



ADR and Civil Justice

CJC ADR Working Group

Interim Report

October 2017

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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

mediations prompted by the Pre-Action Protocols are examples from within the civil court system.

Concurrent ADR

- 3.11. Classically ADR and mediation have occurred concurrently with the proceedings in court, often through judicial encouragement to mediation at case management hearings or through the promptings of the court's checklists and Guides.

Value of Dispute

- 3.12. It is also important to give separate consideration to different levels of value in dispute. What form of encouragement to ADR is appropriate (and what form of ADR is appropriate) will vary widely between for example

-- small claims and fast track cases below the level of £25,000

-- low- and mid-level multi track cases between £25,000 and say £150,000

-- high-value claims in excess of £150,000.

- 3.13. ADR provision is working very differently in each of these bands as Lord Briggs noted. Forms of encouragement and inducement that might succeed at the higher level (cost sanctions, pre-action protocols) will be of less use in lower value claims where parties may well not be legally represented at all.

- 3.14. We would note that there are some complexities around the issue of claim value. First the truth of the English system is that legal costs are themselves a highly significant component of the value at risk. Claims said to be worth £50,000 involve not just that sum but also the legal costs at stake, and are thus usually well over £100,000 and in some technical sectors such as clinical negligence far more. The Annual Report of the NHS Litigation Authority has produced some frightening figures each year to prove this point.

- 3.15. Secondly, and conversely, the clinical negligence sector demonstrates that Value at Risk in such claims embraces far more than just damages. Claims are often for relatively modest sums, especially in cases where death has resulted. Yet even though claimants cannot claim for more than modest damages, they sue because they want non-monetary extra-legal outcomes, even though they actually cannot obtain them from a judge. Many mediations in such cases spend a substantial proportion of the time dealing with such matters, and the damages claim is a small part of the discussion and is often a modest amount. Boundary disputes also illustrate that a dispute over a small strip of land with tiny damages at stake can destroy the value of both adjacent properties, as well as generate seriously destructive animosity between neighbours. This may argue for different ADR rules for different sectors, but both these points serve as a reminder that the damage claimed figure is only a very rough indicator of what may be at stake, and thus what may be proportionate. In 2016, the NHS Litigation Authority began to deploy mediation regularly through a permanent mediation scheme, following a successful pilot during 2015 and 2016; and in 2017 it

has re-named itself, significantly, NHS Resolution (we will refer to NHSR from now on). If there is one sector where a degree of compulsion to use mediation might be appropriate, perhaps on a pilot basis, it might be this. Here a safe confidential process enables fractured communications between patient and family and the NHS to be restored and extra-legal non-monetary benefits are constantly of importance of kind deliverable by mediation but frankly not by litigation or indeed RTMs.

The form of ADR

- 3.16. In Section 4 below we comment in more detail upon various different forms of ADR. We take a slightly narrower view of ADR than is taken in for example the CPR where we find negotiation and arbitration included as forms of ADR process.
- 3.17. In our view the essence of ADR is the deliberate creation of an opportunity for parties to explore calmly their real interests and to step back from the contentious atmosphere of the “battle” of litigation. All members of the working group, from their various different professional points of view, see this as the real value of ADR.
- 3.18. Most of the processes we are discussing here involve the intervention of a neutral third party who otherwise has no involvement in the dispute or litigation or trial process. But not all. There are ADR processes where there may be no human outside intervention. The RTA portal and the initial stages of online dispute resolution are examples.
- 3.19. We do not see arbitration, an adjudicative process, as within our remit even though in the strict sense it is “alternative” simply because cases decided in arbitration do not for the most part subsequently trouble the Courts.
- 3.20. Negotiation can take the form of formal round-table meetings or can be no more than a telephone call between legal representatives. We would welcome the views of consultees, but for our part we incline to the view that negotiation is and should be ever present. Negotiation can be conducted well or badly. But we are concentrating here on the techniques that can be brought into play when negotiation has not achieved settlement.
- 3.21. Achieving settlement in the perennial situation in which both parties believe in their cases and may well both be being advised that they have the better case is a serious challenge. It is a puzzle that conciliators and mediators are trained to unlock.
- 3.22. At present the availability of these techniques to litigants is too limited.
- 3.23. Acknowledging that there is an enormous variety of different techniques and processes and styles within each of these categories the ADR techniques that we concentrate on in our report are these:
 - (i) Consumer Conciliation and Ombudsman
 - (ii) Mediation

- (iii) The RTA portal
- (iv) Judicial ENE
- (v) Online Dispute Resolution

Who are the neutrals?

- 3.24. We are also conscious that it is not just a matter of stimulating demand. There has to be a sustainable supply of neutrals, be they conciliators, ombudsmen or mediators, who are accepted as competent, who deliver a proportionate process and who are administered, rewarded and organised sustainably. Again this is likely to be a different and bigger challenge in lower value disputes. The ADR process will almost certainly need to adapt to fit the sums in issue. Many of the opportunities and challenges we discuss below are directed as much to the ADR community as to Judges and rule-makers.

The civil justice case-load

- 3.25. The picture painted by the Judicial Statistics for the four quarters ending on 30 September 2016 (the last available data) is that a little under 1.8 million claims were issued in the civil courts. Of these around 85% (roughly 1.45 million) were money claims of all types and 15% (about 285,000) non-money claims, such as mortgage and housing possession claims, insolvency and a range of Chancery claims. Of the 1.45 million money claims, around 90% (over 1.3 million) were claims for a specified sum of money (mainly debt), and around 10% (roughly 145,000) were non-specific money claims. 95% of the non-specific claims were personal injury (PI), presumably including clinical claims also.
- 3.26. Because the vast majority of claims are simple debt claims which will not be defended the cohort of disputes which might be assisted by ADR is clearly narrower than the raw total of issued claims. In the same period, **just over 145,000 out of 1.8 million issued cases of all types** (money and non-money claims) **reached allocation stage as being defended**. There were roughly 800,000 judgments in 2015 (this includes consent judgments and judgments in default, but not settlements or Tomlin Orders), but only **roughly 50,000 trials to judgment**.
- 3.27. Of the defended claims around 48% were allocated to the small claims track (claims of up to £10,000 but currently excluding PI claiming more than £1,000), 44% to the fast track (claims broadly of up to £25,000) and just under 10% to the multi-track.
- 3.28. In value terms the civil justice case-load is a pyramid with a very broad base.

The challenge

- 3.29. We would summarise the challenge we face as being to promote the use of ADR and mediation especially in those parts of the civil justice system where they are palpably under-used while meeting the following objectives:

SECTION 3: OUR APPROACH AND THE SCOPE OF OUR WORK

- 3.30. Proportionality: The ADR offered must not be disproportionately expensive or time-consuming to the value or importance of the case.
- 3.31. Suitability: The ADR provision must not burden the large majority of claims which will not be defended as to liability or amount. Even in contested cases we must be aware of the risk that some will be forced unwillingly into an unfamiliar process where the proceeding could be perfunctory and meaningless.
- 3.32. Quality: The ADR interventions must be conducted by neutrals of quality and experience.
- 3.33. Sustainability: There must be viable provision for the funding (or provision pro bono) of both the necessary administration and of the ADR services themselves.
- 3.34. Accessibility: there must be efficient access by the public to the ADR provision making use of all of the available technology.
- 3.35. Coherence: there are already, as we shall see, some signs that the different ADR provisions and the prompts for their use are not working coherently together and it is vital that any group of changes is examined in the round to ensure that the result is a joined-up and coherent system.
- 3.36. The scale of the challenge is frankly obvious. The ideal would be that mediation is utilised widely and to the fullest extent necessary to foster a healthy and efficient civil justice system, with well-informed parties and advisers fully trained and experienced in its deployment setting up mediations at the right time in the life of claims, settling them wisely “in the shadow of the law” with a consequently high level of satisfaction for their clients, and thus freeing the judiciary to try cases where good faith disagreement renders them incapable of settlement, and ensuring affordable and timely access to justice for all. This is not a realistic description of the current civil justice system.

SECTION 4: THE LANDSCAPE OF ADR PROVISION IN ENGLAND AND WALES

(1) Consumer Conciliation and Ombudsmen

- 4.1. This is numerically the busiest area of ADR activity in relation to claims that could at least in theory be pursued in the civil courts.
- 4.2. The Financial Ombudsman Service (FOS) FOS handled 1.6 million enquiries in their last full year, and investigated 341,000 new cases. They settled just under 450,000 cases. Over one half of their cases were about banks and their customers, many over PPI. The Housing Ombudsman Service (HOS) HOS received just under 15,000 enquiries in its last full year and made determinations in just under 1,000, resolving the rest through their interventions.
- 4.3. NHS complaints in 2015 stood at 207,000. This is likely to be a significant underestimate of the potential for dissatisfaction about the NHS in both hospitals and GPs and dentistry. The Parliamentary and Health Service Ombudsman (PHOS) deals with a very tiny number of these, in the vicinity of 1,500 per year.
- 4.4. Beside these there are now a plethora of industry-specific complaints and dispute resolution mechanisms offered, details of which are too many and varied to include here. On-line retailers have well-established complaints and grievance systems that offer ADR solutions apparently with considerable success. The Amazon Payments Buyer Dispute Programme is a good example. In a 2010 study for the OFT 95 discrete schemes were identified covering 25 business sectors. DBEIS is encouraging the growth of sector-specific Ombudsmen. The Small Business Commissioner has as one of its main priorities the efficient resolution of disputes involving small business and the use of conciliation and ombudsmen is an important part of that effort. It may be doubted whether all or even most of the consumer claims would be of a scale which would be seen as justifying even small claims proceedings for many members of the public. But anecdotally there is a core of quite substantial claims being dealt with under these systems. The FOS compensation limit is currently £150,000.
- 4.5. What most of these schemes have in common is that in addition to the familiar techniques of mediation between the parties the neutral will, if necessary, reach a determination or recommendation as to disposal. This will be usually not be binding, at least not on the customer who will still be free if he or she chooses to go to court.
- 4.6. The FOS is a good example. The complaints handler will attempt to mediate a solution but will make a recommendation if he cannot obtain an agreement. If either party is unhappy with that recommendation there can be an appeal to the Ombudsman. The Ombudsman's decision is binding at the option of the customer who can still go to court if dissatisfied.
- 4.7. It seems clear that these schemes are helped by the relative specialisation of the work they do and the number of repeat issues they deal with. This enables cases to be handled affordably by relatively junior staff, at least at first instance. As an extreme

example the PPI cases handled by FOS in vast numbers will tend to be repetitious and can be assessed and dealt for the most part in a relatively formulaic way. There may be a contrast here with the broader more diverse court jurisdiction. We recall that because of the diversity of the Court case-load Lord Briggs was reluctant to permit evaluative work to be conducted by anybody other than a Judge.

