HILL DICKINSON

Mediation in England and Wales

by Rhys Clift

Book review: Mediation in England and Wales by Rhys Clift

By Sir Henry Brooke, Chairman of the Civil Mediation Council:

"Mediation, as a means of resolving civil disputes, has been a slow starter. Ten years ago it throve in a small world largely populated by zealots, and zealots are not always the most persuasive advocates of new ideas. Rhys Clift qualified as a mediator in 1998, and he has now built up a formidable reputation in the mediation marketplace. His present book, composed as it is of papers written in 2006 and 2010, has none of the hallmarks of zealotry. It is a 'must read' for anyone who has heard about mediation but has not yet taken the plunge – and for fairly advanced swimmers as well.

"It is no longer open to the litigator to know nothing about mediation. His or her clients deserve a modern dispute resolution service, and such a service must include expert knowledge of the different methods of dispute resolution now available to parties in conflict. This book provides answers to the obvious questions: How is mediation different from litigation or arbitration? How should one prepare for a mediation? What happens at a mediation? What are the strengths and weaknesses of the process? What are the tell-tale signs that a mediation may be more productive than a bipartite settlement meeting?

"Many mediators are puzzled that such an excellent way of bringing about an agreed closure has been so slow to catch on. Every experienced mediator has witnessed the relief and pleasure on parties' faces when a hard day of facilitated negotiation ends in a signed agreement. The author explains how often good new ideas start by being ignored, may then be treated with hostility or derision, and finally form part of mainstream thinking.

"April 2011 saw the implementation of the EU Mediation Directive. It saw the publication of a Ministry of Justice Consultation Paper containing a very marked emphasis on the importance of mediation. It is seeing other departments urging parties everywhere to seek consensual solutions, rather than go down the slow, expensive path towards an imposed solution. In such a context the publication of this excellent short book is very timely."

By Virginia A. Greiman, Harvard University, Kennedy School of Government:

"Rhys Clift's book on Mediation in England and Wales is essential reading for all those interested in conflict resolution, and developing a powerful alternative to costly adversarial processes such as arbitration and the courts.

"The author, who brings his extensive experience as an international commercial mediator provides a practical overview of the tremendous value that mediation contributes to the resolution of complex disputes on a wide range of matters including insurance coverage disputes, off-shore construction, and class actions against major financial institutions. He provides an excellent review of the important differences between mediation and arbitration and why mediation is a more effective dispute resolution process.

"As mediation continues to expand and is recognized around the world, it is vital to understand the critical advantages of this important methodology for conflict resolution as highlighted in this book."

Foreword

This book contains two largely self-contained papers written in 2006 and 2010.

The first was written to complement and to develop the material contained in our At a Glance Guide to Mediation of 2000/2001 (available in English and Spanish) and in our Mediation FAQs of 2004/5 (available in 13 languages). This first paper compares arbitration and mediation and sets out supplementary information about mediation, its use and effectiveness. The second paper takes up some of the themes from the first then sets out observations on the phenomenon of mediation and the current attitudes of the English judiciary. It describes, for example, the function of mediation, its place in civil justice, the role of mediation in the maritime field and, in particular, expresses a short note of concern about how mediation might develop. Both papers have substantial generic content, applicable across the broad spectrum of commercial activity and disputes.

Since the first paper was written the European Mediation Directive has been passed in 2008. The Directive follows the European Green Paper issued by the Commission in 2002 and the European Code of Conduct for Mediators launched in July 2004. EU member states now have until June 2011 to give effect to the Directive, in respect of cross border disputes. The key elements of the Directive are:

- Formal recognition of the importance of mediation as a part of access to justice.
- Power for the Courts of all EU states to "invite" parties to mediate.
- Protection as regards limitation periods (prescription) where mediation is used.
- Direct court enforceability of settlement agreements made in mediation.
- Protection for mediators/mediation providers from being called as witnesses, save in very limited circumstances.

The Directive is likely to be a significant step forward in the spread of use of mediation in commercial affairs and in cultural change in the management of disputes, not only within the European Union but widely beyond. Further, whilst it may be too early to anticipate precisely how the Directive will be implemented across the European Union, individually by each member state, it should go some way to standardising practice within the EU.

Disputes which are subject to arbitration are excluded from the scope of the Directive, but even here the impact of the Directive may be positive. The change of attitude and a wider general acceptance of ADR and mediation is likely to result in an increase in the use of mediation before or in parallel with arbitration. We certainly see this happening already in England and Wales.

The report *Dispute Resolution in London and the UK 2010* issued by TheCityUK in September 2010 states that there has been a significant surge in dispute resolution in the UK and that the main dispute resolution organisations and schemes have experienced a substantial increase in referrals between 2007 and 2009, probably because of the economic recession and financial crisis. For example, disputes referred to the London Court of International Arbitration doubled between 2007 and 2009; there were over 4,600 referrals to the Chartered Institute of Arbitrators, a decline from 5,300 in 2008 but very substantially more than the annual totals in the two preceding years (2,000 and 3,000 respectively); disputes referred to the London Maritime Arbitrators Association increased from 2,600 in 2007 to 4,400 in 2009.

Statistics for mediation substantially mirror this picture; for example, the Fourth Mediation Audit conducted by the C*entre for Effective Dispute Resolution* (CEDR) estimates an increase in mediation from approximately 3,600 to 6,000 in 2009 in the commercial field. In addition to this there were workplace mediations and over 9,000 mediations conducted by Her Majesty's Court Service Small Claims Mediation Service in the year to March 2009.

Whilst certain matters are difficult to quantify, the CEDR Audit estimates savings to business from achieving earlier resolution of cases through mediation at around £1.4 billion in 2010, including wasted management time and damaged relationships. Further figures in the CEDR Audit make interesting reading; for example, it is estimated that the value of cases mediated (that is the amount at issue) each year is approximately £5.1 billion as compared to £4.1 billion in 2007; since 1990, which was effectively the launch point for civil and commercial mediation in England and Wales (marked by the emergence of both CEDR and ADR Group) the total value of mediated cases (amount at issue) is somewhere in the region of £40 billion and, last, a recent report compiled by the British Ministry of Justice indicates that in 2008/2009 ADR (alternative dispute resolution, of which mediation is one type) was used by government departments in over 300 cases with total savings estimated at £90 million.

As mediation has expanded and developed, a number of individuals have become professional mediators. Parties, and particularly the lawyers who act for them, have progressively become used to choosing particular mediators for particular cases; and appointing them direct. But the mediation organisations (or Mediation Service Providers) still have a very important role to play. Their role is essentially threefold: continuing the substantial (and essential) task of education and training to spread knowledge and use of mediation (where appropriate); training mediators and, not least, maintaining panels of qualified mediators and assisting parties in either nominating or choosing mediators well suited to particular cases, monitoring feedback and maintaining quality standards.

Will mediation eventually become compulsory in England and Wales, as it is in some US jurisdictions? We think not, or perhaps not yet, although the Mediation Directive does not preclude compulsory mediation and Lord Phillips, the President of the new Supreme Court, believes that we are moving in this direction. Indeed, the Directive expressly contemplates that national legislation made to implement the Directive can provide for compulsory mediation (or even make a refusal to mediate subject to sanctions). Some commentators have suggested that compulsory mediation will amount to a denial of justice to access to the courts and thus a breach of Article 6 of the Human Rights Convention. But there is a world of difference between deferring trial or the continuation of legal proceedings pending mediation on the one hand and an absolute refusal to permit access to a court and a compulsion to mediate (to the exclusion of a judicial determination) on the other. For the time being, instead of direct and enforceable measures we are likely to see in England and Wales greater pressure applied by our judiciary to 'encourage' parties to mediate.

The greater use of mediation fits well with initiatives in business to make processes more efficient, to provide better customer service and to preserve vital business relationships. The use of mediation clauses in commercial contracts generally would undoubtedly facilitate greater use and give the parties some control over the process.

Mediation is a process of managed negotiation where the parties negotiate their own deal, but it has a timetable, a structure and dynamics which "simple" negotiation lacks. It is a process in which hard issues are confronted and difficult things are said. It is neither a soft compromise nor an inevitable 50/50. It is effective in resolving intractable cases, even those which involve allegations of fraud or dishonesty. It is quick and comparatively inexpensive and can often preserve not only relationships but reputations. It is not a universal panacea but it works; cases settle.

At the right time, it pays to talk.

Rhys Clift
Partner
Hill Dickinson LLP
November 2010

Mediation panel member:

AIA: Association for International Arbitration

CEDR Solve: The Centre for Effective Dispute Resolution

CPR: The International Institute for Conflict Prevention and Resolution:
Panel of Distinguished Neutrals

IMCAM: International Maritime Conciliation and Mediation Panel

MSMS: Maritime Solicitors Mediation Service

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Introduction to alternative dispute resolution: a comparison between arbitration and mediation

1. Preamble

1.1. Historically, legal disputes have been resolved either by litigation or by arbitration. Mediation (a form of ADR) is a new way to settle commercial disputes.

