in charge of making sure that the process is safe, and this includes ensuring that those drafting are given enough space and time to get it right."

In summary, therefore, the general view of our Audit respondents was that the risk of there being issues around enforcement of mediated settlement agreements is overstated.

Market regulation

Our Audit invited mediators' views as to the need for and nature of any regulation of the mediation marketplace. This revealed overwhelming support in favour of regulation, with the Civil Mediation Council as the preferred body.

Overall, 88% of mediator respondents agreed that the field should be regulated, with only 12% stating that there should be no supervisory body. This latter group generally argued that the marketplace would soon weed out any sub-standard mediators, so regulation was unnecessary, and that consequential institutionalisation may even be harmful.

It is interesting to note that support amongst mediators for regulation of the field has been consistently high – for example, our 2003 Audit reported 76% support for the proposition that there should be a single regulatory body for setting and monitoring professional standards of practice by commercial mediators and dealing with public complaints against mediators.

As to which body should undertake the regulatory function, 82% of those in favour of such an approach believed that the role should be fulfilled by the Civil Mediation Council, whilst 11% favoured a new body and 7% supported other existing organisations (but with no single organisation achieving more than 1% support). Reasons for supporting the CMC generally referred to its established standing and reputation, and the fact that it was non-profit and not itself a training or mediation service provider.

Similar views were expressed in our parallel survey of lawyers, with 76% in favour of regulation, and 75% of such respondents supporting the CMC.

However, one surprising point in relation to the CMC was that, when we asked mediators which organisation had accredited them, some 34% of mediator named the CMC. This shows some misunderstanding of the CMC's role in that it does not actually offer *ab initio* accreditation of mediators, but instead operates a system of recognising Registered Providers who offer suitable training and accreditation. It may be that the CMC needs to clarify its role in this regard – the combined concepts of accreditation and registration may be causing some confusion here.

Contribution of the field

Finally, by combining the results of the Mediator Audit surveys with detailed operational statistics taken from CEDR's own caseload, we can update our assessment as to the overall economic impact of the commercial mediation field as a whole:

- The total value of cases mediated (i.e. the amount at issue) can be significantly influenced by the impact of mega-cases. If, however, the effect of such cases is excluded, the value of cases mediated each year is approximately £20 billion.
- Since 1990, effectively the launch point of civil and commercial mediation within England & Wales, the total value of mediated cases is approaching £195 billion.
- By achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession this year will save business around £5.9 billion in wasted management time, damaged relationships, lost productivity and legal fees.
- Since 1990, our profession has contributed savings of £50 billion.

By way of a comparator to these figures, our Audit results suggest that the aggregate value of the mediation profession in terms of total fee income is around £65 million.

Conclusion

We may never know whether former First Lady, Michelle Obama, a former attorney and graduate of Harvard Law School, could have taken a different career path and become a successful commercial mediator, but perhaps the description of her journey in *Becoming* might equally be applied to our mediation profession:

"Becoming isn't about arriving somewhere or achieving a certain aim. I see it instead as forward motion, a means of evolving, a way to reach continuously toward a better self. The journey doesn't end."

For that is where our Audit shows us to be. Yes, mediation has arrived at its desired destination within the mainstream of the litigation system, but its race is far from run. The move towards mandatory mediation appears to be the next challenge on the horizon, and this Audit suggests that our profession is well placed to meet the need – perhaps, finally, the long-running concern about there being an excess supply of aspiring mediators will turn out to be a virtue?

But simply delivering more cases is not, of itself, enough unless we can also maintain the high standards that have been set so far. As this Audit demonstrates, settlement rates remain high, and the process is cost-effective. However, a lack of diversity amongst mediators is still a concern, and perhaps there is still a need to take the mediation skillset beyond the litigation context. Our historic growth to a total of around 17,000 mediations a

year is certainly an impressive achievement, but with some 247,000 contested Civil law cases in England and Wales each year⁴, the need (and opportunity) is still vast.

So, with new approaches, and new areas for implementation of mediation, we are still evolving, but the journey has not ended.

Graham Massie
CEDR Director

1 February 2023



The Mediation Audit is a biennial initiative undertaken by CEDR as part of its public mission to cut the cost of conflict and create a world of choice and capability in conflict prevention and resolution.

CEDR is grateful for the support of its members.

For further details, see our website: www.cedr.com

⁴ 1.3 Million claims were brought in 2020, but only 19% of claims are defended (and therefore necessitate a court hearing). This figure does not include family law cases, employment tribunal cases or criminal cases.