- 4.8. A recent development in this area has been the Directive on Alternative Dispute Resolution for Consumer Disputes (2013/11/EU) . This creates a framework for the regulation and delivery of consumer conciliation services. In particular it requires suppliers of services to publish the details of their preferred ADR provider. The measure has also seen the setting up of what is (by the standards of this area) a very significant regulatory structure for mediators and providers. There is no obligation (even on the part of the supplier) to use such processes in any given dispute and, there appears to be widespread dereliction when it comes to compliance. Anecdotally these measures have not increased observably the volume of consumer ADR activity. The availability of free small claims mediation may be deterring suppliers from using a system they have to fund.

(2) Mediation

- 4.9. Mediation can be regarded as the pre-eminent non-adjudicative dispute resolution process conducted in parallel with litigation. Almost all the decided cases about ADR have actually been about mediation. It is common for cases to be stayed for mediation on the route to trial.
- 4.10. As to the current extent of mediation practice, statistics are hard to acquire, by reason of the very confidentiality that makes mediation work. CEDR (a not-for-profit organisation set up in 1990 to develop ADR policy and practice, train mediators and provide access to mediation and other ADR processes) reported continuing growth in its Seventh Audit (2016) and found that there are probably around 10,000 commercial mediations per year. About 145 mediators deal with 85% of mediations in the commercial sector and most novice and intermediate mediators do no more than four mediations a year.² These figures embrace non-family civil disputes of all values.
- 4.11. Most of the mediations reported by CEDR will be based around a one-day session where the parties (and usually their lawyers) are physically gathered in the same offices with a mediator exploring possible solutions alternative to court proceedings.
- 4.12. CEDR does not audit the value of the disputes being described. It is our experience and clearly also the experience of others³ that mediation is used well and widely in high value cases that are safely inside the High Court scale. Average claim values indicated by leading mediation providers disclosed very high figures. It seems obvious that it may well be difficult to justify the expense of the standard one-day approach described above in cases of lesser value. There is also an observable concentration of

² Fees are normally split between the parties and more than 50% of mediation fees are £3,000 or less for a day's mediation plus preparation. It may be necessary to pay for a venue with at least two normally three separate rooms available. Parties are likely to incur the additional expense of having their lawyers attend.

³ CCSR Final para 2.24

mediation experience and expertise in the kinds of law firms that deal with higher value cases. At the other extreme where lawyers are not involved at all it is highly unlikely that litigants or potential litigants will have the confidence and knowledge to suggest mediation. We will discuss the lessons to be learnt from family mediation in a separate section but as Lord Briggs noted the effect of the withdrawal of Legal Aid from certain family law disputes was a catastrophic collapse in the use of mediation in those cases. Mediation is not yet culturally normal and without professional advice the public are generally not familiar with it or comfortable about using it.

- 4.13. The CEDR figures do not include the roughly 10,000 Small Claims Mediations run under the auspices of the County Court scheme and conducted by employed HMCTS mediators. These mainly employ a time-limited one-hour technique and are free of charge. The parties agree to make themselves available at a specific time for sequential telephone conversations with the mediator. There are or have been clear capacity constraints on the provision of this service to parties. These mediations settle a very significant proportion of the cases they handle and have high customer satisfaction levels.
- 4.14. Hence it may be said that there are two areas, each at the extreme ends of the civil justice value scale, where satisfactory use is being made of mediation: the parties who are able to take advantage of the small claims mediation scheme on the one hand and individuals or companies whose disputes are of very significant value on the other.
- 4.15. The Technology and Construction Court is a good example of a high value jurisdiction where most of the lawyers and many of the parties are familiar with mediation. The vast majority of cases settle with cases settling by negotiation or mediation in a ratio of roughly 2:1⁴. The vast majority of the mediations were undertaken at the parties' own initiative and not at the prompting of the court. We would expect the Commercial Court to show a similar pattern.
- 4.16. As to division by work type, one senior group of experienced mediators indicated that their average workload splits as follows:

Commercial contract	45%
Professional negligence	42%
Intellectual property	5%
Construction	2%
Insurance	3%
Employment	2%
PI/clin neg	1%

They also confirmed that they had not been asked to convene any ENE or other ADR processes, and that 90% of their referrals were by party agreement as opposed to outside nomination. It is clear that there are other specialist areas in which mediation is widely used; contentious probate is another example.

⁴ The Use of mediation in Construction Disputes, Gould and Others, 7th May 2009.

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- 4.17. As to who provides mediation in England & Wales, some figures have been made available to us by the Civil Mediation Council, a not-for-profit representative organisation set up in 2003 which has been successively chaired by Sir Brian Neill, Lord Slynn, Sir Henry Brooke and Sir Alan Ward, and which has been publishing standards for mediation providers and mediators and granting registration to those who meet them, without being a formally constituted regulator. These show that there are now 53 registered mediation providers. They are all registered for civil and commercial mediation, although some also provide workplace mediation. The CMC has no current scheme for registering providers for solely workplace mediation, and does not register family or community mediation providers. (We note that a significant number of mediation providers and mediators do not support the CMC by becoming registered members).
- 4.18. We are mindful that even these systems place a considerable burden on an organisation which is funded solely by subscriptions, subscriptions paid by a mediation community very few of whom actually make a living from mediating. The CMC has two part-time employees and relies on the commendable voluntary efforts of the members of its Council and Committees to cope with registration procedures. Limitations of the current system include the lack of any procedure for disciplining registered mediators or mediation providers or, in reality, for investigating complaints against them at all. There is only a system for mediating between those who wish to complain and the mediation provider or mediator, the subject of the complaint. We want to discuss whether these are felt to be limitations which are inhibiting the growth of mediation and, if they are, how they might be remedied.
- 4.19. The geographical spread of the registered providers is as follows:
- London – 25
 - Home Counties – 7 (3 of these are in Essex)
 - Northwest – 5
 - Southwest – 4
 - Oxfordshire - 3
 - Northeast - 2
 - East Anglia - 2
 - Hampshire – 2
 - East Midlands – 1
 - West Midlands 1
 - Wales – 1
- 4.20. Each of these providers has to have available a panel of at least four qualified mediators who have the benefit of professional indemnity insurance.
- 4.21. This demonstrates a good national coverage, sufficient to provide mediation back-up for the national County Court. Additionally, a number of the larger providers supply mediators for all parts of the country.
- 4.22. There are 12 mediator training organisations registered with the CMC, and currently there were 223 CMC individual registered mediators. Registration with the CMC as

individuals is entirely voluntary. There are likely to a far greater number of mediators who are mediating either (and mostly) part-time or (in rare cases) full-time. It would be no exaggeration to say that several thousand people have invested time and (not insignificant sums of money) in undertaking training and being assessed as to competence. That is not a driver for making any particular changes to the civil justice system but it is as Lord Briggs has recognised a resource that can be exploited.

- 4.23. In terms of ADR provision directed at low value cases and litigants without means we are aware of some examples of pro bono schemes. An example is the scheme available through the advice centre at the Royal Courts of Justice. Mediation is provided free of charge under an arrangement with a particular set of barristers' chambers. Interestingly one important value of the process is seen to be the assistance the barrister is prepared to offer in drafting a satisfactory settlement agreement. We believe larger scale pro bono schemes have so far failed, mainly because of the cost and burden of administration rather than a lack of ready supply of mediators.
- 4.24. Lord Briggs reported on the local time-limited court-based mediation schemes which operated in a number of County Courts some years ago. These had real traction and their demise was much lamented. We are delighted that on a pilot basis these schemes are being revived at the instance of recommendations made in the CCSR Final Report.
- 4.25. Our collective recollection is that the advantage of the National Mediation Helpline ("NMH") was thought to be its national coverage and also a belief that for procurement reasons criticisms could be made of the County Court schemes. Any provider who satisfied the CMC provider requirements could be listed on the NMH rota and work would be allocated to them.
- 4.26. We think the NMH in due course fell victim to budget cuts but also, it has to be said, to a declining case load. What remains is the civilmediation.justice.gov.uk listing of mediation providers, again limited to those with CMC registration as the condition of inclusion. These organisations offer mediation on a relatively low fixed fee tariff. Indications that we receive are that this portal is rarely used and that the organisations involved derive relatively little work from it.
- 4.27. The only current court-annexed mediation scheme is the Court of Appeal Mediation Scheme,(CAMS) which has been running in its present form since 2003. The Court has an approved panel of mediators and the administration of mediations is currently handled by CEDR on behalf of the Court at modest fees per party. Certain cases are referred to mediation under a scheme covering appeals in personal injury, clinical and professional negligence claims of up to £250,000, although parties can opt out. In any other type of appeal, a Lord Justice can suggest that mediation is tried when considering permission to appeal, or parties can elect to use the scheme. The scheme does remain under-used.

Limitation

- 4.28. The European Directive on Mediation required member states to address the problem of parties being driven to litigate rather than use ADR by the imminent expiry of a limitation period. The Cross-Border Regulations therefore added a new provision, section 33A, to the Limitation Act 1980. This provides for an extension of any limitation period which would otherwise expire during the currency of a mediation until a date eight weeks after the mediation ends. Similar amendments are made to other legislation containing limitation periods such as the Sex Discrimination Act 1975 and the Employment Rights Act 1996. These provisions only apply to the cross-border disputes. None of the members of the working party have any record or experience of these provisions coming into play in practice.

Enforcement

- 4.29. Where proceedings are on foot it is standard procedure for the parties to agree the terms of a Tomlin Order when settling a case. This is not available where the parties are mediating before proceedings have begun. Another consequence of the European directive is the provision made for parties to a mediation settlement to apply to the court for an order giving the settlement the force of a judgement. These are mediation settlement enforcement orders (MSEOs). These are available without a hearing but all parties must consent. These rules again only apply in cross-border disputes. The members of the working party have no recollection or experience of these procedures being used. We speculate this is because in most settlement agreements one party has agreed to pay money in exchange for a claim being dropped. In that situation the MSEO seems to advantage only the recipient and it is hard to see why a paying party would agree.

Confidentiality

- 4.30. There has been criticism in England and Wales of the extent to which the courts protect (or fail to protect) the confidentiality of the mediation process. In a number of reported cases the extent of the protection afforded by without prejudice privilege was tested where reference was sought to be made in subsequent or collateral proceedings to what had occurred at the mediation. (See for example the 2009 *Farmassist* decision⁵ in which the court upheld a witness summons served on a mediator to compel her to attend to give evidence as to whether duress had been exerted during settlement discussions). There were even calls for a Uniform Mediation Act for England and Wales and fears were expressed as to the viability of mediation here.
- 4.31. The law will no doubt continue to be developed case-by-case. But the working party does not think that the state of the law of without prejudice privilege in England and Wales is a major obstacle to the further progress of mediation and ADR.

⁵ [2009] EWHC 1102 (TCC)

(3) The RTA portal

- 4.32. The RTA portal has been in operation since 2013. It is a pre-action protocol which prevents issue of motor, EL and PL claims for personal injury and other damage before the parties have followed a prescribed exchange of information designed to achieve swift resolution in straightforward claims where liability is not in issue. . It is unlike the other ADR interventions discussed above in that it does not involve the intervention of a human third party neutral in the dispute. It is however predicated on the involvement of lawyers on the Claimants' side and a limited costs recovery is permitted to reward them. The RTA Portal is considered further below.

