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The Online Civil Money Claim

Litigation, ADR and ODR in One Single Dispute Resolution Process

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Abstract

This article considers the recent reforms in English Civil Justice System, especially the new Online Civil Money Claim (OCMC). To make the UK courts easily accessible and affordable, Lord Justice Briggs in his Civil Courts Structure Review recommended for the introduction of an Online Solutions Court. This is a revolutionary step because it embeds alternative dispute resolution (ADR), in particular mediation, into the court system. This is very important because mediation emerged as an alternative to courts but has become an integral part of it. This study critically examines how mediation is being embedded into the English Civil Justice System and argues for a balanced relationship between litigation and mediation because they complement each other. This article is divided into four sections (a) Section 2 will discuss how the Online Court will impact the open justice; (b) Section 3 will provide an overview of the three stages of OCMC; (c) Section 4 will carry out a critical analysis of the OCMC; and (d) Section 5 will seek to put forward solutions and recommendations in light of the findings.

Keywords: ADR, pre-action protocols, civil procedure, online dispute resolution, mediation, civil justice, online civil money claim, online services.

1 Introduction

The reputation of the English Civil Justice System is well known and well respected.[1] Access to justice is one of the main ingredients of the rule of law, and the main aim of the courts is to provide easy access to justice to the parties.[2] However, the increasing cost of litigation means it is unaffordable for most litigants.[3] In this regard, ADR, in particular mediation, seems to be a preferred

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1 S. Blake, J. Browne & S. Sime, *The Jackson ADR Handbook,* 2nd ed., Oxford University Press, 2016.

2 *Ibid.*; *R (on the application of UNISON) v. Lord Chancellor* [2017] UKSC 51.

3 *See* Civil Justice Council (CJC) ADR Working Group, ADR and Civil Justice, Interim Report (October 2017); CJC ADR Working Group, ADR and Civil Justice, Final Report (November 2018); Lord Justice Jackson, Review of Civil Litigation Costs, Final Report (2009); Lord Justice Briggs, Civil Courts Structure Review, Interim Report (December 2015); Lord Justice Briggs, Civil Courts Structure Review, Final Report (July 2016).

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option for providing easy and affordable access to justice for ordinary litigants. Among other ADR options, mediation is the dominant and most used ADR option in England and Wales.[4] The reason for this popularity of mediation is that it is frequently more advantageous over litigation in resolving civil disputes as it is much more cost-effective, efficient, flexible[5] and can repair and save the future relationship between parties.[6] Despite being advantageous, its usage is low in the UK.[7]

In an attempt to make litigation more affordable and ADR culturally normal, Lord Justice Briggs came up with the revolutionary proposal for a new Online Solutions Court to deal with the majority of civil disputes of low and medium value of up to £25,000.[8]

The Online Solutions Court has been renamed as Online Civil Money Claim (OCMC),[9] and it is informally known as the Online Court (OC).[10] The OCMC is a simplified civil procedure designed to operate entirely online to make it more accessible and affordable using modern technologies and embedding ADR techniques for the litigants as proposed by the Civil Justice Council[11] and JUSTICE.[12] The design of the OCMC resembles the multi-door courthouse[13] presented by Professor Sander in the 1970s with the main aim to help litigants in finding the most appropriate resolution method for their disputes. Similarly, the OCMC encompasses the adjudicative process and ADR, which will offer the litigants the most appropriate way to solve their disputes.

The proposal for the OCMC came at a time when litigants are finding it difficult to seek justice from the courts due to the high costs of litigation. The high cost of litigation and the 'virtual withdrawal of legal aid' means seeking redress through the courts is almost unaffordable by most litigants.[14] The high cost of litigation has been subject to extensive reviews[15] in the past, and the use of mediation has been encouraged to reduce the cost of resolving civil disputes. It is hoped

