ADR and Civil Justice

CJC ADR Working Group

Interim Report

October 2017

SECTION 1: INTRODUCTION

1.1. The Civil Justice Council resolved at its meeting on 28th January 2016 to form a Working Group to review the ways in which ADR is at present encouraged and positioned within the civil justice system in England and Wales. This is the interim report of that working group.

1.2. The terms of reference of the Working Group were:

1.2.1 *To review existing forms of encouragement for mediation (and other suitable forms of ADR) in civil cases in the Civil Procedure Rules, case law and the powers of the court.*

1.2.2 *To consider alternative approaches to encourage the use of mediation (and other suitable forms of ADR) in civil disputes, including practices in other jurisdictions.*

1.2.3 *To assess proposals for reforms to the rules or for initiatives that might be taken outside the formal rules.*

1.2.4 *To monitor and contribute to the forthcoming review of the EU Mediation Directive.*

1.3. The members of the Working Group are :

William Wood QC (Chair) the ADR representative on the CJC, a commercial mediator in practice at Brick Court Chambers

Tony Allen, a mediator specialising in medical and personal injury matters, a writer and commentator on mediation matters and a consultant to CEDR

Professor Neil Andrews Professor of Civil Justice and Private Law at Cambridge University

Graham Ross, a mediator and specialist in ODR, a member of the Susskind working party on ODR

District Judge Lumb, based in Birmingham, specialising in the management of major medical and personal injury litigation

Stephen Lawson, a litigation solicitor, partner in the firm of FDR Law based in Warrington, specialising in contentious probate.

The Working Group has had the invaluable assistance of **Peter Farr** (as secretary) and also **Andrea Dowsett** and **Alexandra Morton.** Our very sincere thanks to them.

Background to Creation of Working Group

1.4. We understand the following amongst other considerations prompted the setting up of this Working Group.

1.4.1 Relatively low levels of awareness of ADR were found during the MOJ Court Users Survey 2015. More generally there is a perception that there are still many civil disputes in which ADR techniques are not sufficiently used, perhaps particularly those disputes above the small claims bracket whose value is insufficient to make a full one day mediation proportionate and appropriate.

1.4.2 Lessons may be learnt from the other quite different models for the encouragement of ADR that are evident in other parts of the justice system, notably in family disputes and employment disputes.

1.4.3 Useful overseas experience may be available as to the way in which other countries encourage the use of ADR.

1.4.4 The EU Commission was at the time conducting a review of the working of the EU Mediation Directive (2008/S2/EC). As a precursor to this exercise, the European Parliament had earlier commissioned a study which has been published under the heading "Re-Booting the Mediation Directive: Assessing The Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, 2014". [1]

1.5. The Working Group has relied principally on the combined experience of its members from their various professional perspectives. We have at different times briefly raised inquiries with others and we express our gratitude to them. A list is attached at Appendix 4 which we hope is complete. The views we express in this report are of course entirely our own.

1.6. Consultation in a true sense begins now with the publication of this report.

1.7. This report concludes with a set of interim recommendations, some the unanimous view of the group, some as to which we have minority and majority views. Perhaps more importantly we list out what we regard as the questions that now fall for discussion. We invite comments from all stakeholders in respect of these and will contact specific consultees in due course. We hope to hold one or more workshop discussions to deal with specific areas of inquiry.

The Briggs Proposals on ADR

1.8. While ADR was obviously not the only concern of Lord Briggs' CCSR review it was certainly a very significant one. The two reports contain enormously important findings and recommendations in relation to ADR provision. It has been a major concern of ours to complement and build upon those proposals. It is striking that perhaps even fifteen years ago a report on the structure of the civil courts might well not have contained any discussion of the role of ADR.

[1] The EU Commission has now reported at COM (2016) 542 Final

1.9. We have summarised the CCSR recommendations relating to ADR in Appendix 1 to this report.

1.10. Among his most important findings were that

(a) The small claims service was effective and useful but not satisfying its potential demand.

(b) Above the small claims level there was a substantial proportion of claims of modest value where mediation was insufficiently used.

(c) There was a substantial over-supply of mediators. (This in and of itself is obviously not a driver for making policy but, as he noted, it is certainly a resource of which greater use can be made.)

1.11. For the future he recommended that

(a) At the portal to the online court there should be encouragement for the use of ADR pre-action.

(b) At tier 2 of the online court case officers can help the parties choose appropriate forms of ADR

(c) These might include judicial ENE or mediation.

(d) There should be a reintroduction of the County Court after-hours mediation scheme to fill the gap left by the ending of the National Mediation Helpline for claims of all values.

(e) As to whether any form of ADR should be compulsory he said "… the Civil Courts have declined after consideration over many years, to make any form of ADR compulsory. This is, in many ways, both understandable and as it should be."

1.12. We support the Briggs recommendations save only that we wish to open up the last issue, compulsion, for further discussion.

SECTION 2: EXECUTIVE SUMMARY

2.1. For the last 20 years the express ambition of all stakeholders has been that ADR should become integral to the Civil Justice System in England and Wales. It has not done so. ADR has had its successes undoubtedly, but they have been extremely patchy.

2.2. The acknowledged background is that most disputes are resolved by agreement in commercial and everyday life, without proceedings and usually without the intervention of lawyers. The vast majority of cases that enter the Court system are resolved by settlement (or its close relation, capitulation).

2.3. Until 30 years ago the English legal system largely treated settlement as the accidental by-product of an efficient adjudicative system. We think dispute resolution professionals now appreciate that it is in the interest of all parties for a conscious effort to be made to explore and discuss settlement and that very particular skills and techniques are available to assist in that effort. In many cases parties will benefit from outside help in achieving that result. All of the members of the Working Group have seen from their different perspectives the way in which ADR, and mediation in particular, have unlocked settlements in almost every kind of case, and given parties back the certainty and control that litigation can so easily take away. These include complex legal and factual disputes and matters of pure business as well as matters of high emotion.

2.4. The stage has been reached where in various categories of dispute in England and Wales (notably family and employment) the parties are actually required to take steps directed solely to exploring settlement. Nobody in these systems is required to settle, but they are required to commit time and often money to exploring the possibility.

2.5. The Courts and rule makers in the non-family civil justice system in England and Wales have been less forceful. The encouragement of ADR is currently achieved by:

(a) exhortations to try to settle and to use ADR in Court forms and documents;

(b) links and signposts to sources of information about ADR

(c) tick-box requirements that clients have, for example, been advised of the need to settle if possible and of the availability at ADR

(d) costs sanctions being imposed after judgment in the relatively rare cases in which one party can establish that his opponent has unreasonably refused or failed to mediate.

(e) the Courts' acknowledgement that litigation lawyers are now under a professional obligation to advise their clients of the availability and advantages of ADR.

Almost all of these measures are well crafted and well thought out. But in our view the system as a whole is not working. ADR has not become an integral part of the civil justice system. This paper is not intended as a critique of Judges and rule-makers. It

is very much a challenge to all stakeholders, the ADR community included, to renew their attempts to understand each other better and to work together.

2.6. This paper explores a series of possible changes and makes some recommendations, unanimously for the most part but some by a majority of the working group. All of these changes are directed at increasing the use of ADR. The paper concludes with a series of questions which we will ask consultees to address.

2.7. The most exciting area for change lies in the opportunity that digital access to the courts gives for ODR tools to be used. To some extent, with the online Court and general digital access still under construction, our recommendations and views here are bound to be more speculative. We can see that if ODR techniques become woven into the design of the Court system then the debate about whether or not to compel ADR may simply become obsolete.

2.8. Nevertheless our present view is that the Court should promote the use of ADR more actively at and around the allocation and directions stage. We think that the threat of costs sanctions at the end of the day is helpful but that the court should be more interventionist at an earlier stage when the decisions about ADR are actually being taken. We think there should be a presumption that in most cases if parties have not been able to settle a case by the directions stage they should be required to bring forward proposals for engaging in some form of ADR.

2.9. Some of us, a minority, would go further and introduce ADR either as a condition of access to the Court in the first place or later as a condition of progress beyond the CCMC.

2.10. This is not a one-way street. For their part ADR practitioners must earn the trust and support of other stakeholders. For each of the principal forms of ADR we have tried to identify the particular challenges faced. Overall we have suggested various ways in which the ADR offering could be improved and the apparent reluctance of some stakeholders overcome.

2.11. There are also specific challenges which ADR faces in serving cases of middle or lower value. We discuss possible solutions in relation to these also.

2.12. Overall we draw attention to the fundamental problem of the failure so far to make ADR familiar to the public and culturally normal. Meeting this wider challenge will ultimately be more important than any tuning of the rules of civil procedure.

2.13. In none of these areas do we claim to have any magic solutions. What we principally seek is a debate which will itself be a means of developing a better understanding between all those involved. The concluding section, Section 10 of this paper, lists out the questions which arise from these issues in greater detail.

SECTION 3: OUR APPROACH AND THE SCOPE OF OUR WORK

3.1. It has been more or less axiomatic in civil justice policy since the Woolf reforms of 1999 that the court should facilitate and encourage the use of ADR techniques by the parties to litigation. The overriding objective in CPR1 contains several iterations of the court's duty through active case management to encourage settlement:

> *(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;….*
>
> *(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such procedure;*
>
> *(f) helping the parties to settle the whole or part of the case;….*

3.2. This policy has been adopted for, in the briefest of terms, the following reasons:

- The majority of litigants are happy with autonomous, speedy and cheap resolutions of their disputes. ADR has proved to be an efficient way of achieving that.
- Engaging in ADR and in particular mediation can benefit parties (by for example re-establishing communication) and can achieve outcomes by agreement (apologies, agreements as to future dealings) that a judgment of the court cannot provide.
- The efficiency of the courts and hence the availability of justice for those cases that do need to be tried depends upon the vast majority of cases settling before trial. It has always done so. The earlier the settlement the greater the benefit.
- There is a national interest in reducing the cost of the civil justice system particularly at present and clearly this is a significant objective of current government policy.

3.3. There is ample authoritative judicial commentary to the same effect. Jackson L.J stated in his Costs Review that

> *"…ADR*: *(particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, underused. Its potential benefits are not as widely known as they should be (T)here are many cases which are suitable for alternative dispute resolution … but in which ADR is not attempted. Whilst I readily accept that those litigants who wish the court to resolve their disputes are fully entitled to press on to trial, I believe that there are many parties who would be amenable to mediation and who would benefit from it. Mediation can bring about earlier resolution in cases which are destined to settle and can, on occasions, identify common ground which conventional negotiation does not reach*"

3.4. The then Master of the Rolls Sir Anthony Clarke said in 2008 that ADR,

> *"…must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any expert evidence is required and whether a Part 36 offer ought to be made and at what level"*

3.5. We are conscious that the primary concern of the system of civil justice must be genuine access to the Court. Not only does ADR not supplant the court process but ADR provision only works as an adjunct to an efficient system of adjudicative justice. To put it crudely Defendants do not make fair or realistic offers of settlement if there is no real prospect of the Claimant being able to get the matter before a court for judgment. ADR is not a substitute system but a complementary one. Mediation and conciliation work best "in the shadow of the law".

3.6. As we turn to examine various foreign and domestic systems we think that the most obvious variable is the strength of the encouragement to use ADR which the Courts and the rules provide. How forceful is the court's intervention and is it applied case-by-case or across a class of cases?

3.7. In examining alternative approaches to the promotion of ADR the following other variables are also likely to be important:

3.7.1. At what stage is the ADR to take place?

3.7.2. What form of ADR?

3.7.3. Who is the neutral who takes part in the ADR and what qualifications should they have?

3.7.4. How is the ADR and its administration to be accessed/paid for/provided?

3.8. As to timing this report will proceed on the basis that there are, in simple terms, three different opportunities in the life of any given dispute the ADR to be assistance.

Pre-Action ADR at source

3.9. This is ADR conducted at the very outset of the dispute at the time a complaint is first made. The paradigm example of ADR at source is a consumer conciliation scheme which is offered to handle the grievance as soon as the complaint has been expressed. Typically lawyers will not be involved.

Pre-action ADR at the commencement of proceedings

3.10. This is ADR prompted or required when proceedings are about to be issued. The paradigm example of pre-action ADR is a mediation service to which the litigant is directed when filing his/her claim. MIAMS in family proceedings are an example as is the ACAS early conciliation requirement in employment cases. The RTA portal and

1 compulsion. The obvious precedents in the UK justice system are the requirement for an MIAM certificate in family cases and the C100 certificate (confirming that ACAS conciliators have been involved) required for employment tribunal proceedings. These are meant to be relatively simple requirements that can be policed by the court office or by software.