(4) Judicial ENE

- 4.33. The CPR and the various Court Guides have since the time of the Woolf reforms made provision for Early Neutral Evaluation. ENE seems to have been very rarely used indeed. The number of private ENE's of which the Working Group are aware is also vanishingly small.
- 4.34. Many of us were unaware that certain county courts were using robust ENE hearings conducted by Judges in their small claims lists (similar in style to the FDRs conducted in the Family Court) These are described in the final CCSR report at paragraph 2.17. Attendance is compulsory in that parties not attending have their claims (or defences) struck out. The Judge conducts informal ENE and in the event that the case does not settle the Judge is in a good position to make appropriate directions for the remainder of the proceedings.
- 4.35. It is likely that case officers in the Online Court will be able to use hearing of this kind as one approach to using ADR at Tier 2.

(5) Online Dispute Resolution

- 4.36. This is perhaps the newest of the contenders. Online dispute resolution offerings are increasingly available. They are an opportunity to extend the benefits of ADR to many disputes in which physical distance, or time constraints or simple low value would make a traditional face to face mediation very difficult to achieve. They obviously hold major potential advantages in terms of convenience and cost but the more exciting recent developments around data analytics and digital intelligence, as featured in the Online Court Hackathon⁶ recently organised by the HMCTS and others, are beginning to identify how ODR can also improve quality of outcomes.
- 4.37. There is a huge variety of different approaches and varying degrees of subtlety in the design of these systems. But typically these systems begin with an online inter-action with the parties which replicates the scene-setting performed by pleadings. They may direct the party to sources of appropriate online or other advice and then move on to questions which closely resemble the initial stages a an orthodox mediation. A designed stream of questions helps the parties to think through all of their interests

⁶ <https://www.onlinecourtshackathon.com>

and all of their options in relation to the dispute. It might for example, to move beyond lawyer-instigated questions and stray into mediator-raised questions, ask whether there was a pre-existing business relationship with the other party and whether there is a prospect of, or interest in, that continuing or being restored.

- 4.38. If the dispute does not settle on this basis then typically a human mediator will be available to the parties perhaps by web-conferencing or asynchronous text exchange. The key is that if they are necessary at all these later inter-actions are much more effective and less time-consuming because the system has “done the groundwork”. ODR also offers an efficient means for negotiations to continue after the main mediation inter-action has taken place.
- 4.39. ODR ideas were discussed in detail in the earlier CJC working party report prepared under the Chairmanship of Professor Richard Susskind QC. ODR ideas are now being adopted by the courts themselves, most obviously in the Online Solutions Court.
- 4.40. The Scottish Civil Justice Council has very recently published proposals for the use of ODR techniques in Scots Civil Procedure. These go beyond the taking of familiar procedural steps online. The proposals include the possible introduction of a system of blind bidding on line:

“Sometimes both parties are willing to settle at a similar level, but neither party is willing to let the other party know that, for fear of losing bargaining ground; and neither party wants to make the first offer, with the result that the case fails to settle, or only settles very late in the day, resulting in wasted legal expense and Court time.

...

Double blind bidding, on the other hand, is a system whereby both parties submit blind (sealed) bids to a third party, with the proviso that if the bids come within a an agreed percentage of each other, a settlement is deemed to have been agreed.”⁷

- 4.40. A Canadian company, iCan Systems Inc, have a system for blind bidding at the heart of its SmartSettle One+ ODR solution and provides video demonstrations as well as the ability to live test the system against a robot.⁸
- 4.41. For so long as defendants are exposed to cost shifting orders, they have a vested interest in settling early when costs are low. This, of course, is especially so in cases in which they cannot credibly challenge on liability. In such cases settling with a high early offer but with minimal costs could cost them less in total than settling lower later down the line when cost are high. It is likely that defendants do not however make high opening offers out of fear that the transparency of open bidding will damage their negotiating position should the case not settle on the high early offer. With blind bidding that fear does not apply since the high early offer that does not settle is not revealed and the defendant can post lower, and, perhaps, more realistic, offers later

⁷ The New Civil Procedure Rules, first report, May 2017, SCJC, at pg 64.

⁸ See <https://www.smartsettle.com/products/smartsettle-one/>

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down the line. In other words blind bidding can encourage early settlement when costs are low.

SECTION 5: CURRENT MEASURES FOR THE ENCOURAGEMENT OF ADR

Pre-action ADR

- 5.1. Whether or not ADR is involved there is considerable settlement activity at all levels of claim during the relevant limitation periods. This is hard to measure. In PI, for instance, if the CRU annual figure for reported claims (just under 1 million) is set against the annual figure for issue of such claims (around 145,000, once the RTA Portal procedure has winnowed out undisputed cases), this suggests, very crudely, that something like 85% of such claims settle (or capitulate) and only 15% are issued.
- 5.2. The Briggs report suggests that “the modern emphasis is upon pre-issue ADR”. We certainly agree that it should be. Whether and to what extent truly pre-issue ADR is occurring outside the world of consumer conciliation and ombudsmen is extraordinarily hard to assess even by the standards of this area.
- 5.3. Statistics about how many cases settle pre-issue and how many mediations are convened pre-issue are virtually impossible to assemble. Anecdotally in 24 clinical negligence mediations conducted by Tony Allen, a member of the CJC Working Party, over the last three years, of the first 12 of these in time, 11 were convened within 12 months of trial and only one was convened pre-issue. But in the 12 mediations in the second half of that period, 6 (half) were convened pre-issue. Bill Wood’s assessment would be that pre-action mediations are now around one-third of his workload where even five years ago the proportion would have been much smaller.
- 5.4. Of course parties will often delay mediation quite consciously not just until litigation has started but until certain stages such as disclosure or expert evidence have been accomplished. There may be good reason for this. But it is the abiding impression of those of us who mediate that parties to mediations very frequently express astonishment (even pre-litigation) that “*things have got this far*”. They say they regularly resolve disputes both large and small by simple negotiation and “*can’t imagine why this one has gone legal*”.

Encouraging Pre-Action ADR at Source

- 5.5. The consumer conciliation and ombudsman services tend to deal with consumer disputes where the supplier is either required to or voluntarily does offer these forms of dispute resolution to the dissatisfied customer as part of their initial complaint handling process. These are of necessity pre-action ADR techniques invoked at the outset often before there is any thought of or reference to legal advice or the possibility of litigation.
- 5.6. A major incentive for a consumer to use the FOS and other ombudsman and conciliation schemes is of course that they are normally free. Most industry complaints schemes are also free to the consumer, and funded by the relevant business in various ways.

- 5.7. Separately many commercial contracts, including those involving public bodies, contain “ADR contract clauses”, whereby the parties contract to utilise a specified, often stepped series of dispute resolution processes before initiating court or arbitral proceedings. Typically, these will require “friendly negotiations” between specified (sometimes more than one) level of negotiator, failing which a mediation process is defined and invoked. Only once those channels have been exhausted may parties begin litigation or arbitration. The courts have become increasingly ready to insist that parties follow such agreed processes before allowing them access to the courts.
- 5.8. It is fair to note that in many industries including construction, insurance and financial services parties and their lawyers are prepared to consider mediation on their own initiative. It is clear that parties in higher value disputes, often unbidden by their lawyers or even without contacting their lawyers, are agreeing to mediate well in advance of proceedings. They do so because they recognise the virtue of mediating early and they are comfortable with the process. Provided an affordable and proportionate process can be made available it seems to us that this approach can be encouraged at all levels of civil justice. .

Encouraging pre-action ADR at the commencement of proceedings

- 5.9. The CPR established a novel and specific authority to exercise retrospective costs control over pre-issue litigation conduct, enshrined in CPR 44, giving judges’ power to sanction unreasonable litigation conduct at any time during the life of a claim, if necessary by penalising a winning party or by extra penalty on a losing party who litigated in an unreasonable way. This has had a significant impact on litigation conduct in a jurisdiction where costs are high and generous costs recovery is an important ancillary motivator in litigating at all. Broadly parties behave better than they used to before the CPR and the litigation culture is more civilised. But the direct case management powers and responsibilities newly conferred by the CPR on the courts do not and cannot govern conduct earlier than issue of proceedings. In his preliminary report Sir Rupert Jackson mooted the idea of court access to enforce pre-issue obligations over exchange of information, and this might have been applied to requiring compliance with ADR obligations. However, doubtless fearing satellite “pre-litigation litigation”, this idea has not been apparently been pursued. Similarly there are no retrospective costs controls available in cases when issued to control pre-issue expenditure, something about which the NHR has complained frequently.

Pre-Action protocols

- 5.10. Specific to pre-issue litigation conduct, the Pre-action Protocols (PAPs) and the Practice Direction: Pre-action Conduct (PDPAC), introduced in 1999 and subsequent years and modified since, have undoubtedly influenced parties to exchange adequate information so as to make it reasonably possible for meaningful settlement discussions to precede and if possible forestall the issue of proceedings. They have not been free from criticism from professionals and judges, including Sir Rupert Jackson, as risking expensive front-loading of legal costs at a period of making a claim which is very hard to police budgeting retrospectively. But we feel that on the whole

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the PAPs have served a useful purpose, certainly by abolishing the single letter of claim followed by a writ which was not at all unusual 30 years ago.

- 5.11. We would make two immediate observations about the current operation of the PAPs, the first about language and the second about enforcement.
- 5.12. First, the language of the PAPs. The PAPs are significantly inconsistent in the way they are framed when dealing with ADR. For instance, contrast the following paragraph from the PD:PAC:

If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

with the corresponding provision in both the Personal Injury and Clinical Negligence PAPs:

If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR, but a party's silence in response to an invitation to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs. (our emphasis)

- 5.13. The underlined words do not appear in the PD:PAC, but they do appear without qualification in the PAPs concerning Defamation and Commercial Dilapidation claims. They are omitted from the comparable paragraph about ADR in the Professional Negligence, Judicial Review, Housing Disrepair and Mortgage Repossession PAPs. The Disease and Illness PAP (surprisingly) and the low value motor accident PAP (unsurprisingly) are both entirely silent on ADR.
- 5.14. There is a distinct difference in tone from the permissive “may” which pervades the PAPs when their language is contrasted with the usual QB Order devised by the Senior Master Fontaine and in wide use for a year or two. This reads:

At all stages the parties must consider settling this litigation by any means of ADR (including [round table conferences, early neutral evaluation] mediation [and arbitration]) and in any event no later than [date]: any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the judge until questions of costs arise. [our emphasis]

- 5.15. The second problem is that it is not clear to what extent PAP obligations are policed. The marked response to deterrent decisions in such cases as *Dunnett v Railtrack* and *Mitchell v News Group* shows that lawyers and their clients are very sensitive to the risk of sanction. Hitherto there has been no clear decision sanctioning failure to observe PAP obligations, and however vigorously compliance is insisted upon by the

parties at the time breaches can it seems go largely unheeded by the court. There is a strong case for early judicial enquiry at allocation stage about why no ADR process has been used, and firm steps taken to ensure its immediate deployment unless there is good reason to the contrary.

