

## Alternative Dispute Resolution

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### What is ADR?

1.0 As uplifting as it may seem to any lawyer to announce that he will see his adversary in court, a good lawyer is duty bound to tell you otherwise<sup>1</sup>. Nowadays, the range of alternatives to litigation are so well developed that a dispute may be resolved without anyone ever taking the witness box, by one or other methods of Alternative Dispute Resolution (ADR); and that means just about any party, from Candy & Candy to prospective celebrity divorcees like Petra Ecclestone or the fiercest of all opponents, those neighbours squabbling over the alignment of a party wall fence!

1.1 That is not to say ADR kills the theatre. The potential value of a “*cathartic pseudo ‘day in court’*” is often welcomed, indeed relished, by parties mediating, offering them the chance to take (or re-take) centre stage in their dispute, and to say what they think and feel to those who they perceive they need to tell, unfettered by the rules of evidence, helping them to move on. The process is very different from a civil trial (if this is ever convened), where party stories are told in lawyer crafted witness statements, and the experience of giving evidence being largely taken up with being challenged by cross-examination. It is also because there is fall back in the form of a justiciable claim before a public court/tribunal of law that the ‘A’ in ‘ADR’ is an alternative for without Court ADR on its own would be like the sound of one hand clapping<sup>2</sup>.

1.2 ADR<sup>3</sup> is of interest to construction business clients and professionals across the sector as there are few things business people loathe more than litigation in most situations although ADR is not right for every case<sup>4</sup>. Even petty disputes have a way of damaging relationships, tarnishing reputations, and eating up enormous amounts of management time, money, and talent.

1.3 The ‘malaise’ with traditional litigious processes is in large measure the high cost (in money and time) invested in resolving disputes and has several causes, but the most important is the mind-set established and nurtured by the adversarial system. The essence of this system is that lawyers for opposing parties have the responsibility to present nearly every piece of evidence and make every legal argument that might benefit their clients. Pre-trial disclosure and other litigation procedures are designed to leave few stones unturned in the search for relevant evidence. By training, temperament, professional duty, and frequently by client expectation, lawyers have tended to exploit these procedures to the fullest and to persevere as long as any hope remains. In fact, in most common law systems each lawyer has an obligation to be as zealous an advocate as possible, even - sometimes especially - to the detriment of discovering the truth and of resolving conflicts to the satisfaction of one let alone both parties. In England, the Jackson reforms have impacted that ill in many respects.

1.4 While I do not as a rule generally rely on American Judges quotations where an English one is available (not prejudice - training!<sup>5</sup>), one I will quote is from the late Chief Justice Warren E. Burger of US Supreme Court (one of its longest serving) as he I think rightly emphasised and put lawyers in their place. He said the role of lawyers was as enablers for their clients:

*...The obligation of the legal profession is...to serve as healers of human conflicts... we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, with the minimum stress on the participants. That is what justice is all about <sup>6</sup>...*

1.5 As regards a definition for ADR, I see it as a collection of generally voluntary private processes (that is consensual and confidential) conflict resolution methods used for the purpose of resolving conflict or disputes. One walks into ADR freely and in the case of mediation one can walk away at any time. It can result in far more creative settlements than would be available in court<sup>7</sup>. ADR therefore provides alternatives to traditional processes. ADR covers a whole range of consensual dispute resolution techniques; however, it does not displace those traditional processes. A wide variety of processes, practices, and techniques fall within the definition of "alternative dispute resolution." Arbitration, mediation and perhaps early neutral evaluation are the best known<sup>8</sup> and most frequently used types of ADR, but not the only ones<sup>9</sup>.

1.6 ADR (if you ignore arbitration<sup>10</sup>) first originated in the United States as an alternative to litigation and arbitration.<sup>11</sup> ADR is generally facilitative<sup>12</sup> but can be evaluative<sup>13</sup>; it is not inevitable the parties will compromise, although mostly they do reach terms the parties can live with and settle, which is the principal aim.

1.7 ADR is a relatively recent phenomenon, in fact when I started in the law in the early 1980's it was not even mentioned at law school.

1.8 From the second half of the twentieth century "dispute resolution" remained firmly embedded within litigious court and in construction, shipping and commodities also arbitral processes which often were largely reflective of private sector litigation. Tensions occasionally arose between self-help (whilst the oldest recognised legal remedy generally frowned upon as "taking the law into one's own hands" especially when strength or equality of bargaining power between disputants was not equal) and litigation. Ultimately, the resolution of disputes was the business of Courts and lawyers.

1.9 The emergence of a new, more affluent society saw exponentially greater volumes of commercial, property, family and succession disputes.

1.10 On the wider stage, from a social policy viewpoint improved financial wealth, wealth distribution and workforce participation fuelled greater social freedoms and more liberal attitudes towards (or at least the reality of) divorce, social contracts and social welfare, more gender diverse workforces, non-traditional commercial transactions, (especially following the advent of internet based consumption and transacting) practices all shock the tree of the conventional dispute resolution processes.

1.11 These emerging economic and social trends brought with them a greater volume of disputes and disputes of a type and nature entirely new to a legal process which had evolved in the previous 200 years. Consequently existing legal processes were for some disputes ill-resourced and less-equipped to deal with such matters as:

- No fault divorce and consequent “matrimonial causes” that came in 1973 (let alone the growing and increasingly socially accepted unmarried population of de facto, same sex and diverse family types);
- Social Security disputes;
- Immigration disputes;
- Workplace/employment disputes, particularly the movement from collective to individual or individual and group bargaining as well as the increased regulation of the workplace through discrimination and condition legislating;
- Land and discrimination disputes;
- Smaller construction disputes where parties had inadequate recourse to summary judgment.

1.12 From about the 1980s the perceived shortcomings of the litigious court based model of dispute resolution, largely focused upon *transactional* disputes, were increasingly exposed as inadequate for dealing with *relational* disputes. A growing body of disputants were less willing to accept a due process outcome (at great cost of time and money) and sought greater self-determination, i.e. tailoring of solutions (rather than precedent based decision making). Expedition, management and review of resolution - all at less cost than what was for offer was beginning to be the name of the game. The business world slowly became receptive to alternative ways in which differences could be settled particularly from the mid-1990s.

1.13 Both government and the judiciary have in civil cases<sup>14</sup> been promoting ADR as an alternative to litigation to get parties away as early as possible from a legal process both pre and post action.

1.14 Court annexed mediation began for example in Australia (of all places) in 1983, when the Victorian County Court Building Cases List made provisions for matters to be referred to mediators for the resolution of cases<sup>15</sup>. I recall going to a lecture at the Law Society in 1988 given by an Australian then lawyer and now prime minister of Australia, Malcolm Turnbull extolling the virtues of mediation as an ADR technique that was fast, cheap, and worked. Turnbull at that point had just defended Peter Wright, an English former MI5 official who wrote the book *Spycatcher*<sup>16</sup>, and successfully stopped the British government's attempts to suppress the book's publication in Australia! As I recall ADR played no role!

1.15 The Federal Court of Australia has had a mediation program for alternative dispute resolution since 1987....In June 1991 the Federal Court of Australia Act 1976 was amended to allow the court, with the consent of the parties, to refer the proceedings or any part to a mediator...The mediation movement in Australia gained particular impetus and credibility in the early 1990s. By 1992, the then Chief Justice of the Supreme Court of Victoria, Justice Phillips, concluded that delays in the Supreme Court could only be resolved by a “massive and mighty effort using mediation as a vehicle for getting cases resolved.”

1.16 In the UK, the first bow wave reached these shores in about 1987<sup>17</sup>. By 1990, The Centre or Effective Dispute Resolution (CEDR) was up and running<sup>18</sup> under both Dr. Karl Mackie CBE<sup>19</sup> and Eileen Carroll as early pioneers of mediation, in those early days training and educating lawyers about new ways to resolve conflict was the big push, actual mediations were few and far between. Things moved a pace through the 1990s<sup>20</sup>, the construction recession in

the years 1991 – 1994 put added pressure on resolving disputes without the full armory of the law (we did not have modern statutory adjudication then, but it was a twinkle in Sir Michael Latham's eye) being deployed for every skirmish and mediation began no longer to be seen as a 'weak' thing to proffer. The big boys were doing it too.

*The tide turns – the Woolf watershed*

1.17 This progress to ADR was helped enormously by the publication of Lord Woolf's *Access to Justice Reports* in 1995 and 1996<sup>21</sup> as lawyers spread the word. It was a watershed in the development of ADR for the resolution of non-family civil disputes. Lord Woolf devoted a chapter in his Interim Report to the subject of 'Alternative Approaches to Dispensing Justice' in which he stated that ADR had the 'obvious' advantage of saving scarce judicial resources, but that more significantly, 'it offers a range of benefits to litigants or potential litigants. ADR is usually cheaper than litigation, and often produces quicker results'. Despite the asserted benefits of ADR for the Court Service and for litigants, Lord Woolf was clear that he did not propose that ADR should be compulsory either as an alternative or as a preliminary to litigation:

*"...I do not think it would be right in principle to erode the citizen's existing entitlement to seek a remedy from the civil courts, in relation either to private rights or to the breach by a public body of its duties to the public as a whole."*

1.18 He did go on, however, to say that the courts should play an important part in 'providing information about the availability of ADR and encouraging its use in appropriate cases'<sup>22</sup>. In the description of the working objectives for the new civil justice system being proposed, the Interim Report provides that:

*"Where there exists an appropriate alternative dispute resolution mechanism which is capable of resolving a dispute more economically and efficiently than court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they had made use of that mechanism."*

1.19 This emphasis on the value of alternative dispute resolution mechanisms was repeated and reinforced in Lord Woolf's Final Report<sup>23</sup>, in which the encouragement or pressure towards ADR was made quite explicit. In describing the 'new landscape' of civil litigation, the first feature specified was that '*litigation will be avoided wherever possible*' and that information on sources of alternative dispute resolution would be provided at all civil courts. Although there was no policy commitment at the time of the Final Report to make legal aid available for ADR, Lord Woolf also went on confidently to decree that legal aid funding would be available for pre-litigation resolution of ADR. However, the most important of Lord Woolf's introductory statements about the prospects for ADR were contained within the second feature of the new landscape of civil litigation.

1.20 This second feature was that in future litigation would be less adversarial and more co-operative. In seeking to realise this ambition Lord Woolf gave the courts the power to punish lack of co-operation both prior to and during litigation. The shift in responsibility for case management from the parties to litigation to the Judges and courts achieved by the Woolf reforms carried with it the power of the courts, through case management, to divert cases into ADR processes. See the ADR order, as set out in Appendix E<sup>24</sup> of the Technology and Construction Court (TCC) Guide (second revision, third edition).

1.21 In a crucial paragraph in the Final Report describing how the courts will encourage co-operation and punish adversarialism, Lord Woolf makes clear that:

*“The court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.”*

1.22 When a new (Labour) Government came to power in 1997, Lord Woolf’s proposed reforms of civil justice were reviewed and judged to be sound<sup>25</sup>, and then incorporated into the new Government’s Modernising Justice programme. In their White Paper, published in December 1998, the Government made clear that it was:

*“..... seeking to improve the range of options available to people for resolving disputes without a formal court adjudication process. There are several different models of ‘alternative dispute resolution’ (ADR), including mediation, arbitration and ombudsman schemes. We are considering what contribution these can make to a fair and effective civil justice system.”*<sup>26</sup>

1.23 When the new Civil Procedure Rules giving effect to Lord Woolf’s reforms were implemented in April 1999, the courts were given the tools via extensive case management powers including the power to order parties to attempt mediation or another form of ADR and to stay proceedings for this to ensue. Failure to co-operate with a Judge’s proposition regarding ADR can result in cost penalties being imposed on the recalcitrant party if one party wished to partake. It became part of English common law. Whilst we do not have a mediation or ADR statute, the common law says there is a duty to consider ADR before litigation. Indeed even if there is a point of law at issue, there is a duty on the parties to seek to resolve the dispute by mediation.

1.24 As part of a programme of judicial training to handle the implementation of the reforms, the judiciary received instruction to raise awareness of ADR generally and, specifically, to alert them to the potential benefits of mediation in the resolution of civil disputes.

1.25 Following the ‘Machinery of Government’ changes in June 2001, responsibility for issues relating to the constitution, freedom of information and human rights moved to the then Lord Chancellor’s Department<sup>27</sup>. At this time, the Department reviewed its aims and strategic objectives and articulated a series of new Strategic Objectives, which included:

*“To protect and promote the rights and responsibilities of all by ensuring a fair and effective civil and administrative justice system, and the resolution of disputes in a way proportionate to the issues at stake.”*

1.26 Come 2002 the English Courts were virtually mandating ADR<sup>28</sup>. By that time the Commercial Court’s practice of issuing ADR Orders in selected commercial disputes was also in play.

1.27 In fact since 1993 the Commercial Court has been identifying cases regarded as appropriate for ADR. In such cases Judges may suggest the use of ADR, or make an Order directing the parties to attempt ADR<sup>29</sup>. If, following an ADR Order, the parties fail to settle their case they must inform the Court of the steps taken towards ADR and why they failed. Thus although the Court’s practice is non-mandatory, ADR Orders impose substantial pressure on parties.

1.28 Pre-action protocols first appeared in 1999. These encouraged the use of ADR in order to promote settlement before the issue of proceedings<sup>30</sup>. The take up was not impressive in the early 2000s.

1.29 Indeed in April 2002, the Court of Appeal's decision in *Dunnett v Railtrack Plc*<sup>31</sup> highlighted the necessity for lawyers and parties to consider Alternative Dispute Resolution (ADR), failing which a party may be penalised in costs. In *Leicester Circuits Ltd v Coates Brothers plc* [2003]<sup>32</sup> a successful party which had withdrawn at the "11th hour" from a mediation arranged pre-trial was denied some of its costs. In the earlier case of *Cowl v Plymouth City Council*<sup>33</sup>, Lord Woolf, in his Judgment in the Court of Appeal, stated in the context of a judicial review that:

*"...both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress." "Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money was involved, indefensible..."*

1.30 In *Hurst v Leeming* [2002]<sup>34</sup> Lightman J acknowledged that mediation is not compulsory in law. Nevertheless, referring to the decisions of the Court of Appeal in *Dunnett* and in *Cowl*, he said:

*"..alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular, in any case where mediation affords a realistic prospect of resolution of dispute, there must be anticipated as a real possibility that adverse consequences may be attracted."*

1.31 Although he accepted that a party may refuse to proceed to mediation with impunity if there is, objectively assessed, no real prospect of success (as was exceptionally the case in these proceedings), he described such a refusal as "a high risk course to take".

1.32 In refusing permission to appeal, Keene LJ described Lightman J's conclusion that the rejection of mediation was justified as "unusual" but said that it was fully borne out by the evidence in the case.

#### *More pressure on the gas peddle*

1.33 The trend towards mediation as "a firmly established, significant and growing facet of English procedure" was confirmed by Colman J in *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002]<sup>35</sup>. In this case, a mediation clause in a contract was enforced by the court and the litigation stayed. The clause was not a mere agreement to negotiate and therefore unenforceable, but a real contractual commitment to find solutions which were mutually commercially acceptable at the time of the mediation.

1.34 Then in May 2004, the Court of Appeal handed down its Judgment in the case of *Halsey v Milton Keynes General NHS Trust*<sup>36</sup> that again concerned the question of when the court might impose a costs penalty following a refusal to attempt mediation. The case had been the subject of discussion for some time before the Judgment was issued because the Court of Appeal Judges, unusually, had requested opinions from (i) the Civil Mediation Council, (ii) the ADR Group and (iii) CEDR (the largest commercial mediation providers) about the value of mediation. The Law Society had also filed an opinion. In its Judgment, which sought to lay

down guidelines for the courts in dealing with costs in situations where mediation has been refused, the Court of Appeal did not accept the Civil Mediation Council's argument that there should be a general presumption in favour of mediation. In its place, the Court accepted the Law Society's submission that the question of whether mediation had been "unreasonably" refused should rest on a number of factors, which would be evaluated by the court in each case. Lord Justice Dyson<sup>37</sup> significantly and evidently deliberately, held that the courts have no power to order mediation and raised the question of whether a court order to mediate might infringe Article 6 of the Human Rights Act 1998, the right to a fair trial<sup>38</sup> and act as a fetter. He further held that the court has jurisdiction to impose a costs sanction on successful parties who unreasonably refuse to mediate. However, in deciding whether or not to do so, factors to consider include whether the successful party reasonably believed they would win, cost-benefit, and whether the unsuccessful party can show that mediation had a reasonable prospect of success. The decision in the case was viewed by some commentators as representing a departure from the direction in which recent court judgments about ADR had been moving. Various senior Judges took to podium to say LJ Dyson was in error, that it was not an infringement of Article 6.

1.35 That cannot be too surprising as at paragraph 9, Dyson LJ stated that the court had considered arguments on the question of whether it had power to order parties to submit their disputes to mediation against their will. On this point, Dyson LJ was clear. He said (all emphasis added):

*"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, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of Article 6 [of the Human Rights Act 1998]. 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."*

1.36 Thus, whatever else it says, *Halsey* clearly states that courts have no power to order cases to go to mediation. It is arguable whether, in fact, a direction to attempt mediation prior to a hearing would infringe Article 6. Referral to mediation is a procedural step along the way to a court hearing if the case does not settle at mediation. It does not **exclude** access to the courts and to require parties to attend a three-hour low-cost mediation session does not **order** them to compromise their claim. Having attended the mediation meeting, the parties are free to terminate and leave at any point and to continue with the litigation.

1.37 *Halsey* thus took a more cautious line and in doing so appeared to represent something of a retreat. Which at various fora senior Judges unpicked.