1.2. Litigation is quite unlike mediation, but some consider that arbitration is a form of ADR and similar to mediation. In fact the two are fundamentally different. The purpose of this paper is to describe these differences and to set out some supplementary information about mediation, its use and effectiveness.

1.3. The main body of this paper has been designed so that you can dip into any section or point of interest, or alternatively read the whole narrative. Arbitration (and litigation) procedures in England and Wales are in many ways excellent and legal process is arguably indispensable. However, and these are broad generalisations, legal process has deficiencies which can be remedied in suitable cases by the use of mediation. Many of the observations in this paper about the shortcomings of arbitration (and litigation) apply equally wherever they are conducted, whether in England and Wales or elsewhere abroad under foreign systems of law.

1.4. The main body of this paper is divided into the following sections:

1.5. In Annex 1 to this paper (page 23) you will find a bullet point comparison between arbitration and mediation on one page. This is deliberately simplified to provide a snapshot comparison between the two processes “at a glance”. It cannot show the subtlety of any commercial dispute and it should be appreciated that it is often necessary, indeed vital, to go through some of the phases of arbitration in order to put a case into the best shape for settlement on advantageous terms.

1.6. I hope you find this paper of interest and of use.

2. Introduction

2.1. In this introduction, I am touching on a few developments which are part of the backdrop for this comparison.

2.2. First why mediate? Because it works, it is quick, and it saves money.

2.3. "The man with the new idea is a crank until the idea works" according to Mark Twain. As we all know, new ideas are initially ignored. If they persist they are often treated with hostility and derision. And then, suddenly, they are orthodox and part of mainstream thinking. This is as true of commercial mediation as of any other radical new idea. Is commercial mediation now in the third phase? Is it part of orthodox mainstream thinking? The answer to this must be an emphatic "yes" and mediation passes Mark Twain's "crank test"; it works.

2.4. Mediation has a long history, in international diplomacy, in family and labour relations and in Asian jurisdictions. But until recently mediation was something of a minority sport in the resolution of **commercial** disputes. Although there is still perhaps a long way to go, the tide has very clearly turned.

2.5. There has been a veritable explosion of interest in mediation and a substantial growth in the number of mediation service providers. In this I am not thinking simply of the United Kingdom (although very significant progress has been made here) but generally internationally. The first place to look is on the Internet. If you tap the words "**Commercial Mediation**" into any of the main search engines you will generate a vast number of hits. Even if you confine the search to particular countries, the result is similar. If you make a Google "book search" you might find 150 books on the subject. These Internet hits denote a huge amount of activity, a huge amount of energy and effort that has been devoted to understanding the process, developing it and using it.

2.6. Until recently ADR and mediation (and to some extent ADR has become synonymous with mediation) meant hardly anything to English lawyers. Indeed some had (and have?) a negative attitude to it. Until recently lawyers in England were not trained in negotiation skills or dispute resolution at University or in Law School. This inevitably had an effect on their thinking processes. The emphasis was on the process of handling **disputes**; familiarisation with rules and procedures, knowledge of the rules of arbitration organisations and familiarity with the Commercial Court Guide. The mindset was to identify issues and unearth evidence by way of documents, witness testimony and expert opinion with the objective of putting all that at some point before an arbitrator or a Court. Less emphasis was placed on the **solution**. But in a few short years a whole cultural change has taken place. Law firms now have "Dispute Resolution" departments, not litigation departments. Mediation is a key feature of this change.

2.7. In the UK, the ground breaking work on mediation was probably done by the Centre for Dispute Resolution in the early 1990s, but commercial mediation was given an enormous impetus by the new Civil Procedure Rules, implemented at the conclusion of the investigation into the rules of civil procedure by the Woolf Committee in 1999. The fact that the Courts are now able to give "encouragement" to parties through the application of the new Civil Procedure Rules (costs pressures) has meant that mediation has become much more common in litigation; indeed many commercial litigators would accept that there is now a strong possibility or probability that almost all disputes will be referred to mediation at some stage, if not settled before trial.

2.8. But this is not true in arbitration; and a comparison between mediation/ADR and arbitration is the primary focus of this paper. Nonetheless, even though arbitration tribunals do not "encourage" or order parties to go off to mediation, mediation is becoming more common in resolving disputes which are otherwise referred to arbitration. This is a response to client demand. In litigation clients have seen that mediation saves money and cases settle. It works. So they want it in arbitration too.

2.9. The draft "**Directive of the European Parliament and of the Council on certain aspects of mediation in Civil and Commercial Matters**" prepared by the Commission of the European Union in October 2004 (2004/0251 (COD)) is a significant landmark. A review of that draft Directive and the preparatory work which led up to it is beyond the scope of this paper. But if, or perhaps when, that Directive is finally issued it is almost inevitable that it will lead to a proliferation of mediation in commercial matters throughout the now 25 members of the European Union. Indeed it is inevitable that it will have ramifications well beyond the EU given the extent of trading relationships between European Union nations and other foreign states. The fact that the EU Commission has proposed this Directive is evidence of the widespread support there is for commercial mediation, right across the EU.

2.10. More recently, another significant endorsement of mediation was National Mediation Week. National Mediation Week was held in the UK in the week commencing 24th October 2005. The week was launched on Friday 21st October 2005 by a keynote speech given in the name of the Lord Chancellor. The launch day was well attended by solicitors, barristers, mediators, mediation service providers and several members of the judiciary including the Master of the Rolls (a key figure in the English judiciary). It was plain from that launch day that many whose very raison d'etre is the handling of commercial disputes are persuaded of the merit of mediation. At the highest level, the British Government and the judiciary emphatically support mediation.

2.11. How has the market for mediation changed? When I completed my training as a mediator in October 1998, through the CEDR accreditation process, the new Civil Procedure Rules were not yet in force. At that time, it was a fairly common view that any skilled mediator could mediate any dispute. To some degree that is true. But with experience the market has matured. Some would now say that it is important, perhaps vital, that the mediator has specialist expertise in the subject matter of the dispute. The development of the Maritime Solicitors Mediation Service (MSMS – www.msmsg.com) is a significant manifestation of this trend.

2.12. This brings me to the key issues.

Firstly, what is ADR (esp. mediation)?
Secondly, how does mediation differ from arbitration?
Thirdly, when should mediation be used/not used?
Fourth, why is mediation not used?
Finally, why is mediation effective?

3. What is ADR?

3.1. ADR is Alternative Dispute Resolution. This is a term with a very wide definition and covers any form of dispute resolution, other than through Court process. Strictly speaking the term "alternative" may be something of a misnomer. Most forms of ADR are used hand in glove with either litigation or arbitration. A little later in this paper I will explain why it is wise to use the various forms of dispute resolution carefully together.

Mediation

3.2. ADR comes in many forms. First and foremost there is mediation, whether facilitative or evaluative. I will be looking at these in a little more detail below. But before that, I will look very briefly at certain other ADR procedures.

Early neutral evaluation

3.3. "**Early neutral evaluation**" can be organised at any stage in proceedings. The procedure involves a Judge, an arbitrator or an independent third party (for example a solicitor, or a barrister) sitting with the parties for a day and, on the basis of written evidence put before him (for example documents and witness statements) and on the basis of what he hears from the parties, giving a **non-binding** view as to the likely outcome of a legal dispute. If the parties have used a Judge in litigation for early neutral evaluation, then if the case does not settle that Judge will not try the case. He will have no further involvement in the procedural aspects of the case. As far as I am aware, this procedure has not been much used.

Executive tribunal

3.4. Next we come to "**executive tribunal**". This is a procedure akin to mediation where senior management attend before a mediator together with their case handlers. The case handlers then present their respective cases to the mediator and retire. The mediator then meets the senior personnel to discuss how the matter might be resolved. This procedure might be useful where big corporations are involved and where a case has become bogged down at a middle management level. Again, I am not aware that this procedure is much used, certainly in comparison to mediation.

Neutral fact finder

3.5. What about a "**neutral fact finder**"? As the name suggests, this procedure involves a neutral third party investigating just the facts of a case and reporting to the parties. The fact finder will not address legal issues (neither liability nor quantum) and will make no assessment on the merits of the case. This procedure is analogous to the procedure which is used in some continental jurisdictions, for example in France where a Court surveyor is appointed to make findings of fact.