- 5.16. A different PAP created the process which is still called the RTA Portal. The procedure now relates to the handling of PI claims worth up to £25,000 arising from motor, EI and PL accidents, with two PAPs setting out similar procedures. These represent, in a sense, the first formal implementation of Online Dispute Resolution (ODR) in the civil procedure of this jurisdiction, and appears to work well. It deals with cases in which liability is admitted. The parties have access to the courts if (but only if) they become defended or where quantum cannot be agreed. Fixed costs are awarded. The preamble to each of the PAPs involved sets out their objective in exactly the same words:

This Protocol describes the behaviour the court expects of the parties prior to the start of proceedings where a claimant claims damages valued at no more than £25,000 in an employers' liability claim or in a public liability claim. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where this Protocol is not followed.

- 5.17. The word used to qualify the steps to be taken thereafter in each of the low-value claims PAPs is the word "**must**". So while access to the courts is not formally denied to a claimant who ignored the effect of these PAPs, the firm impression is that such a claimant will not get any costs even if they win. We have the impression that the RTA Portal has *de facto* become a mandatory requirement of these claims, even though on paper the only sanction for non-compliance would be costs. This is presumably because the economic advantages of using the system and the provision for the cost of legal advice which is made make this an offer the Claimant really cannot refuse.
- 5.18. Again we note what seems to be an inconsistency of tone between PAPs governing the portal cases and the remaining PAPs. We recommend a consistency of language, tone and intent in dealing with pre-issue ADR obligations that matches other PAP obligations and also the tone of case management that will prevail as soon as proceedings commence. The portal system appears to be a success, probably because both claimant lawyers and defendant insurers are committed to its working. The former get fixed costs (but better than no costs at all if the small claims limit goes up to £5,000) and insurers can have a defined route to settling simple indefensible cases with a clear procedure and limited expense, in which they do not need their own lawyers, and claimant costs are predictable.
- 5.19. Whether the same process is applicable to simple claims in other sectors is an interesting question, for instance clinical claims. A much higher proportion of clinical claims are rejected or defended than in other injury claim sectors, but there may be a certain number of lower value indefensible claims that a portal could resolve. It must really be for NHR and the medical defence organisations (MDOs) to take the initiative on this, as they will have the data to assess whether there are enough possibly qualifying claims to make such a system worthwhile.

- 5.20. The biggest problem with PAPs however is that they simply may not work in the lower value cases which are fast becoming a lawyer-free zone. We think it is difficult to see the ordinary citizen with no legal advice navigating towards the correct protocol for his or her claim and complying accurately with its terms. Sanctions based around costs may well be an irrelevance. The RTA portal assumes the involvement of lawyers and makes provision for their fees

Other HMCTS guidance documents for litigants

- 5.21. The guidance documentation published by HMCTS already contains several prompts of exactly the right tenor. A citizen who seeks to make a claim faces numerous prompts to consider ADR from the court service through paper leaflets and online. Each of the following documents is available as a paper leaflet and as a page on the <http://www.courtandlegal.com> website.
- 5.22. The page "*Make a Claim for Money*" includes in its first paragraph the advice "*A mediation service ([HTTP.www.civilmediation.justice.gov.uk](http://www.civilmediation.justice.gov.uk)) could be quicker and cheaper than going to court. Mediation is when an impartial person helps both sides work.*"
- 5.23. The civil mediation link takes you to a page headed "*Find a civil mediation provider*" enabling you to search the database of mediation providers who provide fixed fee mediation services on a county-by-county basis.
- 5.24. The leaflet EX301 "*I'm in a dispute – what can I do?*" is at pains to explain ways you can settle a dispute without going to court and includes this passage :

"Do all disputes have to be settled in court?

No. Going to court should always be a last resort. It can be expensive, stressful and can take a lot of time.

Before going to court you should always try to reach an agreement. If you are in dispute with an organisation, you should use the organisation's complaints procedure before thinking of making a claim through the court.

If you make a claim through the court without making any effort to reach agreement first, you may find that the judge will hold this against you when considering paying the costs in the case. You may not get your costs back, or the court may order you to pay the other parties costs, even if you win the case. Other ways you might try to reach agreement? Processes like negotiation, mediation and arbitration. They are often more informal than the court process.

Can I sort out my dispute without going to court? There are many ways you could try to sort out that do not involve going to court. The method you choose will depend on what sort of dispute you have, and how you want it dealt with. These methods include the following.

Negotiating an agreement...

Using an ombudsman...

Mediation⁹

Arbitration...

Regulator...

Why choose these other ways to settle a dispute?

These other ways to settle disputes are not meant to replace the courts, but they can have advantages over again.

They will usually be more flexible

Solve your problem faster.

Be less stressful and Cost you less money....

If you're having regular problems with a person, company, organisation, for example an ongoing dispute with a neighbour or a company you deal with, you might find that mediation could bring about a better, longer-lasting solution to your problem...."

5.25. All those options are then further explained.

5.26. Page EX306 "the small claims track in the County Court" contains a succinct account of the operation of the small claims mediation service under the heading "Can we settle the case and avoid a hearing?" It explains how to access the small claims mediation service using the appropriate entries in the directions questionnaire for the small claims track.

5.27. That questionnaire includes question A1

"Do you agree to this case being referred to the Small Claims Court mediation service?

Yes/ no

Please give your contact details below – before parties agree to mediation your details will be passed to the small claims mediation team who will contact contact you to arrange.

5.28. The claim form itself contains no reference to ADR of any kind.

5.29. We are aware that there was a proposal in 2008 that the claim form should be re-drafted to include a box after the particulars of claim section as follows:

"Settlement, pre-action protocols and mediation"

Before any claim is started, the court expects you to have complied with the relevant pre-action protocol, and have made efforts to settle your dispute using some form of alternative dispute resolution procedure, such as mediation. If you have not yet done so, it is not too late to consider this.

Have you complied with the relevant pre-action protocol? Yes/No,

⁹ The definition of mediation refers to the role of the independent neutral and the autonomy of the parties in reaching a solution but then says: "However, any agreement reached is voluntary so you cannot force the other side to stick to it." While a mediated settlement will not necessarily lead to a judgement of the court or be enforceable as such this description seems seriously misleading.

If no please explain why? [There is then a space for an explanation]

Would you like to attempt to settle this claim by mediation? Yes / no."

- 5.30. That proposal was not pursued.
- 5.31. The documentation available to the Defendant receiving a claim, makes some references to the possibility of a mediated solution to the dispute but these are much more limited.
- 5.32. The response pack itself does not make any reference to ADR. The leaflet EX303 "A claim has been made against me – what should I do?" Says this on page 2 paragraph

Remember, you can still talk to the person making a claim against you. Many people think that there should be no contact between the people involved once the court process has begun. That is not true. Although you have to reply to the claim within 14 days, you're probably find it helpful to contact the person making the claim (or their legal representative) to discuss how to settle the dispute."

- 5.33. Then on page 7 of 9 in a flowchart mapping out the way in which a court claim progresses there is the following:

"Finding an alternative to court

The court says that you must try to settle the dispute in ways other than going to court. These are generally cheaper and faster. If an alternative way is successful, you leave the process here."

- 5.34. Where cases have been allocated to the small claims track the page EX306 "the small claims track in the civil courts" (see above) is drafted so as to be equally applicable to the position of Defendant and Claimant.

Concurrent ADR

- 5.35. The use of case management and cost sanctions to promote the use of ADR during the currency of proceedings is now well-established. The rules of court have long sought to promote the settlement of cases and the rules for the making of Part 36 offers (and before that payments into court) are a core element of the civil justice system.
- 5.36. The promotion of ADR was a vital pillar of the Woolf reforms and is strikingly embodied in the overriding objective.
- 5.37. The various Court Guides all include discussions of and expressions of support for ADR. (See for example section G of the Commercial Court Guide). It is now clear that lawyers handling litigation are under a professional duty to advise their clients as to the possibility of ADR. (*Halsey, Garrett-Critchley*).
- 5.38. Allocation questionnaires and pre-trial checklists require parties to confirm that they have considered ADR and to indicate their view as to the appropriateness of ADR. ADR

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is generally the first issue raised in these documents. The courts will grant short stays in the trial timetable to provide a window in which ADR can take place.

- 5.39. The Directions Questionnaire in the small claims track begins by reminding parties that:

“Under the Civil Procedure Rules parties should make every effort to settle their case. At this stage you should still think about whether you and the other party(ies) can settle your dispute without going to a hearing ...

Mediation is usually carried out by telephone in one hour time limited appointments convenient to the parties and is quicker than waiting for a court hearing before a Judge. There is no obligation to use the Small Claims Mediation Service nor are you required to settle if you do. If you are unable to reach agreement with the other party at mediation, the claim will proceed to a small claims hearing.

You can get more information about mediation from www.gov.uk”

The party completing the questionnaire is then asked whether he or she agrees to the case being referred to the SCMS. The questionnaire is then asked the yes/no question whether he or she agrees:

“If all parties agree to mediation your details will be passed to the small claims mediation team who will contact you to arrange an appointment.”

- 5.40. In the Directions Questionnaire for the fast track and multi-track, the opening paragraph again deals with settlement.

“Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing. This could be by discussion or negotiation (such as a round table meeting or settlement conference) or by a more formal process such as mediation. The Court will want to know what steps have been taken. Settling the case early can save costs, including court fees.”

There are then a series of questions beginning with a question for the legal representatives (if any) who are required to confirm that they have explained to their client the need to settle, “the options available” and the possibility of costs consequences if they refuse to try to settle. The questions to be completed in all cases are as follows. All parties, whether represented or not, are then asked the following yes/no questions:

“Given that the rules require you to try to settle the claim before the hearing, do you want to attempt to settle at this stage?

If yes, do you want a one month stay?

If you answered “no” to questions 1, please state below the reasons why you consider it inappropriate to try to settle the claim at this stage.

SECTION 5: CURRENT MEASURES FOR THE ENCOURAGEMENT OF ADR

There is then a box for reasons for a “no” answer to be given. A side note reminds the parties that the Court may order a stay whether or not all the other parties to the claim agree. It directs the parties to more information about mediation and a directory of mediation providers online at www.civilmediation.justice.gov.uk. It reminds them that the mediators available on that website are all accredited by the Civil Mediation Council.