9.18. The majority view on the Working Group is that a requirement of this kind imposed at this stage of proceedings is too heavy-handed. Our principal difficulties are these:

(a) how do we avoid imposing unnecessary cost and hassle in cases most of which are not going to be defended?

(b) What form of ADR do you require (particularly given the simplicity of administration which is essential) ? What is going to count as compliance given the increasingly diverse ADR provision?

(c) How do you avoid imposing an expensive requirement upon parties whose claims may be firmly in the small claims bracket (where even the £100 typically charged to each party for an MIAM would be disproportionate if not prohibitive)?

(d) It is very hard to ignore the largely negative feedback about mandatory pre-action systems from jurisdictions such as Italy

(e) Defendants are very hard to engage pre-action (as the MIAM experience demonstrates) and this requirement risks giving them a license to delay the progress of proceedings.

A significant minority on the Working Group have a more open mind on this question and all of us feel that the question may have been too quickly dismissed in the past. All of us can see these potential advantages of pre-action compulsion:

(a) It has to be worthwhile to impose a simple, universal requirement on the parties to do something which will be of benefit in all but a small minority of cases.

(b) Experience tells us that the courts' and the ADR community's attempts to win hearts and minds for ADR are simply taking too long.

(c) The requirement overcomes the problem of the party or the lawyer who refuses to suggest ADR as it might appear to be a sign of weakness. It solves the "Who blinks first?" problem at a stroke.

(d) The dispute resolution systems of this country already contain a number of obligatory requirements for parties to engage in ADR: MIAMs, family FDRs, ACAS conciliation and the judicial ENE hearings described by Lord Briggs in the CCSR final report.

9.19. Those in favour of compulsion urge that there may be particular sectors in which ADR is so effective and so far preferable to litigation that there should at least be sector-specific compulsion. Two candidates have been mentioned: boundary disputes and clinical negligence.

9.20. The majority view is that on balance the case for **Type 1** compulsion is not made out but that there is validity in all of those points and a debate that needs to take place.

R6. Mandatory pre-action ADR requires more discussion in England and Wales than it has so far received. However the majority of the Working Group do not believe an involvement with ADR should be a mandatory condition of being able to issue proceedings.

R7. Pre-Action Protocols and court guidance documentation should give clear, consistent guidance on ADR using plain, direct language. For example, the directions questionnaire N181: "*The rules require you to try to settle the claim…*"

R8. The terms of EX301 "I'm in a dispute – what can I do?" should be amended to delete that part of the definition of mediation which says "…*any agreement reached is voluntary so you cannot force the other side to stick to it*".

R9 In cases that do not require urgent relief, the claimant should certify that (i) reasonable efforts have been made to contact the Defendant about the dispute and (ii) that the Claimant is aware of his/her obligation to use litigation only as a last resort, that ADR processes are available and have been considered for this dispute.

9.20. What of the possibility of a civil MIAM procedure modelled on the current requirement for MIAM as a condition of serving family proceedings?

9.21. We recall that in *Solving Disputes in the County Court*, the then Secretary of State for Justice expressly looked forward to the day when all of the 80,000 cases going through the Small Claims Court each year would be automatically put through a MIAMs process at the outset[19].

9.22. The Working Group is concerned that in the diverse range of civil disputes where the disputed liabilities can arise from a whole range of circumstances MIAM will not work as well as it does against the more specialist background of family disputes. We can also see a number of quite serious practical issues that will arise in importing the MIAMs model from the family system.

9.23. Who attends? In family MIAMs it is quite clear that the two spouses are the parties who need to be involved in the contact with the mediator. It is far from clear when, for example, a partnership or a company is involved in litigation who should attend

[19] Solving Disputes in the County Court, February 2012, Cm 8274.

the MIAM. As sometimes occurs in mediation if a company chooses to be represented by its external lawyer that might frustrate the exercise.

9.24. Will the Defendant attend at all? It is clearly one of the major problem with MIAMs as they currently operate in the family system that very many Defendants simply do not engage with the MIAM process at all and feel they have no incentive to do so. Is this a problem that would occur possibly to an even greater extent with civil MIAMs?

9.25. MIAMs ought to be particularly useful for unrepresented parties. But problems of funding and sustainability are going to be particularly acute for such parties and no legal aid will be available. From a practical point of view in the small claims bracket it may simply be confusing for litigants to be offered a choice between electing to take up a free mediation service and electing to attend a mediation information and assessment meeting for which they may well have to pay £100. Is there an appetite in the civil mediation community to provide civil MIAMs in large numbers at minimal or no cost?

9.26. We are happy to study more closely the lessons of MIAMs' working in the family system in order to find out what works and what does not and to try to find answers to the issues we raise. .

> **R10**. We invite comment on the reservations we express about the workability of civil MIAMs and discussion of practical proposals for requiring and providing civil MIAMs at the allocation stage. We cannot at this stage recommend the introduction of civil MIAMs.

Encouraging ADR during the course of the proceedings

9.27. There is already significant encouragement during the proceedings, both in terms of the rules and the standard forms and in terms of *ad hoc* case management of the instant case by the court.

9.28. It is clear in our experience that the opportunity for ADR and the point at which the parties really should be expected to use it comes at and after the allocation stage. At this point it is clear that the court is dealing with a defended claim, the dispute should have attained some clarity and costs are about to escalate. Moreover in our experience there is an ideal window between the directions questionnaire and the CCMC for ADR to be scheduled. (In many ways it is the same opportunity that is going to be available at an equivalent stage with the intervention of the case officer at tier 2 in the Online Solutions Court.)

9.29. We wish to raise the issue of whether an opportunity is being missed, certainly in fast and multi-track cases, at the DQ stage, where stronger pressure could be exerted by the court.

9.30. The emphasis has been on the use of deterrent costs sanctions at the end of the day and the tendency has accordingly been to postpone any critical review of the ADR performance of the parties until after judgement under the *Halsey* principles. Thus the

Fontaine/Commercial Court approach requires the parties to document their reasons for not using ADR so that it can be subjected to *ex post* analysis after judgement. We think there is a case for this to be replaced by a more active promotion of ADR **in midstream** with the parties and the court asking whether enough is being done **now** to explore settlement. Just as the parties and their solicitors are able to make objectively reasonable decisions about ADR during the proceedings so a court should be able to decide whether they have in fact done so. Perfect knowledge of the final outcome of the case is never available to the parties when they take these decision and we do not see why *in the right case* the court's judgment in these matters should be deferred.

9.31. We propose that where practicable costs sanctions should be available at the CCMC to reflect the court's disapproval of a party's, or possibly both parties'), conduct. We accept that it will not always be possible, even if the judge was minded to do so, to express disapproval in the form of an immediate costs order at the CCMC. But the judge might at least be able to put down a marker for the judge eventually seised of the costs issue and he could expressly reserve issues as to whether ADR compliance had been reasonable and sufficient to the trial judge for consideration at the time costs came to be decided.

9.32. Moreover if the Working Group were free to choose we would be minded to allow judges to make orders *in particular cases* compelling an unwilling party or unwilling parties to attend a mediation or engage in some form of ADR. This is **Type 3** compulsion as discussed in the previous section. This is a delicate matter of judicial policy. We think the existing Commercial Court and Fontaine orders already provide considerable scope for judicial pressure to be exerted. But if the changes we propose to the DQ are made the Judge will be in a position to look critically at the parties attempts to settle the case. Just as he/she might make costs orders so it seems to us that he/she needs to be able not merely to grant a stay as at present but if necessary to compel at least some form of engagement with ADR.

9.33. We are in part dealing with judicial discretions here and therefore judicial attitudes. As the recent CA decision demonstrates these are not uniform and are impossible to legislate. It is inevitable in this area that the changes we canvass are not all going to be crisp changes to the rules or to the drafting of court documents. But we are initiating a debate with all stakeholders in this document and we think these proposals deserve discussion.

9.34. There might also be issues as to the appropriateness of including in the directions questionnaire matters such as the disclosure of the ADR position which arguably should not be seen by the trial judge. It might therefore be necessary to have a separate ADR questionnaire.

R11. In fast and multi-track cases there should be a new emphasis on ensuring parties address ADR properly when completing the directions questionnaire and in the period prior to the CCMC. The parties should be asked what attempts they have made to enter into an ADR process or to explain why they have not done so. These matters could then be addressed at the CCMC along with consideration of the attempts made to settle the claim prior to the issue of proceedings and the matters certified in the claim form.

R12. New questions in the DQ should include a question as to whether a party considers that its opponent has done enough in terms of ADR.

R13. We should consider introducing a Notice to Mediate procedure on the model of the British Columbia precedent.

R14. The approach whereby the reasonableness of the parties conduct in relation to ADR is reviewed and judged at the end of the day largely in light of the outcome of the case (per *Halsey*) needs to be reconsidered. The reasonableness of a decision should be open to be reviewed and judged at the time it is made and not merely *ex post facto* after judgement. Sanctions for an unreasonable failure to use ADR should be possible at the interim stage where the court considers sensible and reasonable steps are being overlooked. We wish to explore the practicality of this approach.

R15. There should be in individual cases an *ad hoc* power to require parties to engage in ADR. We note that the court already considers itself to have a power to order the parties to attend for an ENE on pain of dismissal of their case.

R16. The courts approach to its discretion in these areas needs to be reviewed and the differences that seem to have appeared between some decisions (*Gore/PGF*) need to be discussed candidly between judges, practitioners and the ADR community.

9.35 The Working Group has considered the use of across the board compulsion at this stage; this **Type 2** Compulsion as discussed in the previous section.

9.36 A minority of members feel that if ADR is not actually a requirement pre-action it should certainly be one, at least in certain sectors, at the directions stage (the two relevant types of case which are always referred to are, as before, clinical negligence and boundary disputes). While a number of the objections to pre-action compulsion do not apply (in particular in that it is clear by this stage that the claim is defended) most of the objections influencing the majority still apply and the majority do not favour **Type 2** compulsion.

9.37 It has been suggested to us that the court might mandate Part 36 offers by each side. Of course parties could offer to accept the equivalent of total success but it would at

least direct the parties' minds to the possibility of a negotiated alternative to trial. We do not however recommend this change.

9.38 It has also been suggested that when costs reach a certain proportion (perhaps 20%) of the sum in issue mediation become compulsory. We have some sympathy with the sentiment behind this but again we do not recommend this change. It seems to us that this scheme would be enormously difficult to police.

Costs sanctions

9.39 The principal criticism of the existing regime for costs orders where parties fail to engage in ADR is that the *Halsey* guidelines[20] are too restrictive. We would welcome a review of the guidelines at the next opportunity in particular with a view to re-examining (a) the burden of proof and (b) the importance accorded to the question whether on balance a mediation would have succeeded.

R17. The threat of costs sanctions at the end of the day remains a vital instrument in backing up the various requirements in the protocols and guides that the parties consider and if possible use ADR. We accept that they are more likely to affect behaviour in middle and high value cases where significant costs can be and will be sought to be recovered.

R18. We would welcome a review of the *Halsey* guidelines on costs sanctions. We think it should not be sufficient to say "This is a complex case and I have just won" as a justification for not having at least attempted to explore ADR. What role does the proportionality of the cost of an ADR process have in this kind of analysis?

ADR and the middle bracket

9.40 We identified at the outset of this paper a middle bracket between the top of the fast track jurisdiction (£25,000) and the high-value high court case range, (which perhaps starts at £150,000). Although all the same procedural promptings are available as apply in the high-value cases ADR is simply not being used to the same extent. If the principal challenge is to spread ADR into the disputes of middling to low value we have to accept that expensive processes such as face-to-face mediation lasting a full-day are probably not going to be appropriate. What is essential is that a model be developed that can deliver a consistent form and standard of ADR which is either cheap or free. This is in many ways a challenge not for the rule-makers or the Judges but for the ADR community.

9.41 Part of the solution has to be that the expense of using ADR must be recognised by the fixed costs regime.

[20] See above

9.42 There seems little doubt, for example, that a one-hour telephone mediation could settle many cases above the small claims limit and would be better than nothing.

9.43 On the other hand even apart from the fixed-price scheme signposted on civilmediation.justice.gov.uk there are clearly other "budget" mediation schemes including those offered by CEDR and Clerksroom. How are these working and what seem to be the obstacles to their greater use? One issue that has been raised in relation to pricing is that consumer mediation under the EU Directive has to be provided at no or minimal cost to the consumer. This is apparently leading to confusion where a higher price is due under, for example, the fixed price scheme.

9.44 We look forward to the results of the proposed pilot which we understand is being set up in Manchester, Exeter and possibly elsewhere. But we invite the ADR community to continue its search for an ADR product that can meet the needs of this cohort.

R19. We applaud the initiative proposed in the Final CCSR report of reinvigorating the County Court time-limited after-hours scheme. We look forward to the results of the proposed pilot. We invite the ADR community to continue its search for an ADR product that can meet the needs of this cohort. We see no reason why online systems should not be added to the buffet of options available.