3.6. Yet again I am not aware that this procedure is much used in England

Arbitration

3.7. Finally, some say that **arbitration** falls within the broad umbrella of ADR. But, in reality, arbitration has more in common with litigation (Court process). Comparing litigation and arbitration the similarities are obvious: there are two (and perhaps more) adversaries, there is generally a formal process for the exchange of pleadings, disclosure of documents, service of witness reports and expert reports. If necessary, parties can be compelled to comply. In each case the process culminates with one or more hearings. At the conclusion of the hearing or hearings there will be some form of determination on the issues which remain live between the parties. Generally there will be one winner and one (or perhaps more) losers. A number of consequences will flow from that determination, notably in terms of who bears the costs or a large part of the costs of the whole process.

3.8. In many respects these features of arbitration and litigation differ substantially from mediation.

Mediation

3.9. This brings me back to mediation.

3.10. There are essentially two types of mediation; **facilitative** and **evaluative**. Facilitative mediation is by far the most common model used in England and Wales for the resolution of commercial disputes. Evaluative mediation is a rather different animal. Although the lines of distinction between the two may appear to blur, in reality the difference between them is profound.

3.11. In evaluative mediation at some point the mediator will express a view, (probably simultaneously to all parties) on the strengths and weaknesses of their respective cases. He or she might indicate which arguments might succeed and which might fail. The mediator might even express a view on what might constitute a fair and reasonable settlement.

3.12. This will not happen in facilitative mediation.

Facilitative mediation

3.13. Throughout the rest of this paper I am referring to the dominant form of ADR and that is facilitative mediation.

3.14. In facilitative mediation a neutral third party, the mediator, assists the parties to settle their disputes. The mediator is the catalyst. The presence of an independent third party is the key distinguishing feature of the process. Facilitative mediation is a process of managed negotiation.

3.15. So what do mediators do? They all work in different ways, partly through their character and partly through their training and expertise. Certainly there is no set formula but there are certain common threads. The mediator must be entirely neutral and independent. The mediator brings a fresh and trusted mind to what is often an old problem. Trust and integrity are key watch words. His role is to aid communication between the parties, to assist them to overcome emotional blockages, to focus their attention and effort on the problems and moreover their solutions. He can help each side to understand the other side's case or even their own case (and its weaknesses, which they and sometimes their advisors have been unable or unwilling to look at). Mediators can suggest new avenues to explore, to identify and work to overcome deadlock, to unlock and release any of the entrenched positions and in some cases the ill feeling that can accumulate in the course of a dispute.

4. How does Mediation differ from Arbitration?

4.1. Arbitration is a form of **compulsory** process. An arbitration agreement can be made in one of two ways. First, parties to a contract may have agreed in advance that in the event that a dispute arises between them, that dispute should be referred to arbitration according to a particular system of law and a particular procedure. Secondly, there may be an ad hoc reference to arbitration after a dispute has arisen. If there is a binding agreement the parties can be compelled to participate, on risk of penalty.

Control of process - orders

4.2. My comparison is largely made on the basis that English law applies. Under English law, notably the Arbitration Act 1996, and under most arbitration procedural rules, the arbitration tribunal will be the master of the process and will have authority over the parties in certain respects (supported by the English Court where necessary). This will generally permit the arbitration tribunal to make orders, like setting down the timetable for the arbitration process and compelling the parties to comply with that timetable. Another example; the arbitration tribunal may, generally on the application of one of the parties, order that certain categories of document should be disclosed in the proceedings. In the event that they are not, the arbitrators may be at liberty to impose penalties. As you will see, this is quite unlike mediation.

Privacy

4.3. Arbitration is private and this is one reason why many commercial bodies prefer that their disputes are always referred to arbitration. There is then less risk that any element of the arbitration will find its way into the public domain. The names of the parties, the issues at stake, the pleadings, the underlying documents, any witness statements, any experts reports and moreover the Arbitration Award itself; few of these are ever likely to see the light of day. In this respect arbitration and mediation are similar, but certainly not identical. The key difference is that there is no **guarantee** that arbitration proceedings will remain private. If an Award can be appealed, then the trial of that appeal will, save in the most unusual circumstances, be public and the names of the parties and perhaps all of the issues between them will then find their way into the public domain. An Award may equally become public through an enforcement process or through pursuit of an indemnity claim.

Decision making - award

4.4. Arbitration (like litigation) is a decision making process. At the end of the process, at the conclusion of the arbitration hearing, the arbitration tribunal will make findings of fact and conclusions of law and thereby reach an adjudication on the issues between the parties.

4.5. In the dim and distant past many disputes were resolved in trial by battle: one lived, one died. There are similarities between litigation and arbitration on the one hand and trial by battle on the other. Legal proceedings are a fine set of rules to allow parties to obtain an adjudication to resolve disputes, even quite ferocious disputes, in a disciplined and effective manner, but without the need for bloodshed. Legal process may save bloodshed, but there is still generally one winner and one loser.

Enforcement

4.6. Finally, looking at this brief list of comparison or evaluation criteria, there is the issue of enforcement. Obtaining an Arbitration Award, or even a judgment, is not necessarily the end of the story. In some respects it is almost the beginning of the story. If the successful litigant does not have in his hands security to cover his claim (for example a bank guarantee, a letter of undertaking, or an injunction freezing assets or property) that litigant may then be forced to pursue his adversary at significant cost and in some cases for considerable time seeking to obtain satisfaction through enforcement.

4.7. Arbitration Awards can be readily enforced in England and Wales as a judgement and abroad under the 1958 New York Convention. 136 nations are at the last count (I believe) now parties to that Convention, Pakistan an original signatory, having just joined (acceded) in July 2005.

4.8. But despite the many advantages of arbitration, it suffers from certain shortcomings. Indeed, these are the very factors both in litigation and arbitration which prompted the original development and latterly the growth in the use of commercial mediation.

4.9. This is certainly not to denigrate litigation or arbitration which are in many respects excellent (and probably indispensable). And these are certainly generalisations, but arbitration is:

4.9.1. Slow.
4.9.2. Costly.
4.9.3. Adversarial; and
4.9.4. Risky.

Many of these failings are equally applicable to litigation and arbitration whether in the UK or abroad.

Slow

4.11. Arbitration is slow to get a result, in other words to bring a case to a final hearing. Although expedited hearings can be held, as a general rule it can take months and in some cases years. Thereafter, there may be further delay following the conclusion of the hearing waiting for the Arbitration Award to be published. Depending on the complexity of the matter, this can take months. There may then be yet further delay in seeking to enforce the Final Award (or perhaps dealing with any appeal before launching into the process of enforcement).

Costly

4.12. As a broad generalisation, Arbitration (or litigation) is costly in most legal systems. It is generally necessary to make an initial review of a claim, to gather some initial papers and request an early legal assessment. Once the issues have been identified and evidence gathered, statements may be taken and then it may be necessary to prepare a formal experts' report. Running through this whole process there will (often) be the fees of Counsel (in the settlement of pleadings, giving advice on evidence and merits and appearances at hearings). There will be the arbitrators' fees (for interlocutory and final hearings) and all costs associated with the hearings (rooms etc). Under some arbitration procedures substantial fees are also payable to the body administering the arbitration at certain stages. It should not be overlooked, however, that it may be necessary to go through some of these procedures to put a case into the best shape to negotiate a settlement.

Adversarial

4.13. The whole process of arbitration, like litigation, is **adversarial**. The very character of the process can in some ways entrench disputes and exacerbate tensions between the parties which in turn then can make disputes difficult to settle.

Risky

4.14. There is always risk in litigation or arbitration. The prospects of success or failure in any particular case can be assessed (in some measure) at various stages, but new documents and information often emerge during the course of the dispute and one can never predict with certainty how an expert or a factual witness might perform at a final trial nor what final Award (or Judgment) will be given. A significant amount of time and cost can be devoted to a dispute before surprises emerge.

Mediation - voluntary

4.15. By contrast, mediation is **voluntary**. In Court process the Court can "encourage" the parties to refer their dispute to mediation with the threat of costs penalties. This does not apply with arbitration.

4.16. Since the whole process is voluntary parties can walk out of mediation whenever they wish and, although it is rare, sometimes they do just that. This would be unthinkable in arbitration.

Without prejudice

4.17. Mediation is **without prejudice**. Anything created solely for the purpose of the mediation and anything said on the day is without prejudice. In the event that no settlement is reached neither party can rely on any documents created for the mediation nor on anything said on the day in the course of the formal mediation "event". This is of course only the case under English law (and the laws of the various Common Law nations). Care has to be exercised in conducting mediations where the underlying dispute is subject to a foreign system of law and procedure.

Private and confidential

4.18. Mediation is **private and confidential**. Nothing which is said in the course of the mediation can be discussed outside the mediation nor revealed to any third party. This stipulation of confidentiality is generally embodied in the Mediation Agreement which is signed (usually on the day) to regulate the mediation process. Facilitative mediation is generally conducted by a series of meetings. Usually the mediation opens with a joint meeting attended by the mediator and all the parties. When that joint meeting is concluded, the parties break up into separate private rooms and the mediator effectively conducts shuttle diplomacy between them.