*ARM<sup>39</sup> pilot scheme*

1.38 On March 24 2004, the DCA<sup>40</sup> announced the establishment of a pilot scheme to be established in Central London County Court involving the automatic referral of selected cases to mediation. A press release issued on the same day stated that: *The new pilot based on an automatic referral scheme in Ontario, Canada will start on 1 April and run for 12 months. If it is successful it will be introduced in other major court centres in England and Wales.*

1.39 A Practice Direction was issued to support the quasi-compulsory nature of the scheme supplementing CPR, Part 26. The Practice Direction entitled "Pilot Scheme for Mediation in Central London County Court" provided, among other things, as follows (emphasis added): This practice direction enables the Central London County Court to: (1) **require** the parties to certain types of claims **either to attend a mediation** appointment or to give reasons for objecting to doing so; and (2) stay the claim until such an appointment takes place. If one or more of the parties state in his reply that he objects to mediation, the case will be referred to a District Judge who may:

- (1) direct the case to be listed for a hearing of the objections to mediation;
- (2) **direct that a mediation appointment should proceed;**
- (3) order the parties to file and serve completed allocation questionnaires; or
- (4) give such directions as to the management of the case as he considers appropriate.

*Not all in the garden is rosy re social policy*

1.40 Many have concerns<sup>41</sup> about the Ministry of Justice, and the UK governments of the last 10 years doing all they can to encourage ADR to save costs of the Treasury running the civil justice machine and funding legal aid<sup>42</sup>. ADR fits in well with that requirement, as it is paid for by the parties under confidential circumstances and any agreements reached are not supervised or published, it need not be tied to legal principles. Professor Michael Zander QC and Professor Dame Hazel Genn are both on this page. Namely, ADR is not a panacea, not a one size fits answer. The civil justice system provides the 'legal architecture' for the economy to operate effectively, for agreements to be honoured, and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly re-affirm norms and behavioural standards for private citizens, businesses and public bodies.

1.41 I have seen with my eyes that we are witnessing the decline of civil justice – access to it is now qualified not 'as of right' the downgrading of the importance of civil justice, the degradation of civil court facilities, and the diversion of civil cases to private dispute resolution, accompanied by an anti-litigation/anti-adjudication rhetoric that interprets these developments as socially positive are not to be ignored. The premise imposed by the Treasury that the civil courts should be self-funding through court fees, which are now outrageously high for ordinary litigants<sup>43</sup>, adding seriously to the escalating cost of litigation (which is, in my opinion, the real reason for the weakening of our civil justice system) and hence, I suspect, creating a deterrent effect<sup>44</sup>. The anti-law story<sup>45</sup> suggests that society is in the grip of a litigation explosion or compensation culture, and that the solution is to be found in cutting down court procedure, diverting cases away from courts, and pushing disputes into private resolution. The message is that 'rights' conflicts can be reframed as 'clashes of interests' which can be satisfactorily reformulated as 'problems' which can then be solved through mediation.



1.42 The reality is the civil courts were not swamped with cases in the 1990s the real force behind government encouragement is to save legal aid and judicial time.

1.43 As Zander and Genn<sup>46</sup> make clear most importantly, the civil justice system has few friends in government, since it is through civil cases that the government is directly challenged. Indeed, the inclusion of judicial review within the civil justice 'tent' might be seen as a particular disadvantage for those interested in securing greater resources for civil justice. I too can confirm the sorry state of the courts. It is true that even in the new Roll's Building which houses inter alia the Technology and Construction Court, admin staff retention is low and staff are overstressed, access to things like IT, even printers and paper to stock them is woeful, there are too few books for Judges; Judges having too little reading days and Legal Aid is not a welfare benefit for the poor, it has all but gone. Instead, it was presented as a gravy train for 'fat cat lawyers' but in truth its loss is access to justice denied, we are told the simple fact is the State cannot afford it in the 21 century.

#### *Change in the way we do things*

1.44 One has to see that civil justice reform and ADR are of course intertwined. As it was, most justiciable disputes do not get anywhere near the court system. Only a tiny percentage of cases get to court. In fact only c16% in High Court and 3-4% in the County Court. Therefore, when government policy is aimed at that tip of the iceberg and getting out of court and into mediation, it has to be remembered the vast majority of parties do not fight and many that do give up early, sort it out themselves, or just move on. That 16% is generally the result of an intractable dispute and would have settled could it have been, and that needs to be borne in mind when considering the rhetoric for diverting cases out of the system into mediation.

1.45 Civil justice reformers from Lord Woolf onwards have pressed the case for bringing ADR within the formal framework of civil procedure, for example by:

- developing pre-action protocols;
- encouraging stays for mediation<sup>47</sup>;
- Including the promotion of ADR within the overriding objective.

1.46 In the TCC Coulson J as he then was in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd & Ors*<sup>48</sup> said obiter the appropriate way for ADR to be accommodated within TCC proceedings was for the court to set a sensible timetable allowing a reasonable period between each step in the process (say 2 months), so that the parties have sufficient time to consider their positions and attempt mediation if they wished before incurring the next tranche of costs.

1.47 ADR also gains traction from many of the reforms to the litigation process, for example: measures to focus disclosure on documents which are central to the dispute; steps to control legal costs before the parties switch to ADR.

1.48 Flexibility is a common theme. The need to adapt procedures to the circumstances of the particular case is a common theme in both realms<sup>49</sup>. It is also the purpose of the array of specialist courts and procedures which have sprung up in recent years such as the Shorter and Flexible Trials Pilot Scheme under Practice Direction 51N.

1.49 The Centre of Construction Law and Dispute Resolution at King's College, London ("King's College") carried out a survey<sup>50</sup> of TCC cases in the period 1 June 2006 to 31 May 2008. The survey was set up by agreement between King's College and the TCC Judges, following an indication by the Judge in charge that empirical data as to the effectiveness of mediation would be helpful<sup>51</sup>. Two large TCC courts participated, namely the London TCC and the Birmingham TCC. The conclusions from the research, which TeCSA supported, chapter 34 sets out King's College's findings. These included:

- 60% of the settlements were achieved through conventional negotiation;
- 35% of the settlements were achieved through mediation;
- Within the 35%, the majority of cases would probably have settled anyway but at a later stage; the financial savings from bringing forward those settlements substantially exceeded the costs of the mediations;
- Within the 35% a small number of cases on the cusp probably would not have settled absent the mediation; the costs saving achieved by mediation in those cases was enormous;
- A small number of cases in the survey went to trial after unsuccessful mediations; in some of these cases, the mediation costs were wasted, but in others, they achieved valuable benefits such as narrowing the issues.

1.50 Sir Rupert Jackson PC has been voluble in drawing attention to the fact that in his submissions received during his Costs Review<sup>52</sup>, in the area of ADR unlike most others, there was a high degree of consensus amongst the submissions. Most people agreed that ADR in general and mediation in particular were good things and should be encouraged. CEDR stated that in each year there were (on the basis of CEDR's figures) about 2,000 small claims mediations and about 4,000 other mediations. CEDR and other bodies put in powerful submissions advocating mediation on a wider scale. Some enthusiasts proposed compulsory mediation.

1.51 The Civil Mediation Council is an organisation that promotes mediation in all areas of dispute resolution. In its submission for the Costs Review in July 2009, the CMC stated that returns from 52 of its provider members reported 6,473 mediations so far that year, which was an increase of 181% over the 2007 baseline. There were 8,204 mediations conducted in 2008 by members. In its submission, the CMC outlined the benefits of mediation in a number of discrete areas, such as Mercantile Court cases, neighbour disputes, chancery litigation etc. It detailed that personal injury and clinical negligence practitioners had been predominantly resistant to mediation, but even they were now becoming less resistant.

1.52 As for the Law Society, it supported mediation, but sounded a more cautious note. It said:

*"The Law Society continues to support the use of all forms of ADR in circumstances where it may be assist the parties to come to terms and they are willing to do so. We also support the principle of 'legal proceedings as a last resort only'. However, mediation is not the panacea which some consider it to be and is not appropriate in all cases. Neither should it be made mandatory. Indeed, there are views among practitioners that there is no consistency about which cases are suitable for mediation – some may well be mediated which are more suitable for trial, and vice versa. We consider that firmer guidelines are needed on what is and is not suitable for mediation."*

1.53 Following the publication of the Jackson's 'Final Report' Susan Blake, Julie Brown and Stuart Sime prepared an authoritative handbook on ADR to comply with the recommendation in Final Report chapter 36. An editorial board, chaired by Lord Neuberger (then President of the Supreme Court) and Lord Clarke (a Supreme Court Judge who has just retired, who had set up the Costs Review when Master of the Rolls), provided support and advice<sup>53</sup>. The book was published in April 2013, in order to coincide with the general implementation date for the Final Report reforms. It was entitled *Jackson ADR Handbook*<sup>54</sup>. The Judicial College issued copies to all Judges dealing with civil work.

1.54 But is mediation access to justice? Mediation may result in a settlement the parties can live with but not a 'determination'. It may not be 'just and fair' as that is not the object it is about achieving a solution in fact it is just about settlement.

#### *Post 2013*

1.55 In the four years since April 2013 there has it would appear been a substantial increase in the use of ADR, in particular mediation. Courts have more readily granted orders in support of ADR. They have more frequently made costs orders against parties who unreasonably refused to mediate. This cultural change has gone hand in hand with the more intensive focus on case management and costs management, which is a major feature of the 'Final Report' reforms.

1.56 A recent seminal case is *PGF II SA v OMFS Co 1 Ltd*<sup>55</sup>. In this case, the Court of Appeal held that the defendant's silence in the face of two offers to mediate amounted to an unreasonable refusal to mediate meriting a costs sanction. Briggs LJ gave the leading Judgment, with which Maurice Kay and McFarlane LJJ agreed.

1.57 Briggs LJ endorsed the Jackson ADR Handbook and went on to say:

*"34. In my Judgment, the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds."*

#### *What stick does the Court have?*

1.58 Well if the winning party has unreasonably refused to mediate, then the court can make 'an appropriate reduction' in its award of costs. If the losing party has unreasonably failed to mediate, that approach is not possible. In *Reid v Buckinghamshire Healthcare NHS Trust* (20 October 2015) the court dealt with the matter by ordering the losing party to pay indemnity costs as from the date when it had unreasonably refused to mediate.

#### *What of the EU position and Brexit?*

1.59 On 23 April 2008, the European Parliament formally approved the Council's common position on the EU Mediation Directive (the "Directive"). It was adopted by the Parliament and Council on 21 May 2008 and entered into force on 13 June of that year. The Directive had to be implemented into the national law of member states within three years of adoption, so by 20 May 2011. The Ministry of Justice here in the UK considered that law and practice in England and Wales already complied in large part with the Directive, but additional legislation was needed to bring particular aspects into force, including the enforceability of

agreements reached through mediation and certain confidentiality aspects. Changes were therefore made to Part 78 of the Civil Procedure Rules ("CPR") which introduced provisions relating to these two aspects and which came into effect for cross-border<sup>56</sup> mediations commenced on or after 6 April 2011. A statutory instrument (the "Regulations") which came into effect on 20 May 2011 implemented the outstanding provisions of the Directive, relating to confidentiality of mediation proceedings and the suspension of the limitation period while a relevant mediation is on-going.

1.60 The European institutions clearly regard the promotion of mediation within the EU as highly desirable. The recitals to the Directive emphasise the speed, cost and efficacy of mediation. However, they acknowledge that without formal legislation it has proved difficult to establish predictable and equal opportunities for mediation across member states.

1.61 There were in fact over the last two years two significant EU enactments on ADR adopted in May 2013 but which came into force during 2015 and 2016, namely:

- EU Directive on Consumer ADR (2013/11/EU)
- EU Regulation on consumer ODR (524/2013).

1.62 These measures apply however to consumer disputes. The ADR Directive requires traders to provide effective, transparent and independent means of alternative dispute resolution and to advertise it to their consumers in a clear and easily accessible way. The ODR Regulation, meanwhile, is concerned with setting up an EU wide ODR Platform which enables complaints against traders to be filed online. The platform takes the details of the complaint and refers them to providers of ADR in the Member State for resolution. Post Brexit they will be unpicked I assume by the Great Repeal Bill<sup>57</sup>. However, European Association of JUDGEs for Mediation (GEMME) is an association of Judges in Europe which seeks to promote the effective use of mediation. Several British Judges are active members of GEMME. UK participation will I have read continue after Brexit.

1.63 Thanks to Sir Rupert Jackson LJ, he reveals a nexus between ADR and Costs in his Final Report in his paper *Civil Justice Reform and alternative dispute: Chartered Institute of Arbitrators* paper last September<sup>58</sup>. He points to numerous interconnections between these topics to include [emphasis added]:

(1) *"During the Costs Review there was strong evidence that the regime of recoverable success fees and recoverable ATE premiums was hindering the work of mediators. There were reports of mediations which failed because the huge recoverable success fees and/or recoverable ATE premiums proved a stumbling block. The abolition of recoverable success fees and recoverable ATE premiums removed this stumbling block. Admittedly, this observation is based on anecdotal evidence, but it gains some support from the Mediation Audits discussed below.*

(2) *Because of costs, management parties now come to mediations knowing (a) what adverse costs they will pay out if they lose; (b) what costs they will recover if they win; (c) what irrecoverable costs they will have to bear in any event if the case goes to trial. Many mediators say that this is helpful.*

(3) *The promotion of more forms of funding, in particular TPF, was an important element of the Final Report reforms. Third party funding has grown substantially over the last three years. It supports both litigation, arbitration and ADR."*

1.64 CEDR publishes a 'Mediation Audit' every two years. The Seventh Mediation Audit which was published on 11 May 2016, it adds some statistics, it states:

*"We asked both mediators and lawyers about the Jackson reforms and whether they had had any impact on either the number of cases coming to mediation or the ease/difficulty of settling cases at mediation.*

*(1) What impact have the Jackson reforms had on the number of cases coming to mediation?*

	Mediators		Lawyer	
	2016	2014	2016	2014
What impact have the Jackson reforms had on the number of cases coming to mediation?	6%	12%	7%	5%
No difference/too early to tell	54%	70%	50%	70%
Increase	41%	18%	43%	25%

*(2) What impact have the Jackson reforms had on the ease/difficulty of settling cases at mediation?*

	Mediators		Lawyer	
	2016	2014	2016	2014
Harder	13%	9%	3%	3%
No difference/too early to tell	58%	73%	73%	79%
Easier	29%	18%	24%	17%

1.65 So whereas respondents were largely sitting on the fence two years ago – and most still are – those who are prepared to express a view are 'tending' (I chose my words carefully) to give the Jackson reforms a positive assessment, although it is apparent that there are still mixed views about the double-edged sword of the costs provisions.

1.66 Without doubt, the use of ADR, and in particular mediation, as a dispute resolution process has been given a cautious boost by a number of the cases I have mentioned in which the courts have sanctioned greater use of it.

1.67 In fact, outside construction the recent case of baby *Charlie Gard* and his parents' fight for the right to choose to extend his life by seeking treatment abroad has been widely debated in the media this summer. Opinions have raged (much ill informed) on both sides of the argument, stoked by the immediacy of social media, and notably there have been distressing attacks on both the parents and those working at Great Ormond Street Hospital (GOSH). In his final decision, Mr Justice Francis makes a particular point: "However, it is my clear view that mediation should be attempted in all cases such as this one even if all that it does is achieve a greater understanding by the parties of each other's positions."

1.68 Whilst this is specific about cases "such as this one", many experienced mediators, commercial and others, would say that there is no such thing as a failed mediation because

mediation helps parties “to understand the process and the viewpoint of the other side, even if they profoundly disagree with it ...” That alone is a good outcome even if settlement is not achieved on the day.

1.69 This was indeed a case for mediation and the question is why was it not mediated? If the decision not to use mediation was based on the assumption that mediation would cloak the matter in confidentiality and thereby disadvantage certain parties then it may be helpful to point out that mediation is confidential by default. However, that does not mean that it must remain confidential. It is entirely possible to issue a statement or statements about the mediation which may also include the content of the mediation if that is agreed between the parties.

1.70 The relevant paragraph is quoted here for convenience: [Emphasis added]

*“[20] Fourthly, I want to mention, again, the subject of mediation. Almost all family proceedings are now subject to compulsory court led dispute resolution hearings. This applies in disputed money cases, private law children cases and in all cases involving the welfare of children who might be the subject of care proceedings. I recognise, of course, that negotiating issues such as the life or death of a child seems impossible and often will be. However, it is my clear view that mediation should be attempted in all cases such as this one even if all that it does is achieve a greater understanding by the parties of each other’s positions. Few users of the court system will be in a greater state of turmoil and grief than parents in the position that these parents have been in and anything which helps them to understand the process and the viewpoint of the other side, even if they profoundly disagree with it, would in my Judgment be of benefit and I hope that some lessons can therefore be taken from this tragic case which it has been my duty to oversee.”*

1.71 So to sum up what ADR is the more important features fundamental to understanding it are:

**1.72 It is an alternative path**

1.73 **It is a consensual process** - The Court of Appeal decision in Halsey (ibid) has restored the traditional view that ADR is consensual, in that parties must normally agree to refer their disputes to some form of ADR. The court cannot compel them to do so, although it can, as explained above, penalise them in costs if they refuse unreasonably to try ADR.

1.74 **Its ‘without prejudice’ nature** - ADR is conducted in privacy and on a “without prejudice” basis. The result of a reference to most types of ADR only becomes binding on the parties once they have reached an enforceable agreement. Until then, either party can withdraw from the ADR process and start or continue proceedings before a court or an arbitral panel. If the reference to ADR does not result in a settlement and litigation or arbitration then starts or continues, neither party may use or refer to anything that arose during the ADR process.

1.75 **It can produce creative commercial solutions** - ADR permits parties to seek solutions which are not available through litigation or arbitration and which can accommodate their commercial needs and interests. By way of example, a claim for money due could be settled by a discount on future services, which might preserve, or even enhance, a business relationship.

1.76 **It is flexible** - The form of procedure can be tailored to suit the needs of the parties. ADR may occur either before the start or during the course of litigation or arbitration

proceedings. The parties are free to agree whether those proceedings should continue or be stayed during the ADR process.