4 CJC Interim Report, 2017, p. 51; and Briggs Interim Report, 2015, at [7.25].
5 Blake *et al.*, 2016.
6 Jackson Final Report, 2009.
7 *Ibid.*; CJC Interim Report, 2017; CJC Final Report, 2018.
8 Briggs Final Report, 2016.
9 Available at: www.gov.uk/make-money-claim.
10 P. Cortés & T. Takagi, 'The Civil Money Claim Online: The Flagship Project of Court Digitalization in England and Wales', University of Leicester School of Law Research Paper (2019).
11 Civil Justice Council ODR Advisory Group, 'Online Dispute Resolution for Low-Value Claims' (February 2015).
12 JUSTICE, 'Delivering Justice in an Age of Austerity' (April 2015).
13 F. Sander, 'Varieties of Dispute Resolution', National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice 7-9 April 1976 Pound Conference (1976) 79 FRD 111.
14 Briggs LJ, 'Civil Justice: My Vision for the Online Court', *The Law Society Gazette,* London,16 May 2016, at [7]. Available at: www.lawgazette.co.uk/practice-points/civil-justice-my-vision-for-the-online-court/5055277.article (last accessed 2 May 2020).
15 *See* Jackson Final Report, 2009; Woolf LJ, Access to Justice, Final Report (Lord Chancellor's Department, 1996); Heilborn-Hodge Report (1983); Briggs LJ, Chancery Modernisation Report (2013); Jackson LJ, Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs (2017).

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that the OCMC will reduce the cost of litigation and litigants will be able to use the service without lawyers.[16] The OCMC operates in three stages: (a) stage 1 (issue of a claim); (b) stage 2 (mediation and case management); and (c) stage 3 (determination by a judge). Currently, stage 1 is being piloted[17] and has been proven successful.[18]

This article critically examines the OCMC, in particular stage 2, as it is very significant because of its emphasis on mediation. Section 2 will begin by discussing how the move of the justice system online will impact the open justice, which is a fundamental principle in the UK justice system. Section 3 will then explain the current structure of the OCMC. Section 4 will critically analyse the OCMC to find how the OCMC will promote out-of-court settlements and whether it can be a solution to the problem the civil courts are currently facing, that is, high costs. Finally, Section 5 will seek to put forward recommendations based on the findings.

2 Open Justice and Online Court

The introduction of the OCMC has sparked a substantial debate among academics about open justice because cases are managed online, and even if a hearing is necessary, it will be through online communications which raises a fundamental question: how fairness and transparency can be ensured online? Open justice is a fundamental principle in the UK justice system. Under Article 6 of the European Court of Human Rights (ECHR), court hearings should be fair and public. The presence of the public gallery in the courtroom is considered a symbol of open justice.[19] According to rule 39.2 of Civil Procedure Rules (CPR), hearings will generally be held in public. In the case of *R v. Sussex Justices Ex p. McCarthy*,[20] Lord Hewart CJ referred to the concept of open justice and stated that

> a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.[21]

Open justice provides the public and media with the opportunity to observe and scrutinize court proceeding,[22] but this is not possible when cases are managed online. In addressing this issue, the UK government in their recent memoran-

16 Briggs Interim Report, 2015.
17 CPR Practice Direction 51R – Online Civil Money Claims Pilot.
18 M. Ahmed & D.Q. Anderson, 'Expanding the Scope of Dispute Resolution and Access to Justice', *Civil Justice Quarterly*, Vol. 38, No. 1, 2019, pp. 1-8; HMCTS Reform Update – Civil (2019).
19 S. Prince, 'Fine Words Butter No Parsnips: Can the Principle of Open Justice Survive the Introduction of an Online Court?', *Civil Justice Quarterly,* Vol. 38, 2019, pp. 111-125.
20 [1924] 1 KB 256.
21 *McCarthy* [1924] 1 K.B. 256, at [259].
22 Prince, 2019.

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dum[23] mentioned that there would be viewing screens in courts to view online proceedings, and the listing of such hearing will be made available to interested parties so that they can attend at the appropriate time.[24] However, academics[25] expressed their concerns that this step is not useful as people will still have to attend court buildings to view the process. There is also a proposal from the Her Majesty's Courts and Tribunals Service (HMCTS) that there will be 'public viewing centres' in public buildings and public will be able to watch the live-stream of the online hearing.[26] At the time of writing, there is very little detail available on how these public centres would work in practice, "but practically, such devices would be unlikely to meet the weighty demands of the principle of open justice".[27]

This article argues that it is right time to change people's perception of open justice in the traditional courts and consider the reform of the courts as an opportunity to change and "radically rephrase the way we design legal processes to increase transparency rather than just make court services more efficient".[28] Senior members of the judiciary also emphasized that open justice must adjust according to changing circumstances.[29] The change is needed now more than ever due to the ongoing COVID-19 (Coronavirus) pandemic, which changed the way of lives and not just the justice system. At this time of global emergency, courts are providing justice to people via online platforms.