- 5.41. All of these prompts and encouragements are well-crafted and contain sentiments with which we fully agree. The question for us is whether they are working and if not, why not?
- 5.42. The courts approach making orders for ADR with some caution because of concerns about the issue of compulsion. The commercial court ADR order takes roughly the following form:
- 1. On or before [date] the parties to exchange lists of three neutrals or identify one or more panels of individuals who are available to conduct ADR procedures in the case prior to [date].*
 - 2. Or before [date] the parties shall in good faith agree a neutral individual or panel from the lists so exchanged or provided.*
 - 3. Failing such agreement by [date] the court will facilitate agreement on a neutral individual or panel.*
 - 4. The parties shall take such serious steps as they may be advised to resolve the dispute by ADR procedures before the individual or panel so chosen not later than [date].*
 - 5. If the case is not settled, the parties shall inform the court what steps towards ADR have been taken and why such steps have failed.*

An alternative approach is taken in the Ungley order which takes the following form:

- 1. Parties shall by [date] consider whether the case is capable of resolution by ADR.*
- 2. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge considered that such a means of resolution were appropriate, when he is considering the appropriate costs order to make.*
- 3. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice, save as to costs, giving reasons upon which they rely for saying that the case was unsuitable.*

We understand that Ungley orders were usually made at the second or third CMC or PTR, late in the life of a litigated case. Fontaine Orders are usually made at the first CCMC.

- 5.43. The main difference between the Ungley and the Commercial Court orders is that the latter merely talks of “ADR”, whereas the former actually specifies different processes and indicates some quite specific initial steps.

- 5.44. The common feature of both “orders” is their imperative tense – “must” or “shall” are the verbs used instead of “may” or “should”. Such orders should secure a high degree of compliance coupled with the Court of Appeal’s ruling in *Halsey* that to ignore such an order or a clear judicial suggestion might of itself give rise to a costs sanction. No research of which we are aware has been done to assess whether this is indeed so, either in increasing the gross number of mediations or getting them convened earlier. Orders such as these have become part of the standard directions.
- 5.45. Turning to cost sanctions these normally take the form of denying a full cost recovery to the victor, to be applied in cases of unreasonable failure to engage in ADR. CPR 44 permits costs sanctions to be imposed on a party who unreasonably failed to engage in settlement discussions in general, or through mediation in particular. Mediation commentators in the late 1990s foresaw that a party who unreasonably refused to mediate might well face a costs sanction soon after the CPR came into force, although it was not until *Dunnett v Railtrack* in 2002 that the Court of Appeal made such an order. It deprived Railtrack, the successful respondent, of a costs award against the unsuccessful appellant because, the court found, it had unreasonably refused the appellant’s good faith suggestion (as they found or assumed) to mediate between losing at trial and the appeal itself. *Dunnett* undoubtedly caused an upward spike in the usage of mediation, with providers like CEDR reporting a marked increase in case numbers, though from a very low base. It was the first evidence that judicial action on costs was significantly more effective in increasing mediation take-up than mere exhortation or threat. Even though as we shall see, the *Dunnett* threat has been softened by subsequent decisions the statistics suggest that the *Dunnett* effect has been lasting. In other words a rule change, even a temporary one, can effect a permanent change in dispute resolution culture.
- 5.46. *Dunnett* and most of the significant cases since 2002 have discussed whether a party unreasonably refused to engage in settlement discussions in the context of a refusal to mediate, because this was the settlement process that was offered and rejected. There are a few cases which have decided that failure to engage in settlement discussions at all might or might not justify a costs sanction¹⁰. But the formality of the making and the refusing of an offer to mediate has been the most usual basis for seeking a costs sanction for not engaging in settlement discussions.
- 5.47. *Halsey* is now the leading case on the circumstances in which costs sanctions might be imposed on a successful party who unreasonably declines to mediate.
- 5.48. *Halsey* identified six well-known factors which might justify a party refusing an inter-party proposal to mediate. Most of them have never been deployed to our knowledge: the factors principally discussed in later decisions are (2) where a party has a reasonable belief that their case is water-tight and (6) that the mediation had no reasonable prospect of success. There seem now to be a steady flow of cases at first instance where judges have imposed a sanction even under the *Halsey* principles.¹¹ They have not accepted on the facts that declining to mediate could be excused and have imposed a sanction. Despite the broadly positive general attitude taken to

¹⁰ For instance, *Daniels v Metropolitan Police Commissioner* and *Vector Investments v J.D. Williams*

¹¹ See for instance *PGF v. OFMS*, *Laporte v. Metropolitan Police Commissioner*, *Garrett-Critchley v Ronnan*, *Northrop Grumman v. BAE* and *Bristow v Princess Alexandra Hospital* NHST.

mediation by the Court in *Halsey*, the decision undoubtedly had at the time a steadying effect on the continued growth of mediation from 2005 onwards. The broad impression was gained that to decline to mediate no longer created a high risk of a costs sanction, as the test of unreasonableness was hard for the losing party to satisfy and anyway there was such a small chance of any given case going to and through trial.

- 5.49. The most significant Court of Appeal judgment since *Halsey* has been *PGF v OFMS* in 2012, which contained a strong and well informed discussion of the role of ADR in civil proceedings and endorsed the view expressed in the Jackson ADR Handbook that to ignore a good faith invitation to mediate altogether might well justify a costs sanction of itself.
- 5.50. Much more recently in *Gore v Naheed*¹², a right of way dispute between neighbours, the Court of Appeal refused to interfere with the cost decision of the first instance Judge, Judge Harris. Lord Justice Patton, giving the Judgment of the Court referred to the *PGF* decision and then said:

“Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated. But, as Briggs LJ makes clear in his judgment, a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the Judge when exercising his costs discretion.

... in this case the Judge did take it into account but concluded that it was not unreasonable for Mr. Gore to have declined to mediate. His solicitor considered that mediation had no realistic prospect of succeeding and would only add to the costs. The judge said that he considered that the case raised quite complex questions of law which made it unsuitable for mediation. His refusal to make an allowance on these grounds cannot in my view be said to be wrong in principle.”

- 5.51. It is not a proper use of this paper to comment on individual exercises of discretion in individual cases, perhaps especially when we are dealing with brief remarks upholding the first instance Judge’s exercise of his discretion. But there does seem to be a discernible difference of emphasis between the two Court of Appeal decisions just mentioned. Despite the complexity of the legal reasoning required to resolve it mediators would point out that the *Gore* case was ultimately about whether a van could park to unload in a particular place for as little as 30 minutes or as long as two hours, a type of dispute ideally suited to ADR. Mediators resolve “complex cases in which both parties feel strongly” (not to mention cases where the parties are going to have to coexist in the future) all the time. We see the *Gore* case as an excellent prompt for discussion between stakeholders

¹² [2017] EWCA Civ 369

- 5.52. The question we address here is whether the costs sanction threat has worked to the level desired by the judges and policy-makers in civil justice, and whether more needs to be done to reinforce its true effect for the benefit of users of the civil justice system. If the judges benefit too, so much the better, but they are the service providers. If lawyers do not benefit, for instance by shortening the time taken to conclude civil claims or increasing the risks of not recovering their costs, that again is not relevant to decisions to be made in this arena.
- 5.53. What is striking about the regime as a whole is that any real criticism of either or both parties' use of ADR (or lack of it) is left until after judgment. Why cannot and should not that conduct be capable of critical review by the court at the time the decision is taken? The subsequent decision is, first, only taken in the rare cases which get as far as final costs order and, second, is then inevitably overshadowed by the judgment. The sting of the Ungley, Fontaine and the Commercial Court orders for those who ignore them is only that they must give a written account of their reasons which can inform the court's ex post assessment of their conduct - should the "end of the day" ever be reached. The conclusion of a well-conducted trial and a carefully prepared judgment are not a hospitable background against which to submit that the whole thing might have been better avoided!
- 5.54. One answer might be that until the case is over there are normally no costs orders to modify. But interim costs sanction may be possible. Interim costs orders have proved an enormously effective instrument of case management since their introduction. We also question whether costs sanction should be the only remedy or whether the power to order mediation ad hoc in particular cases is not a necessary adjunct of a new approach.
- 5.55. We recall Mr Justice Lightman's words in *Hurst v. Leeming* where he said :-

"In general ... it does not seem right to me to entertain an argument that the mediation would not have succeeded as justification for a refusal to mediate. Usually it is impossible to know whether a mediation may succeed until you try it."

We respectfully agree.

- 5.56. There are other approaches to costs orders in support of ADR which we mention for completeness.
- 5.57. In the South African case of *Brownlee v Brownlee* no order for costs was made, and a cap placed on what each lawyer could charge their own client under their retainer, as they had in effect colluded to decline to mediate when their clients might well have benefited from doing so?
- 5.58. Alternatively, would it be possible to rescind the right to trial costs recovery for either side if there is no formal mediation no later than three months before trial, even if there have been Part 36 offers and RTMs: this would reflect the often ignored fact that negotiations conducted through a skilled mediator on a properly confidential basis, fully involving the parties, are far more likely to succeed than bilateral negotiations

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between lawyers. Even the “judicial ENE” schemes show that the presence of parties has a significant effect on outcomes.

SECTION 6: OTHER DOMESTIC ADR SYSTEMS

Family Mediation

- 6.1. Family mediation is more closely regulated than mediation in civil disputes. And the use of family mediation has been more strongly encouraged by the family courts, the legal aid system and the rule makers than civil mediation in the civil justice system. We do not think it is a matter of coincidence that regulation and strong court encouragement go together.
- 6.2. Accreditation by the family mediation council appears well-established and more sophisticated by comparison with for example the registration for mediation providers and mediators by the Civil Mediation Council. Only mediators accredited under the aegis of the Family Mediation Council (FMC) can conduct a MIAM. Legal aid is only available to support mediations conducted by accredited mediators.
- 6.3. In 2014 the FMC set up a register of family mediators that can be searched by the public. A new regulatory framework was introduced progressively over 2015 and a set of standards in family mediation issued in 2016 under the Code of Practice for family mediators. This Code is far more extensive than, for example, the European Code of Practice for Mediators. The family code of practice reaches for example into the question of how far immediately should evaluate the parties cases. Thus paragraph 5.3 states that:

“The mediator must remain neutral as to the outcome of the mediation. The Mediator must not seek to impose any preferred outcome on Participants, or to influence them to adopt it, whether by attempting to predict the outcome of court proceedings or otherwise. However, if the participants consent, the mediator may inform them (if it be the case) that he or she considers that the resolutions they are considering might fall outside the parameters which a court might approve or order. The Mediator may inform participants of possible courses of action, their legal or other implications, and assist them to explore these, but must make it clear that he or she is not giving advice.”

- 6.4. It is apparent to that Family mediators are embracing the growing use of online web conferencing and the FMC issued in September 2016 a guidance for online video mediation.
- 6.5. Family mediation has also done well in creating a visible and accessible presence in the mind of the public. The Family Mediators Association has worked with the courts to set up duty rosters at courts which will enable parties to arrange an MIAM appointment almost instantly.
- 6.6. A new initiative for early resolution and the integration of ADR into formal court systems, the Family Solutions Court, was launched in London on 16 July 2015.