R20. Consideration should be given to recognising the costs of engaging in ADR under the fixed costs rules.

R21. We wish to explore the economic constraints on the provision of ADR in this bracket and whether the pricing levels of for example the fixed price scheme and consumer ADR are inconsistent

Low value cases/litigants without means

9.45 ADR can benefit low value cases. The small claims mediation experience demonstrates this. These are very much the cases at which the CCSR initiative is, at least in the first place, directed.

9.46 Aside from the OSC we want to encourage discussion as to how this section of cases could be better served. Those proposals should also benefit the parties to disputes in the bracket below £25,000. It is in this bracket that we would expect a preponderance of litigants without the means to instruct legal representation though they are by no means confined to this level. Some of these disputes at present benefit from the Small Claims Court mediation service and we can see it may difficult to operate MIAMs or a new low-cost ADR service in apparent competition with the free court service.

9.47 We applaud the indication in the Final CCSR report that given the undoubted excess of demand over supply there will be an increase in the number of mediators nationally back to the original 17 and that efforts will be made to offer an alternative mediation appointment where the first date offered does not work for the parties. Both changes

should be monitored and if necessary consideration given to a further increase in numbers.

R22. We welcome the indication in the CCSR that the numbers of SCM scheme mediators should be restored to previous levels and that there will be greater flexibility on dates.

9.48 We also think there are special challenges here for the ADR community.

9.49 One is the ethical problem for the ADR professional that arises when he or she is dealing with unrepresented parties. We invite the ADR community to open the debate as to how to deal with the ethical and legal problems that can arise where the neutral effectively begins to advise a party as to his or her rights or assist in the drafting of the settlement agreement. We are aware that in these situations it is often almost impossible to avoid doing at least the second of these things.

9.50 The second is the challenge of funding even if it is only funding the burden of the administrative overhead. In essence as far as pro bono mediation is concerned the challenge has always been not the availability of willing, trained mediator who seem to be plentiful but the sustainability of the administration that is needed.

9.51 It is clear that judicial ENE has a contribution to make here. It is free. It does not raise ethical issues as to the competence or legitimacy of any legal input that the neutral may have. Members of the Working Group have experience of it proving useful for precisely these reasons to parties without means.

R23. A debate is required involving at least the ADR community, and the advice and voluntary sectors as to how the challenges of sustainable , accessible, ethically safe, quality assured mediation provision can be made for cases of lower value which are likely to involve at least one unrepresented party.

The online opportunity

9.52 It is clear that the Online Solutions Court envisaged in the Final CCSR report offers huge opportunities for the encouragement of ADR[21]. The inter-active exchanges at the portal to the court clearly afford an opportunity to give the litigant much more focussed guidance towards ADR which can take account of the nature of the dispute. Boundary disputes and personal injury claims require different approaches and at the portal appropriate advice can be given, without human intervention, at the very outset. Blind bidding will clearly need to be considered.

9.53 All the possible reforms we identify make sense in the context of the paper court. But all of them can work equally as well if not considerably better in both the Online

[21] See the summary in Appendix 1.

Solutions Court and in the remaining courts where online filing will become available. Thus where we earlier envisaged requiring a certificate that the claim has been discussed with the other party the online portal can interrogate the Claimant as to what has occurred and whether further contact could be useful before proceedings are commenced.

9.54 Clearly the case officer, armed with the information gathered on the file through the inter-active process, will be able to give bespoke direction to the parties as to appropriate ADR at tier 2.

9.55 We stand prepared to help with the architecture of the OSC as it is developed but for the moment more specific suggestions are probably unhelpful.

R24. We welcome the CCSR proposals as they touch on ADR and we are keen to ensure that where we have suggested changes to the civil justice regime using the language of the paper court those changes should be reflected and exploited in the design of the OSC and of digital access provision generally.

R25. There are numerous opportunities both in the tier 1 portal and in the work of the Case Officers for the use of appropriate ADR to be promoted.

A greater role for conciliation/ombudsmen during the currency of proceedings

9.56 We have already discussed the encouragement of consumer conciliation and ombudsmen and made certain recommendations. We are aware that some commentators feel the conciliation/ombudsman model is still under-used and that it could play a role of a much wider kind. Indeed the ADR provision proposed in the final CCSR report has been criticised for failing to make any or any proper use of the conciliation model[22]. We think this criticism is unfair. We think that the conciliation/ombudsman system is massively efficient when dealing with relatively specialist areas. It is not clear to us how the wider variety of disputes that enter the non-family court system can efficiently and cost-effectively be dealt with on the same basis. We think that any truly evaluative ADR or ADR in which the neutral comments on and recommends outcomes should in the context of the civil court system be conducted by judges alone.

R26. There should be wider acknowledgement of the enormous success these processes enjoy in dealing with disputes at source. We need to explore the possibility of wider use of consumer conciliation and ombudsmen within or alongside the civil justice system. We do not make any immediate recommendations for change.

[22] See Law Society Gazette, Hodges, Online Dispute Resolution: Answers, 20/4/05

Challenges for Judicial ENE

9.57 We have mentioned above a number of the obvious attractions of FDRs or Judicial ENE already. It is free to the parties and the neutrality and quality of the neutral in charge of the process is assured.

9.58 There are obvious potential dangers in this process which we are sure those involved will be as vigilant to deal with as those taking part in family FDRs. It seems to us that however hard the distinction is emphasised some parties are always going to find difficulty with the idea that the exercise is not a decisive adjudication and that the real hearing will take place before a different Judge. ADR purists will object that there is too little party autonomy in these cases and that ADR should be about so much more than the possible outcomes of the litigation. Could a Judicial ENE hearing conclude with an apology of the kind which frequently helps to resolve clinical negligence cases given that it is not a remedy which would be available at the end of a trial and does not arise from an analysis of the purely legal position? Moreover there must be a corresponding risk of this being perceived as quick and dirty justice delivered by a Judge who has necessarily not read everything or heard sworn testimony.

9.59 As long as these risks are borne in mind we see the growth of Judicial ENE as very likely to continue.

R27. We welcome the likely continued growth of Judicial ENE. We invite further discussion of its advantages and disadvantages in comparison to ODR and mediation.

Challenges for Online Dispute Resolution

9.60 We have discussed above a number of the advantages that ODR can offer, many of them likely to be shared by the processes of the Online Solutions Court. We think standards need to be developed governing privacy, security, continuity and hosting. We think that although the public are beginning to encounter ODR through contact with the systems like those on eBay, Paypal and Amazon there remains a substantial task for ODR in terms of public education. Developing standards will help stakeholders gain confidence in ODR.

9.61 Online dispute resolution offers enormous dividends in terms of an engagement with ADR which is not time critical and which can be provided at very low cost. While the vast majority of all ODR systems involve the possibility of a human engagement at some time a great deal of the advisory and exploratory processes can be provided by ODR without the expensive legal or administrative time of court staff or lawyers being taken up.

9.62 ODR can make the benefits of ADR and in particular mediation more accessible. Blind bidding and more sophisticated techniques like outcome prediction and solution finding analytics offer genuinely new tools for exploring settlement.

R28. ODR deserves to be accepted by the Courts and by stake-holders as an acceptable and culturally normal addition to established forms of ADR. Greater acceptance of ODR by the Courts and other stake-holders will require further discussion and, we think, standard setting in relation to areas like impartiality and confidentiality.

Challenges for Mediation

9.63 We think there are specific challenges for the mediation community in relation to issues of legitimacy and regulation. It is inescapable that the courts and the justice system have been fully prepared to require parties to take part in FDRs, ENEs and even MIAMs but have been less assertive in support of classical mediation. We think in the case of those three examples they have confidence that a trusted individual is going to conduct a reliable and consistent process. (Civil mediation is significantly less regulated than family mediation.) We think this acts as a brake upon its further acceptance by the judiciary, the professions and very possibly the parties to litigation themselves. We think that issue should be an important part of the debate which we now seek to sponsor.

R29. We wish to explore attitudes towards mediation among stakeholders and the reasons for any residual mistrust.

SECTION 10: QUESTIONS FOR CONSULTATION

General

10.1. The Working Group believes that the use of ADR in the Civil Justice system is still patchy and inadequate. Do consultees agree?

10.2. The Working Group has suggested various avenues that may be explored by Judges, by lawyers and by ADR professionals in order to improve the position. We will ask questions in relation to these proposals below. But do consultees think that the Working Group has ignored important questions or precedents from other systems or that there are other areas of inquiry with which we need to engage?

Making ADR culturally normal

10.3. Why do consultees think that a wider understanding of ADR has proved so difficult to achieve?

10.4. How can greater progress be achieved in the future?

Encouraging ADR at source

10.5. Is there a case for reviewing the operation of the consumer ADR Regulations? Why has their impact been so limited?

10.6. Should the Courts treat a failure to use an appropriate conciliation scheme as capable of meriting a cost sanction?

10.7. Are there other steps that should be taken to promote the use of ADR when disputes (of all kinds) break out?

Encouraging ADR when proceedings are in contemplation

10.8. Is there a case for making some engagement with ADR mandatory as a condition for issuing proceedings? How in practical terms could such a system be made to work? How would you avoid subjecting cases which are not in fact going to be defended to the burden of an ADR process?

10.9. Can the prompts towards ADR in the pre-action protocols and the HMCTS Guidance documents be strengthened or improved? Should a declaration be included in the claim document in the terms of **R9** (see paragraph 9.19 above)

10.10. Are MIAMs on the family model a practical solution at the pre-action stage? Have the Working Group over-stated the practical difficulties of introducing civil MIAMs? Have they under-stated the potential advantages of doing so?

Encouraging ADR during the course of the proceedings

10.11. Do consultees agree with the Working Group that the stage between allocation and the CCMC is both the best opportunity for the Court/the rules to apply pressure to use ADR and also often the best opportunity for ADR to occur?

10.12. Do consultees agree with those members who favour **Type 2** compulsion (see paragraph 8.3 above) in the sense that all claims (or all claims of a particular type) are required to engage in ADR at this stage as a condition of matters proceeding further?

10.13. If compulsion in particular sectors is the way forward, what should those sectors be? Should they include clinical negligence? Should they include boundary/neighbour disputes?

10.14. Alternatively, should the emphasis at this stage be on an effective (but rebuttable) presumption that if a case has not otherwise settled the parties will be required to use ADR?

10.15. Would it be beneficial to introduce a Notice of Mediate procedure modelled on the British Columbia system?

10.16. Do consultees agree that the emphasis needs to be on a critical assessment of the parties' ADR efforts by the Courts in "mid-stream" rather than a process which simply applies the Halsey guidelines at the end of the day after the judgment? Is it practical to expect the CCMC to be used in this way? If directions were otherwise agreed between the parties can the court reasonably be expected to require the parties to attend purely to address ADR?

10.17. Are costs sanctions at this interim stage practicable? Or is there no alternative to the court having the power to order ADR ad hoc in appropriate cases (**Type 3** compulsion)?

Costs sanctions

10.18. Do consultees agree that whatever approach is taken at an earlier stage in the proceedings it should remain the case that the Court reserves the right to sanction in costs those who unreasonably fail or refuse to use ADR issues?

10.19. Do consultees agree with the Working Group that the Halsey guidelines should be reviewed?

ADR and the middle bracket

10.20. Do consultees agree with the Working Group and with Lord Briggs that there is an ADR gap in the middle-value disputes where ADR is not being used sufficiently?

10.21. Is part of the problem finding an ADR procedure which is proportional to cases at or below £100,000 or even £150,000 in value?

10.22. Could the ADR community do more to meet this unmet demand?

10.23. Should the costs of engaging in ADR be recognised under the fixed costs scheme?

10.24. Anecdotal evidence suggests that the various fixed fee schemes are not receiving any very great take up. Is this the experience of providers? What kind of volumes are being mediated under these schemes? Why, if they are unsuccessful, are they not being used?

10.25. What pricing issues have arisen as between consumer mediation, the civil mediation website fixed price scheme and schemes such as those operated by CEDR and Clerksroom? Are there inconsistencies and confusions?

Low value cases/litigants without means

10.26. Assuming an increase in manpower and the increase in flexibility over dates that have been indicated to Lord Briggs, do consultees think that a further reform or development of the Small Claims Mediation scheme is required?

10.27. Is further effort needed outside and additionally to the SCM scheme to make sure ADR is available for lower value disputes? What do Consultees see as being the challenges in dealing with this area?

10.28. How can we provide a sustainable, good quality, mediation service for this bracket? Is pro bono mediation viable?

10.29. What are the other funding options available?

10.30. Do consultees agree that special ethical challenges arise when in particular mediators are dealing with unrepresented parties?