It is undeniable that the traditional court is not accessible for most parties due to the high cost of litigation, which has reflected in government reports and research papers.[30] It is argued that while parties are unable to afford litigation, it seems odd to claim that open justice can only be ensured in the traditional face-to-face courts. The need for transparency in the court system is equally important, which must be at the heart of any policy design. As such, this article argues that policymakers should devise a system to live-stream the court process. In doing so, the policy design must take into account the need for transparency and open justice and not just the digitization of the traditional court.[31] It would be better to live-stream the court process on television screens and overtime on smart devices, which will enable people to access the process remotely.[32] However, there is an inherent danger of misuse of the system, for example, people can

23 Available at: https://publications.parliament.uk/pa/bills/lbill/2017-2019/0176/ECHR-Memorandum.pdf.
24 J. Tomlinson & M. Ahluwalia, 'Why the Courts and Tribunals (Online Procedure) Bill Needs Rethinking', Legal Action, 2019.
25 Cortés & Takagi, 2019.
26 *M. Cross,* '*Courts Bill: "Viewing Booths" to Preserve Open Justice',* The Law Society Gazette, *London, 23 February 2017*. Available at: www.lawgazette.co.uk/law/courts-bill-viewing-booths-to-preserve-open-justice/5059937.article (last accessed 3 May 2020).
27 Prince, 2019.
28 *Ibid.*
29 *Guardian* [2013] Q.B. 618 at [80].
30 *See* CJC Interim Report, 2017; CJC Final Report, 2018; Briggs Interim Report, 2015; Briggs Final Report, 2016.
31 Prince, 2019.
32 Cortés & Takagi, 2019.

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record the proceedings and put it on social media, which may be harmful to the parties involved or may compromise the whole process. To prevent this, there should be guidelines by which hearings can be live-streamed, and strict regulations for recording and sharing court proceedings on social media must be enforced. It is essential to broadcast the court process and publish the judgments in an anonymized manner. It is argued that these steps would ensure transparency and work as a powerful incentive for the parties, especially those who care about reputation (e.g. businesses, educational institutions and public organizations) to think seriously about mediation and settle their disputes which will remain confidential.[33]

3 The Online Civil Money Claim

The OCMC is designed to deal with low- and medium-value cases using mainly online technology.[34] It started as a soft launch (initially deals with cases valued up to £10,000) on a pilot basis in March 2018. To make the OCMC more accessible, it is divided into three stages: (i) Stage 1: parties are required to fill in their claims forms and responses, and they can exchange 'without prejudice' offers with a view to settle their claim; (ii) Stage 2: a legal adviser helps parties to settle their claims using ADR options and performs case management functions in cases where parties do not settle and require determination by a judge; and (iii) Stage 3: determination by a District Judge.

Stage 1 operates fully online and is designed to help parties fill in an online claim form and send responses electronically. Besides, this stage is intended to promote early settlements. At this stage, claimants are given brief information on mediation but not other ADR options. The claimants are required to fill in the rest of the form with relevant details of the claim and pay the fees and submit the claim. Additionally, the claimants are required to upload documents online in support of their claims and exchange information with the prospective defendants, and defendants are required to respond via the online platform. Once the claim is issued, it allows parties to exchange without prejudice settlement offers, which in effect replaces the pre-action protocols.[35]

Stage 2 includes mediation and simple case management,[36] and it is managed by legally trained legal advisers who inherit some of the judicial functions in terms of case management and referring parties to mediation and other ADR methods, both online and via telephone. Although they can provide legal information to the

33 *Ibid*.
34 *Ibid*.
35 P. Cortes, 'Making Mediation an Integral of the Civil Justice System', University of Leicester School of Law Research Paper, 2018.
36 Briggs Final Report, 2016, at [6.112].

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parties, they cannot give legal advice. Currently, an opt-out mediation pilot[37] is running on the OCMC website, but there is limited data to evaluate this process.[38]

Cases that have not settled proceed to this final stage (*Stage 3*) of the OCMC to be decided by a District Judge. However, the distinguishing feature of this stage is that it is different than the traditional face-to-face court hearing as it is managed online. The determination is to be made by District Judges or Deputy District Judges, either on the documents, over the telephone, by video or at face-to-face hearings, if needed.[39] It is hoped that the majority of the claims will settle at stage 2 and will not reach this stage, but "those that do, like in tribunals, will not require for lay litigants to identify the relevant law to the courts".[40]

4 An Analysis

The pilot of stage 1 has seen great success in attracting a large number of litigants to the OC[41] with high user satisfaction (90%).[42] The online system is very efficient, and the average time to settle a case using the online system has been halved compared to existing non-reformed services.[43] However, the current structure of the OCMC is not helpful in dispute prevention and containment as anticipated, rather it merely replicates the traditional courts.