Family MIAMs

- 6.7. Mediation information and assessment meetings (MIAMS) first introduced in the family dispute system in 2010. Since April 2014 it has been compulsory (subject to limited exceptions) for those issuing proceedings for financial relief or for a child arrangements order to attend a MIAM.
- 6.8. While the party making the application has to attend the MIAM the Respondent is simply expected to attend. The two parties can attend a single meeting but separate meetings appear to be the norm (where the Respondent attends at all).
- 6.9. At the MIAM the mediator will guide the parties as to the available alternatives to court, especially mediation, the advantages and disadvantages of each. Ultimately it is a decision for the parties as to whether to go down the road of mediation but it is a decision reached after discussion with the mediator and therefore on the basis of informed views.
- 6.10. If either party is legally aided the legal aid fund will pay for the MIAM. Otherwise parties negotiate a fee with the mediator or the mediation provider. Fees for an MIAM with one party appear to be in the region of £100. Online MIAMs are being advertised.
- 6.11. Where mediation is chosen it appears extremely successful. According to the MOJ in 2013 nearly two-thirds of couples who attended a single mediation session about child arrangements reached full agreement. Almost 7 out of every 10 couples who opted for mediation reached agreement.
- 6.12. The very first page of the Court application form deals with the MIAMs and requires a confirmatory statement to be signed in the following terms:
- "1. I understand that if I have not attended a mediation information and assessment meeting (MIAM) the court cannot process my application unless there are special circumstances.*
- 2. I understand that if I cannot show evidence that I do not need to attend a MIAM, the judge may stop proceedings until I have considered mediation."*
- 6.13. The principal exemptions are cases of domestic violence, child protection concerns, other forms of urgency, previous attendance at MIAM (or previous MIAM exemption) or where the application is to simply make a consent order. Each of these is required to be supported by evidence.
- 6.14. Where an application is pursued and exemptions do not apply the application must be signed at paragraph 14 by an authorised family mediator (the "MIAM certificate") who must confirm either (a) there has been an MIAM but that the mediator or one or both of the parties have decided that mediation is not appropriate or (b) there has been a mediation but it has broken down or concluded without resolving the case.

- 6.15. Notes to the application form contain various suggested sources of information including the Family Mediation Council website for the applicant and various online resources including videos about family mediation.
- 6.16. How successful are MIAMs? It has recently been reported by one family mediator analysing her organisation's casework that only one in 20 court applications has been preceded by a MIAM. This suggests either that very many cases are falling within the exceptions or that court staff are being flexible about compliance. After compulsion the number of MIAMs moving on to full mediation has shown a slight decline from 69% to 66% but the position remains that if the parties do receive an explanation of the alternatives to court the majority will take them.

FDRs

- 6.17. The financial dispute resolution appointment (FDR) is now well-established having been introduced on a trial basis in 1996 and formally incorporated into the revised rules in June 2000. It is effectively compulsory though the court retains a discretion to waive the FDR on application. Presumably this might happen where the parties have attended a private FDR or a mediation outside the court system already but without success. . It is designed to enable the parties, with the assistance of a Judge, to seek to identify and resolve the issues in the case quickly with less overall cost, less delay and less emotional strain.
- 6.18. The meeting is held for the express purpose of encouraging negotiation and the parties are required to use the best endeavours to reach agreement. They each have to make a proposal for settlement prior to the appointment. The parties must not later than seven days before the appointment file details of proposals including those made without prejudice between the parties. The FDR best practice guide stresses that lawyers should make it clear that the judge taking the FDR is not going to make orders, will not require the parties to settle and will take no further part in the case if the matter proceeds.
- 6.19. Our anecdotal evidence is that FDR's have proved an extremely effective method of resolving cases. Though there appear to be no published statistics we have received anecdotal evidence of very high success rates and reports that where cases do not settle at the FDR many settle soon afterwards. In those that do not settle there can often be a useful narrowing of issues.

Employment Disputes and Conciliation

- 6.20. The Advisory Conciliation and Arbitration Service (ACAS) is a statutory body which has been offering advice and conciliation services in the employment field for many years. It has offered early conciliation services in respect of claims which have been or are about to be brought before employment tribunals since 1984. From 6 May 2014 in most cases it has been mandatory for parties to attempt to resolve the dispute using the ACAS early conciliation service. The application to the tribunal will not be accepted unless it is accompanied by a C100 certificate from ACAS confirming that early conciliation has at least been attempted.

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- 6.21. It is unusually difficult to measure the effectiveness of the early conciliation service because its introduction coincided with a very significant increase in tribunal fees. The very substantial reduction in tribunal applications which followed is thought to be largely the result of the increase in fees.
- 6.22. We understand that before early conciliation was introduced most people were unaware of the availability of mediation. Under early conciliation 20% of cases become subject to a formal settlement and in a further 10 to 15% of cases an informal agreement was reached. In most of the remaining cases, no settlement was necessary because the Applicant proved to be out of time to begin a claim.
- 6.23. The first survey of users in 2015 showed a high satisfaction rate of about 80% of employees and 85% of employers. In 75% of cases both parties, employer and employee, are prepared to engage with ACAS.

SECTION 7: OVERSEAS ADR SYSTEMS

- 7.1. Our researches into overseas ADR systems have proved less fruitful than we had hoped.
- 7.2. First, even in systems which have much in common with England and Wales, there are clear and obvious differences in legal culture and in familiarity with ADR which make it difficult to draw immediate lessons.
- 7.3. Second we have found it enormously difficult to gauge the “success” of overseas systems even where it is possible to read and understand how they are intended to work. Italy is a good example. It is the only European system with a mandatory pre-action mediation requirement. Anecdotally there is a great deal of negative feedback about the system, not only from lawyers but from mediators as well. But some also comment that problems may only be temporary because litigants are, whether they like it or not, being forced to engage with the ADR and awareness of ADR is inevitably growing.
- 7.4. A third issue is the sheer volume of material which is now available in this area. A thorough survey, even one limited to the USA, would require a much longer report and resources that are not available to us.
- 7.5. The discussion here will be focused on a limited number of useful overseas examples. The Working Group has had the benefit of reading in draft an article by one of its members Prof. Neil Andrews which will in due course be published as “Mediation: International Experience and Global Trends” . The relevant section is attached to this report as Appendix 2. Other comparative surveys exist. The European Parliament publication “Re-Bootting the Mediation Directive: Assessing The Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, 2014” contains a detailed country-by-country account of mediation in each of the EU member states. The Irish Law Commission Report on Mediation 2008 (LRC CP 50-2008) contains some excellent comparative material. We have also had the benefit of considering Commercial Mediation, an International Review, an international survey compiled by Linklaters LLP.
- 7.6. It might be thought there was a simple distinction between those jurisdictions which do and those which do not mandate mediation. It is true that a number of systems do give the Judge the specific case management power of ordering unwilling parties to mediate by way of managing a specific case. But there are in fact relatively few examples of systems which mandate attendance at a mediation as a blanket condition of issuing proceedings. Even the Italian decree only actually requires physical attendance for an initial phase of discussion (which looks remarkably similar to a MIAM meeting). The mediation continues beyond the initial phase only if the parties then agree voluntarily to engage.

Europe

- 7.7. It is clear that with the exception of Italy European jurisdictions have not made mediation compulsory save in certain specific areas such as labour law.
- 7.8. In Belgium one source states that compulsory mediation in labour law was an expensive nuisance and “people go through the motions.” In France there is a degree of compulsion in family and labour disputes but it only extends to meeting a mediator for an information session. The German tradition is one of court-based, even court-conducted mediation but a new provision will require those filing claims to state that they have at least attempted mediation.
- 7.9. Italy has taken a different path. In 2010 compulsory mediation was introduced for most types of civil and commercial claim. The Decree introducing the system was the subject of a successful constitutional challenge and was replaced in 2013 by a modified system which has been upheld by the court. The new system made pre-action mediation mandatory in a much more limited range of disputes which include family and family business disputes, banking, investment and insurance.
- 7.10. What is required is that the parties physically attend before a mediator and at least hold an introductory session. The parties pay a modest administration fee for this but on most occasions the mediation does not last beyond an introductory session and the mediator may then receive no fee at all. The parties are required to be legally represented. We understand that the rules require that the mediator is legally qualified.
- 7.11. Reports as to the working of the system are very mixed. There is a suggestion that where mediations do “get going” they are frequently successful. There can be no doubt that large numbers of users of the system have now had a taste of mediation by virtue of the mandatory scheme. But anecdotally there are reports of ADR being brought into disrepute as so many resent being brought into an unfamiliar process and having to spend time and money attending with their legal advisers at a perfunctory meeting, possibly held at some distance from their home base.

USA

- 7.12. There is a vast range of experience in the United States at State and Federal level with various forms of encouragement for ADR ranging from mandatory ADR through to effective laissez-faire. It is very difficult to draw any single or simple lessons from all of this.
- 7.13. It seems clear that mediation has become culturally normal and familiar over time. This may at least in part reflect the length of time over which ADR has been used. ADR was well established by the 1970s. There were for example ADR departments at law schools in the US at least 20 years before the Woolf reforms if not earlier.
- 7.14. Mediation has become a major feature of federal and state court systems. Most District Courts apparently grant a discretion to judges to order ADR, usually mediation, on a case-by-case basis. Some will impose a blanket requirement to mediate with

very limited exceptions. It has been observed that that where a society is much more familiar with ADR it is much more ready to accept that ADR will by default apply in most cases. Many courts maintain a roster of mediators with quite stringent qualification requirements. If courts direct mediation it is to the recognised court mediators that the cases are directed.

- 7.15. Anecdotally contacts in the US have reported from those states which have imposed mandatory mediation that there are, once again, perfunctory, box-ticking mediation meetings which are often wound up quickly after a short and frustrating discussion.

Australia

- 7.16. One other source of overseas experience which has produced a great deal of material is Australia. Again there is a wide variety of state and federal approaches. One feature of a number of systems seems to be a requirement that a party certify that "genuine efforts" or "genuine steps" have been taken to try to resolve the case as a condition of being allowed to bring proceedings. We have the impression that under strong court encouragement ADR has achieved a wide degree of acceptance in Australia.
- 7.17. There are also examples of requirements that parties mediate in good faith pre-issue. Thus in retail tenancy disputes in New South Wales parties can only have access to the court if they have a certificate from the Small Business Commissioner to the effect that they have mediated in good faith under the Small Business Scheme. If the Commissioner certifies that, for example, one party has failed to attend a mediation that party may be penalised in costs by the court.

Canada

- 7.18. We have been much struck by the system operated in British Columbia whereby a party can issue a notice to their opponent in a specified form requiring mediation. A mediation process is then set in train with specified procedures for appointing a neutral and organising pre-mediation and mediation meetings. If the other party declines to attend, then save in certain exceptional cases, they can be ordered to do so or be otherwise sanctioned by the court. (The principal rules from the British Columbia Notice to mediate process are attached as Appendix 3 hereto.) Our enquiries suggest that the establishment of Notice to Mediate procedure in the British Columbia civil justice system has led to the growth of informally agreed mediation as a norm, with the formal procedure itself only being invoked rarely. This is exactly the kind of outcome that the Working Group would welcome and would see as beneficial for civil justice in this jurisdiction.