The on-line opportunity

10.31. In the digital sector how is the Tier 1 prompting for mediation going to work? Can the same prompts be used outside the Online Solutions Court when digital access becomes possible across other jurisdictions?

10.32. What issues arise with the use of Tier 1 of the OSC and the other forms of digital access which are now intended? Is the use of ODR techniques going to lead to unfair advantages for litigants with digital access?

10.33. How should ODR techniques be introduced? Which techniques are going to be appropriate? Could a system of online blind bidding be beneficial? How are they being introduced within the wider digital provision?

A greater role for conciliation/ombudsmen during the currency of proceedings

10.34. Is consumer conciliation still underused? How could its use be expanded? Should it be used alongside civil proceedings to a greater extent?

Challenges for Judicial ENE

10.35. Do consultees agree that JENE has certain distinct advantages (if the judicial resources are available to provide it) in terms of providing a free ADR service with no regulatory/quality risk?

10.36. Do consultees feel that a loss of party autonomy and the narrowness of the legal enquiry are disadvantages of the system and if so how can this be mitigated?

Challenges for online dispute resolution

10.37. Do consultees agree that ODR has enormous potential in terms of delivering ADR efficiently and at low cost?

10.38. Do consultees agree that specified standards for ODR would assist its development and help deal with any stakeholder reservations?

10.39. What are the other challenges that the development of ODR faces? How else can ODR be rendered culturally normal?

Challenges for Mediation

10.40. Do consultees agree that Judges and professionals still do not feel entirely comfortable with mediation in terms of standards and consistency of product? Is there a danger that the flexibility and diversity which many regard as the strength of mediation is seen as inconsistency and unreliability by other stakeholders?

10.41. How do consultees think that these concerns can be reassured and addressed?

10.42. Is there a case for more thorough regulation? How could such regulation be funded and managed?

10.43. What other challenges are faced by mediation?

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DISTRICT JUDGE LUMB

GRAHAM ROSS October 2017

APPENDIX 1: A SUMMARY OF THE CCSR PROPOSALS

1.1. The present position (Interim = Int, Final =F,)

1.1.1. The report noted that the small claims mediation service was effective and useful but that it was not satisfying its potential demand. Int 2.3

1.1.2. The report noted that a form of early neutral evaluation modelled on the FDR (Financial Dispute Resolution) processes operated in the Family Division was being successfully conducted at certain County Court centres. F 2.17-2.23

1.1.3. At the higher levels of dispute by value the position has reached a steady state where mediation is by and large being used properly by litigants. These perhaps are cases towards and above £250,000 in value. But "there is a substantial proportion of claims of modest value where mediation is insufficiently used". Further certain types of dispute, notably personal injury and clinical negligence seemed to make too little use of ADR. F2.24

1.1.4. Provision is particularly weak for pre-issue ADR.

1.1.5. There is a substantial over-supply of mediators. F 2.26

1.2. Proposals for the future

1.2.1. Steps should be taken to promote pre-issue ADR and the improvement of access to ADR during the court process should not detract from that. In the new on-line court, initially handling cases to a possible ceiling of £25,000 there should be continuing encouragement for parties to settle their cases before going to court. F6.71,6,72

1.2.2. An administrative improvement will be made to improve ease of access to the Small Claims Mediation service. The report notes that a small but welcome increase in the number of small claims mediators is planned. F 2.14, 2.15

1.2.3. At Tier 1 in the Online Court the initial steps of the process will render the dispute as amenable as possible to early ADR. A forerunner of the Tier 1 process is the RTA Portal. At Tier 2 Case Officers will make judgments as to whether, for example, to conduct a small claims-style mediation themselves (not necessarily on the current small claims model) or arrange for one to be conducted alternatively allocate the dispute to some form of judicial or other ENE (which they could not themselves perform.) The main forms of ADR at Tier 2 will thus involve human intervention. F6.8, 7.22, 7.33.

1.2.4. There should be a re-introduction of the court-based after-hours mediation systems that were successfully operated prior to the introduction of the National Mediation Helpline for claims of all values. F2.25.2.26

1.2.5. ODR techniques deserve to be used to a greater extent.

1.2.6. The interim report had said this about compulsion:

> *"The relationship between the civil courts and the providers of ADR has undergone fundamental development during the last thirty years but, save in certain respects…it has now reached a relatively steady state. I would describe it as semi-detached. … (M)ost judges will, at the case management stage, provide a short stay of proceedings to give the parties space to engage in ADR. The courts penalise with costs sanctions those who fail to engage with a proposal of ADR from their opponents. But the civil courts have declined, after careful consideration over many years, to make any form of ADR compulsory. …This is, in many ways, both understandable and as it should be … ".* [INT2.86-7]
>
> *"Stage 2 of the OC process is plainly directed to making conciliation a culturally normal part of the Civil Court process rather than, as it is at present, a purely optional and extraneous process, encapsulated in the "alternative" part of the acronym ADR. By that I do not mean it should be made compulsory. Rather it would build upon the current Small Claims Mediation Service by inviting the parties to engage in an appropriate form of conciliation, albeit respecting the refusal of one of more of them to do so."* [INT.6.13]

This issue was not revisited in the Final Report.

1.2.7. Both reports (interim at para 6.11 and final at para 11.22) refer to the possible use of Mediation Information and Advice Meetings (MIAM's) at an early stage or pre-action but neither report expresses any concluded view as to their use.

1.2.8. We also note that the suggestion that some costs provision be made for the receipt of advice at an early stage in proceedings is potentially significant for the uptake of ADR. Both reports note that in family disputes the withdrawal of legal aid and the resulting lack of contact with solicitors caused a radical drop in the use of family mediation. The Report refers to the danger of entering ADR and under-settling in the absence of such advice F6.35

APPENDIX 2: MEDIATION: FOREIGN EXPERIENCES

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INTRODUCTION

This survey of modern international experience draws upon four substantial anthologies of national reports,[23] studies of mediation in particular regions[24] or jurisdictions,[25] general cross-border studies of the subject,[26] the author's discussion with colleagues over many years, and specific information obtained for the purpose of the present report. Sections I and II are summaries of non-English experience, arranged by reference to European jurisdictions and non-European jurisdictions

I
EUROPEAN JURISDICTIONS

Details of the absorption of the Directive by EU Member States were elicited by the questionnaire to which national reporters responded and which are collected in De Palo and Trevor (2012)[27] and in the anthologies of national reports made by Hopt and Steffek (2013),[28]

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[23] The four anthologies are: (1) C Esplugues and S Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) (hereafter `**E & B (2014)'**); (2) C Esplugues-Mota (ed) (and others) *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014), vol 1 (*National Mediation Rules and Procedures'*), vol 2 (*Cross-Border Mediation*) (hereafter `**E-M (2013-2014)'**); (3) K Hopt and F Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press, 2013) (hereafter, `**H & S (2013)**'); (4) F Steffek and H Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013) (hereafter `**S & U (2013)'**). Earlier: N Alexander, *International and Comparative Mediation* (Kluwer Law International, Netherlands, 2009).

[24] G De Palo and MB Trevor (eds), *EU Mediation: Law and Practice* (Oxford University Press, 2012) (hereafter `**De P and T (2012**)'); N Trocker and A De Luca (eds), *La Mediazione Civile all Luce della Direttiva 2008/52/CE* (Florence: Firenze University Press, 2011); Wang Guiguo and Yang Fan, *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) (hereafter `**Wang and Yang (2013)'**).

[25] England and Wales: Tony Allen, *Mediation Law and Civil Practice* (London: Bloomsbury Publishing, 2013); Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration and Mediation in England* (Dordrecht, Heidelberg, London, New York: Springer Publishing, 2012); *Andrews on Civil Processes* (vol 2, *Arbitration and Mediation*) (Cambridge, Intersentia Publishing, 2013), chapter 1; S Blake, J Browne, S Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press, 2011); S Blake, J Browne, S Sime, *The Jackson ADR Handbook* (2nd edn, Oxford University Press, 2016); H Brown and A Marriott, *ADR Principles and Practice* (London: Sweet & Maxwell, 3rd edn, 2011); H Genn, *Judging Civil Justice* (Cambridge University Press, 2010); and H Genn's reports for the Ministry of Justice evaluating court-linked ADR schemes: *Central London County Court Mediation Scheme: Evaluation Report* (1998); *Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court Appeal* (2002); *Twisting Arms: Court Linked and Court Referred Mediation Under Judicial Pressure* (2007).

[26] L Cadiet, E Jeuland, T Clay (eds), *Médiation et Arbitrage*: *Alternative Dispute Resolution-Alternative a la justice ou justice alternative? Perspectives comparatives* (Paris: Lexis Nexis: Litec, 2005); C Hodges and A Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Cheltenham: Edward Elgar Publishing, 2013); M Palmer and S Roberts, *Dispute Processes* (Cambridge University Press, 2005; reprinted 2008); D Spencer and M Brogan, *Mediation*: *Law and Practice* (Cambridge University Press, 2006).

[27] **De P and T (2012)**; for the sake of brevity, no detailed remarks are collected in this paper to the reports from these jurisdictions: Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia. Nor is it possible here to refer to the reports in **S & U (2013)**, fn 1 above, on Denmark, Norway and Switzerland; nor to the reports in **H & S (2013),** fn 1 above, on Bulgaria, Greece, Hungary, Ireland, Portugal, Norway, Russia, and Switzerland; nor to the reports in Esplugues (2015), fn 1 above, vol's 1 and/or 2 on the Baltic Countries, Bulgaria, Croatia, Cyprus, Czech Republic, Greece, Hungary, Ireland, Luxembourg, Malta, Portugal, Romania, Slovakia.

[28] **H & S (2013),** fn 1 above,

Steffek and Unberath (2013),[29] and Esplugues (2013-2014).[30] Here are some highlighted features.

Austria. It has been described as the pioneer in mediation in Europe (a claim which, strictly construed, seems doubtful).[31] Leon and Rohraher report (2012)[32] that compulsory mediation, in the sense that participation in mediation is a necessary precursor to formal proceedings, is confined to neighbour disputes, and to particular categories of employment issues (involving disability complaints and termination of apprenticeship). The Austrian arrangements are also considered by Mayr and Nemeth (2013)[33] and by Roth and Gherdane (2013),[34] the latter commenting on `voluntariness',[35] and by Frauenberger-Pfeiler (2013).[36] The latter note that mediation, subject to small exceptions, is a voluntary system.[37] They observe that `take-up' is increased greatly if mediation is funded or compulsory.[38] Contentious legal activity in Austria is court-centred and `ADR has yet to be established as a real alternative', no doubt because `a lawsuit is more often than not the more lucrative path for lawyers'.[39]

Belgium. Verougstraete reports (2012)[40] that conciliation is compulsory in the field of labour law but it is `an expensive nuisance' and `people go through the motions' with the result that the exercise is largely `unproductive'. More generally, compulsory mediation is not practised.[41] However, there is a tradition of judicially inspired settlement before the courts.[42] It is also suggested that it might be beneficial to introduce costs sanctions and other non-mandatory modes of incentivising mediation.[43] The same author considers this subject in a later work (2013).[44] The Belgian arrangements are also examined by Traest (2013).[45]

England and Wales. See the literature at footnote 2, and this note.[46]

France. Betto and Canivet report (2012)[47] that judicial referral of parties to mediation is premised on consent by the parties except in respect of family or labour disputes. But even then a party's obligation is confined to meeting a mediator who will explain what the process

[29] **S & U (2013)**, fn 1, above.
[30] **E-M (2013-2014),** fn 1, above.
[31] M Roth and D Gherdane, in **H & S (2013),** fn 1 above, p 249.
[32] C Leon and I Rohraher, in **De P and T (2012)**, fn. 2 above, para's 2-05, 2.22-2.24.
[33] P Mayr and K Nemeth, in **S & U (2013)**, fn 1 above, chapter 4 (pp 65-91, incl bibliography).
[34] M Roth and D Gherdane, in **H & S (2013),** fn 1 above, chapter 4.
[35] M Roth and D Gherdane, *ibid*, pp 251-252; 261.
[36] U Frauenberger-Pfeiler, in **E-M (2013-2014)**, fn 1 above, vol 1, pp 1-28, vol 2, pp 1-28.
[37] *ibid*, para 2.03.
[38] *ibid*, para 2.28.
[39] *ibid*, para 2.34.
[40] I Verougstraete, in **De P and T (2012)**, fn. 2 above, para 3.06 .
[41] *ibid*, para's 3.10 and 3.85.
[42] *ibid*, para 3.19.
[43] *ibid*, para 3.59.
[44] I Verougstraete, in **S & U (2013)**, fn 1 above, chapter 5 (pp 93-113, incl bibliography).
[45] M Traest, in **E-M (2013-2014),** fn 1 above, vol 1, pp 45-68, vol 2, pp 39-54.
[46] E Crawford and JM Carruthers, in **E-M (2013-2014),** fn 1 above, vol 1, pp 515-539, vol 2, pp 461-484; H Genn, S Riahi and K Pleming, in **S & U (2013)**, fn 1 above, chapter 7; A Hildebrand, in **De P and T (2012)**, fn. 2 above, para's 28.19-28.25; 28.40-28.45; 28.46-28.52; 28.53-28.57; 28.58-28.67; 28.115-28.116.
[47] J-G Betto and A Canivet, in **De P and T (2012)**, fn. 2 above, para's 10.20-10.40.