It appears that the functions of stage 1 resemble the roles of CPR Pre-action protocols.[44] It is important to note that pre-action protocols encourage parties to settle a dispute before they embark on a lengthy and costly journey through the court procedure. However, in the OCMC, the 'without prejudice' function comes after issuing a claim at stage 1.[45] Unfortunately, this important feature is seriously underused because there is not enough publicity about this important feature, and there are no cost consequences for refusing to accept a without prejudice offer. Due to these apparent flaws in the current system, it has measurably

37 Under the opt-out system, parties are automatically referred to mediation, unless one party expressly opts-out, and they do not need to justify their decision due to low value of the cases under the scheme, which is a major drawback of the current structure.

38 D. Phillips, 'Courts, Tribunals and Regional Tier' (HMCTS Event, 11 Match 2019). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785324/Civil_reform_event_11_March_2019.pdf (last accessed 3 May 2020).

39 Briggs Interim Report, 2015, at [6.7].

40 Cortes, 2018.

41 HMCTS Reform Update, 2019; Justice Committee, 'Court and Tribunal Reforms', 10 July 2019. Available at: https://parliamentlive.tv/Event/Index/9f5ba45a-e4f0-485d-9697-b60e9ae15576 (last accessed 3 May 2020).

42 HMCTS Reform Update, 2019.

43 *Ibid*.

44 CJC ODR Advisory Group Report, 2015.

45 Without prejudice offers to settle is designed in a way that parties can explore early settlement options by exchanging settlement offers without fearing that the conversations could be used against them in the event the matter goes to the court.

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failed to contain disputes and prevent them from crystallizing into actual claims.[46]

The OCMC was introduced to provide easy access to justice to Litigants in Person (LiPs), and it was anticipated it would perform an educative function so that LiPs choose the appropriate dispute resolution suitable to their disputes without the help of their solicitors. However, the OCMC currently provides very little information on ADR options which is not enough to help the prospective litigants, especially LiPs to make an informed decision.[47]

It is important to note that stage 1 is fully online and requires minimum skills to understand the information and fill in the form online. It should be borne in mind that for the OCMC to be successful, its design must be truly accessible for all litigants, including those who have basic or no IT skills at all.[48] According to the Ministry of Justice, 18% of the population is not able to or choose not to use digital services due to lack of IT facilities, IT skills and low motivation.[49] Notably, the government has introduced Assisted Digital Services to help digitally challenged people. Although the HMCTS has partnered with a charity, the Good Things Foundation, to deliver face-to-face assisted digital service,[50] the uptake of these services is not satisfactory because of low awareness levels.[51]

Stage 2 of the OCMC is very important because of its emphasis on ADR, in particular, mediation. Once fully operational, a challenge for the legal advisers will be to find and select the suitable ADR options for a variety of disputes. This approach, which some have labelled as "process pluralism",[52] acknowledges the need to provide access to justice in different ways. There is a concern that legal advisers may not offer more ADR than a facilitator or mediator even with legal training. ADR options are wide-ranging, and it may not be possible for legal advisers to know about all the existing ADR options. Another significant challenge for legal advisers and policymakers would be to meet the huge demand of cases. Existing studies suggest that despite the high success of the Small Claim Media-

46 The recent report by the HMCTS reported that in this way, about 200 settlements had been reached since the launch of the new system until June 2019, which is a very small percentage of cases compared to the number of cases received during that period (70,000).

47 M. Ahmed, 'Moving on from a Judicial Preference for Mediation to Embed Appropriate Dispute Resolution', *Northern Ireland Legal Quarterly*, Vol. 70, No. 3, 2019, pp. 331-354, at 350.

48 P. Cortes, 'The Online Court: Filling the Gaps of the Civil Justice System?', *Civil Justice Quarterly*, Vol. 36, 2017, pp. 109-126.

49 *Ibid*.