1.77 **It is generally inexpensive and expeditious** - compared with litigation, although the parties need to have fleshed out their position and evidence well before they embark upon it if they want to improve the prospects of a good settlement. ADR is relatively inexpensive, particularly if it leads to the resolution of a dispute at an early stage, e.g. following pre action protocol<sup>59</sup>. It is also quick to set up and implement; in many cases, for example mediation takes no more than a day.

## 2.0 Types of ADR process

2.0 We will briefly look at a variety of ADR processes (i) Arbitration; (ii) Adjudication; (iii) Mediation; (iv) Med-arb; (v) Early Neutral Evaluation; (vi) Expert Determination (vii) Dispute Resolution Boards; (viii) conciliation offered by likes of Construction Conciliation Group (CCG) or ICE Mediation/Conciliation Procedure; (ix) Project Mediation; (x) Pendulum Arbitration and (xi) mini-trial.

### *Arbitration*

2.1 Arbitration was the traditional method for the resolution of construction disputes for many years, until the introduction of a range of ADR techniques, adjudication and the introduction of pre-action protocols in litigation.

2.2 Although arbitration is often referred to as part of the new wave of 'alternative' dispute resolution techniques, such as mediation, it is one of the oldest forms of dispute resolution. Arbitration was practised in ancient Greece and Rome. The first English Arbitration Act was passed in 1698.

2.3 Perhaps the least appreciated difference between arbitration and other forms of dispute resolution is that the decision to use arbitration is overwhelmingly made when contracts are entered into - long before the dispute arises. To reap the benefits of arbitration, the right decisions must therefore be made at an early stage.

2.4 The law has traditionally treated litigation and arbitration as being essentially similar in nature. For example, in *Northern Regional Health Authority v Derek Crouch Construction Ltd*<sup>60</sup>, Sir John Donaldson said, "arbitration is usually no more and no less than litigation in the private sector. The Arbitrator is called upon to find the facts, apply the law and grant relief to one or other or both of the parties." The passing of the Arbitration Act 1996 led to some change in this attitude but not much, which with construction adjudication almost universally available for the last 20 years accounts for the massive drop in domestic arbitrations in the UK. International arbitration still thrives.

2.5 Arbitration is therefore not seriously looked upon as ADR other than the sense it is a contract out option from the state tribunals. While the process is much more in the hands of the parties the practical reality is it often takes longer and costs more than litigation as both the tribunal case management can be painfully slow, particularly with a three man tribunal, plus it is paid, travel and lodging too and then the venue has a price.

2.6 Although arbitration is sometimes conducted with a sole arbitrator, the most common procedure is for three, each side to select an arbitrator. Then, those two arbitrators select a third arbitrator, at which point the dispute is presented to the three chosen arbitrators. Decisions are made by majority vote.

2.7 The purpose of arbitration (enshrined in most modern arbitration legislation) is that disputes should be resolved by a consensual mechanism outside any court structure, subject to no more than limited supervision by the courts of the place of arbitration. English arbitration is rightly well respected around the world<sup>61</sup> and the Judges are on the whole hands off.



2.8 An arbitration agreement refers a current or future dispute between parties that arises from a defined legal relationship to an impartial third party (the arbitral tribunal), typically appointed by the parties, but can be an institutional one. The arbitral tribunal is tasked with deciding the parties' dispute in a judicial manner after hearing both sides and the parties agree to be bound by the result.

2.9 The Arbitration Act 1996 (English Arbitration Act) came into force on 31 January 1997. The English Arbitration Act:

- consolidated and updated the existing legislation on arbitration;
- codified legal rules and principles established by case law;
- brought English law more into line with internationally recognised principles of arbitration law;
- sought to make arbitration in England more attractive both to domestic and to international users;
- is broadly based on the Model Law (1985), but applies equally to domestic and to international arbitration;
- goes beyond the scope of the Model Law (1985) and contains a near-comprehensive statement of the English law of arbitration;
- is intended to be user-friendly, has a logical structure and is written in plain English;
- states what the objective of arbitration is, although it does not attempt a definition;
- increases the scope of party autonomy;
- strengthens the powers of the arbitral tribunal; and
- limits judicial intervention in the arbitration process while preserving the courts' powers to provide assistance where this is necessary to make arbitration a fair and efficient dispute resolution procedure.

2.10 I will say no more here.

### *Adjudication*

2.11 Adjudication has in construction disputes become the new normal, be it contractual or statutory in derivation, in fact it is hardly an alternative as it is virtually the first port of call in construction disputes in the UK.

2.12 In its modern form, adjudication was developed in a limited contractual form in the UK and receiving attention from the courts from the 1980s – the standard forms of UK

subcontracts contained a paper-only system of resolving disputes about main contractor set-off against sub-contractor payments. The system was reasonably successful within its limited ambit notwithstanding a lack of support from the Court of Appeal.

2.13 But the system was hugely extended following the Latham Reports into the UK construction industry in 1993/4. The reports, which were commissioned as a joint exercise by industry and government, identified the central problems: contractors (and especially subcontractors) were facing significant delays in getting paid; there was too adversarial a climate and disputes were taking too long and costing too much to resolve. These problems were perceived as damaging for both the construction industry and its clients, and provision for adjudication was introduced by statute in 1996.

2.14 The solution to this problem offered by the Latham report was a right to adjudication of any dispute arising under a construction contract. Like the later Australian model, it was to be a cash flow mechanism; a party dissatisfied with an adverse adjudication decision had to write his cheque, but then had his rights to litigate or arbitrate in full later. The intention that adjudication "must become the key to settling disputes in the construction industry"; the UK system was designed, not only for the small contractor seeking payment, but for all construction disputes. That intention has become fully realised.

2.15 The legislation<sup>62</sup> was also treated as apolitical. As Sir Michael Latham himself recalled in 2004, in his review of the review of the reforms:

*"(The Bill) was deliberately drafted to seek to hold a fair balance between the various conflicting views, and to reinforce fair contract conditions...At no stage was it seen in partisan terms..."*

2.16 In operation, the legislation has, in large measure, been welcomed both by main contractors and sub-contractors.

2.17 It may be said that statutory adjudication has become a short-form quasi-arbitration process, save that, amongst other things, unlike an arbitration award; an adjudication decision is only temporarily binding. Yet many parties simply do not start all over again in court to get a binding decision. So temporary binding becomes final by default.

#### *Mediation 'proper'*

2.18 This is by far the most commonly used technique. The terms 'mediation' and 'conciliation' are sometimes used interchangeably. In the past, the term conciliation was sometimes used to distinguish the variant of the process whereby the neutral makes a recommendation if settlement cannot be reached, but on other occasions, the distinction has been made the other way round. More recently, mediation has become the more widely used term.

2.19 Mediation is one of the most popular forms of ADR used to resolve construction disputes. Unless the parties agree otherwise, it is usually conducted on a voluntary basis by an independent mediator jointly instructed by the parties. Until recently, there were a number of cases which suggested that the court had power to order parties to mediate notwithstanding one or more parties' objections. It is, however, now clear that parties must voluntarily agree to mediate and that it is likely that any form of compulsory mediation would be regarded as a constraint on the right of access to court.

2.20 The benefits of mediation have been recognised worldwide. This has led to the introduction in the UK of a judicial form of mediation called the Court Settlement Process ("CSP") whereby, as far as TCC claims are concerned, a TCC judge in an appropriate case and with the consent of the parties can assist them in reaching a settlement. With the introduction of the Mediation Directive (Directive 2008/52EC), implemented in the UK by the Cross-Border Mediation (EU Directive) Regulations 2011<sup>47</sup> the use of mediation will also be actively encouraged to resolve civil and commercial cross-border disputes. The Ministry of Justice proposes introducing provisions similar to those in the Directive for mediations in domestic disputes.

2.21 In 2010, a Report entitled *Mediating Construction Disputes: An Evaluation of Existing Practice* (The result of research conducted by the Centre of Construction Law and Dispute Resolution at King's College London and the Technology and Construction Court, headed by my firm Fenwick Elliott LLP) was published. This concluded that:

- (1) Where mediation is successful, the cost savings attributed to the mediation were significant, providing a real incentive for the parties to consider mediation<sup>63</sup>.
- (2) Mediation was undertaken on the parties' own initiative in the vast majority of cases<sup>64</sup>.
- (3) The parties themselves generally decided to mediate their dispute at three key stages: as a result of exchanging pleadings; during or as a result of disclosure; and shortly before trial<sup>65</sup>.
- (4) The vast majority of mediators were legally qualified. Only 16 per cent were construction professionals<sup>66</sup>.
- (5) In the vast majority of mediations, the parties were able to agree between them on the mediator to appoint; appointing bodies were only used by 20 per cent of respondents. There was also a tendency to use the same mediators again and again, suggesting a comparatively mature market with parties' advisors suggesting well-known mediators within the construction disputes field.

2.22 The current judicial climate is such that, whilst parties cannot be forced to settle their disputes by means of ADR, they are encouraged to attempt to do so:

*"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. The form of encouragement may be robust ...;"<sup>67</sup>*

2.23 This climate is reflected in the CPR,<sup>68</sup> the pre-action protocols, the TeCSA ADR Protocol and numerous judicial indications. Further court allocation questionnaires now require that legal representatives confirm that they have explained to their clients:

- the need to try to settle;
- the options available; and
- the possibility of costs sanctions if they refuse to try to settle.

2.24 Thus, there are now at least three reasons why parties are well advised to consider mediation:

- (1) it might work;
- (2) a refusal to mediate may well carry a costs penalty; and
- (3) achieving a settlement through a private and confidential process such as ADR would avoid the (potentially adverse) publicity of a trial.

2.25 It is not difficult for a skilled litigator to go through the motions of appearing willing to mediate, and thus to avoid the costs risk, whilst at the same time making sure that no mediation in fact takes place. But these litigators are often the same ones whose instinct is to want to show strength by never appearing to need to talk and once this stance is disturbed by the need to at least appear willing, they will sometimes be persuaded actually to try it.

2.26 A mediation typically follows the following course:

- Parties exchange brief case summaries, and a day for the mediation is arranged.
- At the mediation, the mediator starts by making a brief opening statement.
- The parties then each make oral opening statements.
- The mediation then breaks into caucus, each party retiring to a separate room and the mediator shuttling between the two.
- These caucuses, perhaps with further joint meetings, continue for the duration of the mediation.
- If the mediator has been able to obtain an agreement, the parties come together and draft and sign a settlement agreement.
- If the parties have not been able to reach agreement at that point, the position depends upon whether it has been agreed that the mediator should make a recommendation. If so, the mediator may make a recommendation on the spot, or on a later day. If there is not to be a recommendation, the mediator will typically discuss with the parties why they have not been able to reach agreement, and will suggest further steps which may achieve an agreement.

In all but the most complex cases, the mediation itself typically takes place on a single day.

#### *Med-arb*

2.27 This is ADR technique sometimes, often talked about in England but little practised. Med-arb is a process whereby the parties agree that if the mediated negotiations do not succeed, then the mediator changes role, becomes an arbitrator, and makes a legally binding award. In this sense, it is a melding of two well-established processes for conflict resolution into one hybrid process.

2.28 Mediation and Arbitration are used in conjunction with one another and, in the truest form of med-arb; the same third-party neutral plays the role of both mediator and arbitrator.

2.29 Med-arb gives rise to a number of jurisprudential difficulties, and offends against a number of principles of what is regarded as good ADR practice. Nevertheless, there are some who prefer the robustness of such an approach.

2.30 The act of transmogrifying from mediator to arbitrator is the issue as it creates some horrors in many lawyers' minds after a case in which an adjudicator in one well known case later transformed into a mediator and then tried to swap back.

2.31 In *Glencot Development and Design v Ben Barrett & Son*<sup>69</sup>, a case referred to Judge Humphrey Lloyd QC in the TCC, in contrasting the mediation process with that of adjudication and pointing out the dangers of one person wearing both hats, said: [Emphasis added]

*"The process [mediation] will also be concerned with the commercial interests of the parties which may not be synonymous with their legal rights and obligations. Thus, such a person [the adjudicator/mediator] will or may have to listen to arguments and hear things which may be completely irrelevant to the dispute in the adjudication but which might be prejudicial to its determination. Discussions or a mediation of the kind which apparently took place on 29 September are or may be at variance with adjudication. Thus, Mr Talbot was correct in making it clear to parties that what he might be doing was a departure from adjudication and in getting their agreement to it. Such agreement was essential. Of course an agreement in advance, even if a formal written agreement, may not be effective in depriving a party of its right to question a later decision on the grounds of apparent or actual bias. There are clearly risks to all when an adjudicator steps down from that role and enters a different arena and is to perform a different function. If a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking."*

2.32 In *Glencot Development and Design* Judge Humphrey Lloyd QC set out a test for determining whether an adjudicator should continue to act as such having, half way through the adjudication, donned a mediator hat to try and broker a settlement. The mediation phase of the process failed to produce a settlement and the adjudication recommenced. However, the defendant indicated to the adjudicator that he should withdraw. The adjudicator took counsel's advice and decided not to. The Defendant then sent a formal notice saying:

*"Having considered the matter of impartiality extremely carefully and taken appropriate legal advice, we regret to inform you that we consider your capacity to make an impartial decision in the Adjudication has indeed been compromised by your presence at the partners settlement negotiations"*.

2.33 The Claimant required the adjudicator to continue and he did so, ultimately giving a decision in its favour. The claimant sought to enforce the award by way of summary Judgment but the application was successfully resisted on grounds of impartiality on the part of the adjudicator. Much of Judge Humphrey Lloyd QC's decision was given over to a discussion of impartiality and the test for apparent bias. The Judge referred extensively to the House of Lords decision in *R v Gough*<sup>70</sup> and, in particular, to the Judgment of Lord Goff who, at the end of his (Lord Goff's) Judgment summarised his understanding of the law in this area:

*"In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in*

*any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."*

2.34 Earlier in his Judgment, Lloyd noted Lord Goff found that *'bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias...'* This is a point also made by Lord Woolf (in *R v Gough*). Judge Humphrey Lloyd, in *Glencot*, in referring to these comments of Lords Goff and Woolf, stated that *this is why it is necessary for there to be an objective test for apparent bias, the views of the person involved (the med-arbitrator) being either irrelevant or not determinative*. He went to say that, *'The test is whether the "circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased"*. It is important to appreciate that in *Glencot* the court was dealing with a case of apparent rather than actual bias, Lord Woolf commenting (in *R v Gough*) that *"...except in the rare case where actual bias is alleged, the court is not concerned to investigate whether or not bias has been established."*

2.35 Med-arb gives rise to a number of jurisprudential difficulties, and offends against a number of principles of what is regarded as good ADR practice. Nevertheless, there are some who prefer the robustness of such an approach.

2.36 The nature of the risk can perhaps best be put in context by again quoting from Judge Humphrey Lloyd QC's in *Glencot* *"...such a person [the adjudicator/mediator] will or may have to listen to arguments and hear things which may be completely irrelevant to the dispute in the adjudication but which might be prejudicial to its determination"*.

2.37 Mediators work of course in secret. They hear things from one party, sometimes designed to prejudice the mediator against the other party, which that other party is blissfully unaware of. Comments like: *'They have done this before you know?'* *'They are in dispute with ABC limited who they also tried to rip-off';* *'They have had several Judgments against them all arising in similar circumstances';* *'They are serial copyists'*. This is not for the most part exceptional behaviour. It is all part of the rough and tumble of mediation. Gone are the days (if they ever existed) of parties suffering outbreaks of common sense, reasonableness and benevolence on hearing wholesome stories from the mediator about the last apple in the fruit bowl, increasing the pie and win-win situations. It gets horrible sometimes. People are bad-tempered. Mediators soak up a lot of anger, bile and venom directed against the 'other party' - some of it real, some of it for 'the gallery'. Who knows, who cares because, at the end of the day, the competent mediators are not (usually) going to be making a decision that permanently affects the parties' rights. Unless of course it is a Med-Arb!

2.38 So, to cut to the chase, can a mediator really say, hand on heart, that what I have been told in private about the 'other side' or their case during the mediation phase of a Med-Arb, which they (the 'other side') have not had an opportunity to respond to (indeed they are likely to be unaware of what I have been told), would not or could not influence my views as to either party's case and, ultimately, his decision when it comes to the arbitration phase of the process? It would be arrogant in the extreme to suggest that there is not a chance that the mediator could be so influenced. It is that chance, however remote, that would always led me to say 'No' if asked if I would be willing to undertake a Med-Arb. Ditto I would not lead my clients to it.

2.39 For all those mediators out there who might feel able to brush off whatever irrelevancies they might be told in private and remain totally unbiased in rendering their decision, I would remind them of the words of Lord Goff in *R v Gough*, that *"bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias..."*

2.40 The mediator, who goes on to act as arbitrator, really should not be the one deciding if there is or is not a danger of bias.

#### *Early Neutral Evaluation*

2.41 Early neutral evaluation (ENE) is a concept introduced to the UK in furtherance of the principles of ADR.

2.42 It is an early and frank review of the parties' respect of cases by an independent objective observer (who is likely to be a Judge, retired Judge or Queen's Counsel), designed to afford an assessment of the relative merits of the parties' positions. The assessment is privileged, non-binding and voluntary. However, it affords the parties an early assessment of the strengths and weaknesses of their arguments which can frequently assist in the negotiation process. It is a mechanism which is embraced by the judiciary (the Commercial Court having its own ENE scheme) but has not been taken up widely as yet by the parties to disputes.

2.43 It was 21 years ago on 7 June 1996; Wallace J. issued a Practice Direction in the Commercial Court suggesting that in appropriate cases the Judge might make an Early Neutral Evaluation ("ENE"), whereby the parties could be provided with a non-binding assessment by a neutral of their respective chances of success were the litigation to be pursued. The scheme is that, in such circumstances, the Judge providing the ENE should not take any further part in the case unless the parties otherwise agreed. There is usually a preliminary meeting at which the neutral discusses and agrees the procedure for the ENE, which normally consists of some pre-reading followed by a short hearing not exceeding one or two days; what passes in the course of the ENE is entirely privileged.