involves. Parties are not required to proceed to mediation. There are no costs sanctions.[48] Although this jurisdiction has traditionally displayed scepticism towards mandatory mediation, recent experiments have been conducted into requiring (a) consideration of mediation prior to commencement of proceedings,[49] or (b) participation in mediation prior to commencement of family litigation.[50] The French arrangements are also considered by Ferrand (2013)[51] and Deckert (2013)[52] and Guinchard and Boucaron-Nardetto (2013).[53]

Germany. Koenig reports (2012)[54] that much mediation is in fact practised by the court itself.[55] Referral to out-of-court mediation is likely to remain occasional, certainly non-mandatory. There are context-specific arrangements for mandatory participation in mediation (labour courts; family affairs; very small claims, neighbour conflicts, defamation disputes).[56] Koenig also notes the potentially high impact of a provision which would require (on pain of the claim being inadmissible) a claimant to state at the commencement of proceedings that mediation or other ADR technique(s) have been attempted and why they have not been successful.[57] The German arrangements are also considered by Hess and Pelzer (2013)[58] and Tochtermann (2013)[59] and Bach and Gruber (2013).[60]

Italy. Marinari reports (2012)[61] that mandatory mediation was introduced by statute in 2010 for large categories[62] of civil claims. This was controversial not just because it challenged professional interests in the litigation system but because there is a longstanding public preference for civil litigation. This sentiment is a sociological curiosity when one notes that the Italian system is chronically slow and congested. Financial sanctions are available (payment of double the filing fee) and/or adverse inferences can be drawn from failure to participate properly in the proceedings, as reported by the mediator to the court.[63] Not surprisingly, mandatory mediation caused the volume of mediation references to swell.[64] Independent of this statutory development, the courts can make non-voluntary referrals to mediation, but this is seldom exercised.[65] Arbitration is a favoured form of dispute resolution in high-value commercial litigation.[66]

[48] *ibid*, para 10.68.
[49] *ibid*, para 10.69.
[50] *ibid*, para's 10.73-10.74.
[51] F Ferrand, in **S & U (2013)**, fn 1 above, chapter 8 (pp 175-207, incl bibliography).
[52] K Deckert, in **H & S (2013),** fn 1 above, chapter
[53] E Guinchard (and Boucaron-Nardetto, vol 1 only), in **E-M (2013-2014),** fn 1 above, vol 1, pp 131-158, vol 2, pp 139-154.
[54] S Koenig, in **De P and T (2012)**, fn. 2 above, para 11.15.
[55] *ibid*, para 11.12.
[56] *ibid*, para's 11.18-11.21.
[57] *ibid*, para's 11.44- 11.46.
[58] B Hess and N Pelzer, in **S & U (2013)**, fn 1 above, chapter 9 (pp 209-238, incl bibliography).
[59] P Tochtermann, in **H & S (2013),** fn 1 above, chapter 8.
[60] I Bach and UP Gruber, in **E-M (2013-2014),** fn 1 above, vol 1, pp 159-192, vol 2, pp 155-180.
[61] M Marinari, in **De P and T (2012)**, fn. 2 above, para's 15.01-15.14; 15.38.
[62] See the list at M Marinari, *op cit*, para 15.40.
[63] *ibid*, para's 15.39.
[64] *ibid*, para's 15.63-15.67.
[65] *ibid*, para's 15.15-15.17.
[66] *ibid*, para 15.65.

The 2010 mandatory system of mediation was invalidated by a constitutional decision, but a revised system was introduced in 2013 (see Trocker and Pailli, 2013).[67] Acknowledging the problem of `pathological delay' within the civil procedure system, Trocker and Pailli note that mandatory pre-commencement mediation was declared constitutional within Italian, provided (i) statutes of limitation are suspended during the period of mediation, (ii) the financial burden is not excessive, (iii) mandatory mediation must also be conducted by parties who are legally represented[68] (a manifest concession to a powerful national lobbying group); (iv) finally, during the mediation phase the parties must retain access to the courts in order to see the following forms of judicial relief: protective measures, including interim relief, summary debt procedure, landlord's access to accelerated eviction process, or other possessory proceedings.[69]

The 2013 statute also permits courts to issue, in appropriate cases and without application by a party,[70] referrals to out-of-court mediation. Trocker and Pailli (2013) note various loose-ends, including legislative silence on the topic of sanctions for disobedience.[71] The nature of the mediation process is prescribed in some detail.[72] In response to bad faith (a) refusal to participate or (b) bad faith actual participation, sanctions include adverse inferences by a court and imposition of a penalty (the amount of the filing fee).[73] The mediator's report on an unsuccessful mediation can determine the recovery of costs by the eventually victorious party (that party having done no better than a mediated settlement offer).[74] There are also ingenious fiscal incentives.[75] Mediators' fees are regulated.[76] There is extensive resort to mediation, including by online process, in consumer matters.[77] Mandatory mediation has also been introduced for family company or family business disputes, and in telecommunications, investment, and family matters.[78]

The Italian arrangements are also considered by De Palo and Oleson (2013)[79] and De Palo and Keller (2013)[80] and Queirolo and colleagues (2013).[81]

Trocker and Pailli's (2013) concluding remarks include these six reflections on compulsion:

[67] N Trocker and G Pailli, `Italy's New Law on Mediation in Civil and Commercial Matters: Solutions, Challenges and Unresolved Issues' (2013) ZZP Int 75.
[68] *ibid*, 94-95.
[69] *ibid*, p 82.
[70] *ibid*, p 86.
[71] *ibid*, p 88.
[72] *ibid*, p 88-92.
[73] *ibid*, p 93.
[74] *ibid*, p 93.
[75] *ibid*, p 93.
[76] *ibid*, p 98.
[77] *ibid*, p 99.
[78] *ibid*, p 100.
[79] G De Palo and A Oleson, in **S & U (2013)**, fn 1 above, chapter 10.
[80] G De Palo and L Keller, in **H & S (2013),** fn 1 above, chapter 12.
[81] I Queirolo, (L Carpaneto, S Dominelli, vol 1 only), (C Gambino, vol 2 only) in **E-M (2013-2014),** fn 1 above, vol 1, pp 251-282 , vol 2, pp 221-252.

(1) *`In a system plagued with heavy delay and backlogs in court, mandatory schemes [of mediation] have the potential of improving access to justice and ensuring the disputants are able to resolve their matters within a reasonable time';*[82]

(2) *`Mandatory schemes are often criticised because they curtail voluntariness in the mediation process…A distinction, however, has to be made between voluntariness <u>into</u> and <u>within</u> the process. The form of mandatory mediation adopted [in Italy] compels parties to enter into the mediation process, but does not mandate an outcome. The opt-out provision allows parties to end the "mediation experience" at the preliminary informative meeting, without significant delay and financial burden…'*[83]

(3) *`As far as lawyers are concerned, an advantage of compulsory mediation is that it gets more of them [viz lawyers] to the mediation table than voluntary mediation, thereby increasing awareness of the Bar toward ADR devices…';*[84] (the background to this point is that mandatory mediation in Italy requires representation by lawyers);[85]

(4) *`With regard to the judiciary, …court-referred ADR only begins to develop as a real alternative to court proceedings where it is subject to some kind of mandating. Judges [as a result] may become more comfortable with the mediation process.'*[86]

(5) *`Experience shows that where parties are compelled to mediate, there are still relatively high rates of settlement, and that parties who express reluctance to resort to mediation nevertheless participate in the process, often heading to a successful resolution of the dispute.'*[87]

(6) The authors also note that the Italian experiment with mandatory mediation, although extensive, is not regarded as permanent.[88]

Netherlands. Albers reports (2012)[89] that court-referred mediation is based on `suggestion', which can be made in writing by the court or by a judge during a hearing. In Holland there is no appetite for mandatory mediation.[90] Two thirds of civil mediations involve family law matters.[91] But tax matters are also frequently mediated.[92] The Dutch arrangements are also considered by Pel (2013)[93] and Schmidel (2013)[94] and van Hoek and Kocken (2013).[95]

[82] N Trocker and G Pailli, `Italy's New Law on Mediation in Civil and Commercial Matters: Solutions, Challenges and Unresolved Issues' (2013) ZZP Int 75,100.
[83] ibid, p 101.
[84] ibid, p 101.
[85] *ibid*, pp 94-95.
[86] ibid, p 101.
[87] *ibid*, p 101.
[88] *ibid*, p 102
[89] P Albers, in **De P and T (2012)**, fn. 2 above, para 27.18.
[90] *ibid*, para 27.21, 27.41
[91] *ibid*, para 27.55.
[92] *ibid*, para 27.55
[93] M Pel, in **S & U (2013)**, fn 1 above, chapter 12 (pp 297-328, incl bibliography).
[94] L Schmiedel, in **H & S (2013),** fn 1 above, chapter 13.
[95] A van Hoek and J Kocken, in **E-M (2013-2014),** fn 1 above, vol 1, pp 491-514, vol 2, pp 443-460.

Poland. Gmurzynska and Morek report (2012)[96] that court-referred mediation cannot occur more than once in a case. Such mediation is confined to the earlier stages of the litigation. It can occur with or without a party application. Mediated settlements, once ratified by the court, acquire the binding quality of a writ of execution, but not *res judicata* effect so as directly to preclude re-litigation (although dismissal of the re-litigated claim will probably follow).[97] Gmurzynska and Morek comment on the counter-productiveness of compulsory mediation.[98] But they also note that `bringing parties to the table' can result in the imparting of valuable information concerning the nature of mediation and its possibilities.[99] The Polish arrangements are also examined by Morel and Rozdeiczer (2013)[100] and Grzybczyk, Fraczek and Zachariasiewicz (2013).[101]

Spain. Sanchez-Pedreno reports (2012)[102] that judges can recommend resort to mediation but cannot compel it. Statute prescribes in detail how mediation sessions should be conducted,[103] as well as the legal duties of mediators.[104] The Spanish arrangements are also examined by Villamarin Lopez (2013)[105] and Buhigues and colleagues (2013).[106]

Sweden. Ficks reports (2023)[107] that there is a tradition of court-room mediation as part of judges' settlement responsibility. Less commonly, the courts refer the parties to out-of-court mediators. This court-referral power is now to be considered in all cases.[108] Curiously, agreements to mediate are not legally enforceable if made *ex ante* as distinct from mediation commitments agreed post-dispute.[109] In general, it is reported that there is no appetite amongst Swedish legislators for mandatory mediation.[110] The arrangements in Sweden and other Scandinavia countries are also examined in Ervo and Sippel (2013).[111]

II
NON-EUROPEAN JURISDICTIONS

Here are some highlighted features.