50 HMCTS Reform Update Summer, 2019, p. 24.

51 Available at: https://parliamentlive.tv/Event/Index/9f5ba45a-e4f0-485d-9697-b60e9ae15576.

52 C. Menkel-Meadow, 'Process Pluralism in Transitional/Restorative Justice: Lessons from Dispute Resolution for Cultural Variations in Goals beyond Rule of Law and Democracy Development (Argentina and Chile)', *International Journal of Conflict Engagement and Resolution*, Vol. 3, 2015, pp. 1-32.

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tion Service (SCMS),[53] currently only around 20% of cases where parties request mediation are allocated to an SCMS slot,[54] but the reasons behind the inability to meet the existing demand remain unclear.

Importantly, mediation is moving online, which arguably makes it easier to integrate into a tiered process. It is a significant step in terms of easy access to the service and cost-efficiency. Nonetheless, some academics argue that moving mediation online may impact the settlement rates of mediation because mediation is effective when parties come face to face and share their problems, creating an atmosphere for a settlement that cannot easily be replicated in the OCMC.[55] The mediation process at stage 2 lacks these important elements of mediation, which may hinder the success of stage 2 and result in reduced trust and rapport.[56] This article argues that it would be better if online dispute resolution (ODR) can be made available to all types of parties and that should be the main focus of any dispute resolution design. There are practical benefits of ODR such as parties can join the process from anywhere without needing to take a day off from work to attend the process in person which saves money and time.[57]

It can be noted that the pilot opt-out mediation system does not offer, as it currently stands, much hope as parties are not required to justify their decision due to low value of the cases under the scheme. To make the process effective, policymakers will need to incorporate options for opt-outs,[58] otherwise it will be mandatory which may not be suitable for all cases.

With the OCMC, justice system is moving online, which is a significant cultural shift. This move has other practical benefits such as moving from having District Judges in county courts to having a centralized system whereby judges will be contacted through an online platform, thus allowing for the specialization of judges.[59] This means that there is no longer a need to have generalist judges to serve their local community, and there is an opportunity to have specialized

53 SCMS is run by the HMCTS and is provided over the telephone by trained mediators for claims valued up to £10,000 free of cost to the parties. If both parties indicate in the allocation questionnaire for the small claims track that they are willing to try mediation, they are automatically referred to the SCMS. Having started its journey in 2007, the SCMS is now being used nationwide in the UK.

54 Briggs Interim Report, 2015, at [2.30]-[2.90].

55 J.B. Eisen, 'Are We Ready for Mediation in Cyberspace?', *Brigham Young University Law Review*, Vol. (4) 1998, pp. 1305, 1308; W.T. D'Zurilla, 'Alternative Dispute Resolution', *Los Angeles Bussiness Journal,* Vol. 45, 1997, p. 352.

56 L.E. Teitz, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution', *Fordham Law Review*, Vol. 70, 2001-2002, pp. 985, 1002; N. Ebner & J. Thompson, '@ Face Value? Nonverbal Communication and Trust Development in Online Video Mediation', *International Journal of Online Dispute Resolution*, Vol. 2, 2014, pp. 14-15.

57 D.A. Larson, 'Online Dispute Resolution: Do You Know Where Your Children Are?', *Negotiation Journal*, Vol. 19, No. 3, 2003, pp. 199, 201; D.Q. Anderson, 'The Convergence of ADR and ODR within the Courts: The Impact on Access to Justice', *Civil Justice Quarterly,* Vol. 38, 2019, pp. 126-143.

58 Cortés & Takagi, 2019.

59 P. Cortes, 'Using Technology and ADR Methods to Enhance Access to Justice', *International Journal of Online Dispute Resolution*, Vol. 5, No. 1, 2019, pp. 103-121.

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judges who can decide cases more efficiently and consistently. Indeed, High Court judges, who are largely centralized in London, are fairly specialist. Yet, the case volume and the number of District Judges in the OCMC will be much higher than that of the High Court. As such, the OCMC opens a new opportunity to have specialized judges who can efficiently make a decision via an online platform.[60]

One of the major drawbacks, perhaps the most important one, is that there is no provision for cost sanctions. English CPR allows courts to penalize a party with legal costs if that party has been unreasonable in refusing to engage in mediation when invited by the other party.[61] Understandably, the reasons for the absence of this important feature are that its users are LiPs and it deals with low-value cases where costs sanctions do not work well. It is important to note that OCMC cases valued up to £25,000 (currently up to £10,000) will be dealt, which comprises 90% of civil claims as only 10% of the cases are valued over £25,000.[62] Therefore, the majority of the civil cases will be dealt within the OCMC, and it is argued that if there is no procedural measure such as cost penalties, the uptake of early settlements will remain low.