2.44 The late Judge Toulmin QC CMG of the TCC gave to the Society of Construction Law in 1999 a stirring thumbs up for Early Neutral Evaluation in the TCC where he suggested that a Judge could give the parties an indication as to what the outcome may be. I think that was a very important development in alternative dispute resolution available through the courts. However take up has been on the whole poor but on a private basis at the retired Judge or Queen's Counsel level is happening but no statistics are available.

2.45 Mr Justice Norris, in the case of *Seals & Anor v Williams*<sup>71</sup> set out some of the possible advantages of Early Neutral Evaluation in disputed Inheritance Act proceedings which had *"generated a great deal of acrimony"* and where the parties' positions were becoming *"entrenched"*. Interestingly an attempt at mediation had stalled because of differing perceptions of the issues in dispute and the respective strengths of the arguments being deployed. The Judge noted that:

*"The advantage of such a process over mediation itself is that a Judge will evaluate the respective parties' cases in a direct way and may well provide an authoritative (albeit provisional) view of the legal issues at the heart of the case and an experienced evaluation of the strength of the evidence available to deploy in addressing those legal issues. The process is particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself."*

2.46 The reality is there have been very few ENEs conducted in the Commercial Court.<sup>72</sup> One such process in the TCC has been conducted by H.H. Judge Toulmin Q.C.<sup>73</sup> It is unlikely that ENE will be appropriate in many TCC cases and, if the parties are prepared to indulge in a process along these lines, they are typically more likely to achieve their objective by the employment of an experienced ADR neutral, who will be able to deploy both facilitative and evaluative techniques. There may, however, be occasional cases in which ENE will represent a helpful alternative.

#### *Expert determination*

2.47 In expert determination<sup>74</sup>, an independent third party will consider the claims made by each side and will typically issue a decision which is final and binding, save in the case of manifest error<sup>75</sup>. This process is particularly appropriate for determining technical disputes, and the third party will be chosen for his or her expertise in the subject in question.

2.48 Expert determination is not exactly a subset of adjudication, but it is more closely related to adjudication than to any other method of dispute resolution discussed.

2.49 It is used fairly rarely in the construction industry; I have used it two or three times in thirty years of practise, most notably on Wembley Stadiums sliding roof.

2.50 Experience of it more often comes from:

- The oil and gas industry, where agreements often provide for technical matters to be determined by an expert, or
- Landlord and tenant arrangements, where rent review clauses often provide for a new rent to be determined by an expert chartered surveyor, or
- Company shareholder agreements, where expert accountants are often used to value shares,
- Insurance contracts often have a Queen's Counsel expert clause.

2.51 The use of the term "expert" in these contexts bears no relation to expert evidence. Here, the expert (the Arbitration Act does not apply) is deciding some matter-typically a matter of dispute or at least a lack of agreement-between the parties in a permanently binding way. Expert determination provisions are usually distinguished from arbitration and other dispute resolution methods. The expert is permitted and indeed expected to make use of his own expert knowledge. The rules of natural justice do not apply<sup>76</sup>, see *Bernhard Schulte & Ors v Nile Holdings* (ibid) paragraph 95 Cooke J:

*"There is an essential distinction between judicial decisions and expert decisions, although the reason for the distinction has been variously expressed. There is no useful purpose in phraseology such as 'quasi-judicial' or 'quasi arbitral' as Lord Simon made plain in Arenson and although the use of the word 'expert' is not conclusive, the historic phrase 'acting as an expert and not as an arbitrator' connotes a concept which is clear in its effect. A person sitting in a judicial capacity decides matters on the basis of submissions and evidence put before him, whereas the expert, subject to the express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves. Although, contrary to what is said in some of the authorities, there are many expert determinations of matters where disputes have already arisen*



*between the parties, there is a difference in the nature of the decision made and as Kendall points out in para 1.2, 15.6.1. and 16.9.1. the distinction is drawn and the effect spelt out, namely that there is no requirement for the rules of natural justice or due process to be followed in an expert determination in order for that determination to be valid and binding between the parties."*

2.52 However, there are some principles that have emerged from case law<sup>77</sup>:

- The Courts do not these days regard expert determination clauses as intrinsically objectionable as an ouster of the jurisdiction of the courts;
- Provided that the expert has answered the question asked of him, or departs from his instructions to a material extent, his decision is binding even if it is mistaken;
- The Court may rule upon whether or not there is a dispute capable of reference to expert determination, and either stay or not stay any court proceedings that have been brought in respect of the same subject matter;
- The court will in an appropriate case make declarations as to what an expert's jurisdiction is, and if the expert has made a determination of a question put to him, will enforce it without enquiry as to its correctness<sup>78</sup>;
- And if a matter is within the scope of an expert determination clause, the court will not assume jurisdiction over it even if in the circumstances the matter involves a legal question, unless the expert determination procedure has broken down, or if there are other reasons as a matter of discretion for refusing a stay of court proceedings<sup>79</sup>.
- If the expert is required by the terms of his instructions to give reasons, and if the reasons given are inadequate, then the court may direct him to give further reasons;
- The expert does not enjoy any inherent immunity from a negligence suit.

2.53 As with other forms of alternative dispute resolution, expert determination has received backing from the courts. Lord Mustill in the House of Lords in *Channel Tunnel Group v Balfour Beatty*<sup>80</sup> said this:

*"Having made this choice I believe that it is in accordance not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce that, having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellant should go. The fact that the appellants now find their chosen method too slow to suit their purpose is, to my way of thinking, quite beside the point."*

2.54 In *Homepace v Sita South East Ltd*<sup>81</sup> Lloyd L.J. said:

*"The binding effect, or otherwise, of an expert determination has been considered in a number of cases in recent years. Each case depends on the terms of the contract under which the determination is made, both as to what it is that the expert has to decide, and as to how far his decision is binding on the parties. In each case it is necessary to examine the determination, in order to see whether it lies within the scope of the expert's authority. If it does not, then it has no effect as between the parties. If on the other hand it does, then the contract also governs the question whether the determination*

*is binding....” “The first question, therefore, is what the agreement has entrusted to the expert. The second is whether that is what he has decided. If so, the third is whether it can be shown that he has made a mistake which vitiates his decision.”*

2.55 In *Owen Pell Ltd v Bindi (London) Ltd*<sup>82</sup> there was discussion of a fourth question, namely bias. HHJ Kirkham unsurprisingly adopted the test in *Porter v Magill*,<sup>83</sup> namely “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”. The case also demonstrates the importance of the agreement or expert’s terms of reference. Here the Judge also adopted the guidance given by Cook J. in *Bernhard Schulte v Nile Holdings*<sup>84</sup> namely that there is no requirement for the rules of natural justice or due process to be followed in an expert determination in order for that determination to be valid and binding between the parties. Bindi had argued that such a term could be implied. Following Cook J., the Judge rejected this.

2.56 An expert’s remit is wholly dependent on the terms of the agreement made by the parties. It is therefore for the parties to set out on what grounds, if any, they want to be able to challenge<sup>85</sup> the ultimate decision made by the expert. In *Halifax Life Ltd v The Equitable Life Assurance Society*<sup>86</sup> the parties had agreed that the expert would provide reasons. He failed to do so. Halifax therefore challenged the decision arguing that it was non-binding on the ground of manifest error. Whilst Cresswell J agreed that where there is a contractual requirement that reasons are to be given, it is not enough to say that the reasons can be inferred, the Judge took a pragmatic course decided to adjourn the hearing of Halifax’s claim and to remit the matter back to the expert in order that he could state the reasons for his decision. Once the Halifax had had the opportunity to understand the reasons for the decision, it could then decide whether or not to continue with its challenge. Mr Justice Cresswell referred to the case of *South Bucks DC v Porter*<sup>87</sup> where Lord Brown stated that:

*“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the “principal important controversial issues”, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for a decision.”*

#### *Dispute Resolution Boards (DRBs)*

2.57 The first recorded use of a dispute board was on Boundary Dam in Washington in the 1960s (known as the “Joint Consulting Board”), the Boston ‘Big Dig’ is another well known one. Dispute Boards received a boost due to the publication of a report by the US National Committee on Tunnelling Technology entitled “Better Contracting for Underground Construction” highlighting a familiar litany of undesirable consequences of claims, disputes and litigation. As a result, a dispute board was established for the Eisenhower Tunnel project in Colorado and its success gradually led to the widespread use of dispute boards throughout the US. Dispute boards went international with the El Cajon Dam and Hydropower Project in Honduras. This project was part funded by the World Bank who, mindful of the inexperience of the Honduras Electricity Company in managing such a major project with international contractors, pushed for a US-style dispute board. The use of the dispute board was perceived as successful, leading to further use on international projects.

2.58 In the UAE/Middle East/MENA take up is very poor in my experience. DRB provisions are usually struck out. Which is linked to concerns there about the independence of the DAB as well as a desire to resolve all matters at the end of the project<sup>88</sup>.

2.59 At the same time as this development of dispute boards was taking place, FIDIC outside the UK was facing criticism over the role of the “Engineer” within its standard form contracts.

Although the Engineer was empowered to make determinations under the contracts, contractors were distrustful of the independence of the Engineer given that they were appointed by the employer. These two streams came together in the new FIDIC "rainbow" suite of contracts introduced in 1999. The FIDIC approach to dispute boards was to make the decisions binding (the same approach as the FIDIC contracts had always taken to the decisions of the Engineer) rather than mere recommendations and so the DAB as we know it today was established.

2.60 In addition to establishing the DAB form of dispute boards, FIDIC also introduced two distinct kinds of DABs - the "full-term" or "standing" DAB as provided for in the FIDIC Red Book contract and the "ad hoc" DAB provided for in the Yellow Book and Silver Book contracts<sup>89</sup>. There was a certain logic to that distinction in that the nature of the contracts is different with a larger degree of off-site activities undertaken by the Contractor in the Yellow Book and the Silver Book (a point implicitly made in the FIDIC Contracts Guide in its guidance on clause 20.2). Although the FIDIC Contracts Guide is at pains to emphasise that the parties should consider which arrangement is better and draft accordingly, it is my experience that the vast majority of contracts either follow the FIDIC standard approach or delete the provisions entirely.

2.61 DRBs are therefore used fairly widely on large projects in the United States and Canada, and on other major projects around the world (usually EIB or World Bank funded) but not very much in the UK, in fact they are very rare. The Dispute Resolution Boards Foundation (DRBF) has been actively involved in the promotion of avoidance and resolution of disputes worldwide using the dispute resolution board. The concept is summarised thus by the DRBF<sup>90</sup>:

- The DRB is a panel of three experienced, respected, and impartial reviewers. The Board is organized before construction begins and meets at the jobsite periodically. The Board is usually formed by the owner selecting a member for approval by the contractor, the contractor selecting a member for approval by the owner, with the two thus chosen selecting the DRB Chair to be approved by both parties;
- DRB members are provided with the contract documents, become familiar with the project procedures and the participants, and are kept abreast of job progress and developments. The DRB meets with owner and contractor representatives during regular site visits and encourages the resolution of disputes at the job level. The DRB process helps the parties head off problems before they escalate into major disputes;
- When a dispute flowing from the contract or the work cannot be resolved by the parties, it can be referred to the DRB. The Board review includes a hearing at which each party explains its position and answers questions from the other party and the DRB. In arriving at a recommendation, the DRB considers the relevant contract documents, correspondence, other documentation, and the particular circumstances of the dispute;
- The Board's output consists of a written, non-binding recommendation for resolution of the dispute. The report includes an explanation of the Board's evaluation of the facts, contract provisions and the reasoning which led to its conclusion. Acceptance by the parties is facilitated by their confidence in the DRB and in its members' technical expertise, first-hand understanding of the project conditions, and practical Judgment; as well as by the parties being given an opportunity to be heard;
- While the DRB recommendation for resolution of a dispute is non-binding, the DRB process is most effective if the contract language includes a provision for the admissibility of a DRB recommendation into any subsequent arbitration or legal proceeding.

2.62 Typically, dispute resolution boards will often render quick (and usually temporarily binding) decisions on issues which arise during the currency of the contracts works. One reason for their adoption is concern for the cost of litigation and arbitration in the construction and engineering contexts.

#### *Nine Elements of a Dispute Review Board*

2.63 According to the *Construction Dispute Review Board Manual*<sup>91</sup> there are nine essential elements necessary for a DRB to be successful. If any of these elements are missing, success is jeopardised. These elements are:

- All three members of the DRB are neutral and subject to the approval of both parties;
- All members sign a Three-Party Agreement obligating them to serve both parties equally and fairly;
- The fees and expenses of the DRB members are shared equally by the parties;
- The DRB is organized when work begins, before there are any disputes;
- The DRB keeps abreast of job developments by means of relevant documentation and regular site visits;
- Either party can refer a dispute to the DRB;
- An informal but comprehensive hearing is convened promptly;
- written recommendations of the DRB are not binding on either party but are admissible as evidence, to the extent permitted by law, in case of later arbitration or litigation;
- The members are absolved from any personal or professional liability arising from their DRB activities.

2.64 In my firm, we do a lot of DRB work, DRBs are treated seriously: parties will apply substantial resources to them, and whilst the recommendations are not legally binding, anecdotal evidence from experienced US practitioners suggests that the compliance rate may be of the order of 95% plus.

#### *Dispute Adjudication Boards (DRB)*

2.65 A DAB is a 'job-site' dispute adjudication process, typically comprising three independent and impartial persons selected by the contracting parties.

2.66 Contractors who are working in international markets will almost certainly have encountered the Dispute Adjudication Board ("DAB") contained in each of the FIDIC Red, Yellow, Silver and Gold Books. The ICC launched its own Dispute Board procedure in October 2014 so the spread of dispute boards will continue - they are particularly suitable for contracts in which many individual disputes may arise.

2.67 DRBs predominantly remain the providence of domestic USA construction projects. However, the World Bank and FIDIC opted for a binding dispute resolution process during the course of projects, and so the Dispute Adjudication Board ("DAB") was born. Whilst DABs, like DRBs, are established at the outset of a project, the important distinction between DRBs and DABs is that the function of a DRB is to make a recommendation which the parties voluntarily accept (or reject), while the function of a DAB is to issue written decisions that bind the parties and must be implemented immediately during the course of the project. Further a party cannot refer a dispute to arbitration unless the dispute in question has been the subject of a referral to the DAB<sup>92</sup>. Details of the FIDIC DAB procedure can be found in clause 20 of the standard FIDIC form and the supporting General Conditions of the Dispute Adjudication Agreement.

#### *Conciliation*

2.68 Conciliation is a procedure like mediation but in which the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve an agreed settlement. The term 'conciliation' is gradually falling into disuse and the process is regarded as a form of mediation. It remains, however, a specific process available under a few contracts.

2.69 The ICE Conciliation Procedure was first set up in 1988 and revised in 1994 and 1999 and was introduced into the ICE's 6th edition by cl.66(5) under the Institution of Civil Engineers' Conciliation Procedure (1988). As far as I can tell it is no more, so enough said. I suspect the NEC has put paid to it.

2.70 Conciliation was also available through the Construction Conciliation Group (CCG) which was launched in 2003. That organisation also no longer appears to exist.

2.71 The aim of it is providing a procedure to resolve disputes between property owners and their construction team quickly, amicably and at minimum cost. The parties endeavour, with the assistance of a conciliator, to reach an amicable settlement within a pre-agreed fixed period. If no settlement is achieved, the conciliator makes a binding recommendation. The procedure thus represents something of a hybrid between a non-binding ADR process and an adjudication procedure. It is particularly suited to the typically low-value disputes between residential owners and their builders or professionals, where the statutory adjudication scheme is excluded.

#### *Project Mediation*

2.72 The concept of Project Mediation is not a new one. It may be more familiar as "contracted mediation". The underlying principle of Project Mediation is that the project participants (meaning the main parties to the construction contract as well as key consultants and sub-contractors) contract from the outset to use mediation as a primary means of dispute resolution in order to manage the risk of disputes during the delivery of the project. Project Mediation therefore aims to fuse team building, dispute avoidance, and dispute resolution in one procedure.

2.73 Project Mediation has the following defining features:

- One to two project mediators are appointed at the outset of the project. The mediators are to be impartial and, if there are two of them, should consist of one legal expert and one commercial expert, both with mediation training;

- Many of the interested parties to the project are subject to the agreement to comply with the mediation procedure throughout the duration of the project. This therefore crosses contractual boundaries and allows coordination and collaboration, ensuring that parties relevant to a particular dispute may be easily brought into the project mediation process without each party having to be approached separately and asked to consider joining an ad hoc multi-party mediation (which approach could be refused);
- Key to the process is a workshop or series of workshops at the commencement of the project, between all parties to the project, to explain the role of the mediators and also to familiarise the parties and the mediators with the aims of the project and of the project parties and the personalities involved;
- The project mediators visit the project on a regular basis in order to have a working knowledge of the project and the individuals working on the project. This knowledge enables the panel to have a chance at resolving differences before they escalate. Further, as the project mediators will not be coming to the dispute cold but will have built up their knowledge of the project as it progresses they will be able to use that knowledge to facilitate mediation of disputes more effectively;
- The project mediators' role in the project outside of formal mediation proceedings is deliberately kept flexible. This enables the parties to approach the mediators should they believe that issues have arisen that require some form of discussion, and this can be done on a confidential basis without telling any of the other parties. The aim is to provide an immediate confidential forum for the parties to air grievances and concerns which could, if left, turn into disputes.

2.74 In order to bring some uniformity to the various different procedures and amendments to contracts for contracted mediation, CEDR Solve produced a Model Project Mediation Agreement and Protocol. This comprises non-binding guidance notes ("the Guidance"), the CEDR Model Project Mediation Protocol ("the Model Protocol") (2015 Edition) and the CEDR Model Mediation Agreement ("the Model Agreement").<sup>93</sup>

*Pendulum Arbitration (Baseball Arbitration American term for pendulum arbitration) or 'flip-flop arbitration'*

2.75 Pendulum Arbitration is a system of arbitration in which the arbitrator must decide between one of two solutions (each presented by one of the parties in dispute) rather than attempt to devise a compromise. It is not new, but it is much faster and cheaper than conventional arbitration, and just as binding.