4.19. Anything which is said at the joint session is confidential. Furthermore, there is a sort of double confidentiality. Anything which is discussed in the private sessions is also confidential and cannot be revealed by the mediator to the other party or parties unless and until he is authorised by the revealing party to do so. This is one of the most unusual and effective features of the process. By contrast, would you reveal to a judge or arbitrator your weaknesses or details of any commercial or financial pressures you face? Obviously not. Under this cloak of confidentiality the parties often reveal to mediators the most extraordinary things, which the mediators can then use (with their authority) to fashion a bargain between the parties.

But again I must sound a note of caution here. There are two points.

4.21. First, again if foreign systems of law may apply, beware that the duty of confidentiality may not exist or alternatively may not be enforceable.

4.22. Secondly, and in some senses perhaps more importantly, once something is said or revealed it cannot be unsaid. If a case does not settle anything which is revealed at the mediation even if it cannot be used in the formal arbitration might then influence the conduct of that arbitration. Indeed it might influence the conduct of the parties generally in their commercial dealings from that point onwards. As a matter of strict proof or evidence, parties may be then alerted to things they did not previously know. They may be prompted to hunt down alternative sources of evidence to assist them in proving their case later at a final hearing. This is one illustration of the care that is needed in participating in mediation. Mediation is not merely a matter of common sense. It is a skill.

No orders

4.23. The mediator has control over the process but not over the resolution of the dispute. So he can decide who should take part in joint meetings, who should take part in private meetings (just solicitors or just the parties or just the experts). He can require the parties to prepare summaries of their best points or schedules of claims.

4.24. But he cannot make any orders as such. A mediator unlike an arbitrator cannot order the production of documents. So if there are crucial documents that you must have in handling a dispute, do not go to a mediation until you have got them. Whether documents ever are crucial of course is a matter of judgement. Arbitration and litigation is not physics; it is not a discipline of perfection.

No judgment/no award

4.25. Against this background, perhaps it is obvious that the mediator has no power to make a final determination of issues between the parties. He will not issue an Award or the equivalent of a judgment; nor will he express any view on the merits of each party's case (cf: evaluative mediation). Either the parties reach a settlement between them or the mediation will break up without a resolution. The parties will be left either to pursue formal legal process, perhaps to negotiate or to reconvene a mediation on a later day.

Enforcement?

4.26. When a settlement agreement is signed it is probable that the parties will comply with its terms. Indeed, I am not sure that I have ever heard of anyone reneging on a settlement made by a mediation. Nonetheless, it may be possible to set out the terms of settlement in an Arbitration Award by consent. This would facilitate enforcement. Alternatively it might be necessary to sue on the settlement agreement, but this should be far more straightforward than arbitrating the original claims and counterclaims.

Advantages

4.27. Mediation is certainly not a universal panacea. Broadly, however, by comparison to the four core criticisms of arbitration (and litigation) mediation is:

4.27.1.	quick (slow).
4.27.1.	"cheap" (costly).
4.27.3.	collaborative (adversarial); and
4.27.4.	reduces risk to a minimum (risky).

Quick

4.28. However long or short the preparation for a mediation (which can be weeks or months) in the usual model of facilitative mediation in the UK the final mediation "event" takes up just one day; although it can be a very long day. Many mediations are projected to start at about 10.00 am and provisionally to conclude at 6.00 pm. Often this is the way they are priced. However it is frequently the case that they run on later, sometimes into the small hours.

4.29. There are a number of Court schemes which provide for a much tighter timetable. For example the Central London County Court has a scheme which provides for a mediation of three hours concluding at 7.30 pm. When it gets to 7.30 pm the cleaner comes in and throws everybody out. I have done several of these mediations and this tight timetable can work remarkably well. Sometimes a deal in principle has been concluded by 7.30 pm but it lacks structure and there is nothing in writing. These provisional deals can often be thrashed out on a piece of paper at a hotel which is about 15 minutes walk away. The hotel must be used to seeing small crowds of litigants and solicitors (sometimes barristers). But, even if it is 4 or 5 hours, or 12 or 14 hours it is much faster than a trial or a hearing.

"Cheap"

4.30. Cheap is a relative term. The standard price for a mediator for a commercial mediation in London is about £4,000 for one day's preparation and for a mediation taking up one business day. Add to that the cost of rooms and refreshments. Add to that the cost of each party getting their solicitors (and/or barristers) to prepare the case.

4.31. There is some careful work to be done just for the mediation which may well be a cost which would not otherwise be incurred in the running of an arbitration. In this I have in mind a Mediation Summary, distilling the essential points to no more than about ten pages, and putting together a bundle of open (and perhaps confidential) materials for the common use of the mediator and the parties.

4.32. Certainly all these individual items of costs will pale into insignificance against the cost of running a formal arbitration through the standard process of pleadings, disclosure, witness statements, experts reports, a final hearing and any appeal and enforcement. But bear in mind it may be necessary to go through at least some of these formal stages in order to put the case into the best state to negotiate an advantageous settlement. Although mediation can be conducted before any form of legal process is started generally mediation does not take place in isolation.

Collaborative

4.33. I will come to this again a little later, but there is a common sense of shared purpose in many mediations. Often both or all parties really want a deal (the more so if the dispute has been long running) and they are often keen to use the mediation day to achieve just that. Mediations may start with a joint meeting at which some very harsh things are said; there may be a certain degree of posturing and positional bargaining, but later in the day the serious work starts and true agendas start to emerge. Most parties turn up to a mediation because they want to settle, and it is rarely a process of soft compromise.

Risk management

4.34. Settlement through mediation eliminates the risk of failure at a final hearing or a final appeal.

5. When should mediation be used?

5.1. Some say the proper approach to any dispute is to negotiate, if that fails mediate and if that fails arbitrate (or litigate). But for reasons I will explain in a moment, that may be an ideal but is not always appropriate.

5.2. As a generalisation mediation should only be used when the case is "ripe"; that is when both or all sides to the dispute recognise that they have an incentive to settle. When this should be is a matter of fine judgement and will differ from case to case. In this respect every case is unique.

5.3. Should it be after exchange of letters before action, when an outline of the claim is set out?

5.4. Should it be after an exchange of pleadings, when the issues have been narrowed?

5.5. Should it be after disclosure of documents when the evidence to evaluate those pleadings has been disclosed?

5.6. Should it be after exchange of witness statements when the evidence on both sides should be that much clearer?

5.7. Should it be finally after exchange of experts' reports?

5.8. What is obvious is that most (say 99%) of all disputes settle, whether they are subject to litigation or arbitration. Many of these cases settle at the 11th hour just before trial or a final hearing. Even though its not trial by battle, at this point much the pain has already been suffered and there is blood on the floor. If there is to be a saving in cost, and if the many other benefits of mediation are to be accessed, it is wise to engage in mediation at the earliest possible stage.

When should mediation not be used?

5.9. There are some key things that mediation cannot achieve. Mediation cannot interrupt a time bar. So there is no point embarking on the process of the preparation for and attendance at a mediation without ensuring that a time bar

has been protected. Mediators have no powers over the parties (other than the limited authority I have described) and certainly have no power over third parties, like banks. Mediators cannot grant protective orders, for example freezing orders (injunctions) and search and seizure orders designed to preserve money or assets for the purpose of enforcement, or alternatively to locate and preserve evidence for the fair resolution of a dispute.

5.10. Logically, therefore, one should make an evaluation, take any protective steps that are necessary (and available) and then embark on a mediation (perhaps in parallel to an arbitration process designed to flush out documents and other evidence).

5.11. In what other circumstances should mediation not be used? Obviously because of its essentially private nature there is no point is using mediation if one of the key objectives in any dispute is to obtain a precedent. But this is hardly likely to be a consideration in a dispute which is subject to a binding arbitration agreement. Arbitration Awards, in the absence of an appeal, are private and are not the vehicle by which precedents are created.

5.12. Again, there is no purpose in using mediation to resolve a dispute if a key objective is publicity. The whole mediation process is wrapped in a blanket of confidentiality and any final resolution, in the form of a signed settlement agreement, will never see the light of day. Most Mediation Agreements require there to be an agreement in writing for a settlement to be concluded. Those settlement agreements are subject to the same duties of confidentiality which apply to the rest of the mediation process.

6. Why is mediation not used?

6.1. You may have seen that a survey conducted by CEDR was published in Lloyd's List on 18th January 2006. The conclusions of that survey, on the reasons for lack of use of mediation include these:

6.1.1. First, a lack of knowledge (or perhaps familiarity with) the process at a senior management level (coupled with an unfounded fear that mediation is a sign of weakness).