5 Solutions and Recommendations

It can be noted from the above discussion that the current structure of the OCMC has some shortcomings as some of the effective functions, such as the educative and pre-action function, have not been effectively implemented in the OCMC. To make the OCMC effective, this study recommends the following steps to be taken.

First, assistance should be readily available to help parties who lack IT skills, have no access to internet or are illiterate. The OCMC should incorporate detailed information about the available help, such as how and where to get help and links to charitable organizations at the start of the process in the current structure of the OCMC.

To encourage pre-action settlements, it would be better to include an educative and pre-action protocol function at stage 1 (before a claim is issued and the fee is paid). There should be specific information about mediation and other types of non-binding ADR options, for example, early neutral evaluation (ENE); what mediation has to offer over litigation; risk of possible cost consequences; where parties can get free advice and mediation services; and there should be video demos on how the mediation process works. This article recommends to move the 'without prejudice offers to settle' option earlier at stage 1 before a claim is issued and fee is paid to encourage pre-issue settlement.

One of the ambitions of the HMCTS is to incorporate a triage or diagnosis tool for certain types of disputes prior to stage 1. For instance, HMCTS has been working on a dispute resolution tree for passengers and airline disputes over

60 *Ibid.*
61 *See* CPR rule. 44.5.
62 Cortés & Takagi, 2019.

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delays and cancellations.[63] However, at the time of writing, no such tool has been incorporated into the OCMC. This article strongly recommends for the incorporation of an effective diagnosis tool before stage 1 to help parties to explore their disputes and consider early settlements. Lessons can be learned from Civil Resolution Tribunal (CRT) Solution Explorer[64] operating in British Columbia, which is an online diagnosis tool that asks some interactive questions to classify the dispute concerned, and based on the information provides free legal information including ADR options and appropriate application form should they wish to proceed with the claim. The CRT boasts that the bulk of their users do not proceed to the next stage of online negotiation,[65] which highlights that people do want to resolve their disputes among themselves, but there is a lack of advice in lay language that can help them to decide what to do.[66] As such, it is argued that when designing such online tools, particular attention should be paid to the need of all users and not just those with legal knowledge.

Currently, stage 2 relies on mediation only and the new opt-out pilot offers only mediation and not other types of ADR options available, which is a significant weakness. This may limit the options for the parties and discourage early settlements. Some disputes like small construction disputes and boundary disputes are more suitable for ENE than mediation and require some expert opinion which mediation cannot provide.[67] This article argues that there is room to expand asynchronous text mediation and ENE. To this end, policymakers should recruit enough legal advisers and adequately train them in different types of ADR options so that they can offer a range of suitable ADR options to the disputes that come to stage 2 and refer to the existing specialized ADR schemes. This article suggests that an important policy choice would be to choose between in-house mediation or outsourcing cases to existing certified ADR schemes (e.g. publicly certified ADR entities or ombudsman schemes), which are increasingly specialized and carry out a public service.[68] As legal advisers may not be able to offer mode ADRs, it is recommended to outsource appropriate cases to existing specialized ADR bodies.

To ensure the proper use of the opt-out mediation system, there should be built-in options for parties to opt-out, albeit on limited grounds. Otherwise, it will be a mandatory mediation which is not popular among the English judiciary and policymakers. It could be argued that parties in low-value cases should be able

63 D. Philips, 'HMCTS Reform Programme: Online Civil Money Claims and Civil Enforcement' (11 March 2019).

64 Available at: https://civilresolutionbc.ca/how-the-crt-works/getting-started/small-claims-solution-explorer/.

65 CRT Statistics Snapshot – January 2020 (February 2020). Available at: https://civilresolutionbc.ca/crt-statistics-snapshot-january-2020/ (last accessed 3 May 2020).

66 S. Salter, 'Dispute Resolution in the Digital Age: An Introduction to the British Columbia Civil Resolution Tribunal (CRT)' (Innovations in Technology Conference, Portland Hilton Downtown, 15-17 January 2020). Available at: https://lscitc2020.sched.com/event/Y03z/welcome-and-opening-plenary-with-john-levi-jim-sandman-and-shannon-salter (last accessed 2 May 2020).

