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).

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.

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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.

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.

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.

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[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.

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 supporter of ADR'.[5]

In May 2008 Lord Clarke (Sir Anthony Clarke, as he then was) was equally unequivocal:

[4] Lord Clarke ibid.
[5] Lord Phillips (n 2).

> … 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]

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

[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.

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]

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).

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

[9] Sir Anthony Clarke (n 6).
[10] Note 1.
[11] ibid.

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

[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.

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.

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.

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

[16] See www.msmsg.com.

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.

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

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

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

[18] The Rt Hon The Lord Judge, Civil Mediation Council Conference 14 May 2009.

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 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]

[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.
[21] Mies van der Rohe.