6.1.2. Secondly, that mediation was not mentioned by clients' legal advisors(!)

6.1.3. Thirdly, only 7% of businesses have a dispute resolution policy.

6.1.4. Fourthly, only 2.45% of industries have a collective dispute resolution policy. Many industries lack a standard clause or clauses and a standard Mediation Agreement and Mediation Procedure to which all can subscribe with confidence.

6.2. A corollary of the lack of industry standard procedure means that there is a lack of "compulsion" to mediate in any business sector where arbitration is common. Legal proceedings which are brought in the English High Court of Justice will almost inevitably find their way at some point to mediation, if they are not settled before trial. This is not true of arbitration. The insertion of an appropriate Mediation Clause into standard contracts would change this over night.

6.3. Meanwhile, the survey shows concern about the high cost of legal budgets (in litigation) and the same is almost certainly true for arbitration.

6.4. The survey also shows that there is a huge hidden cost of management time devoted to running legal disputes which might perhaps be better devoted to other work within a business.

7. Why is mediation effective?

7.1. First, there is no doubt that mediation is an extremely effective way to settle commercial disputes. There is a very large number of mediation service providers but no central body in England and Wales recording mediation statistics. However, anecdotal evidence from solicitors, barristers, mediators, and mediation service providers broadly confirms that between 75% and 80% of disputes which are referred to mediation settle either on the day or very shortly thereafter.

7.2. In some respects it is an astonishingly effective process. I have seen some of the most intractable cases settle, even those involving colourful allegations of fraud or dishonesty, the type of disputes which are generally considered the most problematic to resolve.

7.3. So just why is it effective? I would identify four main reasons.

Independent third party

7.4. First, it involves an independent third party. Mediation has its roots in international diplomacy and this can be seen in how the mediator after the usual opening session when all the parties are together operates as a trusted diplomat shuttling between two or more sides and drawing together the threads of the deal. The parties are encouraged by mediators to look at their interests and needs, instead of their rights and wants (as they might perceive them) and most particularly to focus on the alternative if a dispute is not settled. It is often far easier for a third party to do this than it is to hear this message from one's own advisor or indeed from one's opponent.

Decision makers

7.5. Secondly, mediation involves decision makers, rather than just lawyers. It is essential that a person with full authority to settle the dispute attends on the day. Strictly speaking full authority means the authority to settle anywhere on the full spectrum from 0% to 100%. It is understood that those who attend often do not have wholly unlimited authority but generally they do have authority to make any deal within sensible parameters. The fact that they are there and participating in the process is crucial.

Timetable, structure, dynamic

7.6. Thirdly, I would point to the timetable, the structure and the dynamic of the process. There is a dense concentration and rush of adrenaline with the speed and clarity of thought that this often brings. Many people say if parties can negotiate to settle their disputes they should do so and isn't mediation after all just a process of managed negotiation? Absolutely; but often parties cannot negotiate for one reason or another. Some lawyers are highly skilled in identifying risk in litigation at an early stage and seeking resolution by negotiation, but it takes two to tango. To strike a deal all parties must engage in negotiation and shrug off personal struggles and even vendettas. Even then the best efforts may be frustrated. The more complex the case and the more parties are involved the more difficult it is to tango. You cannot dance with six people.

7.7. By contrast, negotiations can drag. They have no timetable (other than the cold chill of an approaching hearing or a deadline to produce documents or statements). There might be six parties involved and negotiations can break down at the whim of one. When all attend a mediation, prepare for it in advance in accordance with a set timetable and then participate actively on the day, all are drawn in.

Shared sense of purpose

7.8. And this brings me to my fourth point. Of course, it is accepted that some parties go into mediation with absolutely no intention of settling. Their only purpose in attending (if they have not been compelled by a Court to do so) is to find out as much as they can about the other side's case while giving away as little as possible about their own. But I suspect, looking at the statistics of settlement, that these are the minority. Most cases reach a point where all parties want to settle and facilitative mediation makes best use of that shared sense of purpose.

Unusual deals

7.9. There are other reasons.

7.10. Through mediation disputes can be resolved by deals which go way beyond any kind of apportionment of the issues between the parties or any sort of adjudication of who is right and who is wrong. The classic tale told about unusual deals is this:

"There was an argument between two junior chefs over an orange. They came to blows in the kitchen. The head chef intervened. Both men insisted they wanted the orange, it was the last one in stock, and they had to have it to prepare lunch that day. Neither could be satisfied if the other was given the whole orange. The chef thought about it for two minutes, picked up a meat cleaver chopped the orange in two and gave half to each sous chef. Simple.

Result: Neither sous chef was happy. The first only wanted the skin for the zest in a sauce. The second needed all of the fruit to pulp for a juice. Neither could make the dessert of his choice with half an orange and both went home unhappy".

7.11. Mediation could have solved this problem. Adjudication could not.

7.12. But obviously there are commercial examples. There might be a dispute over an insurance policy; are the insurers compelled to pay or not? If that was referred to a Court or an arbitration tribunal there would be findings of fact and conclusions of law. Is the policy binding? Are the Underwriters entitled to avoid it? Is there a breach of warranty, does the policy cover the circumstances of loss? Was the property lost by an insured peril? If it goes to a hearing both will take the risk of losing. However through a mediation they might negotiate the settlement of that claim and perhaps a deal about future business, the payment of premiums by instalments, the adjustments of sums insured over say a fleet of ships and all these as concessions as part of a global deal.

Substitute day in court

7.13. Another factor is that mediation is a substitute for a day in Court, without the risk and cost of a trial. The parties can say exactly what they think about the other side directly to the other side. That is never going to happen in Court nor in an arbitration tribunal where there is a fine structure for the running of the case. The parties have an opportunity to vent their feelings, again without the risk or the cost of going to a final hearing. This can be cathartic; it can release pent up tension that would otherwise preclude negotiation.

Relationship and reputation

7.14. Mediation minimises the risk of damage to relationships and to reputations. Instead of being evermore deeply entrenched in an adversarial process the senior parties, the decision makers, can be engaged in constructive discussion with their counterparts in a manner that simply cannot and will not be achieved through traditional dispute handling. Their relationship may even be enhanced.

7.15. And as to reputations we can all think of examples where individuals have adopted a particular stance in handling a particular problem and chosen to stick by that stance even when evidence emerges to suggest that it is unwise. The ultimate damage to reputation is to those who feel then compelled to go into the witness box to give evidence only to find that their evidence has been treated as unsatisfactory by an arbitration tribunal.

8. Conclusion

8.1. I hope you have found these observations about mediation useful.

8.2. Mediation works and cases settle.

8.3. Mediation process is a skill and it repays understanding and preparation. It is a process that is here to stay.

8.4. A standard clause(s) and procedure for particular industries would expand the use of mediation.

8.5. Mediation may not be for all cases but it has enormous scope.

Rhys Clift, 2006

Annex 1

Bullet point comparison between arbitration and mediation: an english perspective

	Arbitration	Mediation
1	Compulsory	Voluntary
2	Protects time bar	Does not protect time bar
3	Power to grant orders • Over the parties • Not over third parties*. (*Use courts' powers, if necessary).	No power to grant orders • Over the parties. • Over third parties.
4	Private (but beware foreign law, appeal and enforcement).	Private & confidential (but beware foreign law).
5	"With prejudice" (but beware foreign law).	Without prejudice - (but beware foreign law).
6	Slow.	Quick.
7	Costly.	"Cheap".
8	Adversarial.	Collaborative.
9	Risky. • On merits. • On relationships.	Reduces risk. • On merits. • On relationships.
10	Costs recoverable and "follow the event".	Costs of mediation itself usually shared 50/50.
11	Creates no precedent.	Creates no precedent.
12	Appeal on point of law.	No appeal.
13	Final Award enforceable as Judgment (and 1958 New York Convention).	Final Agreement readily enforceable.

The phenomenon of mediation: judicial perspectives and an eye on the future

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Introduction

The `Review of Civil Litigation Costs: Final Report' by Sir Rupert Jackson was published on 14 January 2010.[1] It contains yet further support for Alternative Dispute Resolution (ADR), and mediation in particular. Prompted by the publication of the Final Report, this article sets out some points about mediation, its function, its place in civil justice, the likely effect of the European Mediation Directive, the role of mediation in the maritime field and, in particular, expresses a short note of concern about how mediation might develop. The author does not purport to cover the entire ground but touches upon a few selected areas and in particular focuses on certain views expressed, prior to the Final Report, by senior members of the judiciary in support of the wider use of mediation. Mediation is something of a global phenomenon, as a short glimpse on the internet alone will attest; but this article is primarily concerned with the picture in England and Wales. Mediation is in many ways a remarkable process; vigorous, dynamic and effective. Its wider use is to be encouraged; its development should be handled with care.