67 Ahmed, 2019.

68 Cortes, 2017, p. 111.

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to opt-out easily than those involved in high-value cases[69] because low-value cases are less complicated and do not cost much for trial. However, parties in high-value cases should only be allowed to opt-out on limited grounds, for example, a point of law, the need for an injunction, fraudulent conduct by one of the parties and limitation issues.

It is argued that mediation at stage 2 should be free of cost or at a modest fee to the parties, which will work as a strong incentive for parties to opt-in for mediation. To incentivize parties to go for mediation at stage 2, the fees for moving to stage 3 should be higher, and judgments made in stage 3 should be made public. This is only possible if the fee for using the OCMC should be 'pay as you go' system, that is, parties have to pay the services they use.[70] In relation to the higher court fees, it can be higher than the initial two stages but proportionate, otherwise it may restrict parties' right to access to the courts.[71] The higher fee is likely to discourage parties in thinking that if they say no to mediation at stage 2, they can easily move on to stage 3.[72] Other positive incentives may include "fee remission or fiscal benefits through a lower vat".[73] For example, if a party agrees to consider mediation at stage 1, then there should be fee reduction for issuing a claim at stage 1.[74] Another option could be to charge a lower vat or no vat at all for those who consider mediation.

Judges at stage 3 should actively encourage parties to settle early without needing to move to stage 3. To this end, the judges should provide judicial ENE at stage 2 to encourage early settlements. Also, there should be a referral system in place from judges to the legal advisers at stage 3 to send cases that are suitable for stage 2, but one of the parties opted out unjustifiably.

It is recommended that policymakers should seriously think about incorporating some procedural mechanisms such as cost sanctions in the OCMC. It is important to note that in England there is a separate procedure to allocate costs,[75] which allows to impose costs penalties. Existing studies[76] suggest that cost sanction works as a strong incentive for parties to consider early settlement. Senior members of the judiciary and academics have always advocated for the use of cost sanctions to encourage more people to mediate.[77] Their recommendation has been reflected in CPR provisions which placed an obligation on the judges to actively manage cases before them and encourage litigants to settle their disputes

69 Ahmed & Anderson, 2019.
70 *Ibid.*
71 *Unison* [2017].
72 Cortés & Takagi, 2019.
73 Cortes, 2017.
74 At the time of writing it appears that a one off payment is taken when issuing claim at stage 1 which means payment includes fee for stage 2 as well.
75 *See* CPR 44 & also M. Ahmed, 'Bridging the Gap Between ADR and Robust Adverse Costs Orders', *Northern Ireland Legal Quarterly*, Vol. 66, No. 1, 2015, pp. 71-92.
76 *See* CJC Interim Report, 2017; CJC Final Report, 2018; Briggs Final Report, 2016; Briggs Interim Report, 2015; Cortes, 2017; M. Ahmed, 'Implied Compulsory Mediation', *Civil Justice Quarterly*, Vol. 31, No. 2, 2012, pp. 151-175.
77 Jackson Final Report, 2009; Cortes, 2017; M. Ahmed, 'A Critical View of Stage 1 of the Online Court', *Civil Justice Quarterly*, Vol. 36, No. 1, 2017, pp. 12-22; Woolf, 1996.

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using alternative settlement options.[78] However, existing case laws[79] show inconsistencies in approaches adopted by the judges when exercising their power to penalize a party for unreasonable refusal to mediate. Additionally, there is an inherent danger that the use of excessive cost sanctions against litigants, especially LiPs, may put undue pressures on the parties to go for mediation which may clash with their right to court access under Article 6 of the ECHR as envisaged in *Halsey* by Dyson LJ.[80] This view has sparked a substantial debate among the judiciary and academics and is a grey area in the UK.[81] Nevertheless, the decisions of *Alassini*[82] and *Menini v. Banco Popolare-Societa Cooperativa*[83] have effectively weakened the argument that compelling unwilling parties to consider mediation breaches Article 6. In *Alassini*, the European Court of Justice (ECJ) stated that

> [i]t is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question.[84]

More recently, in the landmark case of *Lomax v. Lomax*,[85] Court of Appeal recognized for the first time that courts do have the power to compel unwilling parties to engage in ENE, which is another form of ADR.