2.76 The process works by having a hearing, where the parties put their respective cases. Typically, the hearing will be much shorter than the sort of hearing that would normally be necessary. It can be run on a chess clock basis. Then, at the end of the hearing, each party makes a sealed offer in the form of a draft award which is given to the arbitrator. The arbitrator then has to make her award in the form of one of those drafts, without any amendment. The obvious benefit to this process is that it encourages parties to put in relatively reasonable proposals as the more ambitious a party's draft award, the less likely it is to be chosen by the arbitrator.

2.77 Why is it so effective? It is not hard to see. The more ambitious a party's draft award, the less likely it is to be chosen by the arbitrator. Thus, parties are driven to put in relatively reasonable drafts. And if you know as a party's lawyer that you are just about to put in a relatively reasonable draft, that affects your case preparation and advocacy: there is no point advocating for an extreme position which you are then promptly going to abandon in

the draft award. Therefore, for the purpose of advocacy all of those barely arguable points which are unlikely to succeed, but which tend to be trotted out in full-scale litigation or arbitration on the 'no stone unturned' principle, do not get trotted out.

2.78 From the arbitrator's point of view, the whole thing is delightfully simple. A conventional arbitration requires the arbitrator to build their award from the ground up, taking account of, and evaluating every argument and every entitlement. In pendulum arbitration, all they have to do is decide which of the two drafts more closely reflects their view of the justice of the matter. The moment they have done that, they can pretty much stop work: all they have to do is to sign whichever of the drafts they prefer. It means that the time between the conclusion of the hearing and the delivery of the award can be very much shorter than in a conventional case.

2.79 The procedure is not used nearly as much as it might be and I think that is because in the UK few people know about it. Some might regard the whole procedure is rather radical. Whatever one's view about it, it has the undeniable merit of making the arbitration much more commercially acceptable in terms of the time and cost of the legal process.

2.80 Further, there is a particular place for the process in cases where the parties have attempted mediation but have been unable finally to close the gap between them.

2.81 So, which is better for the parties: the bottomless pit of legal expense or a pendulum arbitration? There is lot to be said for the pendulum!

#### *Mini- trial*

2.82 Mini-trial procedures are a suitable ADR method where it is appropriate to test the relative strength of the parties' legal and technical positions and where an element of semi-formal presentation will assist that process. It is sometimes thought more suitable than mediation in very large cases, or where it is desirable to bring in senior executives on behalf of each party who have not previously been involved with the case. The major steps in a mini-trial procedure are typically as follows:

- The parties agree the timetable for the mini-trial itself at a preliminary meeting. Occasionally, the parties will agree a number of pre-hearing steps, such as paving meetings with a view to seeking agreement on technical points;
- The parties exchange brief case summaries;
- The mini-trial itself may be scheduled to last up to about four days (depending on the complexity of the case);
- The timetable typically allows ½ day or a day to each party to present its case, with further specific time being set aside for each party to answer the other side's case. These presentations are typically, but not always, made by lawyers, but the nature of presentations is often more akin to the documentary television programme than any court proceedings. Presentations will typically include contributions from eyewitnesses; models, overhead projectors, slides and even video film are used and of course, there is considerable scope for each party to put its best foot forward in terms of its best legal and commercial arguments;

- These presentations are typically made to a panel of three consisting of the neutral and a senior executive from each party, preferably one who has not been involved in the case previously;
- Following the presentations, the panel of three retires to negotiate. The underlying philosophy is that these senior executives will have heard together and at first-hand what the two respective cases look like when put up in this way, and being individuals with authority to settle but without a background of involvement in the case, they should be able to arrive at a commercially sensible settlement. The neutral will typically endeavour to separate the executives from their respective teams, and will encourage the panel to see itself as an entity in itself. The neutral may even function as a mediator between the two senior executives, using private caucus sessions if necessary.



### 3.0 Why opt for ADR – its purpose, strategy and techniques

3.0 The underlying purpose of ADR has as its aim to make peace not war i.e. to achieve settlement or compromise, ADR therefore provides a vehicle for the resolution of disputes without the need for, or continuation of, litigation or arbitration. It is a second track to the formal one running in the background whether it is started as a legal process or threatened.

3.1 However, since mediation is essentially a refined and assisted form of negotiation, it is essential, as with all negotiations that the parties are both willing and able to engage in the process and have something to negotiate, which in crude terms means they are prepared to compromise their initial negotiating positions or to search for an alternative solution to their problem. It is preferable, but not strictly necessary, that a degree of compromise also be in both parties interests.

3.2 The techniques used in ADR procedures provide for means to overcome deadlocks which would typically frustrate an unstructured negotiation. In particular, ADR provides a means designed to ensure that the appropriate individuals from each side are brought into the settlement process, and to encourage a shift from positional negotiating<sup>94</sup> to principled negotiating<sup>95</sup> where appropriate.

3.3 The purpose of the process is to assist people in reaching a voluntary resolution of a dispute. Therefore, in its simplest form, it can be said that mediation is negotiation facilitated by a third party neutral. For the purposes of this paper mediation as a structured formal process is governed by a set of key principles<sup>96</sup>.

3.4 Several models of mediation have developed including facilitative and evaluative, mediation in the business dispute area.

3.5 Where the parties are represented by lawyers who are familiar with the dispute resolution process, those lawyers are often able to suggest suitable names as neutrals, and to reach agreement on behalf of their clients. Where the lawyers do not have this experience, it is more common to ask one of the ADR providers to nominate a neutral.

3.6 What qualities are likely to be dominant in the choice of a neutral? Apart from the obvious point that each side typically looks for someone who will be understanding of their position, there are probably two key balances to be considered. The first key balance to be struck is between a facilitative<sup>97</sup> approach on the one hand, and an evaluative<sup>98</sup> approach on the other.

- These present a facilitative mediator is typically the safer bet, and generally the better choice where both parties are skilled positional negotiators.
- An evaluative approach may be preferable where there has been a breakdown of principled negotiation, or where one or both parties is out of its depth, or where there is doubt over whether one or both parties truly has the necessary confidence and authority to settle the dispute.

3.7 Mediators help disputing parties understand each other through effective communication; parties need to go beyond positions to uncover interests; parties are best able to generate options for settlement; parties will be more compliant with an agreement they have themselves constructed; and mediation is more about the future, more so than past in its orientation.

3.8 This underlying objective is achieved by a number of detailed techniques. There are ongoing debates about the pros and cons of different ADR options that could occupy a series of lectures in itself. When thinking about the claims that are made for any dispute resolution option, do bear in mind who is making the claim, and why.

3.9 Mediators will commonly claim that mediation is quicker and cheaper than going to court. Mediation can be much cheaper than taking legal action. However, this is not always the case.

3.10 Following the decision in *Halsey v Milton Keynes General NHS Trust* (ibid), ADR has as we have seen received very strong backing from the courts, which has the power to penalise a party in costs who unreasonably refuses a genuine offer to mediate.<sup>99</sup> This in part is of course government led to save expenditure on the courts, judiciary and legal aid. In 2014<sup>100</sup>, Mr Justice Coulson (as he then was) explained why the TCC considered ADR to be so important:

*“The Judges in the TCC set great store by ADR. Disputes like this one are time-consuming and therefore expensive to fight out in the traditional way. Even if the court adopts all the various techniques for reducing the trial to a minimum (such as ‘hot-tubbing’ the experts and carefully timetabling the cross-examination), trials are often unwieldy and cost-inefficient. Expert’s fees often account for a large proportion of the costs. A professional mediator, engaged at the right time in the process and in the right spirit of cooperation by the parties, will often be able to resolve the most intractable case and save everyone a good deal of money, time and effort. The TCC lists in London would be impossible to operate without the good work of mediators and others involved in the ADR process.”*

3.11 A big selling point for ADR is that it endeavours to provide an informal framework and forum for settlement. This issue is, perhaps, not so straightforward, as it may at first seem. Some particular points arise out of this relevant to the very purpose of going for ADR.

- ADR meetings are typically conducted in a structured way (at least, more so than direct negotiations between the parties). They typically take place in a suite of meeting rooms, often in a neutral venue such as a hotel. This comparative formality tends to aid in bringing the parties together for, or creating expectations of, a solemn attempt at resolving the problem;
- In most forms of ADR, the neutral (mediator) typically requires that the representatives attending the ADR meetings are authorised to negotiate and settle. A provision to that effect appears for example appears at clause 2 of the standard CEDR Mediation Procedure. The representatives may be pressed to confirm that they do have adequate authority, and if they are unable to give this assurance, the mediator may put pressure on that party to send a representative who does have the necessary authority. Where the dispute is of such importance that the ultimate decision makers cannot be expected to attend negotiating sessions, then a sufficiently senior executive may be brought onto a mini-trial panel<sup>101</sup>;
- These requirements recognise the reality that, if the parties’ representatives do not have adequate authority, then the meetings do not truly amount to a forum for settlement at all;
- ADR solutions depend upon the agreement of the parties; they have to consent to the settlement terms. In real terms, this has to be informed consent;
- Due to the nature of the process, sometimes settlement agreements will be handwritten at the end of a long day. Care must therefore be taken to ensure that parties understand whether the agreements made through ADR are legally enforceable<sup>102</sup>.

### *Strategies and techniques*

3.12 Strategy and techniques in ADR of course depend on the viewpoint from which one looks i.e. party position and that of the mediator/neural/third party.

### The mediator/neural/third party

3.13 Even if the parties have lawyers, the mediator educates the parties about the mediation process.

3.14 The role of the mediator/neural/third party is to persuade the parties to focus on their underlying interests and move away from fixed positions. The success of the process depends to a large extent upon the quality of the mediator; he should be a creative problem solver and a listener who inspires confidence.

3.15 The mediator's ultimate role is to do anything and everything necessary to assist parties to reach agreement. In serving this ultimate end, the mediator may take on any or all of the following roles:

### *Convener*

3.16 The mediator may assist in contacting the other party(ies) to arrange for an introductory meeting.

### *Educator*

3.17 The mediator as I mentioned educates the parties about the mediation process, other conflict resolution alternatives, issues that are typically addressed, options and principles that may be considered etc.

### *Communication Facilitator*

3.18 The mediator seeks to ensure that each party is fully heard in the mediation process.

### *Translator*

3.19 When necessary, the mediator can help by rephrasing or reframing communications so that they are better understood and received. If the parties have engaged experts with different opinions, the mediator will often get them into the mediation<sup>103</sup> and himself<sup>f104</sup> question them on their points of difference.

### *Questioner and Clarifier*

3.20 The mediator probes issues and confirms understandings to ensure that the participants and the mediator have a full understanding.

*Process Advisor*

3.21 The mediator comes to be trusted to suggest procedures for making progress in mediation discussions, which may include caucus meetings, consultation with outside legal counsel and consultation with substantive experts.

*Reality checker and a tough dude when needs be*

3.22 The mediator may exercise his or her discretion to play devil's advocate with one or both parties as to the practicality of solutions they are considering or the extent to which certain options are consistent with participants' stated goals, interests and positive intentions.

3.23 He or she will not abandon the mediation too early. Apparently insurmountable impediments to settlements are commonly overcome at the end of the day.<sup>105</sup>

3.24 Even mediators at the facilitative end of the scale will try to undermine any misplaced confidence that a party has in his own position.<sup>106</sup> As a broad rule of thumb, a mediator is likely to aim to produce about the same level of apprehension as a party feels part way through a trial, having heard unwelcome evidence and judicial comments.

3.25 Nevertheless, mediators, even at the evaluative end of the scale, will typically not express their opinions too soon, but will wait until the parties reach a point where they are looking for some guidance as to likely outcome. Patience is the name of the game.<sup>107</sup>

*Catalyst*

3.26 By offering options for considerations, stimulating new perspectives and offering reference points for consideration, mediator serves as a stimulant for the parties reaching agreement.

*Responsible Detail Person*

3.27 The mediator may assist the parties to implement their agreement on the day. That includes ensuring the tripartite mediation agreement I signed up too.

3.28 It is more or less universal for parties to an ADR process to enter into a formal ADR agreement in order to regulate the ADR process, even where they had already agreed an ADR clause in the original contract. There are a number of reasons for this. Most importantly, the neutral will not have been a party to the original contract between the parties, and he will be looking for a direct contractual commitment from the parties to pay his fees and, perhaps of more concern, to agree his immunity from any subsequent complaint.<sup>108</sup> Secondly, an ADR agreement is necessary to set out some ground rules for the ADR process. It would in theory be possible for the parties to incorporate by reference, either by their original contract or by the ADR agreement, a standard set of conciliation rules,<sup>109</sup> but in very many cases the parties choose to make some sort of modification to the standard procedures in order to reflect the particular circumstances of their case.

3.29 Indeed, in most forms of ADR, the neutral typically requires that the representatives at ADR meetings are authorised to negotiate and settle and that will be recited in the

mediation agreement usually. A provision to that effect appears at cl.2 of the standard CEDR Mediation Procedure. The representatives may be pressed to confirm that they do have adequate authority, and if they are unable to give this assurance, the mediator may put pressure on that party to send a representative who does have the necessary authority. Where the dispute is of such importance that the ultimate decision makers cannot be expected to attend negotiating sessions, then a sufficiently senior executive may be brought onto a mini-trial panel.

3.30 There is no doubt that the primary significance of inserting into contracts an ADR clause is commercial rather than legal; it sets up a presumption that disputes will be resolved by means of ADR, thereby removing the fear that the mere suggestion of ADR may be seen as a sign of weakness. On the contrary, where there is an ADR clause, then a refusal by one side to embark on the ADR is typically seen as a sign of weakness by that party, on the basis that a refusal to submit to ADR signifies a lack of confidence by that party in his own position.

3.31 In cases where the parties agree an ADR procedure, and settlement is not achieved during the course of that procedure, then it is typical for the neutral to nevertheless suggest some ongoing programme of meetings. Such suggestions should not be seen as desperate attempts by the neutral to keep his success rates high, for a significant number of ADR settlements are achieved comparatively soon after the conclusion of an agreed ADR procedure.

#### The strategy of the parties

3.32 No surprises, it is nearly always to get the very best deal. In terms of the process of getting that over to the other side, it is normal and usual in mediation as a form of ADR to deploy simultaneous exchange of position statements prior to the mediation day.

3.33 Position Statements should be seen as the first serious step in the mediation process towards persuading the other side that they should think again about the strengths and weaknesses of their position. Mediation is all about changing an adversary's view, such that they consider it to be more in their interests to settle than fight. But disputants rarely move their position unless they consider it to be in their interests so to do. So they must be encouraged and persuaded to think again about the merits, about how their true interests can best be served by way of settlement rather than litigation, about their views on risk, and about their ability and willingness to endure conflict. Position Statements lay the groundwork, provide an introduction to the dispute for the mediator and can set the agenda for the mediation in terms of the issues that need to be discussed.

3.34 A Position Statement should be short and in summary or "skeleton" format. As a rough guide, it should usually be between 5 to 10 pages in length. Position Statements should be provided by each party to every other party, and the mediator. The parties should endeavour to exchange Position Statements. In advance of the mediation, parties will often want to share more information about their position with the mediator than their adversaries, and should therefore consider whether a 'for mediator's eyes only' Position Statement should be provided, as well as the version that is to be exchanged. In fact, these confidential Position Statements often turn out to be an early draft of the Position Statement that is eventually exchanged with the other party or parties.

3.35 A Position Statement should briefly explain a party's position, as well as their position on their adversary's case. A Position Statement should not be designed to try and 'prove' any particular point, but rather explain arguments and provoke thought on the other side of the fence. Misunderstandings should be cleared up. Brevity is important. It is the one document lead negotiators on the other side will read on their way to the mediation. It should be a forceful, 'punchy' and very clear document. A Position Statement should also act as a

'road map' for the mediation bundle, describing important documents or referring to key paragraphs of contracts or statements of case.

#### *What a Position Statement might contain*

3.36 A Position Statement might be structured as follows:

##### *Introduction*

3.37 At the outset the party on whose behalf the Position Statement is prepared should be 'introduced', contain a description of their business and how the relationship with other party (if any) came about. References to corporate website addresses can be useful for background, should the mediator want to get a better idea of the nature of the party's business.

3.38 It should be made clear that the document is without prejudice, confidential and to be used for the purposes of mediation only.

##### *The Dispute*

3.39 A summary of how the dispute arose, including details of any relevant contracts, the nature of the claims and the defences against them, should be given.

3.40 A chronology of relevant dates can be helpful.

##### *Issues Involved*

3.41 There should be a brief summary of the factual issues a court would have to resolve in order to decide the matter and the parties' position on each. If the issues have been rehearsed at length in correspondence between the parties or their advisors, references to key letters should be provided (and copies included in the mediation bundle).

3.42 The parties should also set out a brief summary of the issues of law or construction a court would have to consider in order to resolve the matter, and their position on each.

3.43 It can sometimes be helpful for each party to set out the issues on which they consider agreement to have been reached, or in relation to which they think there is no dispute.

##### *Quantum*

3.44 There is usually a far more diverse range of views on quantum, than on the facts or law. There will often be a range of approaches to the calculation of quantum and a variety of assumptions that under-pin them. It is useful if parties before the mediation think about their chances, before a Judge or arbitrator, of recovering/paying everything claimed or just a proportion thereof, on the basis that liability goes in the claimant's favour. It can be useful if the parties say something about their views on quantum but in any event, they should at least consider quantum in the run up to the mediation.

### *Proceedings*

3.45 A very brief outline of the current position in any proceedings that have been commenced is helpful. The Position Statement might summarise the position on disclosure, witness statements, expert reports, trial dates, preliminary determinations, etc. Any significant orders for costs might also be mentioned.

### *Costs*

3.46 It is helpful for the numbers to be set out, both for costs incurred and to be incurred. Some parties prefer not to do this. At the least, parties should be in no doubt going into a mediation what the bill is to date, as well as what is likely to be run up if the matter does not settle.