International experience of settlement rates in compulsory systems

- 7.19. The much-debated question whether evidence from overseas experience shows settlement rates suffering in compulsory systems is very difficult to answer definitively.
- 7.20. In Lord Woolf's interim report he noted that the evidence from the United States suggest that mediation was less effective where it was compulsory. Indeed supporters

of the principle of voluntariness will often assert that settlement rates suffer where the parties do not attend of their own volition. Intuitively this may seem not unlikely.

- 7.21. But other evidence suggests that there may be no real difference in settlement rates. Thus in Maine one study showed that 43% of compulsory and 42% of voluntary cases settled. There is also an oft-cited body of Australian statistics from a set of schemes, four of which were voluntary (for example the New South Wales Department of Fair Trading Scheme) and four of which were mandatory (for example the New South Wales Farm Debt Mediation Act). The schemes show various settlement rates between 70% and 90% but there was no correlation between voluntariness and success. But none of these are scientific experiments and comparisons are very difficult between schemes with different subject areas
- 7.22. Ultimately a better guide for us may be the limited domestic experience of members of the working party who have mediated with parties who attend unwillingly (often because of an ADR clause in a contract). This shows that in a surprisingly large number of cases they are in fact drawn into the process, become engaged and frequently settle.

SECTION 8: COMPULSION OR PERSUASION

- 8.1. Is there a need for measures stronger than pure persuasion to promote the use of ADR?
- 8.2. In paragraph 2.86 of his Interim Report, Lord Briggs described the relationship between the civil courts and ADR providers as “semi-detached”, and then went on to say that “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.” Although the views of the working party on compulsion are not unanimous we all agree that the question deserves further wider discussion.
- 8.3. It seem to us that compulsion could take one of three very different forms:
 - A requirement that the parties in all cases (or in all cases of a particular type or subject-matter) engage in or attempt ADR as pre-condition of access to the court, with the Claimant unable to issue proceedings until evidence of the appropriate efforts is produced (**Type 1** compulsion).
 - A requirement that the parties have in all cases (or all cases of a particular type or subject-matter) engaged in or attempted ADR at some later stage such as the Case Management hearing (**Type 2** compulsion).
 - A power in the court to require unwilling parties in a particular case to engage in ADR on an ad hoc basis in the course of case management (**Type 3** compulsion).
- 8.4. The arguments for and against compulsion do not apply uniformly to all of these options and we consider them separately below.
- 8.5. In general terms the usual arguments for mandatory mediation are these:
 - 8.5.1. ADR is capable of conferring huge benefits on disputants and on the civil justice system. If we really believe that litigation should be the last resort then we should make it the last resort.
 - 8.5.2. The "voluntary" take up of mediation, in particular, is disappointingly slow and small. The message has been being conveyed for many years now but it is obvious that "doing" rather than "learning" is the way that the mediation message gets through. We think the lesson of *Dunnett* is that changing the rules, even temporarily, really can change the culture.
 - 8.5.3. It is impossible to tell in advance which cases will actually settle and which will not. But those who practise as mediators feel strongly that unless a case is genuinely a pre-selected test case or a claimant is obsessive and will not settle mediation will be effective to settle the majority of cases. (Many cases that are spoken of as ground-breaking or test cases in fact prove to be capable of settlement to the benefit of all, the retained organs litigation being an example). It will shorten or help to focus many of the remainder.
 - 8.5.4. If you let the parties waste energy and costs arguing about whether or not to mediate they will do so, generally for tactical/positional reasons.

- 8.5.5. The parties are never under an obligation to settle. They would be under an obligation to attend and participate in good faith. They are always free to go back to court burdened by, at most, the costs of the mediation and a small element of delay. (This is not only the key to the success of the process but is also the answer to the constitutional objections to compulsion.)
- 8.5.6. There is no convincing evidence that ADR is less successful when compulsory. Experience suggests that parties who are compelled to attend mediations unwillingly (for example by contract terms) often do engage in the process and settle their disputes. In the period after the decision in *Dunnett v Railtrack* and prior to *Halsey* when parties felt they had to mediate or risk a costs sanction there was no sense that settlement rates dropped.
- 8.5.7. Sometimes parties were quietly relieved when they felt externally compelled to use an ADR process and did not have to propose it, which they feared might lead an opponent to suspect weaknesses in their case. Compulsion gets rid of the “*who blinks first*” issue.
- 8.5.8. The fact is that in England and Wales there are a number of ADR processes that are effectively or actually compulsory. The obvious examples are the RTA portal, ACAS conciliation, family MIAMs and FDRs. Another is the County Court judicial ENE described in the CCSR report, which parties have to attend on pain of having their claim/defence struck out. If compulsory ADR represents a constitutional *Rubicon* then it does seem to have been crossed a number of times already.
- 8.6. In general the arguments usually advanced against mandatory mediation are these:
 - 8.6.1. It taints the voluntary ethos which is “the hallmark of mediation’s success”.
 - 8.6.2. It pulls unwilling parties into an unfamiliar process such that not only does the mediation have a reduced chance of succeeding but the whole process of mediation could be brought into disrepute.
 - 8.6.3. The process has to be paid for by the parties or the state. Those costs will in many cases be wasted.
 - 8.6.4. The cost may well be disproportionate given that this measure is typically targeting the low and middle value dispute. Even a fee of £100, the typical costs of a family MIAM meeting, will be impossible in many small claims cases – and would be wholly unwelcome even if a free Small Claims Mediation Service was not available.
 - 8.6.5. From the Defendant’s point of view compulsion means that any claim however worthless will involve expense and hassle. This creates an artificial nuisance settlement value for spurious claims.
 - 8.6.6. The likely consequence of making mediation mandatory (as at least some overseas experience seems to show) is to produce perfunctory, box-ticking

mediations which go nowhere. Because of privilege issues it can be enormously difficult to police a requirement of good faith participation.

- 8.6.7. Mandating mediation may be a breach of the parties' Article 6 human right of access to the court.
- 8.6.8. How does the system avoid catching the cases in which there is no real dispute, typically the undefended money claims which make up the majority of claims?
- 8.7. Voluntariness in engaging in mediation is subject to a very important distinction which was first drawn as long as the 1970s by Professor Frank Sander, the begetter of the multi-door court-house concept. Continued voluntary participation within a confidential mediation process once commenced (with freedom from criticism or sanction for withdrawal and return to litigation) is a fundamental and non-negotiable tenet of mediation. But this does not mean that requiring parties to engage in mediation in the first place, or sanctioning their failure to do so, necessarily subverts its principles or reduces its effectiveness. Parties must always be free not to settle, but it may be legitimate for a civil justice system to require them to attempt settlement.
- 8.8. The current position is well illustrated by looking at the attitudes taken by three of the main players (and thus funders) in civil litigation – insurers of personal injury litigation, now NHR, and insurers of professional indemnity litigation. Generalising to make a point, most personal injury insurers do not use mediation, preferring to convene RTMs at which full legal teams and their clients assemble to discuss settlement without the formality of a mediation agreement to create contractual confidentiality and of course without a neutral to manage the process and facilitate negotiations. Few insurers have conducted mediation pilots. As is seen below, insurers largely objected to having their cases referred to mediation in the mandatory pilot at Central London County Court in 2004-5. By contrast, professional indemnity insurers have a long history of mediation use, and it is probably their dispute resolution process of choice. As to the NHR, they have recently piloted a mediation scheme, following the success of which (roughly an 80% settlement rate and high satisfaction levels) they are setting up permanent mediation scheme for all types of clinical and personal injury claims involving NHS hospitals. The NHS has been persuaded to do this by experience, and not by external court pressure, and has had to require its previously somewhat reluctant panel lawyers to invite equally reluctant claimant lawyers to participate in mediation. As the CEO of NHR wryly remarked in the NHR's Annual Report published in July 2017, "getting the lawyers on both sides engaged in mediation has been challenging"! Should personal injury insurers and their lawyers and indeed claimant lawyers be pressed more firmly to try out mediation at least in the heavier cases that occupy a good deal of case management time before the vast majority of them settle? After all, in most other common law jurisdictions, the vast majority of personal injury cases are mediated. Is there a particular reason why this should not be so in England & Wales?
- 8.9. A form of mandatory mediation (called "Automatic Referral to Mediation" or ARMS) was experimented with in the Central London County Court in 2004-5. It was frankly

not a notable success, as demonstrated by Professor Hazel Genn's appraisal "Twisting ARMS". The machinery used was for the court to initiate the referral of a quasi-random selection of defended cases into a mediation scheme, meanwhile staying the action, but giving parties the right to seek an opt-out, though warning them that this would only rarely be granted by a designated District Judge. Costs sanctions awaited any party without a court-approved opt-out who declined to mediate. In effect the court was ordering parties into mediation on its own initiative, almost exactly when the Court of Appeal's judgment in *Halsey* expressed the view (*obiter*) that courts could not order unwilling parties to mediate, as it would be contrary to ECHR Article 6. Parties in around 80% of the cases that were automatically referred to mediation in ARMS objected, requiring considerable District Judge time to deal with applications to opt out. Of the 1,232 cases referred to mediation, 172 were actually mediated, with a settlement rate of 53%.

The vast majority of cases (1,016) were personal injury claims – 39% employer's liability, 33% road traffic and 10% clinical claims – and Professor Genn commented "had insurance companies showed a greater willingness to attempt mediation, the results of the pilot scheme might have looked somewhat different". Many of the "excuses" for not mediating seem to suggest a real unfamiliarity with the mediation process. It may be that 12 years later in the post-Halsey era the success rate would be higher.

- 8.10. So far as **type 1** compulsion is concerned, ADR as a pre-condition of commencing proceedings, an obvious practical issue is the burden on those Claimants whose claims are not going to be defended and who simply seek to recover undisputed debts. The risks of imposing unnecessary costs and of bringing ADR into disrepute are obvious. Also the family experience with MIAMs shows that it is enormously difficult to involve Defendants pre-action. They seem likely to think (possibly correctly) that by refusing co-operation they may be able to delay the claim.
- 8.11. Proportionality of cost is also an issue and the solution of restricting pre-action compulsion to claims above a certain level will be awkward to administer under the current system.
- 8.12. **Type 2** compulsion is not subject to the objection that it burdens the undefended case. By the time parties are completing Directions Questionnaires and the case is proceeding through allocation into case management a defence will have been served and there is, ordinarily, a real dispute. So why should not all parties at that stage be required to engage in ADR? The answer for many is that, in addition to the general arguments of principle, a blanket requirement would be insensitive to the cases in which ADR is either inappropriate or unhelpful. The specifically-selected test case is probably the strongest example, albeit a rare one. The *Hurst v. Leeming* example of the obsessive claimant who will never settle may be another. But what of the situation in which direct negotiation (or possibly even an earlier ADR) have failed to resolve the case and the parties do not want to commit further time and money. Mediators will say that those are the very cases in which a neutral third party can unlock a settlement. However the majority of stakeholders probably have yet to accept that view and might, we suspect, sympathise with the reluctant parties.