Disputes: the case for settlement

Historically, disputes were resolved in trial by battle; one lived, one died. Litigation and arbitration were developed as a fine set of rules to allow parties to obtain an adjudication to resolve legal disputes, even quite ferocious disputes, in a disciplined and effective manner without the need for bloodshed. But again, the idea is that there is a decision, and generally a winner(s) and a loser(s).

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[1]The Final Report can be found on the website Judiciary of England and Wales at www.judiciary.gov.uk. Following publication of the Final Report, the Senior Judiciary has considered its response. The Judicial Executive Board has agreed to support the recommendations of the Final Report and has established a Judicial Steering Group to lead judicial contributions to its implementation

However, the vast majority of cases settle, generally by negotiation, leaving a small minority where settlement is truly impossible or where settlement is inappropriate, for example test cases to set a precedent or cases where publicity is both necessary and desirable. Both are relatively rare.

In March 2008 Lord Phillips, now President of the Supreme Court, expressed this view:

> ...It is madness to incur the considerable expense of litigation [...] without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the Court can deliver is, I believe, illusory...[2]

Life was ever thus. More recently in June 2009 Lord Clarke observed:

> A truth that our civil justice system has long recognised: that the vast majority of disputes settle before trial - the present figure of 98 per cent settlement rate mirrors that which was noted in the 1820s by the Common Law Commissioners [...] only a madman does not want to settle.[3]

I will touch on some of the reasons in a moment, but plainly effective new procedures that facilitate settlement must be welcomed. And although this is a matter of fine judgment in each case, this must be so especially if they facilitate earlier settlement, for example before incurring the costs of disclosure, witness statements, experts' reports and trial. Indeed the case for early settlement, with most `routine' disputes (as distinct from, say, the most complex civil fraud cases) is even more compelling with the advent of E Disclosure with the inevitable additional delay, cost and technical difficulty this must entail.

The effective management of litigation and arbitration requires considerable skill. It may be necessary, even essential, to go through some of the main procedural steps including, for instance, disclosure and exchange of witness statements and experts' reports, in order to put an individual case into the strongest position from which to negotiate, whether that negotiation is conducted in the usual way or through mediation. But a sharp focus on settlement on the `right terms' (whatever they may be) remains an imperative for almost all cases.

[2]Lord Phillips of Worth Matravers, then Lord Chief Justice of England and Wales `Alternative Dispute Resolution, An English Viewpoint', India 29 March 2008.
[3]Lord Clarke of Stone-Cum-Ebony, Master of the Rolls: `Mediation ± An Integral Part of our Litigation Culture', Littleton Chambers Annual Mediation Evening, Gray's Inn, 8 June 2009.

What, in a nutshell, is mediation?

Mediation is a relatively new and highly effective means to settle commercial disputes, often more quickly and more cheaply than by normal litigation, arbitration and negotiation. Mediation has a long history in family and labour relations, it has featured in international diplomacy and particularly in the Far East.

There are essentially two types of mediation; facilitative and evaluative. In evaluative mediation (something of a minority sport) the mediator at some point may express a view to the parties about the strengths and weaknesses of their cases, or about what might be a fair and just resolution to their dispute. This will almost never happen in facilitative mediation (although mediation agreements often contain a liberty for the mediator to express such views, if all the parties so wish).

In facilitative mediation a neutral third party, a mediator, assists the parties to settle their disputes. It is a voluntary process of managed negotiation where the parties negotiate their own deal, but it has a timetable, a structure and dynamics which `simple' negotiation lacks. Mediators issue no judgments or awards. They control the process, not the result. Facilitative mediation is the dominant form of mediation used for the resolution of commercial disputes in England and Wales.

Mediation is a subset of ADR which includes for example adjudication (widely used in the construction industry) and early neutral evaluation. Mediation is probably the most widely used form of ADR. The mediator is the catalyst. The presence of, and the role played by the independent third party mediator is the key distinguishing feature of the process.

When mediation was in its infancy in the United Kingdom, about 20 years ago, and even 10 years ago, it attracted considerable scepticism. Some thought that it would probably, or inevitably result in a soft compromise or 50/50 split. In fact, in practice it is absolutely nothing like this. In mediation hard issues are often confronted and difficult things are said. Mediation is even effective in resolving disputes involving allegations of fraud or dishonesty, where a soft compromise or 50/50 split may have no place. Significantly it can preserve not only the relationships between the parties in the dispute but the reputations of the individuals involved (which can be important in relation to maritime matters where there may be substantial `repeat business'). It is particularly effective at resolving multi-party disputes which can be so difficult to resolve by negotiation and where settlement discussions can (and do) break down on the whim of one party. Finally, and most particularly, mediation works; cases settle. The settlement rate is somewhere between 75 and 80 per cent, either on the day or shortly after.

What is the position of mediation in civil justice in England and Wales?

Arbitration and litigation proceedings in England and Wales are in many respects excellent; highly developed and refined, respected for honesty, thoroughness and intellectual rigour. And the legal process is arguably indispensable. In June 2009 Lord Clarke echoed the views of many senior jurists when he said:

> An effective Civil Justice System that is readily accessible to everyone is an absolutely essential element of any open, democratic society committed to the rule of law.[4]

No one would dispute this. However, and these are broad generalisations, the legal process has its deficiencies which can be remedied in suitable cases (and at a suitable time) by the use of mediation. Many of the shortcomings of litigation and arbitration apply equally wherever the legal process is conducted, whether in England and Wales or elsewhere under foreign systems of law.

What are these shortcomings? Without denigrating the processes one jot, litigation and arbitration can be, to put it a little bluntly, slow, costly, adversarial and risky; slow to achieve a final result (judgment or award), costly with the inevitable time and effort required (by lawyers, barristers, experts, witnesses and clients), adversarial by its very form and method, risky in the sense that there is (rarely) any guarantee of result. The law is not physics; it is not a discipline of perfection. And whatever the care and skill applied, there are sometimes nasty surprises (inconvenient documents, inadequate witnesses and experts, surprising judgments). Indeed these are some of the factors that have always motivated parties to settle and must form the basis of the views expressed on the wisdom of settlement by Lords Clarke and Phillips, both of whom had extensive knowledge of litigation from their time at the bar before going to the bench.

Litigation (and arbitration) is also necessarily focused on the past (perhaps a distant past by the time matters finally come to trial) whereas mediation is directed to the future.

The enormous potential of mediation has been recognised at the very highest level in the English judiciary for some time. Lord Woolf may well have been a pioneer in this respect in 1998/9, but his views have since spread widely. Lord Phillips declared his position in March 2008: `Let me end by nailing my colours firmly to the mast. I number myself with Sir Anthony Coleman and Sir Gavin Lightman as an enthusiastic

[4]Lord Clarke ibid.

supporter of ADR'.[5] In May 2008 Lord Clarke (Sir Anthony Clarke, as he then was) was equally unequivocal:

> ...ADR in general and mediation in particular, where it is the appropriate ADR mechanism, must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and thought processes as standard considerations like what, if any, expert evidence is required...

He goes further, expressing the view that mediation must become`...part of the culture; so that it becomes second nature to us all'.[6]

Perhaps the full integration of mediation has since been achieved? In June 2009 Lord Clarke expressed the position succinctly thus:

> ...Mediation and ADR are part of the civil procedure process. Thus, as I see it, mediation too is an integral part of litigation, and not simply ancillary to it. [...] Mediation is an adjunct to formal justice.[7]

Indeed, in some quarters there are suggestions that mediation is even usurping the function of the civil justice system. Nothing could be further from the truth. The courts exist to try cases and in appropriate cases (the tiny minority) will always be there to discharge that function. Those who are engaged in disputes, whether as a routine part of their daily work or, sadly, where they have become wrapped up in a dispute in their personal life, will always have access to justice (although at a price).

Here again are the views of Lord Clarke:

> Speaking only for myself (as they say in the Court of Appeal [where he then sat]) I do not think that the proper use of ADR and mediation supplants in any way the role of the courts or risks any downgrading of civil justice. On the contrary the existence of the judges and the courts remain in order to determine the rights and obligations of the parties in the very few cases in which settlement is impossible.[8]

[5]Lord Phillips (n 2).
[6]Sir Anthony Clarke, Master of the Rolls, the Second Civil Mediation Council National Conference `The Future of Civil Mediation', Birmingham 8 May 2008.
[7]Lord Clarke (n 3).
[8]ibid. Lord Clarke was appointed as a Justice of the Supreme Court with effect from 1 October 2009; the first Justice to be appointed direct to the Supreme Court.