### *Attendees at the mediation*

3.47 It is helpful if a list of attendees (and the positions they hold) is provided. If there is to be a change in the attendee list, this should be notified in advance.

### *Previous negotiations*

3.48 The history of any without prejudice negotiations can be useful, even if a party feels that they also need to make clear that it should not be assumed that they are happy to pick up where they left off.

### *What not to put in a position paper*

3.49 Parties should think carefully about including statements that might be seen as offensive. A Position Statement is a permanent record of a party's position, ever present throughout the mediation. If it contains unhelpful comments, this may prove to be a barrier to effective dialogue. If a party wants the mediator to understand at the outset their depth of feeling without running the risk of inflaming an already volatile situation, a separate document can be prepared in advance of the mediation, 'for mediator's eyes only'. Or of course the party can speak to the mediator in advance of the day set for mediation, or at the initial private meeting prior to the opening joint session.

### *Exchanging position papers*

3.50 Position Statements should be provided by each party to every other party, and the mediator. Often a date for simultaneous exchange is suggested by the mediator or agreed between the parties.

### *The mediation day*

3.51 ADR meetings are normally conducted in a structured way (at least, more so than direct negotiations between the parties). They usually take place in a suite of meeting rooms, one

for each party to the dispute plus a retiring room for the mediator; usually it is best to be convened at a neutral venue such as a hotel. This comparative formality tends to contribute in bringing the parties together and creating anticipations of, a serious attempt at solving the problem.

3.52 On the appointed day for the mediation meeting, the mediator will meet all the parties in an initial joint plenary session at which each will usually present a brief oral summary of their case and position, possibly through their legal advisers. A cap on the time allowed for each party is common.

3.53 Each party will then retire to their separate rooms and the mediator will talk to each party in turn, shuttle diplomacy style either by visiting them in their separate rooms or by calling them into the main room. Such private meetings are known as 'caucuses' in the jargon of ADR practitioners. Everything that takes place in the caucuses is private and confidential and their purpose is to enable the mediator to establish his understanding of the possibilities for reaching agreement and the approach most likely to encourage settlement.

3.54 The mediator will then shuttle between the various parties as required in an effort to find a settlement to the dispute. Nothing disclosed to the mediator in confidence in the caucuses will be disclosed to any other party without the express permission of the party disclosing the information. Private meetings between the mediator and only some of the parties may take place.

3.55 Working with the parties, the mediator will examine the issues arising in the dispute. The mediator does not take sides but they may challenge a position being adopted by one or other party. The mediator may suggest looking at the dispute from a different angle. They may test out possible ways of resolving the dispute. In short, they will examine the dispute and work with the parties to find an acceptable solution.

3.56 During the various joint and private sessions, the mediator will be using the conventional negotiating techniques such as:

1. separating the people from the problem – being easy on the people and hard on the problem;
2. getting behind the position to find the interest;
3. encouraging a constructive problem-solving approach rather than dwelling on past quarrels and arguments.

3.57 The mediator may decide at any time to bring the parties together in joint session to report progress and seek mutually agreeable ways forward.

3.58 When and if the mediator reaches the position at which a settlement has been achieved, they will bring the parties together in joint session for a final time and will work with the parties to reduce the settlement to writing by means of a binding legal agreement and/or a consent order.

3.59 If no settlement can be reached at the meeting, but some progress has been made, it is still open to the parties to adjourn to another time and place. The evidence is that even when no settlement is reached at the meeting itself, the parties will often reach an agreement shortly afterwards as a consequence of the discussions and progress made at the meeting.



### *The lawyer*

3.60 Ask: What do I need to do for this mediation to be a success? That question is one a litigator should always consider when preparing for mediation. For each mediation, there may be a different measure of "success." If your case is in the early phases of discovery and you want to test the settlement waters, "success" may be learning more about the other side's positions on settlement and case strategy. Alternatively, you may have been embroiled in litigation for years in a very contentious case, and your definition of "success" may be getting difficult clients to see strengths and weaknesses of the case in a last effort before trial.

3.61 Regardless of your definition of "success," there are certain tactics and general preparation tips that help ensure you are prepared to effectively negotiate for your client. While the tips that follow are by no means comprehensive, they are a good guideline of essentials to consider in any mediation.

### Consider the Timing

3.62 Timing can be critical. If you want to look at early resolution of a case, a mediation might be beneficial prior to taking expensive depositions. Alternatively, if you have gone through the entire discovery process, mediation may be beneficial before trial to see if settlement can be reached to avoid the expensive costs of trial.

3.63 That being said, mediation is not useful if neither side has any expectation or intention of settling the case. If the opposition suggests mediation and you know your client is absolutely against settlement, do not mediate. Doing so only creates further animosity and wastes time that could be used for discovery or trial preparation.

### Be Prepared

3.64 It is important to convey to the mediator and opposing party that you are prepared and well versed in the facts and law of your case. Solicitors that are unprepared on those fronts are automatically behind in the mediation. You cannot sell your position and case strengths if you do not know what they are. Take the time before the mediation to review and address key facts and issues of law.

### Research, Research, Research

3.65 A large factor in negotiating successfully for your client is doing the necessary research. What are you researching?

(1) *Research your mediator:* Determine the approach and experience you want from your mediator and ask peers about experiences with proposed mediators. It is important to ask not only about experiences with a mediator who has served in that capacity for other cases, but also to inquire about the mediator's prior legal experiences.

(2) *Research key legal issues:* Review cases for and against your position on key legal issues and be prepared to explain why your position is correct—having the cases with you does not hurt.

(3) *Research authorities:* Conduct a case analysis for similar facts to determine what legal outcome might be expected at trial. It is important to know if facts similar to yours resulted in summary judgment for failure to prove an essential element etc. Be prepared

to distinguish facts or legal issues from jury verdicts you believe the other side will use in support of its damages analysis.

#### Use the Mediation Statement and Opening Statement

3.66 Use the mediation statement as a roadmap for the mediator. The mediation statement is your first opportunity to gain credibility and support with the mediator. Be concise in your positions, and set out the background facts, contended facts, legal theories, and defences for the case. Also, anticipate and address the other side's positions. If the mediation statement is done well, the mediator will have a quick synopsis of the case and settlement positions.

3.67 The opening position statement is one of the few times you will have the opportunity to speak directly to the opposing party. Use this to your advantage. Speak to the opposing party in your opening. Explain your positions, including both strengths and weaknesses of your opponent's case, and why at the end of the day you believe your client will prevail. Try to avoid being overly confrontational or accusatory. If your opening statement has only the effect of further polarizing the negotiation, you might as well go home.

#### Prepare your Client

3.68 Before the mediation, meet with your client and go over your negotiation strategy, you cannot cover all bases but the main ones should not be missed re what you expect your client's role to be in mediation, and how the mediation process works generally. If you have a client that has never participated in mediation, informing them of how the process works and what he or she can expect will help alleviate anxiety and keep your client focused on the settlement issues. Make sure you have authority, or are able to get authority, from your client during the mediation.

3.69 Many times insurance companies are involved in litigation. If the claims adjuster is not attending the mediation, communicate with him or her before the mediation and go over the strengths and weaknesses of the case.

3.70 Keeping the client and insurance company informed can only help the mediation process. Make sure in these discussions that you do not oversell your case. Giving your client a false expectation of the result will not help resolve the matter at the end of the day.

#### Play the devil's advocate

3.71 To be prepared for any mediation, you must consider the strengths and weaknesses of your opponent's case. Try to consider what your approach would be if you were on the other side. What facts and legal theories would you emphasize? What would you try to negotiate as a settlement price? If you can look at the facts of the opposition and know its strengths and weaknesses, you will be better prepared to address and counter those facts in your negotiations.

#### Be principled

3.72 This theory is one that cannot be overlooked in negotiating at any time, but particularly in settlement discussions. Be principled in your negotiating. What does that mean? If you make a counteroffer or demand, make sure it is because the other party has demonstrated something that you believe actually impacts the value of the case. Know and explain to the mediator and opposing counsel why you are making a counteroffer or demand. If you are mediating a case and you begin to go back and forth on the settlement numbers, you convey

to the other side “I have a certain amount of authority, and I’m just negotiating price until I reach it.” At that point, you have lost credibility and negotiating power.

Do not be afraid to walk away (or continue negotiations!)

3.73 If it is apparent from the settlement figures being negotiated that the parties are worlds apart, do not be afraid to end the mediation and walk away. It is only frustrating to both the parties and counsel to work on a mediation that has no chance of settlement.

3.74 Alternatively, if the parties are close to a deal, but it is the end of the day, agree to continue the negotiations for a week before reengaging in the litigation process. Doing so will give the parties a chance to consider their settlement positions and see if a final deal can be reached.

Use a negotiating approach that works for you

3.75 Everyone has his or her own approach to negotiating. Some individuals are quiet and unwavering, others are loud and tenacious. Whatever your preference, know your negotiating style and use it to your advantage. Play to your negotiating strengths.

3.76 If you are the quiet type, use your steady approach to convey strength and conviction in your positions. If you tend for the more flamboyant approach, use your outgoing nature to intimidate. If you do tend to the more aggressive approach, remember you have an intermediate third party conveying your position. Do not be so aggressive that you irritate and alienate your mediator.

Listen to the Mediator’s Observations

3.77 Mediation is the opportunity for both sides to hear their strengths and weaknesses. So, LISTEN. If the mediator says, “Hey, I think you may really be in trouble with your expert’s report on the issue of fault,” consider his position and reasoning. If the case does not settle, you can use the mediator’s observations to conduct further discovery, amend pleadings, or supplement expert reports.

#### 4.0 What to do to prepare for ADR – the how

4.0 I have already above addressed the crafting of position papers and given some tactics steers.

4.1 ADR is a system of processes designed to assist parties in resolving their disputes economically and more quickly than the traditional court system. Its value as we have seen lies in reducing the time, cost and uncertainty in the civil justice system. The key to achieving successful results in ADR is preparation. The following represents the basic steps to prepare for a mediation hearing. I will say no more, as they are trade secrets!

##### Step 1 - Choose the right ADR process

4.2 The various ADR processes have their good and bad points, and some are better suited to certain situations than others. Here, in a nutshell, are the most common:

- Mediation is a private, voluntary process in which an impartial person facilitates communication between the parties to promote a mutually agreeable settlement;
- ENE is a neutral individual, usually a retired Judge, who listens to an abbreviated presentation of the case and renders a non binding advisory opinion on factual or legal issues, as well as damages;
- Med/Arb Parties agree to mediate with a stipulation that any issues not settled will be resolved by binding arbitration;
- Arbitration - An adversarial process in which the disputants select a neutral third person to listen to evidence and render an award. Can be either binding or non-binding, and may involve "high-low" limits;
- Adjudication – basically a fast track arbitration over 42 days but extendable.

##### Step 2 - understand the rules and guidelines of the mediation process.

4.3 At this stage, you want to make sure that everyone understands the rules of engagement. By taking the lead in doing this, you will avoid problems later:

- Confirm agreement to the hearing and costs involved;
- The written Agreement to Mediate sets forth the procedures for the hearing and who is responsible for the costs. The agreement can be designed to fit your needs. However, since mediation is non-binding and can be terminated at any time, the agreement is normally flexible so that the parties can control their own destiny. The main components of the agreement include confidentiality, cost and selection of the mediator;
- Confidentiality - make sure the written agreement is executed by all parties confirming the confidentiality of all information learned during the process, and that the information cannot be used later against someone in court. (The rules of evidence in some states may not provide adequate protection). During the hearing, the mediator will get your permission before disclosing information you revealed in a private session to the other side;

- Formalities and informalities - usually a hearing is informal, although each mediator has his or her own style. Ask the mediator about his/her style or approach in advance of the hearing or at the beginning of the session. Mediators vary in their insistence on following formal evidence rules. Determine what or whether the mediator has any preference in how you should present your side of the case. Be sure that everyone with authority to settle is present.

### **Step 3 - create a case road map**

4.4 As with a full-blown court case, you need to plan your preparation carefully.

4.5 Do not let the informality of the procedure lull you into something less:

- Identify the issues in dispute - make a written list of what you consider are the critical issues of the controversy. This will allow you to focus the negotiation on those issues, and assist in your objective evaluation of the case;
- Do a "critical information analysis" make sure you have all the information you need regarding liability and damages before the hearing. If legal research is involved, bring copies of appropriate research to the hearing to share with the mediator;
- Analyse how you would try the case - evaluate the strengths and weaknesses of the case from an objective perspective. What verdict would a jury likely return in the case, or what conclusions would a Judge make? Consider what your realistic expectations are, based on criteria that can be supported by the evidence. This allows for a balanced approach to the case, rather than a subjective evaluation;
- Plan your presentation - consider what information about your interests and the facts of the case you want to disclose to the mediator, and what information you want to disclose to the opposing side. Usually, full disclosure to the mediator helps facilitate a successful settlement;
- Prepare a simple case summary - also known as a "position paper or statement" or brief; this is your opportunity to outline the facts of the case, issues in dispute, damages and other factors. Consider the value in providing a confidential statement to the mediator, which includes your thoughts on what criteria you will use to determine when an agreement proposed is fair, how you think the other party realistically views their chances of success, and what you think the other party views as a fair outcome for both sides.

### **Step 4 - develop a negotiation strategy**

4.6 Although the mediator will meet with the other side to communicate offers and counteroffers, you should have a clear idea of how you want the negotiation process to proceed. You should also consider how to make your proposals palatable to the other side:

- Identify the current negotiating position of the parties - do a mental review of the negotiation activities conducted to date so you know where to begin, or where the opposing party might perceive where you will begin. This is a good opportunity to remind yourself of your common goals;
- Determine "wants" and "needs" - often referred to as "interests," these are the silent movers that motivate people to change their "positions" in a negotiation. Your position is something you decided upon, while your interest is what caused you to decide;

- Consider “what’s at stake” Objectively evaluate your case through information obtained through litigation, or independent, verifiable criteria such as jury verdicts;
- Create favorable perceptions - negotiation is a series of communications in which the parties attempt to alter each other’s perceptions. To be successful, you must be able to manage the information received by the other side. Do this by listening actively, respecting the other side’s claim, posing arguments, making proposals and offering alternatives.
- Develop options for mutual gain - Consider whether the settlement options available are preferable to proceeding to trial. This requires a cost analysis of settling at mediation versus going to trial, as well as close reflection on what options are available to the other side.

### **Step 5 - obtain authority to settle**

4.7 Be prepared to come to the table ready to negotiate. That means having the financial ability to settle the dispute with adequate reserves in place. Meet in advance, with whoever might need to be consulted about the prospect of an immediate settlement (attorney, wife, husband, business associate, or other necessary person).

### **Step 6 - determine which people will attend the hearing and what role each will play**

- Claimant;
- Lawyers and expert;
- Respondent;
- Insurance representatives.

### **Step 7 - pre-mediation preparation**

4.8 Basic preparation steps include the following:

- Consider what you are going to disclose both in pre-mediation and during the mediation;
- Use the mediator. In private, preliminary telephone conversations before the hearing, talk with the mediator about your presentation and approach to the case, what information you and the other side need to know in order to evaluate settlement options;
- Anticipate what story you will tell during the opening session of the mediation and rehearse it; and
- Organize Documents. Have copies of documents, photos or other writings available before the hearing begins.

### **Step 8 - Opening statements**

4.9 Three simple rules for your opening statement:

- Be simple, concise and clear - tell a short story in plain words;
- Don’t waive your right to an opening statement;
- Talk about your side, not theirs.

**Step 9 - make it easy to reach agreement**

4.10 Throughout the process, and even before it begins, you should think about what it takes to make it easy to reach agreement.

- Cultivating a sense of mental detachment. Take yourself out of the negotiations playing field and insert the dispute in your place. This allows you to talk about the issues in dispute, rather than being bogged down in personality games.
- Meeting the other side's needs. You can better understand your opponent's needs by listening actively, acknowledging and paraphrasing their arguments. Express your views without provocation. This is an effective tool to "disarm" your opponent while understanding their point of view.
- Problem Solving. This is the time to recast what your opponent says in a form that directs attention back to the problem of satisfying both side's interests. Ask "what" and "how" questions to move toward a solution. Sometimes asking "why" will cause your opponent to be defensive. Considering the consequences.
- Ask reality testing questions such that your opposition will understand what will happen if agreement is not reached. Bridging the gap. Reach agreement by helping your opponent save face. Try to satisfy unmet needs and involve your opponent in the process. Do not rush into the agreement; it will fall into place naturally.

**Step 10 - reaching agreement**

4.11 After all, of the hard work that you have done to reach agreement, take a few final steps to make sure that there are no disappointments:

- Put the agreement in writing. Do not wait - do it immediately upon reaching agreement;
- Make sure the parties can perform the agreement; and
- Congratulate each other!

## **5.0 ADR in the Middle East - how important is international arbitration in the Middle East**

5.1 The vast majority of construction work in the Middle East is state procured, and therefore for the purposes of this paper, it is more appropriate to consider arbitration in the Middle East from the perspective of the contractor.

5.2 International contractors and engineering companies bidding for large and complex construction infrastructure projects in the Middle East generally insist on international arbitration clauses that provide for arbitration in London or Paris and will usually be governed by English law.

5.3 However, the current state of the market means employers have the upper hand and therefore they may increasingly insist on contracts being subject to local law and the jurisdiction of their local courts or to domestic arbitration.

5.4 It is sometimes suggested that arbitration is not accepted in the Middle East. Not so. Arbitration, or Tahkim, is reported to have been used by the Arabs as early as the seventh century. In many countries, therefore arbitration is part of local custom.

5.5 Historically, however, there was difficulty with international arbitration because of several arbitration awards in the 1950s and early 1960s that were unfavourable to state governments.

5.6 As a result, Arab countries became suspicious that international arbitration would not provide them with a fair means of resolving their disputes. Even today in Saudi Arabia, state entities are forbidden by law from agreeing to arbitration clauses without obtaining government consent. However, the global trend towards international arbitration and various conventions in favour of international arbitration have substantially eroded this hostility and increased its acceptance. This is evidenced by the increasing number of local arbitration centres and the growing number of arbitrations in the region, particularly in Dubai.