Australia. David Bamford (2014) notes expansion of mediation, including use of court-annexed mediation, the court having power to direct a reference to a mediator, without the consent of the parties.[112] In some contexts the law imposes a requirement that a party makes

[96] E Gmurzynska and R Morek, in **De P and T (2012)**, fn. 2 above, para's 10.05-10.11.
[97] *ibid*, para's 20.27-20.29.
[98] *ibid*, para's 20.33-20.34.
[99] *ibid*, para's 20.35.
[100] R Morel and L Rozdeiczer, in **H & S (2013),** fn 1 above, chapter 14.
[101] K Grzybczyk and G Fraczek (vol 1), M Zachariasiewicz in **E-M (2013-2014),** fn 1 above, vol 1, pp 299-326, vol 2, pp 273-304.
[102] A Sanchez-Pedreno, in **De P and T (2012)**, fn. 2 above, para 25.13.
[103] *ibid*, para's 25.36-56.
[104] *ibid*, para's 25.64-25.76.
[105] ML Villamarin Lopez, in **H & S (2013),** fn 1 above, chapter 16.
[106] J Buhigues and colleagues, in **E-M (2013-2014),** fn 1 above, vol 1, pp 445-490, vol 2, pp 419-442.
[107] E Ficks, in **De P and T (2012)**, fn. 2 above, para's 26.9-26.17; 26.51.
[108] *ibid*, para 26.70.
[109] *ibid*, para's 26.52-26.55.
[110] *ibid*, para 26.51.
[111] L Ervo and L Sippel, in **E-M (2013-2014),** fn 1 above, vol 1, pp 371-426, vol 2, pp 359-384.
[112] D Bamford, in **E & B (2014)**, fn 1 above, pp 64-5; 68-69.

a statement of genuine and reasonable efforts to resolve the dispute before commencement of proceedings.[113] Bamford also notes institutional and educational reinforcement of the new culture of alternative dispute resolution.[114]

Bagshaw (2013) notes the need for family disputants to have displayed a `genuine effort' to resolve matters before they are entitled to file an application before a family court,[115] except in respect of family violence, child abuse, or urgency. A certificate can be obtained to exempt particular parties. Bagshaw remarks that o the extent that mediation is rendered compulsory, mediators need to display a high level of professionalism.[116] He also notes that many laypeople suppose that mediators are necessarily an `appendage to the court system', and this can cause confusion.[117] Problematic outcomes are possible, founded on an uncorrected, or perhaps unnoticed, imbalance of covert power.[118]

The Australian arrangements are also examined by Magnus (2013).[119]

Canada. Morris (2013) reports that although mediation is `mainstream'[120] it has not supplanted the `adversarial, adjudicative norm.'[121] She examines in detail the history of mediation, including the British Columbia systems of mandatory judicial settlement conferences,[122] and party-issued notices to mediate requiring the opponent to proceed to mediation,[123] and on-line (`ODR') neutral case evaluation, etc, for small claims.[124] The Ontario system of mandatory mediation is also explored.[125] The author also comments: `the legal system with its labyrinthine processes and complex forms is not designed for self-representation.'[126] The Canadian arrangements are also examined by Ellger (2013).[127]

China. Bu (2014) reports on trends and controversies. The position is fluid and there is little concrete comparative information.[128]

Tang (2013) reports that `Chinese courts encourage and support mediation' as well as `themselves mediating civil disputes during court proceedings'; furthermore, `if mediation fails, the same judge will decide the case at the end'; and the system of court mediation is

[113] *ibid*, pp 66-7.
[114] *ibid*, pp 77-8.
[115] D Bagshaw, in **Wang and Yang (2013)**, fn 2 above, para 1.21.
[116] *ibid*, para 1.22.
[117] *ibid*, para 1.22.
[118] *ibid*, para's 1.48, 1.62-1.64.
[119] U Magnus, in **H & S (2013),** fn 1 above, chapter 17.
[120] C Morris, in **Wang and Yang (2013)**, fn 2 above, para 3.79.
[121] *ibid*, para 3.80.
[122] *ibid*, para's 3.37-3.39.
[123] *ibid*, para's 3.40 ff.
[124] *ibid*, para's 3.41-3.42.
[125] *ibid*, para's 3.54 ff.
[126] *ibid*, para 3.75.
[127] R Ellger, in **H & S (2013),** fn 1 above, chapter 18.
[128] Y Bu, in **E & B (2014)**, fn 1 above, pp 79-101.

`generally believed to be very effective.'[129] Extra-curially mediated settlements are not enforceable unless ratified by the court.[130]

Wang (2013) reports that extra-curial mediation occurred in 8.94 million cases in 2011, with a success rate of 96.9 *per cent*; and in the same year 2.67 million cases were mediated in court and 1.75 million of these went no further.[131] There is a cultural disinclination to engage in `face-to-face' mediation. Instead so-called `back-to-back' mediation, using the mediator to communicate points, is preferred.[132] Mediators often have prior knowledge of the parties and the facts.[133]

The system of court conciliation is also described by Yao (2013) who reports a settlement rate of over 60 *per cent* in civil and commercial courts of first instance since 2008.[134] This type of judicial intervention is declared to promote `simplicity, effectiveness, and efficiency'.[135] Parties are at liberty to decide whether to participate in this mode of proceeding and whether to accede to a proposed settlement.[136] Judges also find mediation of their cases to be a convenient opportunity for disposal because mediated settlements reduce backlogs. Furthermore, settlements are not subject to appeal.[137] Yao also criticises the practice of the settlement judge remaining the trial judge,[138] and this point is elaborated by Zou (2013)[139] (who also reports[140] lawyers' dissatisfaction with judicial mediation).

As for the appropriateness of mediation for different kinds of dispute, Zhang (2013) suggests this division: (i) matrimonial property, succession, neighbour disputes, partnership agreement claims; (ii) contract or commercial cases; (iii) cases involving the interests of the state, the general public, or third parties. Zhang then suggests that mediation is the preferable method for (i), rather than adjudication; as for (ii), Zhang's view is that mediation should be attempted first; as for (iii) Zhang declares that mediation is not appropriate.[141]

Zou (2013) notes that courts are required to conduct pre-trial mediation in these types of cases: marital disputes and other family matters; succession issues; traffic and work accidents; partnership agreements; low value claims.[142] Zou's recommendation is to separate the mediation and adjudicative functions of judges.[143]

[129] H Tang, in **Wang and Yang (2013)**, fn 2 above, para 4.1.21.
[130] *ibid*, para 4.1.29.
[131] C Wang, in **Wang and Yang (2013)**, fn 2 above, para 4.2.17.
[132] *ibid*, para 4.2.33.
[133] *ibid*, para 4.2.35.
[134] J Yao, in **Wang and Yang (2013)**, fn 2 above, para 4.3.16.
[135] *ibid*, para 4.3.17.
[136] *ibid*, para 4.3.17.
[137] *ibid*, para 4.3.20.
[138] *ibid*, para 4.3.19.
[139] T Zou, in **Wang and Yang (2013)**, fn 2 above, para 4.5.19.
[140] *ibid*, para 4.5.21.
[141] J Yao, in **Wang and Yang (2013)**, fn 2 above, para's 4.4.15-4.4.16.
[142] T Zou, in **Wang and Yang (2013)**, fn 2 above, para 4.5.26.
[143] *ibid*, para's 4.5.22-4.5.25.

The Chinese arrangements are also examined by Pissler (2013).[144]

Hong Kong. Denton and Kun (2014) note statutory provisions which intensify the system of costs sanctions for unreasonable failure to engage in mediation.[145] There is also a statutory regulation on mediation confidentiality.[146]

Ali and Koo (2013) note that procedural rules require parties to consider mediation and to take steps to organise it. Case law has placed the onus on the party who refuses mediation to justify that refusal, otherwise costs sanctions are available.[147]

More detail on costs sanctions is supplied by Zhao (2013),[148] including the statutory notion of a `minimum level of participation'.[149]

India. Khambata and co-authors (2014) note that court-directed mediation is in principle one of a range of strategies which might alleviate a chronically over-burdened judicial system, but party consent to a mediation referral is required.[150]

There is a detailed examination of the Indian experience in Sharma (2013),[151] who also notes that there is acute court congestion.[152]

Indonesia. Simandjuntak and co-authors report (2014) that court-annexed mandatory mediation has been adopted and a powerful pro-mediation culture has arisen.[153]

Mills (2013)[154] examines critically introduction in 2003, amended significantly in 2008, of mandatory early phase mediation for civil litigants. She reports problems caused by parties' lack of good faith in compliance with this requirement, and some cynicism amongst legal practitioners.

Japan. Haga (2014) notes the very low level of the lawyer-to-citizen ratio in Japan (71,500 citizens per lawyer).[155] Consistent with this, there is a mature tradition and extensive network of ADR provision, including mediation and conciliation (here taking the form of settlement proposals made by a conciliation committee).[156] Conciliation is (i) provided by the courts;[157] or (ii) supported by Government with respect to various forms of dispute, such as consumer

[144] K Pissler, in **H & S (2013),** fn 1 above, chapter 19.
[145] G Denton and Fan Kun, in **E & B (2014)**, fn 1 above, pp 156-7.
[146] *ibid*, pp 157-8.
[147] S Ali and A Koo, in **Wang and Yang (2013)**, fn 2 above, para's 6.1.12-6.1.13.
[148] S Zhao, in **Wang and Yang (2013)**, fn 2 above, para's 6.2.16; 6.2.23 ff.
[149] *ibid*, para's 6.2.26; 6.2.50-6.2.54.
[150] D Khambata, A Mehta, N Jejeebhoy, in **E & B (2014)**, fn 1 above, pp 167, 199-200.
[151] R Sharma, in **Wang and Yang (2013)**, fn 2 above, chapter 7.
[152] *ibid*, para's 7.01 and 7.57.
[153] M Simandjuntak, V Suroto, B Resti Nurhayati, in **E & B (2014)**, fn 1 above, pp 214-8.
[154] K Mills, in **Wang and Yang (2013)**, fn 2 above, chapter 8.
[155] M Haga, in **E & B (2014)**, fn 1 above, p 256.
[156] *ibid*, pp 271 ff.
[157] *ibid*, p 258.

disputes;[158] or (iii) provided by private ADR organisations or individuals.[159] There has been enthusiasm for speedy mediation in clinical negligence claims[160] and mass tort cases.[161]

Japanese mediation arrangements are also noted by Baum (2013)[162] and by Sakai (2013),[163] whose discussion includes references to traffic damage claims[164] real estate disputes,[165] and to financial services, insurance, and banking.[166]

The Japanese arrangements are also considered by Kakiuchi (2013).[167]

Korea. G Lee (2014) notes that economic transformation has led to increased litigation.[168] The Koreans, like the Japanese (above), make the following three-fold division of ADR: (a) court-centred, including conciliation proceedings conducted directly by the court itself;[169] (b) Government-promoted `administrative' ADR, for example, concerning consumer, environmental, and medical disputes[170] (c) private arrangements.[171]

Hwang (2013) explains that in 2011 direct mediation by trial courts accounted for 76 *per cent* of all Korean mediations.[172]

Yi (2013) confirms that court conducted mediation does not require party consent to the judge's resort to mediation (although any settlement is based on agreement).[173] That process is criticised.[174] Y's study includes discussion of copyright[175] and medical disputes mediation[176] (lasting 90 to 120 days,[177] conducted before a mediation panel of five,[178] and yielding a 88 *per cent* success rate).[179]

New Zealand. Hart (2013) notes that `there are approximately 50 statutes in New Zealand that encourage mediation by either recommending it or making it a mandatory process.'[180] She reports on a jurisdiction which has pragmatically embraced mediation in a range of

[158] *ibid*, p 258.
[159] *ibid*, pp 259 ff.
[160] *ibid*, pp 284-5.
[161] *ibid*, p 285.
[162] H Baum, in **H & S (2013),** fn 1 above, chapter 20.
[163] H Sakai, in **Wang and Yang (2013)**, fn 2 above, chapter 9.
[164] *ibid*, para 9.04.
[165] *ibid*, para 9.04.
[166] *ibid*, para's 9.07-9.08.
[167] S Kakiuchi, in **S & U (2013)**, fn 1 above, chapter 11 (pp 269-296, incl bibliography).
[168] G Lee, in **E & B (2014)**, fn 1 above, p 288.
[169] *ibid*, pp 292-9.
[170] *ibid*, 299-301.
[171] *ibid*, p 288.
[172] D-N Hwang, in **Wang and Yang (2013)**, fn 2 above, para 10.1.57.
[173] L Yi, in **Wang and Yang (2013)**, fn 2 above, para 10.2.14.
[174] *ibid*, para 10.2.44.
[175] *ibid*, para's 10.2.26-10.2.28.
[176] *ibid*, para's 10.2.29-10.2.35.
[177] *ibid*, para 10.2.32.
[178] *ibid*, para 10.2.30.
[179] *ibid*, para 10.2.35.
[180] D Hart, in **Wang and Yang (2013)**, fn 2 above, para 11.29.

contexts, including pasturing disputes between farmers, earthquake disasters, and defective building work. The New Zealand arrangements are also examined by Berg (2013).[181]

The Philippines. Calimon (2014) notes that there is a mechanism for summary enforcement of mediated settlements which have been lodged with the court.[182] More generally, in an effort to `de-clog'[183] the lists of pending cases, the courts have promoted mandatory mediation.[184] Mediation can also be attempted by a judge. If unsuccessful, a different judge will become the eventual trial judge.[185]

Singapore. Lee (2013)[186] and (same author) (2014) notes governmental efforts to broaden awareness of mediation's possibilities.[187] Road accident claims which do not involve personal injury are regularly referred to mediation by the court system, whereas other types of claim are referred only if a party requests or the parties consent.[188] Lee suggests that the need to avoid futility requires that only suitable cases are to be mediated.[189] There is co-ordinated provision of mediation by a public organisation which charges fees.[190] Procedural rules require parties' lawyers to discuss during the case-management phase of a pending case the prospects of mediating the case.[191] At this same stage, the judicial officer can recommend or direct the appropriate form of dispute resolution.[192] There is also a system of presumptive referral of lower value cases to mediation, a party's capacity to opt out of such a referral being restricted to cases where `ADR' has already been attempted, or a point of law is in issue, or some other good reason.[193] Costs sanctions are applied if there has been a failure to respond reasonably or in good faith to the other party's request to consider or pursue mediation.[194] In general, there is an interesting tilting of the Singaporean system towards greater resort to mediation, founded upon the notion of proportionality[195] and supported by a national and co-ordinated decision to encourage amicable resolution of disputes.[196]