There are those who favour referring disputes to mediation even before proceedings are started; Lord Phillips is one. Indeed some favour making mediation compulsory or mandatory (attendance and participation at mediation that is, not settlement). And the spread of compulsory mediation is foreshadowed by the European Mediation Directive (see below). But for all sorts of good reasons mediation before the commencement of proceedings is relatively unusual (at least for the present). These reasons include (with a particular eye on maritime disputes) preservation of time bar, securing an advantageous jurisdiction, obtaining security for a claim or preserving evidence (including by search and seizure in suitable cases).

Mediation is therefore most usually invoked after the commencement of proceedings, in tandem with legal process; it is the silk glove on the iron fist of litigation (or arbitration). And in this it discloses part of its heritage in international diplomacy, when it was often bolstered by the sword or the gun ship.

Why has mediation not spread more rapidly - misconceptions and a lack of education?

Although there has certainly been a significant increase in the use of mediation in England and Wales in recent years, it has not spread as rapidly as it might have done. If the process is so good, so effective, the question must be: `Why not?' This is something of a puzzle, given some of the obvious virtues and values of mediation. Perhaps it is because, even now, nearly ten years after the reform of the rules of civil justice in 1999 (the Woolf Reforms), which first brought mediation to prominence, misconceptions remain. Many of the key ideas and concepts are thought to be well known and understood; it is voluntary, without prejudice, private and confidential, it necessarily involves an independent mediator and the like. But nonetheless there is undoubtedly an enduring need to explain what mediation is and, moreover, how it works. Sir Anthony Clarke rather lamented in May 2008: `Experience…shows even now there are far too many people who know far too little about mediation. I think we can all agree that this has to change…[9]

[9]Sir Anthony Clarke (n 6).

And this view has been reiterated most recently in Sir Rupert Jackson's report (Review of Civil Litigation Costs: Final Report). The report aims to set out a coherent package of interlocking reforms designed to control costs in litigation and to promote access to justice. Sir Rupert observes:

> Alternative Dispute Resolution (ADR) (particularly mediation) has a vital role to play in reducing the costs of civil disputes by fomenting the early settlement of cases. ADR is, however, underused. Its potential benefits are not as widely known as they should be.[10]

He then recommends:

> *There should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits it can bring.
>
> *...An authoritative handbook for ADR should be prepared, explaining what ADR is and how it works and listing reputable providers of ADR services. This handbook should be used as the standard work for the training of judges and lawyers.11

I shall return to the latter point in a moment, and will touch on the former in the context of maritime disputes.

But it must be said that it is somewhat curious that misconceptions and misunderstandings persist. Over a number of years there has been a veritable explosion of interest in mediation and a substantial growth in the number of mediation service providers. In this, I am not thinking simply of the United Kingdom (although very significant progress has been made here) but generally internationally both in the common law nations and more recently in the civil law nations (where costs pressures are said to be less of a factor in settlement). Again, this much is clear if one only looks on the internet. There is a vast literature available, in a multitude of languages.

Literature may not be the best way of teaching this new art. It is often best to explain in person, by talk or seminar. But reference works certainly have their place. In this the Insurance Institute of London is playing its part. Under its programme of Research Study Groups the IIL is creating a `manual' of mediation by and for the insurance and reinsurance industry (and this will include of course the maritime industry) under the chairmanship of Paul Moss of Montpelier Re. The book is to be published later in 2010 and will go some way to providing the sort of manual that Sir Rupert, perhaps, had in mind (and although sharply focussed on a particular industry, it has substantial generic content).

[10]Note[1].
[11]ibid.

The inherent conservatism of the legal profession and the paradigm shift

Has the spread of use of the process been restrained by the inherent conservatism of the legal profession? Perhaps...It has been the case until relatively recently that mediation meant very little to English lawyers. Indeed, some had a negative attitude towards mediation and some may still have; such views can be heard (although less so, latterly). Until recently lawyers in England were not trained in negotiation skills or dispute resolution either at university or in law school. The inevitable consequence was that this had an effect on their thinking and way of working. The emphasis was on the process of handling disputes; knowledge of the rules of arbitration organisations and familiarity with the Commercial Court Guide. The mindset was to identify issues and unearth evidence by way of documents, witness testimony and expert opinion, the objective being to place that material in a suitable form, at a suitable time before an arbitrator or a judge. Less emphasis perhaps, was placed upon seeking out a solution. Perhaps this is, in part, an expression of English reserve (and deference?), of sticking to the rules, forming queues and a reluctance to haggle.

Surely, however, matters have changed? Law firms have undergone a cultural change of approach. Almost all now have `Dispute Resolution' departments, rather than litigation departments. And mediation has been a key feature and driver of this process.

Perhaps then it is less a matter of lack of familiarity on the part of lawyers and the judiciary, but, rather, a lack of familiarity with, and understanding of, mediation within society generally; that is, amongst the clients, the users of the courts and arbitration processes. Even this is something of a surprise; many members of the judiciary, solicitors, barristers, mediators and mediation service providers have put in enormous time and effort to spread the word over many years. Perhaps it is simply the fact that the enormous cultural and social change represented by the spread of mediation simply takes time; and a great deal of time at that.

New ideas will always take time to reach acceptance; their integration into orthodox thought follows a predictable pattern: first they are ignored, if they persist they may be treated with hostility or derision and then, finally, suddenly they form part of mainstream thinking. One can think of parallel examples in art (Picasso's Blue Period), science (heliocentricity, plate tectonics) and social justice (universal suffrage).

Some view the phenomenon of mediation as a change of radical proportions, comparable even to the revolution worked by the Judicature Acts at the end of the nineteenth century. Perhaps it is simply an illustration of the time required to recognise, and adapt to, a paradigm shift?

However, presumably for those who have never actually taken part in mediation, its subtle alchemy has remained and will remain a mystery; after all how can a voluntary, non-binding, non-decision making process solve what are often long standing, entrenched and sometimes bitter disputes? Participation in the process is often a revelation.

What will be the impact of the new European Mediation Directive?

The Mediation Directive was published in the Official Journal of the European Union on 24 May 2008 and took effect from 11 June 2008.[12] It is the culmination of a body of work within the European Union, including the European green paper published by the Commission in 2002,[13] the European Code of Conduct for mediators launched in 2004[14] and the draft Mediation Directive published in October 2004.[15]

ADR has been recommended directly or indirectly by a diverse body of other European Union legal instruments or proposals, for example those touching on legal aid, family relationships, consumer disputes in e-commerce, so called open network provision (telephony) and the Framework Directive for electronic communications networks. It can be seen by this that ADR and mediation have already penetrated wide and deep into the structures of the European Union and that, notwithstanding the fact that most of the Member States in the European Union are civil law states, mediation is strongly supported within the European Union.

The Directive applies only to cross border disputes, in other words disputes where parties are domiciled or resident in two different Member States. But nothing in the Directive prevents Member States from extending the scope of any implementation legislation they pass to Cover domestic disputes.

[12]Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters OJ L136/3 24.5.2008. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF

[13] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0196:FIN:EN:PDF

[14] http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

[15] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0718:FIN:EN:PDF

At present within the European Union there exists quite a wide variety of practice in mediation. It seems almost certain that the Mediation Directive will give a new impetus to the spread of knowledge and use of mediation within the European Union, including here in the UK, and probably well beyond, given the range and extent of relationships between EU and non-EU states. It should also go some way to standardising the practice.

Where does mediation feature in the maritime world?

From the time of the implementation of the new Civil Procedure Rules in 1999, mediation has progressively become a fact of life in civil litigation. The pressure that the courts can apply by active case management has meant that mediation has become, even if somewhat slowly, more common. Indeed, many commercial lawyers would probably accept that there is now a strong possibility, or even a probability, that almost all disputes will be referred to mediation at some point if not settled before trial. The most likely point for the court to apply pressure will be at a Case Management Conference.

But similar pressures do not necessarily exist in arbitration and many of the typical disputes in the maritime field are subject to binding arbitration agreements (for example, charterparty and bill of lading disputes). Arbitration tribunals may not encourage or order parties to go off to mediation, but nonetheless mediation is becoming more common in resolving disputes which would otherwise be referred to a final determination by an Arbitration Tribunal. This is almost certainly a response to client demand. Increasingly clients, in particular insurers and mutual insurance associations, significant and highly sophisticated users of legal process, have seen that mediation saves time and that cases settle. They know that it works and so increasingly they are requiring that mediation be used in conjunction with arbitration. The inclusion of mediation clauses in standard form contracts (which also include arbitration clauses) will, however, be essential to speed up the spread of the process.