5.7 Traditionally, arbitration centres across the Middle East have been part of the local chamber of commerce. Their expertise varies considerably and, on the whole, they have not yet built a track record for dealing with the large and complex disputes likely to arise on construction projects where hundreds of millions of dollars may be at stake.

5.8 While there is movement across the Middle East to reform arbitration laws and to adopt laws based on the United Nations Commission on International Trade Law (UNCITRAL) model, there is still another hurdle to overcome. If arbitration requires assistance from the local courts - for example, where the court's enforcement powers are required in respect to interim measures or even to begin the arbitration process (as in Saudi Arabia) - then progress is likely to be slow, affecting the conduct of the arbitration. Despite this, substantial advances have been achieved in international arbitration across the Middle East. The following centres are especially noteworthy:

### **The Cairo Regional Centre for International Commercial Arbitration**

5.9 This is perhaps the most established arbitration centre in the Middle East, with over 30 years' experience. It attracts many arbitration cases, mainly those connected with Egypt and North Africa.



### **The Dubai International Arbitration Centre (DIAC)**

5.10 Arbitration in the UAE is governed by articles 203 to 218 of the Civil Procedure Law. Under the Civil Procedure Law, contracting parties are permitted to refer any dispute concerning the implementation of a specified contract to one or more arbitrators. The UAE increasingly favours arbitration as a suitable mechanism for alternative dispute resolution (ADR) and is home to the following arbitration centres.

5.11 None of the centres in the Gulf has attracted more cases than DIAC, which has established itself as probably the leading centre in the Gulf. The DIAC has the advantage of new rules that were published in May 2007, which are in line with other major arbitration centres around the globe.

### **Dubai International Financial Centre and the London Court of International Arbitration (DIFC – LCIA)**

5.12 Dubai's reputation as a regional arbitration centre was bolstered in February 2008, with the opening of a joint venture between the Dubai International Financial Centre (DIFC) and the London Court of International Arbitration (LCIA). The alliance added LCIA's expertise in administering arbitrations. Yet another enhancement to the centre's reputation came with the enactment in October 2008 of the new DIFC Arbitration Law 2008, which, in principle, enables parties anywhere in the United Arab Emirates and beyond to choose the DIFC as the seat of their arbitration. Thanks to the new law, a DIFC award, once ratified by the DIFC Court, is theoretically enforceable without any opportunity for challenge in the Dubai courts, unlike an arbitral award obtained outside the DIFC. The advantage of a DIFC award is clearly significant but it remains to be seen how the Dubai courts will deal with such awards as a matter of practice.

5.13 However despite the popularity of arbitration, there continues to be no federal arbitration law in onshore UAE (outside of the DIFC Arbitration Law and the ADGM Arbitration Regulations), and onshore domestic arbitral proceedings are governed by a limited number of articles in the UAE Civil Procedure Code. Common procedural issues continue to be raised, which threaten the efficiency of proceedings and the enforcement of final awards, particularly surrounding signatures and authority to enter into arbitration agreements. Enforcement proceedings for arbitral awards can be a lengthy process, irrespective of which rules the arbitration was conducted under.

5.14 Less encouraging too was a move that sent ripples through the arbitration community in the UAE, the 2016 amendment (Federal Decree Law No. 7 of 2016) to the UAE Penal Code (Federal Law No. (3) of 1987 (the Penal Code) which introduced potential criminal liability (including imprisonment) for arbitrators acting in an unfair or biased manner against a party (Article 257 of Federal Law No (3) of 1987 (the Penal Code). While the risk of an arbitrator being convicted and imprisoned under this law appears low, the practical consequences of parties raising a complaint for tactical reasons must be considered and has had a warning off affect. It remains to be seen how this development will unfold.

### **Other centres in the Gulf**

5.15 There are a number of other less established arbitration centres situated throughout the Gulf States. These include Doha, the capital of Qatar, which is home to the Qatar International Conciliation Arbitration Centre. In Bahrain, the Bahrain Chamber for Dispute Resolution has teamed with the American Arbitration Association since 2009 to provide dispute resolution services in and beyond Gulf. In Abu Dhabi, the Abu Dhabi Commercial Conciliation and Arbitration Centre has been in operation for many years.

### **Enforcing Awards in the Middle East**

5.16 Enforcing arbitration awards in the Middle East may be problematic, particularly in Libya and Yemen, which have not yet signed onto the New York Convention. Even where the New York Convention is in place, most Arab countries will decline enforcement on the basis of its public policy exemption, if the award contravenes domestic public policy.

5.17 Enforcement is particularly difficult in Saudi Arabia, where the enforcement of foreign awards will be declined if it is inconsistent with Sharia law. There are no formal statistics but very few awards have actually been enforced in Saudi Arabia solely on the basis of the New York Convention.

5.18 However, in the UAE, two foreign awards were enforced last year in accordance with the New York Convention. This is seen as evidence of the increasing trend in favour of arbitration in the UAE.

5.19 If there are assets outside the Middle East, the best course probably is to start enforcement there. If enforcement is to take place in the Middle East, however, in order to increase the chances of successfully enforcing an award, the conduct of the arbitration and the pleading of claims should be done in a way that, as far as possible, is careful to avoid falling foul of procedural and substantive local law.

### **Summary**

5.20 Contractors will know from experience that, in complex projects, the process of enforcing entitlements does not always start with a dispute. However, the absence of an effective deterrent to disputes, in the form of proper dispute resolution machinery, may lead to more disputes arising. Therefore, Arbitration remains a key means of avoiding disputes in the Middle East by acting as a deterrent and, if amicable resolution cannot be achieved, a means of achieving an appropriate resolution.

5.21 Choosing a local arbitration centre in the Middle East may be a good compromise, but careful consideration needs to be given to all project circumstances before signing a contract that provides for this.

## 6 The pros and cons of various dispute resolution processes – an aid memoire

### 6.1 Litigation

#### 6.2 Advantages include:

- Suitable for multi-party disputes;
- Pre-Action Protocol seeks to ensure litigation is the last resort (see para 1.3 of Pre-Action Protocol for Construction and Engineering Disputes);
- CPR Part 36 offers enable parties to settle a dispute, and more importantly, any offer made will be taken into account by the court when awarding costs – obliges a party to act reasonably;
- Encourages parties to use ADR with potential cost sanctions for an uncooperative and unreasonable party;
- Depending on the merits of the case, parties can take up after the event insurance policies to cover costs;
- Costs budgeting – assists parties in setting budgets;
- Forum suitable for parties and their assets based in the UK and EU;
- Quality of the Judges at the TCC;
- Case authorities as precedent and guidance on approach of the Court;
- CPR – provides clarity on the court process;
- Apart from paying the court fee, parties do not have to pay for the fees of the Judges and venue.

#### 6.3 Disadvantages include:

- Public forum, Judgment available for all – may affect reputation of a company;
- CPR - rigid procedure.

#### 6.4 Suitability for construction disputes

- Yes;
- Where a dispute involves multi-parties, this is likely to be a more suitable forum compared to arbitration.

## 6.5 Arbitration

### 6.6 Advantages include:

- Confidential and private process – no bad publicity;
- Neutral forum, parties can agree a “seat” for arbitration;
- Can nominate/agree the tribunal and the number of arbitrators;
- Suitable for international disputes, compared to submitting to a foreign jurisdiction for fear of bias;
- Ease of cross-border enforcement, but depends on whether a state has acceded to the New York Convention of 1958;
- Flexible – parties able to agree on a suitable procedure;
- Parties can choose whether to conduct arbitral proceedings ad hoc or under the auspices of an arbitral institution;
- Parties can choose to adopt specific rules of disclosure;
- Supported by Arbitration Act 1996, for e.g. courts takes a robust approach in staying legal proceedings if there is an arbitration agreement in place between the parties (s.9 of Arbitration Act 1996);
- Final and binding award with limited grounds for appeal.

### 6.7 Disadvantages include:

- Requires an arbitration agreement or agreement of the parties after the dispute has arisen;
- Limited grounds for appeal, only ss. 67, 68 and 69 of Arbitration Act 1996;
- Have to pay for the costs of the arbitrator, hearing venue and institutional administrative fee;<sup>110</sup>
- May require the court’s assistance for interim measures;
- May face enforcement challenges in a foreign jurisdiction – additional costs;
- Not suitable for multi-party disputes;
- Can be a protracted process, for example tribunal extending timetable to ensure due process;
- Award not binding on parties not privy to the dispute.

### 6.8 Suitability for construction disputes

- Yes.

### 6.9 **Mediation**

#### 6.10 Advantages include:

- Cheap and quick process, typically a day;
- Can nominate/agree mediator;
- Flexible – scope for non-monetary remedies;
- Confidential;
- Negotiations on without prejudice basis;
- Assists parties in understanding the other party's case and its strengths and weaknesses;
- Focus is on the interests of the parties and not legal rights alone;
- Helps parties to re-establish lines of communication;
- If case settles, saves considerable legal costs;
- Can take place at any stage of a case;
- Parties have control over the outcome.

#### 6.11 Disadvantages include:

- Purely consensual process;
- Requires parties to have realistic expectations;
- Key decision makers on behalf of the parties must be present;
- Not suitable where the outcome requires a remedy involving a court's assistance.

### 6.12 Suitability for construction disputes

- Yes.

### 6.13 Adjudication

#### 6.14 Advantages include:

- Statutory right, parties are obliged to adjudicate “at any time” if a referral is made;
- Quick process, only 28 days from the date of the referral notice;
- Adjudicator’s decision is interim, can be overturned in a court or an arbitration;
- Rough and ready justice;
- The vast majority of adjudicator decisions are enforced by the courts – courts in support of adjudication process;
- Can nominate/agree adjudicator;
- Confidential unless enforcement actions taken.

#### 6.15 Disadvantages include:

- Tight time-table, only 28 days from the date of the referral notice;
- Vulnerable to ambush owing to tight time-table;
- Can be an elaborate and expensive procedure;
- Rough and ready justice;
- Each party bears its own costs;
- Parties may be unhappy with the adjudication outcome having spent considerable money;
- Adjudicators may be out of their depths dealing with difficult points of law and/or extensive complicated facts;
- Parties have the benefit of an extended limitation period: six or twelve years from the time of payment of the adjudication decision to overturn the adjudicator’s decision via litigation or arbitration;
- Adjudicators have no free standing power to award interest on sums unless provided for in contract or with parties’ agreement;
- Parties jointly and severally liable for the adjudicator for the adjudicator’s fees and expenses.

6.16 Suitability for construction disputes

- Depends on the nature of the dispute, unlikely to be suitable for professional negligence and complex final account types of disputes

6.17 **Expert Determination**

6.18 Advantages include:

- Final and binding decision, usually no means of appeal in the courts absent fraud, bias or ultra vires;
- Generally quicker and cheaper than litigation and arbitration;
- Confidential;
- Useful for technical disputes.

6.19 Disadvantages include:

- Expert generally not obliged to observe due process rules;
- If expert reaches an unfair and unjust outcome, usually no legal means of appeal absent fraud, bias or ultra vires.

6.20 Suitability for construction disputes

- Depends on the nature of dispute;
- Can be a risky forum.

## Conclusion

Looking to the future, I would say the UK will continue to be a leader in ADR post Brexit although we cannot rest on our laurels. It seems obvious that Brexit will not affect the popularity of London as an arbitral and court centre. Significant cost/benefit advantages can be achieved by adapting court procedures to meet the particular requirements of the case; for example, by reducing the scope of disclosure. In addition, our highly experienced judges are proactive in preventing unnecessary cost escalation by appropriate case management directions, including as to ADR.

The UK will continue as a contracting state to each of the New York and Washington Conventions which govern the enforcement of relevant arbitral awards in both the private and public international law spheres. The Arbitration Act 1996 is not part of the European acquis, and so is unaffected by Brexit. It is difficult to envisage that there will be any impediment to arbitrators, legal representatives and parties visiting the UK for the purpose of participating in arbitration.

Here in the UK, we have ombudsmen dealing with small cases in almost every sector: financial services, banking, transport, travel, energy, telecoms etc. We have a number of ADR bodies servicing the business and family court community. We have a vibrant mediation sector and we shortly to introduce the Online Solutions Court for Online Dispute Resolution (ODR) for small disputes in England & Wales. The EU has already opened its Online Dispute Resolution site that directs consumers to accredited mediators in their country in relation to unsatisfactory online purchases in the EU but some of the Eastern European countries have a way to go.

ADR is a vast topic, but it will have a serious bearing on the attractiveness of the UK as a jurisdiction of choice post-Brexit. We are capable of offering state of the art ADR and ODR processes and we must do so if we are to stay at the leading edge of international dispute resolution. Ultimately, ADR too, is a critical part of an independent justice system – once again, a piece in the jigsaw that is required if overseas investors are to have the confidence to invest in post-Brexit Britain.

ADR cannot exist in a vacuum, as there will always be a need for some cases to be adjudicated and decided by the best judicial brains and for ADR to be what its name suggest the Sword of Damocles needs to be over ones shoulder in the form of formal resolution.

May I close on settlement agreements reached in mediation, they are enforceable (via the court!) like any other contract. While there is no requirement for such settlement agreements to be in writing (except for employment tribunal cases), mediation agreements generally provide that a settlement is not enforceable until it has been agreed in writing and signed by the parties. Parties retain control of the decision of whether or not to settle and on what terms. The settlement agreement will be enforceable as a contract through the English court system so long as the usual requirements for a binding contract have been complied with. A settlement may exceptionally be incapable of enforcement if its terms are too uncertain.

With respect to my profession, we can offer bang for the buck at the end of a mediation in getting the settlement to stick, lawyers out there do not forget this imperative!



## Notes

1. Solicitors have a duty to advise their clients about mediation. This coupled with ADR requirements in the pre-action protocols, the CPR and court guides, along with certain court schemes, means that mediation is something which must be considered in every case.
2. In Professor Hazel Genn's 2008 Hamlyn Lecture in Edinburgh she drew on her then recent research into two London court-based mediation schemes, one voluntary, the other compulsory, painting a sorry picture of court-linked mediation, with low settlement rates, high opt-out rates and declining user satisfaction. The Review specifically endorses her opinion that mediation should be a supplement rather than an alternative to the court system, and that without Judges to back it up, mediation is "the sound of one hand clapping".
3. See HMCS mediation "toolkit" in the form of the Civil Court Mediation Service Manual on the Judicial Studies Board ("JSB") website <https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/adr-mediation-handbook/>.
4. For example injunctive and protective relief where time is of the essence. Pressing people to mediate is not always the best move. It is and always will be antithetical to ADR as a voluntary consensual process to force parties to mediate.
5. The vast output of academic theory in the USA relating to ADR has not been imported to or embraced by the perhaps more pragmatic world of ADR in the UK, and some of the diagnoses made by US academics do not cross the Atlantic well.
6. 24 January 1982.
7. Where one usually gets a transfer of money. ADR can unlike court actions result for example in an apology.
8. Mackie, K (ed) 1991 *Handbook of Alternative Dispute Resolution*, Routledge; Brown, H and Marriott, A (1993) *ADR Principles and Practice*. London: Sweet and Maxwell.
9. We will briefly look later at a variety of processes (iii) Mediation; (iv) Med-arb; (v) Early Neutral Evaluation; (vi) Expert Determination (vii) Dispute Resolution Boards; (viii) conciliation offered by likes of Construction Conciliation Group (CCG) or ICE Mediation/ Conciliation Procedure; (ix) Project Mediation; (x) Pendulum Arbitration and (xi) mini-trial.
10. And the fact Alternative Dispute Resolution (ADR) in the common law tradition has its origins rooted in English legal development. As early as the Norman Conquest, legal charters and documents indicate that English citizenry instituted actions concerning private wrongs, officiated by highly respected male members of a community, in informal, quasi-adjudicatory settings. In some instances, the king utilized these local forums as an extension of his own legal authority; rather than adjudicate a suit via the more formal king's court, the king would simply adopt the decision of a local, but highly respected, layperson without ever "reaching the merits" of the suit, creating one of the first forms of arbitration. In some sense, then, common law ADR has been around for centuries.
11. The use of the word "alternative" is sometimes criticised and other labels such as appropriate dispute resolution or amicable dispute resolution have been canvassed in order to emphasise that litigation and ADR are by no means mutually exclusive, and that ADR often works well against a backcloth of existing litigation or arbitration.
12. The mediator/neutral does not give his or her view of the merits of the case, but allows the parties to move to a compromise..
13. A process modelled on settlement conferences held by Judges. An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a Judge would be likely to do.
14. Although some use exists in criminal cases too. For example Victim Offender Mediation (VOM) involves a scheduled face-to-face meeting between victims of crime and the offender. The meeting gives offenders and victims the chance to discuss the offence and the consequences, and decide what the offender should do to repair the harm cause by the crime. This includes an apology and may also involve financial reparations from the offender to the victim.