It is noted that judges in English jurisdiction hesitate to use their existing power to penalize litigants, especially LiPs with cost sanctions.[86] However, this approach needs to change and there should be cost consequences for unreasonably refusing to consider mediation or without prejudice offers to settle. This article argues that extra care should be taken when penalizing LiPs with cost sanctions, as well as to ensure that LiPs are not left in a disadvantaged position and not pushed to accept under settlements in fear of facing heavy cost penalties later in the court. It is recommended that the following factors should be considered when using cost sanctions to penalize LiPs:

78 CPR rr.1.4(1), (2).

79 See *Daniels v. Commissioner of the Police for the Metropolis* [2005] EWCA Civ 1312; *Hickman v. Blake Lapthorn* [2006] EWHC 12 (QB); *Swain Mason v. Mills & Reeve*[2012] EWCA Civ 498; [2012] 4 Costs L.O. 511; *Hurst v. Leeming* [2001] EWHC 1051 (CH); 2002 WL 1039525; *Bristow v. Princess Alexander Hospital NHS Trust unreported 4 November 2015 RCJ Senior Courts Costs Office* (WL 9298774); *Nigel Witham Ltd v. Smith and Isaacs, PGF II S A v. OMFS Company 1 Ltd* [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386; *R. (One the application of Paul Crawford) v. University of Newcastle Upon Tyne* [2014] EWHC 1197 (Admin); *LaPorte* [2015] EWHC 371 (QB); [2015] 3 Costs L.R. 471.

80 *Halsey* [2004] EWCA Civ 576; [2004] 4 All E.R. 920.

81 Jackson Final Report, 2009; Lord Justice Neuberger, 'A View from on Lord High', Civil Mediation Conference, 12 May 2015.

82 *Alassini v. Telecom Italia SpA* (C-317/08) [2010] 3 C.M.L.R. 17 ECJ.

83 *Menini v. Banco Popolare Societa Cooperativa* (C-75/16) EU:C:2017: 457 (ECJ).

84 *Alassini,* 2010, at [62].

85 [2019] EWCA Civ 1467.

86 Cortes, 2017.

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a Whether the party has been made aware of the possible cost sanctions in clear and unequivocal terms;[87]
b Whether the party has refused to comply with a clear invitation from a judge or the other party to consider mediation and was informed about cost consequences at court;
c Whether the party is already familiar with mediation process and possible cost sanctions through previous experience, for example, attended a mediation process before;
d Whether the party has acted in good faith.[88]

6 Conclusion

The OCMC is admirable in a number of aspects. This article notes that the OCMC is likely to have a huge impact on the current ADR landscape because it will be the busiest and largest OC in the world and ordinary citizens are more likely to use it. The OCMC is designed in a way that people will view ADR as culturally normal as it is being incorporated within the court itself. However, the current structure of the OCMC does not incorporate effective mechanisms to encourage early settlements except the without prejudice offers to settle, which is underused. As such, this article recommends the introduction of an educative and pre-action stage before issuing a claim at stage 1 in the OCMC, which is currently absent. Education should be at the heart of policy design and should be reflected through stages 1 and 2 of the OCMC to contain disputes and encourage early settlements.

It is also recommended to incorporate positive incentives (e.g. fee remission or lower court fees for considering mediation) and procedural measures such as cost sanctions that will work as important tools to encourage parties to consider mediation, which will eventually channel more cases to mediation. Litigants should be repeatedly reminded about the possible consequences of escalating a matter further down the OCMC, which is likely to encourage more litigants to settle early and avoid costly litigation.

The success of the OCMC in providing easy and affordable justice to litigants and channelling more cases to mediation will depend on how it interacts with the existing ADR mechanisms for channelling cases to mediation and how it will incentivize its stages to encourage early settlements using ADR options, in particular mediation. It is argued that if the incentives recommended in this article are embedded in the OCMC, it is likely that OCMC will provide easy and affordable justice to ordinary litigants and the uptake of early settlements via mediation will improve. As Professor Pablo Cortes rightly stated,

> if the right incentives to consider ADR are imbedded in the OCMC procedure, then litigants will be able to resolve more effectively their disputes, putting us closer to filling the gaps in the English Civil Justice System.[89]

87 Cortes, 2018, p. 20.
88 *Ibid.*
89 Cortes, 2017.