- 8.13. The comparative disadvantage of **Type 3** compulsion, an ad hoc case management power to order ADR in an individual case, is in one sense precisely that it invites expensive procedural debate about whether or not to use ADR. Its advantage is that it enables the court to focus ADR on the cases which are appropriate but in which the parties (or their representatives) are too stubborn (or self-interested) to explore alternatives to trial.
- 8.14. **Type 3** compulsion was under consideration in *Halsey v Milton Keynes*. In a much-discussed passage in his judgment Dyson LJ said this

It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.

....Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of Volume 1 of the White Book (2003) say at para 1.4.11:

"The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court cannot direct that such methods be used but may merely encourage and facilitate."

If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.

Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far. The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. But we reiterate that the court's role is to encourage, not to compel.

We will express certain interim views about compulsion in the next section.

For the moment we simply note that the compulsion debate draws attention to the significant respects in which this jurisdiction does already require interaction with an ADR professional. The interesting question is why those requirements are acceptable (in judicial ENE, employment and family disputes) when compulsory attendance at mediation is clearly so much less welcome. We think these are the reasons:

- (a) Confidence in the quality of the neutral.
- (b) Sustainability and accessibility of supply.
- (c) A consistency of process.
- (b) The intervention is cheap or free as far as the litigant is concerned.
- (c) The commitment of time involved is not disproportionate.

We think the ADR (and particularly the mediation) community need to reflect on these qualities which seem to us to be the key to greater acceptance of and a greater welcome for ADR, whatever the fate of the compulsion debate.

SECTION 9: INTERIM RECOMMENDATIONS

- 9.1. The purpose of this interim report is to promote debate over possible further changes and to maintain the search for the right relationship between civil justice and ADR. We expect a final report will follow wider consultation on this interim report. The questions we pose in section 10 later are at least as important as the interim recommendations we make now.
- 9.2. One of the challenges for the Working Group has been that the relationship between the civil justice system and ADR is not only complex but is developing all the time. We give just three examples. The new pre-action protocol for debt claims directing parties to consider appropriate ADR which comes into force in October this year. Arising out of the CCSR proposals a county court mediation pilot is about to launch in Manchester and elsewhere. Just as we were finalising our report the Court of Appeal gave judgment in *Gore v Naheem* (see paragraphs 5.50-1 above).
- 9.3. It is the digitisation of legal proceedings which is overwhelmingly the most significant force for change. The Online Solutions Court proposed in the CCSR report has ADR very much at centre stage and many of the same opportunities to encourage parties to consider settlement in general and ADR in particular will be available across all jurisdictions as digital access proceeds. If this paper frequently seems to use only the language of the paper court it should be assumed that at least equivalent steps are being recommended for the digital system. Online access may be a game-changer in a more profound sense. The use (or the offer) of ODR techniques like blind bidding may make arguments about compulsion irrelevant. To the extent that a better service can be rendered to those accessing the court digitally (and plainly it can) there may be some issues of fairness from the point of view of the digital deficit.
- 9.4. We have concentrated on four main types of ADR process.

(i) Mediation:

Mediation is now well established both in England and Wales and in many jurisdictions internationally. We agree with the view expressed by Lord Briggs in his CCSR report that for present purposes it is "the dominant method of ADR"¹³. We think it is still significantly under-used in the civil justice system.

(ii) Consumer conciliation and ombudsmen:

This is the most prolific form of ADR in terms of the sheer volume of disputes disposed of. It is predominantly used "at source" in consumer matters. Much larger numbers of disputes than will ever be dealt with by mediation or the courts are resolved by conciliators and ombudsmen working mainly in industry-specific schemes, statutory or otherwise.

¹³ CCSR Interim report at 7.25

(iii) Judicial ENE¹⁴:

While private early neutral evaluation has been almost wholly ignored as an option it is clear that *Judicial* ENE on the FDR model is now increasingly gaining momentum. Three examples will suffice. Lord Briggs draws attention to its use in small claims in certain county courts, effectively as a mandatory process, apparently with great success. The Chancery Division operates a Judicial ENE process for property and will disputes. The new Birmingham Property and Business List appears likely to use an "FDR" (Judicial ENE) as a standard direction.

(iv) Online dispute resolution:

In a sense ODR is not an alternative to other forms of ADR, but an avenue through which established ADR approaches can be delivered efficiently and effectively. It is clear first that online dispute resolution offerings are increasingly available and hold huge potential advantages in terms of convenience and cost. There is a huge variety of different approaches and a great deal of subtlety in the design of these systems. But typically they begin with an online inter-action with the parties which replicates the scene-setting performed by pleadings and moves on to questions which closely resemble the initial stages of an orthodox mediation. If the dispute does not settle on this basis then typically a human mediator will be available to the parties perhaps by web-conferencing or asynchronous text exchange. The key is that if they are necessary at all these later inter-actions are much more effective and less time-consuming because "the system" has done the groundwork. Second we note that ODR ideas are being adopted by the courts themselves most obviously in the Online Solutions Court at Tier 1.

Making ADR culturally normal

- 9.5. This is a vast challenge and one which the mediation world in particular has been trying to tackle for many years. It is plain that for very many people the idea of ADR remains strange and difficult to grasp. Our efforts have to be maintained. The Working Group have no magic solutions; we are not experts in public legal education. But plainly a situation in which most of the population were comfortable with ADR and aware of its usefulness would be worth far more than any amount of compulsion or encouragement.
- 9.6. It is already the case that in some sectors parties begin to use the tools of ADR almost before consulting lawyers, at the very outset of the dispute. This is hugely encouraging. We very much hope this kind of awareness will spread and we think it will provided that the public experience ADR being used well and appropriately in and around the civil justice system.
- 9.7. There is already significant information available both online and otherwise about all four of these ADR processes including those on the *justice.gov.uk* websites. But there

¹⁴ The "Early" in ENE may be here to stay but needs to be qualified somewhat. This technique is likely to be used only once proceedings have been issued and probably only when the proceedings have reached a developed stage.

needs to be a single central ADR page with links to more detailed information about all of the processes.¹⁵

- 9.8. When lawyers do become involved they are now clearly (*Halsey, Garrett-Critchley*) under a professional obligation to advise their clients about ADR.

R1. We invite discussion as to why the attempts to make ADR familiar and culturally normal have so far been largely unsuccessful and as to how more might be achieved in future.

R2. Consideration should be given to a single ADR page from which links permit each of the four main techniques to be explored. Based on existing mediation pages there should be easily accessible explanations of what the processes involve (with video of, for example, a mock mediation), how ADR can be accessed and who may provide it.

Encouraging ADR at source before legal proceedings are contemplated

- 9.9. There are two areas in which rule-makers and policy-makers can influence the use of ADR at source.
- 9.10. In numerical terms the work of consumer conciliators and ombudsmen makes an enormous contribution to alleviating the burden on the courts. The use of these schemes should have received a significant boost from the European Directive on Dispute Resolution for Consumer Disputes (2013/11/EU). However a decision was taken to limit the directive's ambition to requiring a supplier of goods and services merely to identify the ADR provider that they would use *if minded to do so in a given case*. It does not require the supplier of goods and services to offer ADR when complaints arose. The result is that potential customers will think they are reading an offer of an ADR procedure when in fact their supplier may have no intention of ever using it in a dispute. That would seem to us a serious misrepresentation.
- 9.11. We appreciate that this was a decision reached at EU level with a great deal of deliberation between member states but the fact is that a considerable administrative burden has been imposed on the business community without what seems to be the crucial last step being taken. We can see that where these systems involve binding adjudications (even if only binding from the supplier's point of view) there may be Article 6 implications.
- 9.12. Separately the ODR Regulations (524/2013) require online traders to display a hyperlink to the EU's ODR platform. The ODR platform will not resolve the dispute but identify an ADR provider, approved under the Regulations and offering online resolution, on application by the consumer. This should, in order to satisfy the requirement of being "easily accessible"¹⁶ be displayed on the Company's home page.

¹⁵ This echoes a proposal expressed in a report by Gemme (England and Wales), its Response to Consultation by ENCJ and ELI, which we commend.

¹⁶ Regulation (eu) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes

In fact it appears many companies, including many well-known high street brands, bury the link deep in their (mostly unread) terms and conditions.

- 9.13. Given that in recent years finding a partner through a dating service has, due to the prevalence of such services on the Internet, become more culturally normal than hitherto, making ADR more accessible via a tablet or smart phone through ODR seems entirely feasible.

R3. Careful consideration should be given to amending the EU directive or the domestic Regulations made under it to require companies not merely to advertise but actually to participate, if the consumer so wishes, in the form of consumer ADR offered. .

R4. We invite discussion as to whether the regulations generally are working effectively and whether they are being observed and enforced.

- 9.14. It also appears that the courts have not yet felt able to impose costs sanctions if the parties do not use such schemes when they are available¹⁷. If the vastly greater expense of litigation is incurred pursuing a result that could have been achieved much more cheaply under a scheme then a costs sanction should follow.

R5. We hope that the court will feel able in the right case to support the imposition of a costs sanction where the conciliation option is ignored by a complainant.

- 9.15. The other principal form of ADR at source is a contractual requirement for mediation as one of the steps in an escalation clause. These clauses are upheld and enforced by the courts¹⁸ (provided they are sufficiently certain). We do not recommend any change of approach.

Encouraging or requiring ADR when proceedings are in contemplation

- 9.16. There is already considerable encouragement for litigants to seek to settle cases and indeed to use ADR methods prior to, as a last resort, issuing proceedings. The obvious examples are the pre-action protocols and their less formal equivalent, the advice documentation aimed mainly at the unrepresented litigant available on the gov.uk website. The ADR in question at this stage will normally be mediation. If a scheme is available and has not yet been used then conciliation is clearly still a route that could be taken. (It seems to us that judicial ENE is not really feasible until the court is seised of the dispute.)
- 9.17. What then of pre-action compulsion? This would involve a requirement that before legal proceedings could be issued a certificate that some form of ADR involvement has occurred must be provided. We have referred to this in the previous section as **Type**

¹⁷ Tui v Tickell [2016] EWHC 2714, Briggs v. First Choice (Unreported).

¹⁸ Cable and Wireless v IBM, [2002] EWHC 2059

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 outset¹⁹.
- 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 seized 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* guidelines²⁰ 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 ADR²¹. 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 model²². 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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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 regions²⁴ 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

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 alla 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 à 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 Fleming, 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 categories⁶² 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 represented⁶⁸ (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) ZJP 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 into and within 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) ZJP 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 (2013)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 to 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 reports¹⁴⁰ 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 claims¹⁶⁰ 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 claims¹⁶⁴ 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 disputes¹⁷⁰ (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 copyright¹⁷⁵ and medical disputes mediation¹⁷⁶ (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 proportionality¹⁹⁵ 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 court²⁰⁰ 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 Kinkel, 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', in the analogy of failure by (English) defendants to accept CPR Part 36²²⁵ 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 PROCEDURE²²⁶

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 Resolution 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.