- VOM may be voluntary or court-ordered, and can be instead of a custodial sentence, or at the end of a period of imprisonment. While similar in content and aims, VOM differs slightly from Restorative Justice Conferencing as it focuses on bringing victim and offender together, but not necessarily family and community members who may have also been affected by the crime.
15. It is to be noted that the reference to “mediators” in this period largely refers to Registrars and senior legal practitioners rather than formally trained “mediators”.
  16. The Spycatcher Trial” (1988) – Ironically in a decidedly adversarial way Turnbull said: “The fact of the matter is that nothing is achieved in this world, particularly politically, other than with persistence, and persistence involves repetition and it involves argument and re-argument... The public interest in free speech is not just in truthful speech, in correct speech, in fair speech... The interest is in the debate. You see, every person who has ultimately changed the course of history has started off being unpopular.” *Turnbull’s closing submissions, 18 December 1986.*
  17. Susskind, L & Cruikshank, J. (1987) *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*; Williams, R. (1987) Should the State Provide Alternative Dispute Resolution Services *Civil Justice Quarterly*, 6: 142-152
  18. CEDR was founded as a non-profit organisation in 1990, with the support of The Confederation of British Industry (CBI) and a number of British businesses and law firms (Fenwick Elliott LLP being one of them), to pioneer the development and use of Alternative Dispute Resolution (ADR) and mediation in commercial disputes. It has trained a vast hunk of the legal profession.
  19. CEDR’s Founder President.
  20. One of the leaders of ADR texts has been *ADR Principles and Practice*, written by two distinguished litigation solicitors and mediators, Henry Brown and the late Arthur Marriott QC, the first edition of which was published in 1993 and the second in 1999. It discusses the philosophy of ADR and cautionary views about it, citing among others Professor Owen Fiss, the principal US anti-settlement academic. Brown and Marriott capture their views of the essence of ADR in para. 2-019 of the second edition of their book, published in 1999:
 

*“ADR complements litigation and other adjudicatory forms, providing processes which can either stand in their own right or be used as an adjunct to adjudication. This enables practitioners to select procedures (adjudicatory or consensual) appropriate to individual disputes. ADR gives parties more power and greater control over resolving the issues between them, encourages problem-solving approaches, and provides for more effective settlements covering substance and nuance. It also tends to enhance co-operation and to be conducive to the preservation of relationships. Effective impartial third party intercession can help to overcome blocks to settlement, and by expediting and facilitating resolution, it can save costs and avoid the delays and risks of litigation. Sometimes, but not necessarily, it can help to heal or provide the conditions for healing underlying conflicts between parties. ADR processes, like adjudicatory procedures, have advantages and disadvantages which make them suitable for some cases but not for others.”*
  21. Following his tours of Australia, New Zealand, Canada and seeing ADR there.
  22. The Rt Hon the Lord Woolf, *Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, June 1995, Lord Chancellor’s Department, Chapter 18, para 4, page 136.
  23. See excellent paper on Court Based ADR initiatives for non-family, civil disputes: the commercial court and the Court of Appeal by Professor (now Dame) Hazel Genn, UCL, 2002. See too her book *Regulating Dispute Resolution ADR and Access to Justice at the Crossroads*.
  24. <https://www.gov.uk/government/publications/technology-and-construction-court-guide>.
  25. Sir Peter Middleton, *Review of Civil Justice and Legal Aid*, Lord Chancellor’s Department, September 1997.
  26. White Paper, *Modernising Justice*, December 1998, Chapter 1, Para 1.19.
  27. Which was to be later merged with the then Department for Constitutional Affairs (now Ministry of Justice - MOJ) in 2003.
  28. The Academic Committee of the Civil Mediation Council is hosting a conference on

- compulsory mediation on 13 October 2017 and is currently seeking abstracts for papers on this very subject!
29. See The Admiralty and Commercial Court Guide, page 28, paragraph D8.7, March 2016 update. ADR Order in the form of Appendix 7 to the Commercial Court Guide.
  30. The new Pre-Action Protocol for Construction and Engineering Disputes, which came into force on 14 November 2016, has added a provision for the meeting to take the form of an ADR process such as mediation. The previous requirement – that if the parties are unable to agree a means of resolving the dispute other than by litigation, they should use their best endeavours to agree how the issues should be defined – has been removed (paragraph 9).
  31. [2002] 2 All ER 85.
  32. EWCA Civ 333.
  33. [2002] 1 WLR 803.
  34. EWHC 1051 and EWCA Civ 1173.
  35. EWHC 2059.
  36. *Halsey v Milton Keynes General NHS Trust* (2004) EWCA Civ 576.
  37. Some say something of a mediation agnostic.
  38. A view it is said he no longer holds.
  39. Automatic Referral to Mediation (ARM).
  40. Department of Constitutional Affairs since replaced by Ministry of Justice.
  41. Professor Hazel Genn articulating them loudly at the 2008 Hamlyn Lectures.
  42. Civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) has been all but killed. Hundreds of thousands of people who were eligible for legal aid on 31 March 2013 became ineligible the very next day.
  43. £10,000 to issue a half-decent claim over £200k is obscene in my opinion.
  44. I have seen that in the TCC alone the number of Claim Forms issued per annum is well below 500.
  45. To quote from Professor Dame Hazel Genn's Hamlyn lectures, *Judging Civil Justice*, December 2008.
  46. Professor Dame Hazel Genn, whilst Dean of UCL's Faculty of Laws, is a social scientist by training. She examines legal processes from that viewpoint. In 2001, she published a favourable appraisal of mediation in the context of county court disputes (The Central London County Court pilot mediation scheme). She noted that mediation was capable of promoting settlement in a wide range of civil cases; it worked particularly well in cases where both parties were willing participants and were of roughly equal strength. In her 2008 Hamlyn Lectures, (published by CUP in 2010, *Judging Civil Justice*) however, Genn also identified the limitations of mediation and the dangers of misuse.
  47. For example CPR 26.4 A 'the Mediation Service' means the Small Claims Mediation Service operated by Her Majesty's Courts and Tribunals Service. Part 1 – the overriding objective - the court has a duty to encourage the parties to use an ADR procedure if appropriate and to facilitate the use of such a procedure.  
 Rule 1.4(2) sets out the activities the court may undertake which constitute active case management. These include: (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating use of such procedure; (f) helping parties to settle the whole or part of the case.."  
 Part 3 & 26 – The court's case management powers include the ability to stay the proceedings for a certain period to allow ADR.  
 CPR Rule 26.4(1) provides that the court may "stay" proceedings where a party makes "a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means" when filing the allocation questionnaire."
  48. [2014] EWHC 3546 (TCC).
  49. See Sir Rupert Jackson's PC Civil Justice Reform and alternative dispute: Chartered Institute of Arbitrators: 20/9/2016.
  50. In which my Partners at Fenwick Elliott LLP, Nick Gould and Claire King were instrumental.

51. 21 Construction Law Journal 265 at 267 (2005).
52. Review of Civil Litigation Costs in 2009.
53. The Judicial College, the Civil Justice Council and the Civil Mediation Council endorsed the book. Oxford University Press was the publisher.
54. It is available on Amazon! <https://www.amazon.co.uk/Jackson-Adr-Handbook-Susan-Blake/dp/0199676461>.
55. [2013] EWCA Civ 1288; [2014] 1 WLR 1386.
56. The Directive applies where two or more parties to a cross-border dispute (a dispute is "cross-border" when at least one of the parties is domiciled or habitually resident in a Member State different to that of the other party) of a civil or commercial nature attempt, by themselves and voluntarily, to reach an amicable settlement to their dispute with the assistance of a mediator. It does not extend to revenue, customs or administrative matters, or to disputes involving the liability of the State, nor to those areas of family law where the parties do not have a choice of applicable law. However, given the broad definition of "cross-border disputes", the Directive's provisions on confidentiality and on limitation and prescription periods also apply in situations which are purely internal at the time of mediation but become international at the judicial proceedings stage, e. g. if one party moves abroad after mediation fails.
57. European Union (Withdrawal) Bill.
58. 20 September 2016.
59. See <http://www.tecsa.org.uk/pre-action-protocol-pap>. A failure to cooperate may lead to costs penalties being imposed by the courts regardless of whether a party's claim is successful or not. In particular, paragraph 8 of the Practice Direction on Pre-Action Conduct (PDPAC) indicates that while alternative dispute resolution (ADR) is not compulsory, the courts may require evidence that the parties have considered some form of ADR. In this context, mediation is by far the most popular form of ADR in England and Wales.
60. [1984] Q.B. 644, 670.
61. The Chartered Institute of Arbitrators saw the provision of well-trained and competent arbitrators meets a need which was recognised with admirable foresight by the Institute's founders a century ago. The Institute's 1915 records show that they saw that "*the tendency of all commercial matters is in the direction of complexity*" and that "*beyond the most complete knowledge and experience in [the subject matter of the arbitration], special knowledge, training and experience, together with acquaintance with the laws of evidence, the rules for the construction of written documents, the principles of law and equity, and some degree of judicial capacity, are equally important.*"
62. Housing Grants, Construction and Regeneration Act 1996.
63. Only 15+ of respondents reported savings of less than £25,000; 76+ reported savings in excess of £25,000; and the top 9+ saved over £300,000. The cost savings are generally proportional to the cost of the mediation suggesting higher value claims spend more money on mediation, presumably because they realise that the potential savings resulting from mediation will be greater.
64. Out of the successful mediations only 22+ were taken as a result of the Court suggesting it or due to an Order of the Court. Even where unsuccessful, 91+ of mediations occurred as a result of the parties own initiative. This suggests that the incentive to consider mediation provided by the Civil Procedure Rules (namely, cost sanctions) are effective and that advisors to parties to construction disputes now routinely consider mediation to try and bring about resolution of the dispute.
65. Of successful mediations, a higher percentage of respondents whose mediations had taken place during exchange of pleadings and shortly before trial believed that the dispute would have progressed to judgment if mediation had not taken place. This potentially suggests that mediation was comparatively more successful at these stages.
66. This perhaps diminishes the strength of any argument for greater regulation of mediation and supports the market based approach adopted by the recent EC Mediation Directive for 2008/52.
67. *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [11], per Dyson L.J.

68. Particularly r.1.4 (2)(e), which states that the court should further the overriding objective of the CPR by, inter alia, encouraging the parties to use ADR; see para.9–10 below. Furthermore, CPR 1.3 states that the parties are required to help the court in furthering the overriding objective. Rule 44.5(3)(a)(ii) requires the court, when considering the amount of costs to be awarded, to have regard to the efforts made to resolve the dispute.
69. [2001] All ER (D) 384 (Feb).
70. [1993] UKHL 1 (20 May 1993).
71. [2015] EWHC 1829 (Ch).
72. The Second Report of the Commercial Court Committee Acting Party on ADR of February 1999 reported that only four ENEs had been conducted in the Commercial Court, although Professor Hazel Genn of UCL London has doubted this figure.
73. Details were contained in a paper presented to the Society of Construction Law on May 4, 1999.
74. For an example of the rules for Expert Determination, see the Academy of Experts' website at <http://www.academy-experts.org/edrules.asp>.
75. Save that, an expert determination clause will not prevent the intervention of the courts if there is a question over the expert's jurisdiction. In *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826, where there was a dispute over whether the expert had jurisdiction to deal with the dispute, the Court of Appeal considered it to be "in the interests of justice and convenience" to determine that dispute. There were two points underpinning the Court's rationale. First, they said that an expert determination clause pre-supposes that the parties intend certain types of dispute to be resolved by the expert and others by the Court. Second, the Court was clear there was a genuine dispute. The Court of Appeal evidently considered that the point was of some importance, as Judgment was issued even though the parties had settled their differences.
76. See *Bernhard Schulte & Ors v Nile Holdings Ltd* [2004] 352 at 372, paragraph 95 Cooke J.
77. The leading and much praised textbook is by John Kendall and Clive Freedman, *Expert Determination* (Longman) third edition.
78. *Jones v Sherwood Services Plc* [1992] 1 WLR 277. Some expert determination clauses provide that the expert's decision is final and binding "save in the event of fraud or manifest error". Such provisos are applied restrictively: see *Conoco v Phillips* (1996) CILL 1204 and *Dixons Group Plc v Murray-Oboynski* (1997) CILL 1330 86 BLR 16.
79. A stay was refused in *Thames Valley v Total Gas and Power* [2006] 1 Lloyd's Rep. 441 for three reasons: 1. Whilst a stay would have been mandatory under the Arbitration Act 1996, expert determination is not arbitration, and so the position is akin to that which prevailed in arbitration cases before the passing of that Act. Here, the claimant in the litigation would have been entitled to summary Judgment on the substantive issue in dispute, so that even if there had been a domestic arbitration agreement, no stay of court proceedings would have been granted (see and para.54 of the Judgment). 2. The court had before it all the relevant material, so that proceedings before an expert would represent a complete duplication of effort and expense (para.55 of the Judgment). 3. There were public interest reasons in the case (it involved the supply of power to Heathrow airport) why the substantive issue should be determined speedily, which the court could do and which an expert might not be able to do (para.56 of the Judgment). Accordingly, the court went on to determine the substantive issue by declaration notwithstanding the parties' agreement to refer disputes to expert determination.
80. [1993] AC 334. A decision noted and followed by Mr Justice Ramsey in *Braceforce Warehousing Ltd v Mediterranean Shipping Company (UK) Ltd* [2009] EWHC 3839
81. [2008] EWCA Civ 1.
82. [2008] EWHC 1420 (TCC).
83. [2002] 2 A.C. 357.
84. [2004] Lloyd's Rep. 352.
85. Any challenge must be made promptly, in *Zvi Construction v The University of Notre Dame* [2016] EWHC 1924 (TCC) the Judge felt that not only did ZVI not advance any reservation of the right to challenge the expert's jurisdiction; it took an active part in

the expert process. Deputy Judge Furst said that: “Having impliedly agreed to submit the dispute as to whether there were defects for which ZVI ... were responsible under the Development Agreement, ZVI is now bound by Clause 17.1.1 which renders the expert’s determination final and binding on it. There is nothing unfair or illogical about this. ZVI had every opportunity to argue these points but for whatever reason it either chose not to deploy those arguments or did not consider them.”

86. [2007] EWHC 503
87. [2004] 1 WLR 1953
88. The usual justification given for the deletion is the cost of funding a standing DAB. However, if cost is the real concern, an ad hoc DAB or modified form of standing DAB could be used and contractors should certainly consider proposing that in negotiations. Ultimately, whether a DAB is agreed or not is a commercial decision between the employer and the contractor but if a DAB is not going to be included, it should be fully excised in the amendments. An unfortunate situation, which sometimes occurs, is when the DAB is partially deleted from the contract. This introduces considerable confusion and leaves both sides unclear as to whether they need to proceed with the DAB appointment or go straight to arbitration.
89. The DAB is required to render a decision within 84 days.
90. <http://www.drb.org/>.
91. R. M. Matyas, A. A. Mathews, R. J. Smith and P. E. Sperry, *Construction Dispute Review Board Manual* (McGraw-Hill, 1996).
92. This in itself can be a source for dispute. What if a party refuses to engage in the DAB process? In that instance, it may be possible to refer the dispute straight to arbitration: see the Swiss Supreme Court case 4A 124/2014. Alternatively, what if using the DAB might be an unnecessary and unproductive exercise because the unsuccessful party would inevitably serve a notice of dissatisfaction and look to arbitrate or litigate as the case may be. The view of Mr Justice Edwards-Stuart in the case of *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC) was that, whilst he had had some sympathy for that predicament, the parties had chosen to incorporate the DAB process into their contract and were bound by that.
93. See <http://www.cedr.com> for further details.
94. Positional negotiation strategy involves holding on to a fixed idea, or position, of what you want and arguing for it and it alone, regardless of any underlying interests or contrary positions.
95. Principled negotiation seeks to establish a climate where parties can be creative in searching for mutually beneficial solutions to a shared problem. This approach preserves, and may even enhance, ongoing relationships. Principled negotiation seeks a winning outcome for parties by bargaining over the interests of both parties, not on the positions.
96. This reflects the definition of mediation in the 2008 EU Directive on Mediation which states that it is a structured process.
97. A facilitative neutral will typically not express any view as to the substantive dispute one way or the other, will never tell either party that it is wrong and will be reluctant to make any sort of recommendation at the end of the process if negotiations have not proved successful. He is likely to be instinctively mild mannered and patient. It is notable that good facilitative mediators are typically much tougher and more determined than they appear.
98. In other words prepared to come off the fence and to tell the parties when he thinks that they are being unreasonable or unrealistic. Good evaluative mediators need to be intellectually sharp; otherwise, they can come across as mere bullies.
99. [2004] EWCA Civ 576.
100. *CIP Properties (AIP) Ltd v Galliford Try Infrastructure Ltd* [2014] EWHC 3546 (TCC).
101. See below.
102. See *Frost v Wake Smith and Tolfields Solicitors* [2013] EWCA Civ 1960 where it was alleged that a solicitor was negligent for failing to ensure the legal enforceability of handwritten terms signed by the parties at the conclusion of a mediation. The Court of Appeal did

not agree but Lord Justice Tomlinson made a number of interesting comments about the nature of the mediation process: *"It should be a cause for neither surprise nor dismay that the process of mediation did not in this case at the first session result in an immediately enforceable agreement. Mediation has proved a flexible and immensely valuable process of dispute resolution. No doubt in some situations immediate and binding agreement is possible, whereas in others, of which this was a paradigm, flesh will need to be put upon the bones. It would be regrettable if any decision of this court were to cause practitioners to approach the process of mediation with anything other than maximum flexibility, although I need hardly emphasise that it will be normally be part of a solicitor's duty to advise his client, especially a lay client as opposed to a professional litigator such as a liability insurer, of the nature of the process and of the status of any agreement reached as a result."*

103. Aka "hot tubbing".
104. Allowing parties to cross-examine each other is usually a bad idea, especially in mediation, but also in mini-trial and hybrid procedures.
105. In one-day mediations, teatime is the typical low point.
106. The technique of reality testing, or asking pointed rhetorical questions, is often used.
107. This is, perhaps, why so many Judges have proved to be somewhat inept mediators.
108. It may be possible, with some imagination, to circumvent the privacy of contract problem. The mechanism contained in the TeCSA Adjudication Rules, for example, is that the reference to TeCSA Adjudication Rules in the contract constitutes a standing offer by both contracting parties to TeCSA and any TeCSA nominated adjudicator to abide by the TeCSA Adjudication Rules, which offer may be accepted by TeCSA and the adjudicator respectfully making and accepting the nomination. That procedure is designed to reflect the exceptional speed required of the adjudication process, often in circumstances where one of the parties may not wish to co-operate. In the consensual climate of ADR, however, it is much more satisfactory to enter into a fresh agreement.
109. There are, for example, standard ICC ADR Rules. There are two versions: the old ADR Rules dating from July 2001, and new Mediation Rules which came into force on 1 January 2014. The Rules can be found on the ICC website - [www.iccwbo.org](http://www.iccwbo.org). The ICE also has a set of Conciliation Rules.
110. Unless *ad hoc arbitration*.