Thailand. Ariyanuntaka (2013)[197] and Vongkiatkachorn (2014) report extensive legislation providing the framework for out-of-court mediation by state officials or representatives of public bodies in a variety of contexts.[198] As for mediation of post-issue disputes (`court-

[181] H Berg, in **H & S (2013),** fn 1 above, chapter 21.
[182] D Calimon, in **E & B (2014)**, fn 1 above, p 372.
[183] *ibid*, p 373.
[184] *ibid*, pp 373 ff.
[185] *ibid*, p 373 n 195, p 375.
[186] J Lee, in **Wang and Yang (2013)**, fn 2 above, chapter 12.
[187] **E & B (2014)**, fn 1 above, pp 403-5.
[188] *ibid*, pp 400.
[189] *ibid*, pp 403.
[190] *ibid*, pp 405-9.
[191] *ibid*, p 413.
[192] *ibid*, pp 413-4.
[193] *ibid*, p 414.
[194] *ibid*, pp 414-5.
[195] Implicit in the rules summarised *ibid*, p 414.
[196] *ibid*, pp 415-420.
[197] V Ariyanuntaka, in **Wang and Yang (2013)**, fn 2 above, chapter 13.
[198] S Vongkiatkachorn, in **E & B (2014)**, fn 1 above, pp 423-7.

annexed mediation'),[199] mediation can be ordered by the court[200] and attendance at the relevant mediation session is required.[201] Tax disputes can be mediated.[202]

As for the role of legal representatives, Ariyanuntaka (2013) adds:[203] `Lawyers must venture to think of themselves not as mere mechanics but as engineers or architects whose task is not merely to win the case at hand, but to work in the best interest of the client.'

United States of America. There is detailed examination by Van Kinkel (2013),[204] covering the USA generally but with particular attention to California. There are references to statistics on the `vanishing trial'[205] and the rate of success for private mediation (c 80 *per cent*)[206] and court-annexed mediation (45 to 72 *per cent*).[207] Where the claim is brought under a contingent fee arrangement, the plaintiff's attorney will be economically induced to try mediation earlier than hourly-paid attorneys.[208] Mediation can be `*pro bono*' `low-cost' or `market rate'.[209] Premature court directions to mediate cases not yet `ripe' for this type of consideration can lead to disillusionment.[210]

Specter and Pearlman (2014) provide a trenchant survey of the modern history of mediation in America,[211] notably the acceleration of mediation projects since the 1970s.[212] Post-issue mediation has become a major feature within both the Federal Court and State Court systems.[213] It can even be `mandatory',[214] one State (Southern District of Florida) imposing this requirement in almost a blanket fashion (mediation generally required, subject only to a `few narrowly defined exceptions'[215] and the mediator is obliged to file a statement to the trial court `advising of the status of settlement negotiation'). By contrast, `most district courts', for example, in Pennsylvania, grant discretion to the judge to order mediation on a case-by-case basis.[216] Matters of confidentiality are treated in the Uniform Mediation Act (2001, amended 2003), which has been adopted in ten States and has been influential in many others.[217] Specter and Pearlman provide insights into the tactics of participation in mediated negotiations.[218] The authors conclude that mediation in the USA has become entrenched as

[199] *ibid*, pp 429-431; 458-460.
[200] *ibid*, pp 459.
[201] *ibid*, pp 459.
[202] *ibid*, pp 473-474.
[203] V Ariyanuntaka, in **Wang and Yang (2013)**, fn 2 above, para 13.22.
[204] E van Ginkel, in **Wang and Yang (2013)**, fn 2 above, para's 14.19-14.21.
[205] *ibid*, para 14.22.
[206] *ibid*, para 14.22.
[207] *ibid*, chapter 14.
[208] *ibid*, para 14.27.
[209] *ibid*, para 14.35.
[210] *ibid*, para 14.37.
[211] S Specter and J Pearlman, in **E & B (2014)**, fn 1 above, p 549.
[212] *ibid*, pp 544-7.
[213] *ibid*, pp 548-9.
[214] *ibid*, pp 548-9; and see p 549 n 73 on the position in State courts.
[215] *ibid*, p 548 at n 69.
[216] *ibid*, p 548 at n 69.
[217] *ibid*, pp 551-552.
[218] *ibid*, pp 553-554.

`big business', and that it will `continue to grow' not just as an `alternative' to litigation but as a `prominent tool' within the context of litigation.[219]

The American arrangements are also considered by Menkel-Meadow (2013)[220] and by Kulms (2013).[221]

CONCLUDING REMARKS

The following seven main points have emerged from this brief survey of various nations:

(1) *Flexibility*. Mediation is a flexible technique: it can be face-to-face or conducted at a distance (the parties not being physically in the same mediation space). It can be high-tech (video-conferencing, etc), low-tech (telephone or letters) or zero-tech (meetings).

(2) *Not Exclusive.* Mediation is not sufficient; there must be provision for disputes to be taken to the courts or to public tribunals if (a) mediation is not available, or (b) it is legitimately avoided by the disputants, or (c) mediation was attempted but it failed to resolve the matter fully or at all, for any reason, or (d) mediation resulted in an agreement which, however, is not rendered legally binding, or (e) if a dispute arises concerning the validity, interpretation or enforcement of an ostensibly binding mediated settlement.

(3) *Timing.* Mediation can precede formal proceedings (whether those proceedings are to take place before a court, public tribunal, or involve arbitration, or some other formal process), or mediation can take place after commencement (with or without a formal pause or `stay' of those proceedings), or take place after judgment (whether pending an appeal, or enforcement).

(4) *Who Pays?* Mediation can be free, because state-financed, or provided by other public funds or by charity, or provided *pro bono* by mediators. If mediation is not free, it can be paid jointly, or financed by one party, or provided as an `industry tax' on a business party (in the sense that businesses active in that field fund the provision of mediation concerning disputes in that economic sector and do not charge individuals).

(5) *Expansion.* Mediation has grown in importance and visibility. It is now seldom dismissed as a sign of a party's weakness. Government is attracted to mediation's expansion for budgetary reasons and because this process (when it works) confers a deeper and more flexible style of resolving disputes than the rigid and narrow technique of adjudication (or indeed arbitration).

(6) *Further Advance.* The scope for resort to mediation has not yet been exhausted. It is in fact still under-used.

[219] *ibid*, p 554.
[220] C Menkel-Meadow, in **S & U (2013)**, fn 1 above, chapter 15 (pp 419-454, incl bibliography).
[221] R Kulms, in **H & S (2013),** fn 1 above, chapter 25.

(7) *The Central Dilemma: No Compulsion?* In general, there is predominant international respect for the principle of voluntariness (on which see notably Sections II and IV). Parties should not be compelled to participate in mediation; the process should be under their joint consensual control at all times; and the results should be freely agreed upon. The principled and pragmatic approach to this issue is perhaps best summarised by the Belgian commentator, Ivan Verougstraete (2013),[222] who says simply: `In the early stages of a conflict the parties should enter into negotiations rather than involve a neutral. This is particularly true in the business world. Less invasive methods are to be preferred over mandatory ADR. Pre-trial compulsory methods have not worked out very well in systems in which the courts work reasonably well. The parties do not see the point of avoiding the court system at all costs.'

However, there is some counter-movement (see *Sanctions* below).

Sanctions and other Disadvantages? The following adverse consequences might be suffered by, or imposed on, one or both parties the following defaults, if their conduct, omission, or silence is regarded as inexcusable in any particular case:
(a) refusal to *consider* mediation; or
(b) failing to help to *appoint a mediator*, or
(c) *absence:* that is failure to *attend* mediation `sessions' or `introductions' (physically or online), or
(d) *non co-operation or obstruction in discussion*: that is, a failure to *engage co-operatively or adoption of obstructive tactics* in negotiations during mediation.

Inadmissibility of Claims, or Stays of Proceedings. The first form of gate-keeping involves removing the option to take a case to court if there has been failure to adhere to a mandatory element of mediation. A variation is a stay of pending proceedings for such a failure, including breach of a mediation clause.

Nullity of Court Proceedings. It might be that declarations can be obtained that purported proceedings before the courts were in fact a nullity because there had not been compliance with mediation requirements; Ferrand (2013)[223] reports that this possibility exists in France when proceedings have been brought in violation of a mediation clause. And in Indonesia an even more drastic possibility is that court proceedings will be a nullity if mandatory pre-court procedure has not been conducted, as noted by Mills (2013).[224]

Costs Sanctions. These are the modification of costs results or orders, adjusted by the court to reflect censure of a party or parties. Such a disciplinary modification (a `costs sanction')

[222] I Verougstraete, in **S & U (2013)**, fn 1 above, p 112.
[223] F Ferrand, in **S & U (2013)**, fn 1 above, p 192 at fnn 80-82.
[224] K Mills, in **Wang and Yang (2013)**, fn 2 above, para 8.06.

might be imposed for failure to participate in mediation or for unreasonable failure to engage in this opportunity, or for unreasonable steps or non co-operation displayed during the mediation, or perhaps following the conclusion of the mediation.

Other Financial Consequences. Where the failure to adhere to a mandatory element of mediation has been committed by the defendant, that party might suffer increased financial burdens, such as interest payments or even `additional payments', n the analogy of failure by (English) defendants to accept CPR Part 36[225] settlement offers.

[225] R Jackson, *The Reform of Civil Litigation* (London: Sweet & Maxwell, 2016), chapter 10; *Andrews on Civil Processes*, vol 1, *Court Proceedings* (Cambridge: Intersentia Publishing, 2013), 18.31 ff; *Foskett on Compromise* (8th edn, Sweet & Maxwell, 2015), chapters 14-18.

APPENDIX 3: THE BRITISH COLUMBIA NOTICE TO MEDIATE PROCEDURE[226]

Initiating mediation

3 Subject to section 4, any party to an action may initiate mediation in the action by serving a Notice to Mediate in Form 1 on every other party to that action.

[en. B.C. Reg. 77/2013, s. (a).]

Not more than one mediation under this regulation in any action

4 Unless the court otherwise orders, not more than one mediation may be initiated under this regulation in relation to any action.

When notice to mediate must be served or delivered

5 Unless the court orders otherwise, a Notice to Mediate may be served or delivered under section 3 no earlier than 60 days after the filing of the first response to civil claim in the action and no later than 120 days before the date of trial.

[am. B.C. Reg. 159/2010, s. 3.]

Appointment of mediator

6 The participants must jointly appoint a mutually acceptable mediator,

(a) if there are 4 or fewer parties to the action, within 14 days after the Notice to Mediate has been served on all parties, or

(b) if there are 5 or more parties to the action, within 21 days after the Notice to Mediate has been served on all parties.

[am. B.C. Reg. 159/2010, s. 4.]

Application to roster organization

7 If the participants do not jointly appoint a mutually acceptable mediator within the time required by section 6, any participant may apply to a roster organization for an appointment of a mediator.

[226] Law and Equity Act, Notice to Mediate (General) Regulation

Roster organization's appointment procedure

8 The following procedure applies if an application to a roster organization is made under section 7:

(a) the roster organization must, within 7 days after receiving the application, communicate to all participants an identical list of possible mediators containing at least 6 names;

(b) each participant, within 7 days after receipt of the list referred to in paragraph (a),

(i) may delete from the list up to 2 names to which the participant objects,

(ii) must number the remaining names on the list in order of preference, and

(iii) must deliver the amended list to the roster organization;

(c) if a participant does not deliver the amended list within the time referred to in paragraph (b), the participant is deemed to have accepted all of the names;

(d) within 7 days after the expiry of the 7 day period referred to in paragraph (b), the roster organization must select the mediator from the remaining names on the list or, if no names remain on that list, from any available mediators, whether or not the selected mediator was included on the original list provided under paragraph (a), taking into account

(i) the order of preference indicated by the participants on the returned lists,

(ii) the need for the mediator to be neutral and independent,

(iii) the qualifications of the mediator,

(iv) the mediator's fees,

(v) the mediator's availability,

(vi) the nature of the dispute, and

(vii) any other consideration likely to result in the selection of an impartial, competent and effective mediator.

Notification of mediator

9 Promptly after a roster organization selects the mediator, the roster organization must notify the participants in writing of that selection.

Deemed date of appointment of mediator

10 The mediator selected by a roster organization is deemed to be appointed by the participants on the date that the notice is sent under section 9.