In this, the Maritime Solicitors Mediation Service (MSMS)[16] has played a significant part. MSMS was originally set up in August 2003 and formally launched on the internet in January 2004. In 2009 MSMS was registered with the European Commission as a mediation service provider whose mediators comply with the European Code of Conduct for Mediators 2004. In many respects, MSMS is an unusual organisation. First, it is an unincorporated association of 19 English maritime law firms which set up the body in a collegiate manner and in the spirit of co-operation. Indeed that cooperation runs deep; immediately after the launch of MSMS the member firms ran a year-long programme of mock mediations (in the UK and other countries) to provide a practical demonstration of what the process is, how it works and just how effective it can be.

[16]See www.msmsg.com.

Secondly, MSMS is also somewhat unusual in that it is sector-specific, designed expressly for the maritime and marine insurance trades. There is a fairly large number of bodies providing ADR services whose focus is deliberately general, prominent amongst which is the Centre for Effective Dispute Resolution (CEDR). This group now includes service providers such as the Chartered Institute of Arbitrators (who have recently welcomed mediation), the Academy of Experts and the Ombudsman Service. However, according to a thorough and lengthy report issued by the European Civil Justice Systems Research Programme, at the Centre for Social-Legal Studies, University of Oxford (`Civil Justice in England and Wales: Beyond the Courts'[17]) the sector-specific mediation service providers (MSPs) are few and far between. The report identifies a mere handful including, in addition to MSMS, the Pensions Advisory Service and ACAS (Employment).

How should mediation evolve?

The present

Mediation (in the UK at least) is currently a relatively informal process, but this may be under threat. The parties generally agree on the appointment of a particular mediator, sometimes on the recommendation of an MSP, sometimes, perhaps increasingly, from a (short) list of well known mediators. About ten years ago it was a fairly common view that any skilled mediator could mediate any dispute and to some degree that is certainly true. But with experience the market, particularly the maritime and marine insurance market, has matured. Many in this market would now say that it is important, some say vital, that the mediator has specialist expertise in the subject matter of the dispute. The development of the MSMS is a significant manifestation of this trend.

As it is at the moment the process is not complex and prescriptive. Generally all the parties need to do is to prepare a mediation summary (some call this a position statement) and put together the key documents. These summaries should certainly not be so long that they would take more than a few hours for a mediator to read; 10 to 20 pages are often more than enough. The summaries generally put forward the parties' best cases. It is important that they are written in normal prose and not in the arcane language of the law; not in the sort of technical legal language used in legal documents and in pleadings in court cases (and in some arbitrations). They are a pitch to a jury, not a summing up in legal argument. The ideal approach is accuracy, brevity, clarity. This is because a significant purpose of a mediation summary is to explain the dispute clearly, not only to help the mediator understand the case, but most particularly to help the party on the other side (as distinct from his lawyers) to understand the case against him.

[17]www.csls.ox.ac.uk/documents/themelist.docx.

These summaries exemplify what mediation is about. They distil in an easily understood form exactly what matters in a dispute, and what matters to the parties individually and in their relationships with one another (sometimes beyond the legal issues in the case), in a process where parties will be constantly asked to focus their attention on their interests and needs and not on their rights and wants, as they may perceive them. Indeed the whole process of creating the summary is a vital part of preparation. It should compel the parties (the lawyers and the clients) to think - very carefully. This work, and the work on the day, will (should) promote a dense effort of concentration.

As to documents, the papers gathered together for a mediation should include just a few core documents and sometimes charts, diagrams or photographs. The alpine snow-storm of documents that are typically seen in litigation or arbitration proceedings (after disclosure, especially after E Disclosure) is generally unhelpful and even if such documents are produced they are rarely looked at.

Generally a common bundle of documents is created to be used by the mediator and all the parties; each party will have a copy. But in addition to this sometimes parties provide documents (and information) to the mediator on a confidential basis. This may help the mediator to understand the background to the dispute and ultimately may assist him in fashioning a bargain between them.

Obviously mediators do not reveal either the existence or the contents of such confidential documents to other parties unless and until authorised to do so.

The whole mediation process itself is regulated by a simple mediation agreement setting out the key aspects of the process including confidentiality and certain protections for the mediator.

It is beyond the scope of this article to describe in detail how mediations work on the day. Every one is different. But broadly they fall into three phases; exploration, negotiation and a concluding phase, often settlement. The whole process is informal. Strict rules of evidence, legal terminology and legal advocacy are all inappropriate for mediation. In some senses mediation provides an artificial deadline, like an approaching day in court. There is often a rush of adrenaline, with the speed and clarity of thought that this brings. The guillotine concentrates the mind.

Of course not all cases settle on the day. It is not unusual for discussions between parties to continue after a mediation day, often with the assistance of the mediator, and for a settlement to be concluded days, weeks or even months later.

There is no central body gathering all mediation statistics in England and Wales (although the Civil Mediation Council is progressively encouraging mediation service providers to disclose settlement statistics on a confidential basis). Anecdotal evidence from some of the most active and prominent commercial mediators suggests that the ratio for settlement on the day may have originally been somewhere in the region of 60/40 or perhaps 50/50. But progressively this may have declined as parties (or perhaps lawyers?) get more used to the process; some refer now to a ratio of 40/60. In other words, about 60 per cent of cases may now settle after the mediation day, although the general percentage of settlements in absolute terms seems to have remained reasonably constant at somewhere in the region of between 75 per cent and 80 per cent.

The future

So much for the current picture; there are indeed concerns that the process of mediation may progressively become more structured and detailed, with the hazard that it may become progressively less effective. This is a serious matter. The Right Honourable Lord Judge touched on this concern at the end of an address to the Civil Mediation Conference on 14 May 2009 in the following terms:

> Can we just take a long term view? Every few years, or about every ten years, there is a great hullabaloo about the cost of civil litigation. Arbitration, after all, is a system of avoiding court process. Do you remember when employment tribunals began? These were to be informal meetings at which the opposing parties would put their cases to a tribunal, almost a form of palm tree justice. Consider now how much more complicated and expensive the processes have become.
>
> I do urge the Council to recognise this danger. The mediation process could, unless the danger is recognised and addressed, particularly if it is part of the court process, may eventually, and quite unintentionally, and by unforeseen accretion become increasingly formalised and procedural. It really must not eventually become just one more part of the expensive process that all of us are trying to avoid.[18]

I would echo that sentiment; but it is not simply the matter of cost. Generally one should be wary of the development of what is described as mediation advocacy and the creation of a standard form timetable and procedural requirements and the risk of progressive linkage of mediation (solely) to the issues in an action. The youthful, dynamic and optimistic face of mediation must not be allowed or pressured to morph into litigation or arbitration by any other name; therein lies elaboration, rigidity, ossification. If it does it will have failed.

The fate of arbitration provides a clear warning. A splendid treatise on the subject is `Arbitration: the new Litigation'[19] by Professor Thomas Stipanowich, previously head of the International Institute for Conflict Prevention and Resolution (CPR).[20] Although describing the American experience, the concerns expressed there should be heard here. For example he notes that:

Early in the twentieth century...Arbitration was popularly touted as a more efficient, less costly, and more final method for resolving disputes; there was little or no

[18]The Rt Hon The Lord Judge, Civil Mediation Council Conference 14 May 2009.
[19]University of Illinois Law Review vol 2010 No. 1. 2010.
[20]See www.cpradr.org for further details. CPR, based in New York, was one of the pioneers of mediation.

discovery, motion practice, judicial review, or other trappings of litigation. By the beginning of the twenty-first century, however, it was common to speak of US business arbitration in terms similar to civil litigation - "judicialized", formal, costly, time-consuming, and subject to hardball advocacy....These practices...have made arbitration...increasingly similar to civil litigation, and arbitration procedures have become increasingly like the civil procedures they were designed to supplant, including pre-hearing discovery and motion practice. Not surprisingly, clients and counsel often complain about the costliness and length of arbitration...

Although there are differences, of course, one sometimes hears similar views expressed about English arbitration procedure. Stipanowitch then observes that the emergence of mediation has, in the USA:

> ...revolutionized public and private dispute resolution, as well as challenged the primacy of litigation and arbitration with their emphasis on full information exchange, full exposition, and extensive due process.

His description of and explanation for the upsurge in popularity of mediation, on the phenomenon of mediation, makes compelling reading.

Those who run litigation and arbitration should not, therefore, seek to bring their skills, their work-template and their mindset to mediation and seek to impose these on this lively new process. They should set aside preconceptions about the ways disputes are conducted and resolved, and learn the new processes. Mediation is not merely common sense; it is a new skill that repays time spent in learning. Those involved in disputes of any character need to be vigilant to ensure that mediation (probably used skilfully in conjunction with legal process) retains its dynamism, simplicity and effectiveness. In architecture, clarity of expression and now in the resolution of disputes it seems that in some measure `less is more'.[21]

[21]Mies van der Rohe.

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