Replacement of appointed mediator

11 If the mediator selected by the roster organization under section 8 (d) is unable or unwilling to act as mediator, the selected mediator or any participant may so notify the roster organization and the roster organization must, within 7 days after receiving that notice, select a new mediator in accordance with section 8 (d).

When pre-mediation conference must be held

12 The mediator must hold a pre-mediation conference if, in the mediator's opinion, the action is sufficiently complex to warrant it.

Pre-mediation conference

13 At a pre-mediation conference, the mediator must endeavour to have the participants consider all organizational matters including the following:

(a) whether the pleadings are final and complete;

(b) the issues that are to be dealt with during the mediation process;

(c) pre-mediation exchange of information;

(d) exchange of documents;

(e) obtaining and exchanging expert reports;

(f) scheduling;

(g) time limits.

Notice of pre-mediation conference

14 The mediator must give notice of the pre-mediation conference to all parties.

Participants must attend pre-mediation conference and mediation session

15 Unless relieved under section 22 or 23 (c) of the obligation to attend,

(a) each party who receives a notice under section 14 must participate in the pre-mediation conference, and

(b) each party to the action must engage in mediation at a mediation session in relation to the action.

Attendance by lawyer or representative

16 Despite section 15 but subject to section 20, a party referred to in section 15 may

(a) attend a pre-mediation conference by lawyer, or

(b) attend one or both of a pre-mediation conference and a mediation session by representative if

(i) the party is under legal disability and the representative is that party's litigation guardian,

(ii) the party is suffering from a mental or physical injury or impairment sufficient to limit the party's effective participation in mediation,

(iii) the party is not an individual, or

(iv) the party is a resident of a jurisdiction other than British Columbia and will not be in British Columbia at the time of the pre-mediation conference or the mediation session, as the case may be.

Representative may be accompanied by a lawyer

17 A party or representative who attends a pre-mediation conference or a mediation session may be accompanied by a lawyer.

Other persons may attend with consent

18 Any other person may attend a pre-mediation conference or a mediation session if that attendance is with the consent of all participants.

Attendance by communications medium

19 A person entitled or required to attend a pre-mediation conference may attend that conference by telephone or other communications medium if the person is a resident of a jurisdiction other than British Columbia and will not be in British Columbia at the time of the conference.

Qualifications of representative

20 A representative who attends a mediation session in the place of a party referred to in section 16 (b) must

(a) be familiar with all relevant facts on which the participant, on whose behalf the representative attends, intends to rely, and

(b) have full authority to settle, or have access at the earliest practicable opportunity to a person who has, or to a group of persons who collectively have, full authority to settle, on behalf of that participant.

Exemption if previous mediation

21 Parties to an action need not attend a pre-mediation conference or a mediation session if all of the parties to the action have already been involved in a mediation session in relation to the matters in issue in that action.

Other exemptions

22 A party need not attend a pre-mediation conference or a mediation session if

(a) the party is exempted from attending the pre-mediation conference or the mediation session, as the case may be, under section 23 (c), or

(b) the participants agree that the party need not attend the pre-mediation conference or the mediation session, as the case may be, and that agreement is confirmed by the mediator in writing.

Applications to court

23 On an application, the court may direct that

(a) the mediation proceed at the time or times and on the terms and conditions, if any, that the court considers appropriate,

(b) the mediation be postponed to a later date on the terms and conditions, if any, that the court considers appropriate, or

(c) one or more of the parties is exempt from attending one or both of a pre-mediation conference and a mediation session if in the court's opinion it is materially impracticable or unfair to require the party to attend.

Scheduling of mediation session

24 A mediation session must occur within 60 days after the appointment of the mediator but not later than 7 days before the date of trial unless a later specified date

(a) is agreed on by all participants and that agreement is confirmed by the mediator in writing, or

(b) is ordered by the court.

Court may postpone mediation session

25 On an application for an order under section 24 (b), the court

(a) must take into account all of the circumstances, including

(i) whether a party intends to bring a motion for summary judgment, summary trial or for a special case,

(ii) whether the mediation will be more likely to succeed if it is postponed to allow the participants to acquire more information, and

(iii) any other circumstances the court considers appropriate, and

(b) may make any order referred to in section 23.

Pre-mediation exchange of information

26 At least 14 days before the mediation session is to be held in relation to an action, each participant must deliver to the mediator a Statement of Facts and Issues in Form 2 setting out the factual and legal basis for the party's claim or opposition to the relief sought in the action.

Mediator must distribute statements

27 Promptly after receipt of all of the Statements of Facts and Issues required to be delivered under section 26, the mediator must send each participant's Statement to each of the other participants.

….

Conduct of a mediation

32 The mediator may conduct a pre-mediation conference and the mediation at the location and in any manner he or she considers appropriate to assist the participants to reach a resolution that is fair, timely and cost-effective.

Allegation of Default

33 (1) Any participant who is of the opinion that any other participant has failed to comply with a provision of this regulation may make application to the court for an order under section 34.

(2) Before making application under subsection (1), the participant bringing the application must serve on each of the other participants

(a) an Allegation of Default in Form 4 respecting the participant who is alleged to have failed to comply with a provision of this regulation, and

(b) any affidavits in support of the application.

[am. B.C. Reg. 159/2010, s. 5.]

Effect of an Allegation of Default

34 (1) On an application referred to in section 33 (1), the court may do any one or more of the following unless the participant in respect of whom the Allegation of Default is filed satisfies the court that the default did not occur or that there is a reasonable excuse for the default:

(a) adjourn the application and order, on any terms the court considers appropriate, that

(i) a scheduled pre-mediation conference occur, or

(ii) a mediation session occur;

(b) adjourn the application and order that a participant attend one or both of a scheduled pre-mediation conference and a mediation session;

(c) adjourn the application and order that a participant provide to the mediator and other participants a Statement of Facts and Issues;

(d) stay the action until the participant in respect of whom the allegation is filed attends one or both of a scheduled pre-mediation conference and a mediation session;

(e) dismiss the action or strike out the response to civil claim and grant judgment;

(f) make any order it considers appropriate with respect to costs.

(2) If the court considers that public disclosure of the Allegation of Default and related affidavits would be a hardship on a participant, the court may

(a) order that the whole or any part of the Allegation of Default and related affidavits be sealed in an envelope and that no person may search the sealed documents without an order of the court, or

(b) make such other order respecting confidentiality of those documents as the court considers appropriate.

[am. B.C. Reg. 159/2010, s. 6.]

Court may consider allegation in ordering costs

35 The court may consider the existence of an Allegation of Default in making any order about costs, whether that order is made following final disposition of the action or otherwise.

Confidentiality and compellability

36 (1) Subject to sections 37 and 39 and subsections (2) and (3) of this section, a person must not disclose, or be compelled to disclose, in any civil, criminal, quasi-criminal, administrative or regulatory action or proceeding,

(a) any oral or written information acquired in anticipation of, during or in connection with a mediation session,

(b) any opinion disclosed in anticipation of, during or in connection with a mediation session, or

(c) any document, offer or admission made in anticipation of, during or in connection with a mediation session.

(2) Subsection (1) does not apply

(a) in respect of any information, opinion, document, offer or admission that all of the participants agree in writing may be disclosed,

(b) to any fee declaration, agreement to mediate or settlement document made in anticipation of, during or in connection with a mediation session, or

(c) to any information that does not identify the participants or the action and that is disclosed for research or statistical purposes only.

(3) Despite subsection (1), if and only to the extent that it is necessary to do so for the purposes of section 33 or 34, a party may disclose evidence of any act or failure to act of another party that is alleged, for the purposes of section 33, to constitute a failure to comply with a provision of this regulation.

No restriction on otherwise producible information

37 Nothing in this regulation precludes a party from introducing into evidence in any civil, criminal, quasi-criminal, administrative or regulatory action or proceeding any information or records produced in the course of the mediation that are otherwise producible or compellable in those proceedings.

Concluding a mediation

38 A mediation is concluded when

(a) all issues are resolved, or

(b) the mediator terminates the mediation.

Certificate of Completed Mediation

39 When a mediation is concluded, the mediator must deliver a Certificate of Completed Mediation in Form 5 to each of the participants who requests one or to their lawyer.

[en. B.C. Reg. 77/2013, s. (b).]

APPENDIX 4: ACKNOWLEDGEMENTS

We wish to thank the following individuals and organisations who have assisted us on various issues that arise in our discussions. Of course all the views expressed in this report are those of the working party alone.

Individuals:

Peter Causton

Roberta Crivellaro, Withers

Jonathan Eades

Michael Fordham SC

HH Judge Allan Gore

Georgina Haysom

Marco Imperiale

Corado Mora

Professor Sue Prince

Matilde Rota, Withers

Rebecca Scott, RCJ Advice

Professor Tania Sourdin

Peter Wood, Withers

Organisations:

CMC

CEDR

In Place of Strife

ADR Group

APPENDIX 5: WORKING GROUP CVS

WILLIAM WOOD QC

Bill Wood is a full-time commercial mediator practising from Brick Court Chambers. He works on a variety of international and domestic commercial disputes and travels extensively. He is the ADR representative on the Civil Justice Council. He served on the Board of the Civil Mediation Council for a number of years and latterly served as its Vice Chair under Sir Henry Brooke and then Sir Alan Ward.

TONY ALLEN

Tony Allen is a solicitor and was in private practice for over 30 years before joining CEDR as a Director in 2000. Since 2012 he has been a freelance trainer and mediator, specialising in mediating clinical negligence and other medico-legal claims. He has delivered training and seminars all over Europe, Asia and Africa, and written articles on mediation in many jurisdictions. He is co-author of *The ADR Practice Guide,* and his own book *Mediation Law and Civil Practice* was published in 2013.

PROFESSOR NEIL ANDREWS

Neil Andrews is Professor of Civil Justice and Private Law, University of Cambridge and a Fellow of Clare College. His main teaching interests are civil procedure, including mediation and arbitration, and contract law. He was called to the English Bar in 1981 and became a Bencher of Middle Temple in 2007. He is a Member of the American Law Institute. His works include Andrews on Civil Processes (2 vols) (Intersentia, Cambridge, 2013) and Contract Law (2nd edn, Cambridge University Press, 2015).

GRAHAM ROSS

Graham Ross is a retired solicitor now specialising as an accredited mediator in commercial, company and IT/IP mediation. Graham's work in ODR has led to his appointment as a Fellow of the National Center of Technology and Dispute Resolution (NCTDR) at the University of Massachusetts. He developed the leading training course in applying technology to ADR and, as such, has trained mediators from over 20 countries as well as developing and delivering a course for the Milan Chamber of Arbitration and for the UK Ministry of Justice. Graham has been invited to advise court services in the UK and Canada on applying technology tools to improve ADR. Graham was also the founder of LAWTEL the online legal information update service. He is widely acknowledged as the UK's leading expert on the subject and now heads the European operations for Modria Inc, a US spin off company to eBay (www.modria.com). Graham was a member of the CJC Working Group on Online Dispute Rresolution chaired by Professor Richard Susskind.

In his legal work, Graham had considerable experience in clinical negligence and in major high profile personal injury and product liability group actions, including the successful action against the UK Government for HIV infected haemophiliacs (which he founded and led) and was a member of the steering committee that negotiated the largest ever group settlement, being for miners made ill by coal dust inhalation). Graham has been the founder and member of over ten group action steering committees since 1987. Graham worked as such with the courts in what was then virgin territory for managing large numbers of claims. He was at the forefront of developments in the court management of personal injury and product liability related group litigation.

DISTRICT JUDGE LUMB

Richard Lumb was appointed as a District Judge (Civil) in 2011 following 11 years as a Deputy District Judge. He is Junior Vice President and Chair of the Civil Committee of the Association of Her Majesty's District Judges (ADJ).

As a solicitor in private practice for 25 years prior to appointment he specialised in all aspects of personal injury litigation including claims of the utmost severity and latterly with a particular interest in civil costs.

At Birmingham Civil and Family Justice Centre he is one of the nominated Specialist Personal Injury District Judges concerned with the case management of the most complex personal injury and clinical negligence claims. He is a Regional Costs Judge dealing with detailed assessments of costs of bills in excess of £100k with some bills over £1m as well as any particularly difficult costs issues that may arise. He also hears Financial Remedy Applications on Divorce and Private Family (Children) matters.

All of these areas of practice produce cases well suited to Mediation and other forms of ADR although in his experience to date those opportunities are seldom taken up.

STEPHEN LAWSON

Stephen Lawson is the head of Civil Litigation at the Warrington firm FDR Law. He is a member of the Law Society Civil Justice Committee, The Step Worldwide Council, The Step England and Wales Committee and Chair of Step Cheshire. Stephen is also a member of Actaps and the former secretary of Apil.